

**ADMINISTRATIVE TRIBUNAL OF
THE AFRICAN DEVELOPMENT BANK**

QUORUM:	Honorable Mohammed Bello	- President
	Professor Maurice Glele Ahanhanzo	- Vice-President
	Professor Christian Tomuschat	- Member
	Judge Lombe Chibesakunda	- Member
	Judge Pio Marapi Teek	- Member

APPLICATION No. 2002/03

Mr. B. A. I., Applicant
African Development Bank, Respondent

Judgment of the Tribunal – delivered on 23 July 2004

I. THE FACTS

1. The Applicant, a Guinean national and former staff member of the Bank, filed with the Administrative Tribunal an application on 8 August 2002, challenging the decision dated 28 May 2001 of the Secretary General of the African Development Bank, Mr. Africa Philibert, on the instructions of the African Development Bank President, contesting the:

" Production of an unlawful and defamatory memorandum; improper use of the arbitrary breach of my work contract to oppose my candidature for the position of African Development Bank Executive Director; moral and professional harassment."

The Applicant was recruited by the Bank on 14 February 1974 and his employment with the Bank was terminated on 18 May 1995.

2. **The facts that gave rise to the Application may, briefly, be summarized as follows:**

Upon his nomination as a candidate for the position of Executive Director and during the African Development Bank Annual Meetings held in Valencia, Spain, from 29 to 31 May 2001, the Respondent, allegedly, unlawfully interfered with the choice of Executive Directors by circulating a document indicating that the Applicant's appointment with the Respondent had been terminated by the Respondent in 1995 for misconduct. The Applicant alleges that by mentioning, in a confidential memorandum, the improper termination of his appointment, the Respondent manipulated the facts in opposing the admissibility of his candidature for the position of Executive Directorship because the Bank President was aware of the finding of the Appeals Committee that the charge of gross misconduct leveled against him was non-existent, as the President had accepted and implemented the recommendations of the Committee. According to the Applicant the Respondent's action violated all the Rules of ethics and constituted an offence of defamation and dissemination of false information and thus prompted him to write the letter of 14

September 2001 to the Vice-President in charge of corporate affairs condemning the action which caused him an unprecedented moral, professional and political prejudice. In other words, in circulating the memorandum the Respondent deprived him of the post of Executive Director, which he deserved and hereby, prejudiced his chances of obtaining a comparable position elsewhere. The Applicant in the said letter, containing substantive statement of supporting facts, referred the matter to the President for administrative review. Having received no reply from the President's office, the Applicant filed an appeal with the Staff Appeals Committee on 19 October 2001.

3. On 18 April 2002 the Committee found that the Appeal was inadmissible because the subject of the Appeal was not an administrative decision as defined in Articles 12.00 and 103.01 (a) of the Staff Rules.
4. On 11 June 2002 the Bank Management approved this recommendation and informed the Applicant accordingly on 13 June 2002.
5. The Applicant stated the grounds for challenging the decision and its legality as follows, that:

The Respondent wrongly relied on alleged misconduct for justifying the breach of his work contract. As the Staff Appeals Committee had found the complaints against him erroneous and subsequent to management approving the Committee's recommendations, the Respondent was barred from invoking same to deprive him of an employment in the Bank. By relying on the said memorandum the Respondent has taken an "administrative decision" affecting his prospective conditions of work in the Bank, and such conduct touched on the conditions and benefits related to his past employment in the Bank. According to the Applicant the impugned decision was unlawful because it:

- " - relies on a document approved by the Board of Directors but not communicated to the Governors;
- it is not based on any regulations in force in the Bank;
- it makes a fraudulent use of the conditions under which my work contract was terminated;
- makes a value judgment on me arising from defamatory and dissemination of false information which destroy my image and impairs my respectability; and
- constitutes an act of desperation, moral and professional harassment."

