

**ADMINISTRATIVE TRIBUNAL
OF THE AFRICAN DEVELOPMENT BANK**

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| QUORUM: | Professor Maurice GLELE AHANHANZO | President |
| | Professor Christian TOMUSCHAT | Member |
| | Professor Yadh BEN ACHOUR | Member |

APPLICATION No. 2007/05

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

Judgment of the Tribunal rendered on 25 November 2008

I. THE FACTS

1. The Applicant joined the Bank in 1989. At the time these events occurred, he occupied the position of Principal Agro-Economist in charge of operations at the Bank's Regional Office in Senegal as a career civil servant.
2. In 2005, the Bank received information according to which some staff, including the Applicant, may have been involved in embezzlement concerning the Lower Mangoky Rice Rehabilitation Project financed by the Bank. Thus, the Bank's OAGL Department fielded an audit mission. Following that audit mission, the Applicant was summoned by the Director, OAGL Department, on 27 November 2006 and questioned about the charges leveled against him. During three days of investigations conducted by OAGL, the Applicant was informed about those charges. First, he was accused of having unduly collected the sum of EUR 11 000 between August and September 2004 from a Malagasy official of the project. Furthermore, he was accused of authorizing a request for the replenishment of a revolving fund without complying with the financial and accounting procedures set forth under Bank regulations.
3. By memorandum dated 30 November 2006, the Applicant was suspended for three months, with salary. On 28 February 2007, the suspension was extended for one month, with effect from 1 March 2007. On 30 March 2007, the suspension was again extended for one month, with effect from 1 April 2007. On 3 May, the suspension was extended yet again with effect from 1 May 2007. These suspension decisions were taken by the CHRM Director, pursuant to Rule 101.01 of the Staff Rules.

4. On 8 June 2007, the President of the Bank took a decision to dismiss the Applicant without notice and benefits, pursuant to Regulation 10.2 of the Staff Regulations. The grounds for the decision were given as follows: *“The Bank has enough proof that you received from a former PRBM official, between August and September 2004, money in cash amounting to nearly EUR 11 000. There is also proof of transfers of amounts to you for which you have been unable to offer satisfactory explanations. The Bank has also established that you approved disbursements, including payments in favor of some suppliers, of which Garage Aroumougom, especially for vehicle hiring expenses unjustified by the services provided by the supplier.”*

It is the dismissal decision without notice and benefits that the Applicant challenges before this Tribunal, through his Application filed on 7 September 2007. By that Application, the Tribunal is prayed, on the one hand, to declare the decision illegal; on the other hand, the Applicant in his Application requests the Tribunal to grant him the following reliefs:

- “1) *Payment of compensation for emotional damage suffered for harming my honor, probity and integrity: UA 500 000;*
- 2) *My reinstatement with retroactive payment of all my entitlements, or:*
 - a) *Payment of termination benefits and all related entitlements estimated at UA 500 000*
 - b) *Payment of legal costs: USD 20 000”.*

II. APPLICANT’S ARGUMENTS

5. In his Application, the Applicant first maintains that the suspension procedure followed is illegal since it breaches Rule 101.1 (a) of the Staff Rules. According to the Applicant, the suspension period cannot exceed six months whereas in his case, the period covered six months and eight days. Furthermore, the Applicant claims that he was denied the right to defend himself before the Bank’s Disciplinary Committee – a procedure that would have offered him the possibility of defending himself against charges levied against him.
6. The Applicant adds that the investigations conducted by OAGL violated the principle of adversarial process and that proof of the accusations against him was never given. In that regard, the Applicant considers that he had given all explanations that the Bank sought of him with regard to transactions on his bank accounts, and that as sole proof, the Bank “produced a report, the content of which I have no knowledge and against which I could not make any comment whatsoever...” Lastly, the Applicant denies not complying with the disbursement procedures, stating that in that regard, his action cannot be characterized as serious misconduct in the sense of Rule 101.02 (c) of the Staff Rules.

