

**ADMINISTRATIVE TRIBUNAL  
OF THE AFRICAN DEVELOPMENT BANK**

<b>QUORUM:</b>	Professor Maurice GLELE-AHANHANZO	President
	Judge Lombe CHIBESAKUNDA	Vice-President
	Professor Christian TOMUSCHAT	Member
	Professor Yadh BEN ACHOUR	Member

**APPLICATION No. 2004/07**

Mr. B. M., Applicant  
African Development Bank, Respondent

Judgment of the Tribunal rendered on 1 December 2006

**I. THE FACTS**

1. Mr. B. M., the Applicant, a Moroccan national, born on 29 December 1950, was an employee of the Bank from 12 April 1978 to 31 January 2002. A dispute arose between him and his employer as to whether the termination of appointment decided by the President of the Bank by letter dated 28 December 2001 was justifiable under the terms of the Staff Rules. Since the dispute could not be settled amicably, the Applicant on 18 August 2004 filed an application with the Tribunal to challenge the legality of the decision that led to the termination of his appointment.
2. Firstly, the Applicant claimed damages. Furthermore, he alleged that an erroneous rate was used in calculating his pension entitlements, as a result of which he suffered loss amounting to USD 32 791.
3. Pursuant to Rule XIV (1) of the Rules of Procedure, the Respondent filed a motion to dismiss on 4 October 2004, claiming that the application was time-barred. The Appeals Committee was in error in accepting the appeal filed by the Applicant. Logically, the Tribunal should dismiss the application on account of that error. Moreover, by signing a release, the Applicant had waived his right to seek judicial review of the contested decision.
4. By its judgment of 1 December 2005, the Tribunal dismissed the motion filed by the Bank and called on it to present its submissions on the merits of the case.
5. The Tribunal delivered its judgment on the merits of the case on 11 May 2006. In essence, it dismissed the application for insufficient justification of its merits (point 1 of operative provisions of the judgment). However, it decided not to rule on the controversial issue of the interest rate used by the Bank in calculating the retirement benefits. Under point (2) of the operative provisions of the said judgment, the Tribunal ruled:

*“ The matter concerning the Applicant’s request to be paid the difference between the amount actually received as pension entitlements and the amount that would have been received were the correct conversion rate applied, remains pending before the Tribunal. The Respondent is invited to present its comments within thirty (30) days of this decision. The Applicant shall be entitled to respond within thirty (30) days of receipt of the Respondent’s comments.”*

6. As ordered by the Tribunal, the parties filed their submissions with regard to the rate applicable (Respondent’s comments on 12 June 2006, Applicant’s reply of 10 July 2006).

## **II. CLAIMS BY THE PARTIES**

7. The Respondent requests the Tribunal to declare and judge that:
- a. The request by the Applicant is inadmissible;
  - b. Additionally: that it lacks merit.
8. The Applicant prays the Tribunal to:
- a. Declare and judge that the admissibility of his request had acquired the authority of final judgment; it should therefore reject the motion to dismiss filed by the Respondent as lacking merit;
  - b. Award the Applicant his entire claim and order that he be paid 34 105 Units of Account in compensation for loss suffered in calculating his pension entitlements.

## **III. THE LAW**

9. The Bank argues that the Applicant’s claim comes under the scope of application of the provisions of the Staff Retirement Plan. Consequently, it should first have been brought before organs set up under the Plan. On the contrary, the Applicant states that at the current stage of the proceedings, the authority of final judgment inherent in the decision of 1 December 2005 should bar invocation of any argument to deny the admissibility of the Application.
10. The Tribunal recalls that the Application was filed on 18 August 2004. Pursuant to Rule XIV (1) of the Rules of Procedure, the Respondent had thirty (30) days within which to file a motion to dismiss. The Respondent exercised that right by its submission dated 4 October 2004. However, the motion filed did not mention the need for the Applicant to direct his concerns regarding allegations of error in calculating the applicable exchange rate to organs of the Retirement Plan. The Respondent for the first time invoked the inadmissibility of the request concerning the calculation of the pension entitlements in its answer of 26 January 2006 on the merits of the case. However, in the light of the text and the philosophy of the Rules of Procedure, a motion not raised within the prescribed timeframe is barred.