6. The Relief sought by the Applicant is two-fold:

a. An undertaking by the Respondent:

- “ - Acknowledging and publication of the non-existence of gross misconduct justifying a dismissal without notice and entitlements,
 - Not to mention his unfair and arbitrary dismissal to his future employers; and
 - To put a definitive and irrevocable stop to the moral and professional harassment to which he has been subjected since 1992 ”

b. Material Relief being the Payment of Compensation for:

- “ - the loss of a position of Executive Director, equivalent to 3 years salary and allowances of serving as Executive Director; and
 - moral, professional and political prejudice equivalent to 3 years salary.”

II. MOTION TO DISMISS

7. The Respondent filed a Motion for the Dismissal of the Application pursuant to Rule XIV of the Rules of Procedure of the Administrative Tribunal on the ground of inadmissibility. The Respondent stated the grounds for inadmissibility as two-fold namely that:

- There is no administrative decision of the Bank that is being contested; and
- the Application fails to disclose a cause of action falling within the Tribunal's competence.

7.1 The Absence of an Administrative Decision:

Emphasizing the fact that the Applicant's basis for invoking the jurisdiction of the Administrative Tribunal is an "an alleged decision taken by the Secretary-General of the Respondent on 28 May 2001 to circulate a memorandum referring to the termination of the Applicant's employment by the Respondent and referring to the standards of conduct applicable to Executive Directors of the Respondent", the Respondent contended that the circumstances of the circulation of the memorandum do not involve an administrative decision within the meaning of that term as defined in Article 11 of the Statute of the Tribunal. According to the Respondent the fact that one is a candidate or would be candidate for a non-staff position in the Bank such as the position of Executive Director does not endow a person with the status of a staff member of the Bank in the sense in which staff member is defined in Article 11 of the Statute. Accordingly, the fact of being a candidate for a non-staff position does not thereby give such person recourse to the Administrative Tribunal. No decision of the Respondent can affect such a person in his capacity as a staff

member for the reason that such a person lacks that specific capacity. He does not have an employment contract with the Respondent and can therefore not be subject of an administrative decision concerning the non-observance of the terms his employment by the Respondent.

The Respondent submitted further that, the fact of the Applicant having previously been a staff member does not in any way affect this fundamental basis of the Tribunal's competence pursuant to Article 11 of the Statute, although a former staff member is included in the Article 11 definition of "staff member" that inclusion can only be understood to relate to matters that affect the person in his or her capacity as a staff and not to matters, which fall outside the scope of the employment relationship. In the same way that a current member of staff cannot by virtue of being such a staff member, invoke the jurisdiction of the Tribunal in respect of matters that fall outside the scope of the employer – employee relationship with the Respondent, that same limitation applies to persons who are not staff members as defined in the Statute, or lack the capacity of being staff members. In the latter case, the effect of their lack of capacity is to bar them from bringing any application before this Tribunal, as such persons, like the Applicant, lack *locus standi*. In conclusion, the Respondent, submitted that the circulation of existing information on the Applicant's employment history does not constitute an administrative decision within the meaning of the definition of administrative decision in Article 11 of the Statute of the Tribunal as no determination is thereby made "concerning the terms and conditions" of his employment. Consequently, there can be no "non-observance of the contract of employment or the terms of appointments" as provided in Article 11 (1) (iii) of the Statute that could possibly be contested by invoking the jurisdiction of the Tribunal.

7.2 The Failure to Disclose a Cause of Action within the Tribunal's Competence.

In respect of the Applicant's argument relating to the termination of his employment in 1995 by the Respondent the latter submitted that the present Application is an attempt to re-litigate the substantive claim that his employment with the Respondent was wrongly terminated in 1995. In the circumstances, the Respondent contends that the 1995 termination of the Applicant's employment is a matter in which a final decision has been taken that is not subject to appeal before the Tribunal pursuant to Article XVII (2) of the Statute.

The Respondent further contends that the finality of the decision to terminate the Applicant's employment and its consequences was upheld by the Tribunal in its judgment rendered in the case of *A. I. B. -vs- the African Development Bank (Application 1998/02)*. In as much as the Applicant's complaint before the Tribunal centers around the fact that the Board of Governors did not elect him to the position of Executive Director of the African Development Bank after he had been nominated as a candidate for that position, the Respondent contends that is tantamount to an attempt to subject proceedings of the Board of Governors of the Respondent to the Administrative Tribunal's review contrary to the Tribunal's competence bestowed upon it by its Statute.