7. To the Applicant, the only element of proof provided by the Respondent consists in a written declaration provided respectively by two Malagasy civil servants in charge of managing the project, and based solely on hearsay, assumptions and contradictions – for instance in connection with the Applicant’s stay in Paris. According to the Applicant, the use of such inconsistent and vague form of evidence violates accepted principles of international administrative law. The Applicant avers that the recourse to mere assumption and hearsay is based on the analysis of Mr. Ratovoson’s statement. To the Applicant, this element of insufficient proof is bereft of legal value. It falls totally short of standards acceptable to international jurisprudence with regard to the probative value of the form of evidence which, *prima facie*, could justify such serious disciplinary sanction, as ruled by the World Bank Administrative Tribunal in the *Dambita* case, 243 (2001). The Applicant adds that in fact the declarations of which he had become a scapegoat are attributable to a number of problems and conflicts between the Malagasy Minister of Agriculture and one of the sources of the declaration, Mr. Rakotondrazaka, who accused the former of corruption. The Applicant claims to be a victim of machinations. In his Reply, the Applicant states that the proof provided by the Respondent which was not forwarded to him at the start of the investigations, lacks details and particulars. The Applicant points out that the investigating officer surreptitiously showed him one of the depositions for a few seconds, before withdrawing it immediately. The Applicant requested a copy of the deposition, but was refused. Furthermore, the document which was surreptitiously presented to him during the investigation is not exactly the same as the one that the Respondent has filed before the Tribunal in Annex 4B of its Answer. Thus, the Applicant was deprived of the right to contest the legitimacy of the Respondent’s declarations.
8. According to the accusation, one of the project managers is said to have given the sum of EUR 11 000 to someone who is said to have handed same over to the Applicant on transit in Paris. Yet, according to the Applicant, the Respondent never revealed the name of the person, neither did it establish any link between the Applicant and that person. Furthermore, the Bank’s depositions contain contradictions with regard to the Applicant’s presence in Paris. Thus, the Applicant alone bore the onus of proof by establishing that all transfers considered suspicious by Bank investigators, notably two transfers to his account by his wife and his brother’s acquaintance, were justifiable in their own right. The Bank at no time clearly stated on what basis it considered these transfers as dubious.
9. To the Applicant, it is simply not enough to inform him about the vague allegations levied against him. Such action constitutes a flagrant violation of the right of defense and the Applicant’s right to fair proceedings, the protection of which is required in disciplinary matters. Hence, there was neither respect of disciplinary procedure nor disclosure of the charges. The Applicant was informed of the charges on 4 May 2007, i.e. after several extensions of the suspension period. Furthermore, the Applicant recalls that he was given only ten days to answer the charges against him – which is another procedural error contrary both to Rule 101.03 (b) of the Staff Rules and the jurisprudence of international administrative tribunals. That error is liable to compensation. In support of his argument, the Applicant makes specific reference to

the *Iddi* decision, 1011 (2001), rendered by the United Nations Administrative Tribunal, based on regulatory texts similar to those of the Bank.

10. To the Applicant and based on established international jurisprudence, it is incumbent on the Tribunal to determine whether the disciplinary measure is not an arbitrary measure or an abuse of discretion. In that regard, the Tribunal should determine the accuracy of facts and their appropriate legal characterization. It should also ascertain that due process was followed, that there was no abuse of discretion and that the sanction was proportional to the facts charged.
11. The Applicant also denies the accusation of bad management with regard to Disbursement No. 43 for vehicle lease. He points to the fact that the lease was approved by the PPRU Department. Although the lease was classified under the “operations and technical assistance and/or consultancy” category, it was in line with acceptable Bank practice; if the final approval was not found in the dossier, the mistake was not attributable to the Applicant.
12. Therefore, to the Applicant, the charges against him lack proof, on the one hand, and cannot be characterized as serious misconduct that could justify dismissal without notice and benefits, on the other. There is both absence of proof and disproportionality. In that regard, the Applicant recalls that in the *Iddi* decision, the Tribunal, although admitting the existence of misconduct, refused to characterize such misconduct as serious, justifying summary dismissal; thus, there was misappraisal of facts liable to compensation. A fair assessment should take into account both the highest standards required of civil servants and the need to protect such individuals from arbitrary measures. As ruled by the World Bank Administrative Tribunal in the *Carew* case in 1995 and the *Smith* case in 1997, even when misconduct is serious, it is not automatically subject to a summary dismissal procedure. Account should be taken of the set of circumstances, on a case-by-case basis. In this instance, there was abuse of discretion.