11. On the merits of the case, the Applicant limits himself to stating that the texts in force, in particular Article 13 of the Administrative Rules of the Staff Retirement Plan, support his position. The amount in question should have been calculated on the basis of the average arithmetic exchange rate of the reference currency at the end of each of the twelve months preceding the payment.
12. However, the Bank maintains that the rate applicable is the monthly exchange rate in force at the date of payment of the pension entitlements. To support that method of calculation, it refers to the constant practice of the Staff Retirement Plan. At no time in the past had the moving average exchange rate ever been used in converting pension entitlements into foreign exchange or any other currency chosen by the participants.
13. The Tribunal's mandate is to apply the internal rules and regulations of the Bank, and generally recognized principles of international administrative law concerning the resolution of employment disputes of staff in international organizations (Statute, Article V). These are the norms that the Tribunal must uphold. First and foremost, there is need to apply the specific rules governing the conversion of pension benefits. In that regard, the Bank issued a regulation specifying the modalities in detail.
14. Section 5.19 (2) of the Staff Retirement Plan states:

*“Benefits shall be payable in any currency selected by the recipient, translated at the rate of exchange determined in accordance with the Administrative Rules.”*

In the Administrative Rules of the Staff Retirement Plan, an entire provision (Rule 13) is devoted to “Currency of Payment of Benefits”. Pursuant to paragraph (a) under this Rule, the choice made by the Pension Plan participant shall remain irrevocable for a minimum period of twenty-four (24) months. Furthermore, paragraph (c) states:

*“Subject to the provisions of paragraph (d) below, the amount of benefit due to the recipient in any currency shall be determined as follows:*

- i. The amount of benefit which shall have been determined in F.CFA is translated into U.A. using the current exchange rate of the SDR;*
- ii. The amount obtained in (i) above is re-translated into the relevant reference currency elected by the participants on the basis of the arithmetic mean of the exchange rate between such reference currency and the U.A. at the end of each of the last twelve (12) consecutive calendar months immediately preceding the date on which such benefit shall have become effective.*
- iii. The amount obtained in (ii) above is then translated into the currency elected by the participant on the basis of the market rate prevailing on the date of payment, in the country of currency elected by the participant.*

*Payments in the currency elected pursuant to paragraph (a) above shall commence with the first payment following the receipt of the notice of election by the Plan Administrator.”*

15. In this case, the operations to undertake by virtue of Rule 13 (c) (i) are not subject to controversy. In contrast, the parties disagree over the issue as to whether the amount of benefit due the Applicant should be converted according to the rule set out in sub-paragraph (ii) or in sub-paragraph (iii). The Respondent seeks to justify recourse to the latter one of the two sub-paragraphs. However, the structure of paragraph (c) is unambiguous. After a determined amount is converted from F.CFA into U.A., it is re-converted into the currency elected by the participant on the basis of the arithmetic mean for the last twelve months. After that operation, another operation may be effected in which the amount so obtained is converted into the currency of the country elected by the participant, based on the market rate prevailing on the date of payment. It is a step-by-step process. The fact that another procedure was followed in practice cannot invalidate the incontrovertible conclusions in the light of the relevant texts.
16. In the case before the Tribunal, the third and final operation cannot be undertaken. The Applicant elected the Euro as reference currency. Therefore, the calculation stops at the stage set forth in Rule 13 (c) (ii). The structure of this provision precludes a direct transition from sub-paragraph (i) to sub-paragraph (iii). Therefore, the Applicant is right to request that his pension fund be converted according to the average exchange rate specified under sub-paragraph (ii).
17. The dossier does not state the exact amount of the retirement fund expressed in Units of Account. The Applicant mentioned two different amounts regarding the loss that he claims to have borne. Whereas his Application mentions USD 32 791, he states in his submission of 10 July 2006 that the sum involved amounts to 34 106 Units of Account. The Tribunal shall limit itself to stating that the amount in dispute must be converted according to the average exchange rate set forth in Rule 13 (c) (ii) of the Administrative Rules of the Staff Retirement Plan.
18. Furthermore, the Tribunal holds that the sum of the conversion operation should incur interest at the applicable rate.
19. Regarding the Applicant’s request for reimbursement of his legal expenses, the Tribunal recalls that pursuant to Article IX (4) of the Statute, each party should, in principle, bear its own costs. However, the Tribunal may, at its discretion, order that the reasonable costs incurred, including legal fees, be totally or partially borne by the Bank.
20. In applying this provision, the Tribunal takes particularly into consideration the fact that the Applicant was only successful in a tiny part of his claims which exceeded 1 500 000 Units of Account. Consequently, the Tribunal holds that the Bank should only contribute a small part of the expenses incurred by the Applicant.

**III. THE DECISION**

21. For these reasons, the Tribunal decides as follows:

1. The Bank shall convert the Applicant's pension fund using the mean rate of the last twelve months as specified in Rule 13 (c) (ii) of the Administrative Rules of the Staff Retirement Plan.
2. Interest shall be paid on the additional amount accruing from that operation at the rate applicable in the Bank.
3. The Bank shall pay the Applicant a lump sum of USD 1 000 as partial compensation for his legal expenses.
4. All other claims by the Applicant are dismissed.

Professor Maurice GLELE-AHANHANZO

President

Albertine LIPOU MASSALA

Executive Secretary

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