In conclusion, the Respondent submitted that the Applicant failed to mention that it was the authorities of his country who, having nominated him for the position of Executive Director of the African Development Bank subsequently decided to withdraw his candidacy. Adding that, decisions taken by the authorities of member countries of the Respondent do not fall within the class of administrative decisions as defined nor can they constitute grounds for a cause of action against the Respondent.

8. The Respondent's prayer:

In the premises, the Respondent prayed for the Motion to Dismiss to be upheld and for the Application to be dismissed as inadmissible.

III. APPLICANT'S REPLY TO THE MOTION TO DISMISS

9. In a lengthy Reply the Applicant prayed that the Motion to Dismiss be rejected as the memorandum of 28 May 2001 is an administrative decision and as such falls under the Tribunal's competence and further that the motion is not based on arguments founded in law. The Applicant re-iterated in his Reply that his Application contested an administrative decision of the African Development Bank management which has caused him "incommensurable prejudice" in referring to the "illegal and defamatory memorandum, the abusive use of the arbitrary termination of my employment in order to oppose my candidature for the post of African Development Bank Executive Director; all constituting moral and professional harassment".

10. The Applicant contends that since his candidature for the post of Executive Director was not submitted in Valencia but was sent to the Secretary-General of the African Development Bank in Abidjan on 22 May 2001, the Respondent had ample time to alert the Guinean Government of the problems that his candidature could create but in waiting until Valencia to have the document circulated "clandestinely" was a failure to respect the Applicant's employment contract and conditions of service. The publication of the defamatory memorandum deprived the Applicant of the post of Executive Director and compromised his chances of obtaining comparable employment in future. In respect of the last minute decision of the delegation of the Government of Guinea to withdraw his candidature, the Applicant submits that this issue is irrelevant to the merits of the case as it does not affect the nature of the ruling nor the admissibility of his Application.

IV. EXISTENCE OF AN ADMINISTRATIVE DECISION AND THE ADMISSIBILITY OF THE APPLICATION

11. Relying on Articles III, II (i) and II (iii) of the Statute the Applicant contends that the impugned decision taken by the Secretary General of the Bank to circulate a confidential memorandum which referred to his non-observance of the conditions of employment resulting in the interruption of his employment contract by the Respondent and the reference to the Code of Conduct applicable to the elected Executive Directors of the African Development Bank affected his conditions of employment.

12. The Applicant further submitted that the memorandum in itself cannot constitute an administrative decision "but it is the content and the status of the author, which make it an administrative decision." It is pursuant to Article 4 of the resolution B/BD/2001/14-F/BD/2001/10 dated 25 April 2001 of the Board of Governors that Management published the memorandum in compliance with the rules governing the election of Executive Directors. Therefore, it is a decision stemming from another administrative decision. In other words, the Respondent's decision refers to the non-observance of his letter of appointment and his conditions of employment and for this reason falls within the competence of the Tribunal.
13. The Applicant denies that the Application is an attempt to re-open the dismissal case he filed against the Respondent in 1995 as his is a new Application that has nothing to do with his termination benefits subsequent to his leaving the Bank and does therefore, not question the ruling of the Tribunal on delivered on 6 July 1999 in case N° 1998/02, *A. I. B. -vs- the African Development Bank*. The Applicant dealt extensively with "new element in order to explain to the Tribunal the circumstances that led to sign that release whose legality is null and void. The Applicant is challenging a decision made by the Governors who allegedly had rejected his candidature as the Board of Governors did not have to take a decision not to elect him for the post of Executive Director because the objective targeted by the memorandum in question was in fact to invalidate his candidature even before the elections was held. The decision challenged, according to the Applicant, is in fact management's defamatory memorandum, and does not concern the last minute decision of the Governor of Guinea to withdraw his candidature which is a political decision, governed by relations between the Bank, a member country and its partners.