III. RESPONDENT’S ARGUMENTS

13. The Respondent maintains that towards the end of 2005, it received information from the Malagasy authorities concerning the alleged involvement of some national civil servants and staff of the African Development Bank in embezzlement in connection with the agricultural development project mentioned in paragraph 2 above. The Bank fielded two audit missions in January and July 2006. During these missions, OAGL Department, responsible for the inspection, met with the Malagasy authorities and the former director of the project, Mr. Rakotondrazaka, as well as the former head of the project’s administration and finance unit, Mr. Ratovoson. To the Bank, these missions enabled it to “gather detailed and specific information on the involvement of the Applicant as well as a former colleague/disbursement officer, Mr. O.” On 27 November 2006, the Applicant was invited to cooperate with the investigations and summoned to auditions organized by OAGL Department on 28, 29 and 30 November 2006. On 30 November 2006, the Applicant was suspended for three months with salary. The decision was renewed for another three-month period.

14. Firstly, the Bank accuses the Applicant of: recommending the payment of Disbursement No. 43 to replenish the special fund (called “the rolling fund”). Among expenditures incurred included an amount classified as expenditure for lease of vehicle from Garage Aroumougom. The vehicle lease expenditure was listed under “technical assistance” and “consultancy services”, without justifying documents. To the Bank, this vehicle lease system would have been used to embezzle money for the benefit of certain persons, especially the Applicant.
15. Furthermore, the Bank accuses the Applicant of receiving a total of EUR 11 000 between August and September 2004 that someone sent by Mr. Rakotondrazaka would have handed over to him in Paris. On 4 May 2007, the CHRM Director queried the Applicant over the allegations of serious misconduct and gave him ten days to reply. By a memorandum dated 9 May 2007, the Applicant refuted all the allegations contained in the query of 4 May 2007.
16. In reply to the Applicant’s arguments, the Bank claims first of all that the suspension during which the Applicant maintained his full pay was entirely compliant with Rule 101.01 (a) of the Staff Rules. The Bank adds: “The fact of taking eight additional days to complete the review of the Applicant’s answers to charges levied against him before making a final decision cannot be considered as abuse of discretion by the President.”
17. Moreover, the Bank, pursuant to Regulation 10.2 of the Staff Regulations and Rule 101.02 (a) of the Staff Rules, differentiates between two types of disciplinary procedures – the ordinary procedure leading to the formation of a Disciplinary Committee and the summary procedure where the formation of such a committee may be dispensed with. The choice of one or the other of these procedures depends on the Bank’s assessment of the facts charged.
18. Contrary to the Applicant’s claims, the Bank recalls that the Applicant was heard by OAGL during the audits of 28, 29 and 30 November 2006, in the course of which Mr. Rakotondrazaka’s deposition was read out; that he was notified of the charges against him by the memorandum of 4 May 2004 and that the Applicant was able to reply to the charges against him within a reasonable period. To the Bank, “the Respondent is not bound to convey statements or the content of statements, but rather the facts charged against the Applicant. In that regard, the Respondent’s obligation is limited to the conveyance of charges in a way that gives the Applicant the opportunity to reply to them” (Rejoinder, paragraph 11). To the Bank, Rule 101.03, which gives 14 days for response, is only applicable to the ordinary disciplinary procedure. In any event, to the Bank, the charges were notified on 4 May 2007 and the Applicant replied to the charges on 9 May, without requesting for additional time. Consequently, the Respondent fully met the requirements of due process before dismissing the Applicant.
19. In its Rejoinder, the Bank first adds that the two depositions that it obtained could not be characterized as “hearsay” insofar as “their actors narrated events of which they had personal and direct knowledge.” Moreover, the Bank considers that contemporary legal systems – whether common law or civil law – admit proof by “hearsay”. In that regard, it cites the Civil Evidence Act of 1995 which admits proof by hearsay and leaves to tribunals the leeway to assess the relevance of such hearsay. The Bank also cites the *Morris* judgment of 15 April 1999 on an administrative case rendered by the Canadian Federal Court of Appeal admitting proof by hearsay. In that connection, the