In conclusion, the Applicant contends that if the Staff Regulations gave access to the Appeals Committee and the Administrative Tribunal to former staff member and their beneficiaries, it is to ensure that after their departure from the Bank or their death, their interests would be preserved. These rights and benefits are not only of a material nature, they can also be of a moral, professional or social nature. It is therefore, a general principle of Labour Law that the integrity and image of the staff member be preserved even after the termination of his work contract. The fact that Management accused him of failing to respect his contract and conditions of employment compel him to defend himself before the only existing court: the Administrative Tribunal of the African Development Bank. It was the Respondent that broke the alleged "negotiated agreement", the release signed on 27 July 1998.

Referring to Article 103.01 (c) of the Staff Rules regulating instances where the Appeals Committee and Administrative Tribunal are not competent to deal with certain matters in the administration of the Respondent, the Applicant submitted that any other decision is within the competence of the review bodies, to wit: The Appeals Committee and the Tribunal.

14. Applicant's prayer:

The Applicant concluding that the memorandum of 25 May 2001 being an administrative decision falling under the competence of the Tribunal requested the rejection of the Motion to Dismiss and to allow the Application to be heard on the merits.

V. THE PROCEEDINGS

15. In the instant case, counsel's oral arguments were heard on Monday, 19 July 2004.

VI. THE LAW

16. The competence of the Administrative Tribunal is defined in Article III (1) of the Statute in the following terms:

"The Tribunal shall be competent to hear and pass judgment upon any application by a member of the staff of the Bank contesting an administrative decision for non-observance of the contract of employment or the terms of appointment of such staff member".

The term "administrative decision" is defined in Article II (1) (i) of the Statute as follows:

“ ‘administrative decision’ means a determination by the Bank concerning the terms and conditions of employment of a staff member”.

A staff member is defined in Article II (1) (ii) of the Statute as follows:

“ ‘member of the staff’ means any person whose current or former letter of appointment or similar instrument provides that he is a member of staff of the Bank, any person who is entitled to claim upon a right of staff member as a personal representative or successor in interest by reason of the staff member's death and any person designated or otherwise entitled to receive a payment under any provision of the Staff Retirement Plan.”

Article II (iii) provides that: “ ‘contract of employment’ and terms of appointment include all pertinent rules and regulations in force at the time of the alleged non-observance of the contract of employment or the terms of appointment, including the Staff Retirement Plan and the rights and benefits provided for thereunder.”

Rule 103.01 (c) of the Staff Rules provides that the Appeals Committee shall not be competent to consider the following:

- " (i) an appeal arising under the Retirement Plan that is within the competence of the Pension Appeals Committee; and
- (ii) an appeal against a resolution or a decision of the Board of Directors or the Board of Governors of the Bank.
- (iii) an Appeal against the imposition of disciplinary measures, including summary dismissal."

Rule XIV (1) of the Rules of Procedure provides, in part, that: "The Respondent may file a motion within thirty (30) days of receipt of an Application alleging non-admissibility of the Application..."

VII. COMMON CAUSE FACTS

17. The following facts are common cause or not in dispute between the parties:

- The Applicant's employment with the Respondent was terminated on 18 May 1995;
- The Tribunal upheld the Respondent's decision to terminate the Applicant's employment and its consequences in its judgment in *A. I. B. v the African Development Bank*, Application 1998/02, delivered on 6 July 1999;
- The Secretary-General of the African Development Bank, Mr. Afrika Philibert, circulated a memorandum in Valencia, Spain, on 28 May 2001, referring to the termination of the Applicant's employment by the Respondent;
- The delegation of the Government of Guinea withdrew the Applicant's candidature before the appointment of an Executive Director;
- On 14 September 2001, the Applicant wrote a letter to the President of the Respondent for an administrative review of the decision to circulate the memorandum in Valencia, which went unanswered;
- On 18 April 2002 the Staff Appeals Committee found that the Respondent's Appeal challenging the memorandum was inadmissible because the subject of Appeal was not an "administrative decision" as defined in Articles 12.00 and 103.01 (c) of the Staff Rules;
- On 11 June 2002 the Bank Management approved this recommendation; and

- On 8 August 2002, the Applicant filed the Application with the Administrative Tribunal challenging the decision to circulate the memorandum of 28 May 2001.