Bank considers that “in determining the evidentiary weight of proof by hearsay, the Tribunal could take into account several factors, among which the existence or not of rebuttal evidence, the quality of the witness, the corroboration of elements of proof, especially by *contra proferentem* evidence.” To the Bank, Mr. Ratovoson’s written deposition wherein he confesses to preparing bogus invoices to obtain the payment from which the Applicant unduly benefited precisely constitutes *contra proferentem* evidence (Rejoinder, paragraph 18). To the Bank, “the Respondent has established *prima facie* proof of accusations against the Applicant... The Applicant’s denials are no proof that the alleged payments were not received” (Rejoinder, paragraph 18). To the Bank, the accusations against the Applicant originate from credible, different and independent sources. The Applicant was in Paris at the time the payments were made. On that issue, the Bank refutes the Applicant’s argument according to which there might be contradictions in the depositions produced by the Bank, some of which claimed that he was in Paris in August 2004 and others end September 2004. In paragraph 30 of its Rejoinder, the Bank avers that the August 2004 date in no way concerned the Applicant’s presence in Paris; rather, it was the date at which the Director informed his colleague Ratovoson that the ADB officers had indeed received the amount demanded (this concerned Mr. O. who had received EUR 5 000 via a transfer into his bank account with Société Générale in July 2004). Furthermore, the Bank reasons that for events dating back to nearly two years, “approximations are normal and are not *per se* of significant or determining importance to the credibility of information” (Rejoinder, paragraph 32). A vehicle lease system in breach of Bank rules had been put in place. The Applicant could not provide credible explanations that could exculpate him. Still with regard to the credibility of proof concerning transfers to the Applicant’s bank accounts, the Bank considers that the accusations levied against the Applicant fall within the realm of “white-collar crime” (Rejoinder, paragraph 21). According to the Bank, the authors of such crime “who generally are shrewd individuals, take necessary measures to dissimulate their actions in order to escape possible investigations” (Rejoinder, paragraph 21) and are careful not to act in an imprudent manner consisting in paying the full amount received into their bank accounts. In support of this point of view, the Bank cites Decision No. 79 of 17 August 2007 rendered by the Administrative Tribunal of the Asian Development Bank in the *Nagarajah* case. To the Bank, “*the fact that the amount of banking operations considered questionable by the Respondent did not reach EUR 11 000 does not signify that the Applicant did not receive the payment of that amount. Furthermore, the fact that the name of the emissary who met the Applicant in Paris was not mentioned is also no proof that the said emissary was not in Paris in September 2004, that the meeting did not take place and that the illicit payments were not made.*” Lastly, the Bank recalls that, contrary to the Applicant’s claims, he maintained a personal relationship with Mr. Rakotondrazaka as proven by the e-mail messages produced as Annex 6 of the Reply.

20. Concerning the burden of proof, the Bank admits that the burden of proof is incumbent on the one invoking the alleged fact or violation. However, the Bank maintains that the application of that principle in administrative and disciplinary matters is not of the same imperative level as in criminal matters. In paragraph 25 of its Rejoinder, the Respondent submits that “international administrative jurisprudence organizes the application of this principle by considering that administrative disciplinary proceedings are not criminal in nature and that the standard of proof necessary in criminal cases does not apply to such proceedings.” In support of its position, the

Respondent cites cases judged by the United Nations Administrative Tribunal: *Berg* (Judgment No. 1090, 2002, paragraph V), *Patel* (Judgment No. 850, 1997, paragraph IV) and *Edongo* (Judgment No. 987, 2000, paragraph IV), as well as the judgment already cited rendered on the *Nagarajah* case by the Administrative Tribunal of the Asian Development Bank. According to the Bank, these precedents establish a distinction between disciplinary proceedings and criminal proceedings. In disciplinary proceedings, “the Administration is not required to prove its case beyond reasonable doubt, but only to present adequate evidence”, (*Berg*), and that “insofar as the plausibility of wrongful conduct is established, the onus is on the staff in question to prove the legitimacy of the conduct” (*Patel*, cited in the Rejoinder, paragraph 25). In other words, to the Bank, in case of mere presumption of misconduct, the onus is on the staff to satisfactorily justify his/her conduct (*Edongo*). To the Bank, “in administrative proceedings, proof beyond reasonable doubt is not the appropriate standard” (*Nagarajah*). Consequently, the Respondent prays the Tribunal to follow the path taken by the administrative tribunals of sister institutions by noting the Applicant’s failure to satisfactorily justify his misconduct.

21. Furthermore, recalling that it is not the Tribunal’s brief to judge on the existence or otherwise of professional misconduct or serious misconduct, as ruled in the *C. G. S.* case (Application NO; 2004/01) judged by this Tribunal, the Bank maintains that the Applicant was charged with serious misconduct on the basis of: (1) information provided by the Malagasy authorities; (2) allegations from former officers of the project; (3) the Applicant’s presence in Paris during the period in which he was alleged to have received cash payments; (4) the Applicant’s unsatisfactory explanations on a number of operations on his bank accounts; (5) the content of Disbursement Request No. 43; (6) the Applicant’s role in recommending the payment of disbursement request No. 43; (7) the difference between the speed of processing disbursements prior to and after the alleged payments were received; (8) the Applicant’s unconvincing explanations over his role in the disbursement approval process.
22. Regarding the EUR 11 000 amount that the Applicant unduly received, the Bank bases its claims on information provided by the Malagasy authorities and the written depositions by former managers of the project implicating the applicant and one of his colleagues in the alleged embezzlement. The depositions are given as annexes to the Respondent’s Answer (Annexes 4 and 9). In its Rejoinder, the Bank presented two copies of Mr. Rakotondrazaka’s deposition, a copy with handwritten amendments and a final fully printed copy (Annexes 2 and 3). According to Mr. Ratovoson’s deposition, the vehicle lease system accompanied with bogus invoices and post-dated bills was a pseudo-mechanism through which resources shared with the Applicant were embezzled. According to the Bank, the Applicant does not deny traveling to Paris between 17 and 20 September 2004, during which he would have been handed the sum of EUR 11 000. Lastly, the Applicant’s explanations over a number of transfers to his bank accounts are not enough to exculpate him, given “the suspicion arising from such specific circumstances” (paragraph 3.1.4 [iv], Respondent’s Answer).
23. Concerning the processing of Disbursement Request No. 43 signed by the Applicant on 2 August 2004, the Bank observes that the disbursement request presented by the Applicant did not include a copy of the vehicle lease contract and that a copy of the

said contract dated 10 March 2004 was only obtained subsequently, within the framework of investigations. The Respondent adds that the disbursement request was made without the necessary justifying documents as required by the Disbursement Manual. To the Bank, the recommendation to approve the replenishment of the special account breaches Bank rules as set forth in the disbursement manual; no other practice was acceptable, contrary to the Applicant's claims. Furthermore, the Bank adds that the Applicant was required to enter all information in connection with the vehicle lease contract in the financial database/SAP, in line with procedures for the computerized management of projects financed by the Bank. The Applicant did not comply with these procedures as he was required to. If the documents on the basis of which the special account was replenished had been forwarded in line with the Disbursement Manual, a professional verification would have revealed the irregularities contained in the said request. To the Bank, the speed with which the disbursement requests were processed in 2004 is an added indication of the Applicant's involvement in embezzlement to the detriment of the project. Lastly, the Bank maintains that contrary to the Applicant's claims, the PPRU Department's procurement unit is not involved in the disbursement process. Its tasks are limited to verifying the compliance of procurements with Bank rules. The Applicant requested PPRU's opinion by e-mail dated 2 August 2004 but submits no proof of PPRU giving an opinion.

24. In the light of the foregoing, the Bank maintains that the charges levied against the Applicant are likely to discredit the Bank vis-à-vis its shareholders, member countries, public opinion and the international press. Hence, the charges incontestably constitute serious misconduct and justify the disciplinary sanction meted out to the Applicant. In that regard, the Bank recalls the jurisprudence of this Tribunal in the *B.* case (Application 2000/10) as judged on 25 July 2001. Pursuant to that jurisprudence, the sanction meted out by the Bank President and aimed at protecting the best interests of the Bank and the integrity of its staff, is by no means disproportionate.
25. For all these reasons, the Respondent prays the Tribunal to dismiss all the Applicant's claims.