VIII. DETERMINATION

18. The Tribunal is, in essence, called upon to decide whether or not the fact of circulating the said memorandum is an administrative decision concerning the terms and conditions of employment of a staff member within the meaning of the provisions of Article II (1) (i-iii) of the Statute. In other words, whether or no the Applicant as a former staff member has *locus standi* before the Tribunal pursuant to the provisions of Article III (1).

This investigation is three-fold: Firstly, to establish whether or not the action to circulate the memorandum is an administrative one; if so, secondly, whether or not such action concerned "terms and conditions of employment/contract"; and if so, thirdly, whether or not the Applicant qualifies to be regarded as a staff member for the purposes of or pursuant to the provisions of Article II (1) (ii). If the answer to any one of these questions is in the negative then, that is the end of the matter as the Tribunal has to rule that the case does not fall within the Tribunal's competence.

19. The Applicant in his argument relied primarily on this Tribunal's judgment A. -vs- *the African Development Bank*, Application N° 2001/06, delivered on 19 July 2002, in which it was held that the Applicant whose employment was terminated in March 1995 was "legally regarded" as a "staff member" of the Respondent and was "for all intents and purposes covered by the Respondent's internal law..." The Applicant's reliance on this finding is fundamentally flawed because the two cases are factually and legally distinguishable if proper regard is had to the *ratio decidendi*, or the Tribunal's reasoning to wit: That the A. Application was brought before the Tribunal "... pursuant to the provisions of Article II (1) (ii) by virtue of which the Applicant is a person whose former letter of appointment provided that he shall be a member of staff. Without which the Applicant would have had no *locus standi* before the Tribunal. It is by virtue of that status accorded him as a former member of staff of the Bank that he was entitled to assert any claims relating to termination benefits before the Tribunal. Therefore, his legal status as a "staff member" pertaining to his rights and liabilities survived or extended beyond his dismissal or termination of service".
20. In the instant case, the Applicant's employment with the Respondent was terminated on 18 May 1995, the critical date on which the contract of employment pursuant to the provisions of Article II (1) (iii) came to an end. The alleged cause of action based on the impugned non-observance of the contract of employment arose on 28 May 2001 with the circulation of the memorandum. On this critical date the Applicant had already ceased to be a staff member of the Respondent for about six (6) years.
21. The challenged memorandum was an action on the part of the Respondent pursuant to the provisions of Articles 1 (ii) and 3 of the Code of Conduct for Executive Directors of the African Development Bank and African Development Fund

adopted by virtue of Resolution B/BD/2001/14-F/BD/2001/10 by the Board of Governors on 25 April 2001. Article 1 (ii) provides that: "Election to the office of Executive Director is a vote of confidence by representatives of members of the Bank. The important functions and responsibilities of the office, however, require that an Executive Director must meet the highest standards of loyalty, competence and integrity in discharging his/her duties, and must be particularly sensitive to the special development needs of Africa."; and Article 3 reads as follows:

- "i) Executive Directors shall observe the highest standards of ethical conduct. In the performance of their duties, they are expected to carry out the mandate of the Bank to the best of their ability and judgment, and maintain the highest standards of integrity. They shall perform their official functions with impartiality and utmost discretion.
- ii) In their conduct outside the work place, they shall observe local laws and refrain from any action that might lead to the perception that they are abusing the privileges and immunities conferred on the Bank and on Executive Directors.
- iii) The conduct of Executive Directors shall be above reproach both in the performance of their official duties and in their personal lifestyles."

Therefore, the circulation of the memorandum was in discharge of a duty incumbent on the Respondent pursuant to the said Resolution. Similarly, Resolution 01/83 dated 30 November 1983, Article IV thereof authorizes the President to discharge his duties pursuant to the provisions contained therein.