IV. THE LAW

26. As the Respondent maintains, in disciplinary matters, the Staff Rules and Staff Regulations clearly distinguish two procedures – the ordinary procedure which allows a staff undergoing a disciplinary process to defend himself/herself before a disciplinary panel, before the Bank authorities take the final decision in his/her case, and the summary procedure which, in case of serious misconduct allows the President of the Bank to dismiss a staff without notice and entitlements, and without going through the disciplinary panel mechanism.
27. Furthermore, notwithstanding the nature of the misconduct, Rule 101.01 of the Staff Rules provides for a suspension procedure. As the rule clearly states, the suspension measure is not a disciplinary measure.
28. The Tribunal acknowledges that, pursuant to Regulations 10.1 and 10.2 of the Staff Regulations and the resulting provisions, the President of the Bank enjoys wide discretion to order a suspension measure or otherwise, qualify the misconduct as ordinary or serious and consequently choose the disciplinary procedure to follow. The

Tribunal repeats the wordings of its previous jurisprudence: “It is not within the province of a tribunal to substitute its assessment to that of the competent authority, subject to destroying the discretionary powers granted and exceeding the limits of the Tribunal’s jurisdictional competence” (Application 2004/02, *Derris Jenkins-Johnston*, paragraph 44, Compendium of Judgments, Vol. II, p. 165). However, the Tribunal restates that discretion cannot be based on a mischaracterization of facts, materially incorrect facts, reasons outside the Bank’s interest and manifest disproportionality between the facts and the decision.

29. Among the most important principles governing the disciplinary process, preponderance should be given to the principle according to which the onus to provide tangible proof of the accusations levied against the staff prosecuted lies with the prosecuting authority, that s/he be made aware of such proof and put in a position to discuss it fully. This universal principle is accepted by all legal systems worldwide, universal and regional international conventions and the jurisprudence of international tribunals. Therefore, in disciplinary matters, the onus of proof lies with the prosecuting authority as the Respondent acknowledges in paragraph 24 of its Rejoinder.
30. The Tribunal also shares the Respondent’s opinion according to which, in terms of proof, the requirements in disciplinary matters differ from those concerning penal matters. Therefore, the Bank rightly draws inspiration from the cases judged by the United Nations Administrative Tribunal and the Administrative Tribunal of the Asian Development Bank (*Berg, Patel, Edongo, Nagarajah*) cited in paragraph 20 of this judgment. In disciplinary proceedings, the administration is only required to establish the facts with reliable, corroborating and convincing proof, to support accusations levied against a staff member.
31. Nonetheless, the Tribunal reiterates the principle according to which the administration must provide tangible proof of facts levied against the staff member prosecuted, that s/he be informed about such proof and that s/he be put in a position to discuss it fully. Although the Tribunal admits that disciplinary proceedings are not subject to the same degree of exigency as penal proceedings, a minimum degree of due process must be guaranteed. It would be grave, even in cases of serious and corroborating suspicion, to overturn this principle by leveling accusations against a staff, engaging disciplinary proceedings against him/her and forcing him/her to prove his/her innocence, in other words to prove that s/he is not guilty. By doing so, the staff would be forced to prove a negative fact in manifest breach of the fundamental principle governing the onus of proof.
32. In the current dispute between the Applicant and the Bank, the Tribunal shall put aside the arguments of the parties concerning the Applicant’s suspension, given its little relevance to solving the dispute.
33. In the Tribunal’s view, the core accusation that led to the Applicant’s dismissal without notice and entitlements is an accusation of corruption, according to which the Applicant may have not only unduly received amounts embezzled, but above all, such embezzlement was possible thanks to bogus supplies and fake services involving the lease of vehicles. According to the Respondent, this was a true “corruption scheme.”

34. The remaining question is whether, in the course of investigations conducted by the Bank vis-à-vis the Applicant, the minimum guarantees provided in paragraph 31 of this judgment were respected, particularly concerning proof.
35. As stated in paragraph 21 of this judgment, the Respondent presents the following elements of proof: (1) information provided by the Malagasy authorities; (2) allegations from former project officers; (3) the Applicant's presence in Paris during the period he was alleged to have received cash payments; (4) the Applicant's unsatisfactory explanations with regard to certain transactions on his bank accounts; (5) the content of Disbursement Request No. 43; (6) the Applicant's role in recommending the payment of Disbursement Request No. 43; (7) the difference in the speed of processing disbursements prior to and after the alleged payments had been received; and (8) the Applicant's unconvincing explanations of his role in the disbursement approval process. The Tribunal will now examine the totality of the evidence.
36. Concerning information and intelligence from the Malagasy authorities, the Tribunal acknowledges the Respondent's right to use its sources with discernment, prudence and discretion, in a way as not to affect the relations of an international organization like the African Development Bank with member States or even foreign States. Without in any way calling into question the veracity and sincerity of such information, the Tribunal must, however, note that such is not a means of evidence in the legal sense of the word. To constitute real means of evidence, these claims must be supported and corroborated by written evidence, reliable documents or convincing testimony.
37. Regarding the allegations of former project managers, the Respondent maintains, on the one hand, that the evidence presented cannot, as claimed by the Applicant, be characterized as hearsay, insofar as "their authors narrated events of which they had personal and direct knowledge" (Respondent's Rejoinder, paragraph 15). On the other hand, the Respondent argues that proof by hearsay is accepted by contemporary common law and civil law systems (Rejoinder, paragraph 16).
38. However, the Tribunal notes, to begin with, that the two statements are characterized by vague and unspecified wordings without specifics as to names, dates, concrete facts (Mr. Rakotondrazaka's statement: "It would appear that...", "the sum of nearly 11 000 Euros", "a friend..."), contradictions ("I made payments in Euros to Mr. B. M.", "I collected the sum of ... that I sent end September 2004 to Paris via a friend who was visiting Paris...") and assumptions, especially Mr. Ratovoson's declaration in paragraph 5 ("I thought these were persons directly in charge of the project dossier...") and 7 ("The above facts suggest that ..."). In addition, the deposition signed by Mr. Rakotondrazaka on 20 April 2008 and transmitted to the Bank by the Applicant, in which he retracts his previous statement, voids his testimony of all credibility.
39. As far as evidence is concerned, it is for the Respondent to establish it in a convincing manner, so that the Applicant may be able to challenge them. In the present case, the

Applicant was unable to challenge the entire evidence against him. A corrected version of Mr. Rakotondrazaka's statement was quickly shown to him and no copy of this important document was given to him. Thus, no confrontation with the direct witness of the incriminating facts could take place.

40. Regarding proof by hearsay, in cases where such proof is admitted (as in the 1995 *Civil Evidence Act* in England or by Canadian jurisprudence cited by the Respondent), its reliability rests first on the judge hearing the dispute, as acknowledged by the Respondent. Above all, it gives the opposing party the right to contest or contradict such evidence. The *Civil Evidence Act* acknowledges that any party in a case may call the author of hearsay as witness and submit such author to cross examination; but that possibility was precisely denied the Applicant during the investigation conducted by the Bank. The Applicant was constrained to justify various transactions on his bank accounts to prove his innocence. However, stating as does the Respondent that "the Applicant's denials are no proof that the alleged payments were not received" (Rejoinder, paragraph 18) amounts to reversing the onus of proof. It is up to the plaintiff to prove positively that the staff is guilty, and not the staff to prove negatively that s/he is innocent.
41. Concerning the Applicant's presence in Paris during the period that he is alleged to have received payments in cash, the Tribunal notes in the first instance that the specific date of the trip was not ascertained. However, what is more important is not to establish whether or not the Applicant was in Paris – in which case the proof would be highly conjectural – but whether some individual would actually have handed him money from Mr. Rakotondrazaka. This capital aspect of the question remains in the dark. The individual in question remains unknown, as acknowledged by the Respondent during the hearing of 17 November 2008, and the Applicant was not even able to discuss the individual's testimony which, in any case, is not in the dossier. It would be serious indeed to condemn someone based on indirect evidence, and even worse to condemn someone on the basis of non-existing evidence.
42. With regard to the Applicant's unsatisfactory explanations over some transactions on his bank accounts "which raised doubts" (Respondent's Answer, p. 9), the Tribunal is not convinced of the conclusions that the Respondent would want to draw from its investigations into the Applicant's bank accounts. The Applicant gave all explanations to issues raised and no element therein proves his guilt. The Bank's doubts and assumptions on some transactions are nothing but hypotheses not backed by any conclusive fact.
43. Therefore, based on the foregoing, the Tribunal concludes that the Bank has not provided sufficient proof of the alleged acts of corruption.
44. Given their connectedness, what remains to be examined are the issues relating to Disbursement Request No. 43, i.e. accusations 5, 6, 7 and 8 made by the Respondent.¹