22. Therefore, it cannot reasonably be said that in providing the required information, albeit partly adverse or prejudicial to the Applicant, the Respondent acted irregularly, *ultra vires* or in breach of internal laws or rules of practice and procedure of the Respondent. The Respondent's action in providing the information as contained in the memorandum did not affect the Applicant's rights, obligations and liabilities relating to current or existing terms and conditions of contract or employment with the Respondent beyond May 1995. In other words, there is no connection between the Respondent's conduct and the Applicant's past or previous " terms and conditions of contract or employment" or the Staff Regulations in so far as they continued to apply to him. The Respondent's action in providing the memorandum was extraneous to the Applicant's status vis-à-vis the Respondent as an employer. It is therefore, not necessary to accede to the Applicant's request to give a restrictive interpretation to the provisions of the relevant articles of the Statute and the Rules of Procedure.

Although, novel and ingenious, the Applicant's allegation that "the decision challenged is in fact management defamatory memorandum..." and therefore falls within the competence of the Administrative Tribunal, it is baseless in law and lacks a factual basis and therefore, stands to be rejected.

23. Although the Tribunal has competence *ratione personae*, to entertain an Application pursuant to Article II (1) (ii) of the Statute for being open to a former staff member, Article II (1) (iii) of the Statute restricts the competence of the Tribunal, *ratione materiae* to complaints alleging the non-observance "in substance or in form of the terms of appointment of a staff member or of the provisions of the applicable Staff Regulations". See in *re Palma (N°5), Judgment 1845 (ILOAT) – Administrative Tribunal*, delivered in Geneva on 8 July 1999. The facts in that case are comparable and relate to the status the Applicant finds himself in *casu*. In that case the European Southern Observatory (ESO) issued a vacancy notice for an assistant to the head of Administration. The complainant applied for that post, about four years after this employment was terminated in August 1995 with the ESO.
24. Having failed selection to the post, the complainant asked the ILO Tribunal, *inter alia*, to quash the Observatory's implied negative decision and to order the ESO to re-open the selection procedure and to refrain from discrimination against him and to award him moral damages and costs. The Tribunal's refusal to entertain the complaint was based on the rationale that "On expiry of the complainant's contract, he ceased to be a staff member. This complaint, concerning his non-selection, does not involve any allegation of the violation of any rights which he enjoyed under his contract or the Staff Regulations in so far as they continued to apply to him."
25. In the premises, the Tribunal in the instant case is not competent to hear the Application contesting an administrative action by the Respondent for the alleged non-observance of a contract of employment or terms and conditions of appointment of the Applicant as he ceased to be a staff member in May 1995, six long years prior to the circulation of the memorandum. The Applicant as a former staff member, in the peculiar circumstances and facts of this case lacks *locus standi* before the Tribunal on the strength of Article III (1) (ii) of its Statute because the alleged cause of action relied upon, whether or not valid under any law arose after he left the Respondent's employment and lacks connection to the time of his active duties with the Respondent. The Respondent's challenged administrative action does not constitute an administrative decision within the meaning of the definition contained in Article II (1) (i) of the Statute as no determination is thereby made "concerning the terms and conditions" of the Applicant's employment. There can therefore, be no " non-observance of the contract of employment or terms of appointment" as provided for in Article II (1) (iii) of the Statute that could possibly be challenged by invoking the Tribunal's jurisdiction. Put conversely, or simply, being a candidate for the position of Executive Directorship does not confer to one the status of a staff member of the Respondent.
26. Incidentally, the said memorandum produced no legal effect decision on the Board of Governors, as the Applicant's appointment to the position of directorship of the Respondent as the Government of Guinea withdrew the Applicant's candidature prior to the meetings in Valencia and the election of the Executive Director. His candidature was invalidated before the elections for the appointment of Executive Directorship was held. Had such decision been taken Rule 103.01 (c) (ii) of the Staff Rules would in any event have been operative.

IX. CONCLUSION

27. In the circumstances, the Tribunal is satisfied that the Respondent has succeeded in showing that the Motion to Dismiss should be allowed and the Application be dismissed on the grounds of inadmissibility pursuant to the provisions of Rule XIV of the Rules of Procedure of the Tribunal.

X. THE DECISION

28. In the result, the following orders are made:
- a. The Respondent's Motion to Dismiss the Application succeeds; and
 - b. the Application is dismissed.

Honorable Mohammed BELLO - President

Albertine LIPOU MASSALA - Executive Secretary

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