¹ (5) the content of Disbursement Request No. 43; (6) the Applicant's role in recommending the payment of Disbursement Request No. 43; (7) the difference in the speed of processing disbursements prior to and after the alleged payments were received; (8) the Applicant's unconvincing explanations of his role in the disbursement approval process).

45. As stressed in the Bank's Answer (paragraph 3.1.5, page 9-12) and Rejoinder (paragraph 36 down), the Applicant is accused of: (a) having "recommended" the approval of disbursement requests without justifying documents that are needed for conducting checks as required by the Disbursement Manual, specifically paragraphs 5.4.1, 9.11, 9.12.1 and 9.13.3; the Applicant did not insist that the Borrower provide the necessary documents to justify the replenishment of the special account, whereas those documents could have revealed flagrant irregularities; (b) having listed the "vehicle lease" expenditure under two separate chapters, namely "technical assistance" over the March to June 2004 period, and "consultancy services/studies" over the April to June 2004 period; (c) having prepared bogus vehicle lease expenses that did not correspond to services rendered; (d) not having entered information related to the vehicle lease in the SAP financial database, in line with the Bank's computerized management procedures.
46. The Respondent acknowledges that the disbursement procedure followed is at variance with instructions contained in the Bank's Disbursement Manual. However, the Tribunal must also note:
- To begin with that, in a legal relationship that principally binds the Bank and the borrowing Government, the Applicant's role is to "recommend" the approval of requests for advance and replenishment of rolling fund No. 43. In the inter-office memorandum of 2 August 2004 which the Applicant signed on behalf of the Acting Division Manager, ONAR.2, the Applicant confirmed the eligibility of expenditures committed on the previous rolling fund, on the one hand, and declared having "no objection" to the request for the replenishment of the rolling fund, on the other. In that regard, the Applicant is empowered to recommend, not decide.
 - Moreover, assuming the Applicant had a decision-making role in the disbursement process, the irregularities committed would on their own not have justified an accusation of corruption and summary dismissal without notice or benefits. These irregularities came to buttress the accusation which in fact is essentially based on embezzlement committed to the Applicant's benefit as discussed in paragraphs 15 and 33 of this judgment.
 - Lastly, along the same line of reasoning, that the relationship between these irregularities and the offences charged are based on pure suspicion. Suspicion, even if strong, cannot be a substitute for proof. There should be clear proof, beyond a simple suspicion, before a finding of guilt.

V. THE DECISION

47. On these grounds, particularly those set forth in paragraphs 39 to 42, the Tribunal decides:
- 1) that the decision of summary dismissal without notice or benefits of 8 June 2007 is annulled, in accordance with Article XIII (1) of the Statute of the Tribunal;
 - 2) that the Applicant be paid his salary retroactively from the date of dismissal to his retirement date;

- 3) that the Applicant be paid compensation for moral damages in the amount of 8,000 US dollars;
- 4) that the Applicant's retirements benefits be restored in full, if necessary;
- 5) that the Bank pay the Applicant as compensation for legal costs in the amount of 2,000 US dollars.

Professor Maurice GLELE AHANHANZO

President

Mrs. Albertine LIPOU MASSALA

Executive Secretary

COUNSEL TO THE APPLICANT

Rose Marie DENNIS Esq.

COUNSEL TO THE RESPONDENT

Mr. Kalidou GADIO, Ag. General Counsel

M. Dotse TSIKATA, Division Manager, GECL.2

M. Kouame KLEMET

Mme. Omesiri AKPOFURE-IDRIS