BOARD OF INTERNAL TRADE *v.* YONAH MAPENZI

COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM
(Kisanga, Mfalila and Lubuva, JJ.A.)

CIVIL APPEAL No. 3 OF 1996

(From the Judgment of the High Court of Tanzania at Tanga, Msumi, J., dated 15 September 1995 in Civil Case No. 20 of 1992)

Labour Law – Disciplinary authorites – Employees on secondment – Disciplinary authority in respect of seconded employee

Natural Justice – Right to be heard – Employee given right of hearing by institution to which he is seconded and not heard by the employer seconding the employee – Whether employee denied the right to be heard

Tort – Defamation – Defences – Qualified privilege – Communication of statement to a professional body of the employee at the request of such body – Whether defence of qualified privilege is sustainable

The respondent was employed by the appellant Board and seconded to the Tanga Regional Trading Company Ltd (RTC). While working at Tanga RTC the respondent's employment was terminated on the grounds of misconduct and financial mismanagement. The respondent successfully challenged his termination in the High Court, on grounds that it was unlawful, that he had been denied his right to be heard, and that he had been defamed by his employer communicating to his (the respondent's) professional body information that suggested he was a dishonest and unprofessional person. On appeal by the appellant Board the Court of Appeal considered who/what was the disciplinary authority for the respondent employee, whether or not he had been given the right to be heard, and whether the communication by the appellant to the

employee's professional body, the National Board of Accountants and Auditors ("**NBAA**") was privileged. A

Held:

(i) Parastatal Service Regulations state that the disciplinary authority in respect of the employees of the Board is the Board; this cannot mean that other bodies or institutions to which Board employees are seconded cannot assume disciplinary powers over them; B

(ii) The company, Tanga RTC, to which the respondent was posted had full disciplinary authority over him and the steps they took against him were fully in accord with their powers; C

(iii) The appellant Board retained the final authority over the respondent in such serious matters as dismissal and termination, but even in those matters, the appellant Board could generally act only on the recommendation of the companies concerned, because it is the companies that were dealing with the employees on a daily basis; D E

(iv) It was proper for Tanga RTC, to which the respondent was posted by the appellant Board, to institute disciplinary proceedings against the respondent, invite him to defend himself, deliberate on the matter and send the record of proceedings and recommendations to the appellant employer; F

(v) The appellant's Board of Directors was, therefore, perfectly entitled not to summon the respondent afresh and only consider what had been written and said in defence before the Tanga RTC, him immediate disciplinary authority; G

(vi) The learned trial court judge erred in law and in fact in holding that the respondent was not afforded an opportunity of being heard; H

(vii) The appellant Board as the respondent's highest authority had unearthed, through an internal audit, what they believed was gross professional misconduct on the part of the respondent and, on request, they reported this to the NBAA, the respondent's professional controlling body; the I

appellant never published this information to anyone else outside this controlling professional body and the appellant's own system;

(viii) The NBAA as a professional controlling body had an interest in the matter; therefore, the learned trial court judge erred in law in holding that the defence of privilege was not available to the appellant Board in the circumstance of the case.

Appeal allowed

Cases referred to:

(1) Clark v. Holyneux [1877] 3 Q.B.D. 237

(2) Perera v. Perris [1949] A.C. 1

(3) Toogood v. Sprying 1834 1 Cr. M & R 181

(4) Chimala Stores v. Zambia-Tanzania Road Services Ltd [1970] H.C.D. 232

(5) Hunt v. Great Northern Railway Company [1891] 2 Q.B. 189

Dr. Lamwai, for the Respondent

JUDGMENT OF THE COURT

(Dated 9 September 1997)

Mfalila, J.A.: In the High Court at Tanga, the respondent Yona O.K. Mapenzi, sued the appellant, his erstwhile employer, claiming damages amounting to Sh. 48,000,000/= for wrongful termination of his employment and defamation. The High Court (Msumi, J. as he then was) allowed the claim and awarded damages as claimed, i.e. Sh. 18,000,000/= for wrongful termination of employment and Sh. 30,000,000/= for damages. The appellant filed this appeal contesting both its liability and the quantum of damages awarded.

According to the respondent's case in the High Court, his claims arose as follows: The respondent was at all material times employed by the appellant Board as an Accountant and was seconded to one of

its Group Companies; the Tanga Regional Trading Company Ltd, where he rose through the ranks until he reached the post of Chief Accountant. That in November 1992 the appellant, without any reasonable cause, wrote the respondent a letter terminating his employment on the allegation that he had grossly mismanaged the Tanga RTC Account No. 1205 with the Cooperative and Rural Development Bank (CRDB). That subsequent to this termination the appellant wrote a letter to the respondent' s professional body; the National Board of Accountants and Auditors, in which the following allegations against the respondent were made:

(a) That the respondent had demonstrated gross negligence and misrepresentations of facts leading to the Tanga RTC losing its purchasing power.

(b) That the respondent had deliberately and in an organised systematic manner concealed mismanagement of the Tanga RTC finances leading to a loss of Sh. 3.3 million.

(c) That the respondent had colluded with parties outside the company to defraud the said company, i.e. Tanga RTC, the said amount of Sh. 3.3 million.

The respondent alleged that by the said allegations, the appellant was saying that the respondent is a dishonest person and an unprofessional man who was prepared to undermine his employer for the sake of stealing from his employer, and that the publication of these allegations seriously injured his credit as an Accountant and exposed him to disciplinary action by his professional body, and that for that reason the appellant was liable to pay punitive damages in the sum of Sh. 30 million. For the wrongful termination of his employment, the respondent claimed Sh. 10 million. At the trial, the respondent gave evidence in support of his claims stating that the termination of his employment was

wrongful because he was never given any opportunity to defend himself, in other words he was condemned and punished without being given a hearing. He added that the only time he was given an opportunity to defend himself was when he appeared before the management committee of Tanga RTC which recommended his dismissal to the appellant. The appellant, he said, wrongly acted on this recommendation because as his employer and disciplinary authority, the appellant should have launched its own independent investigation in which he should have been heard.

As to the allegation of misconduct and financial mismanagement, the respondent denied them all, saying that what are referred to as concealments and apparent financial management shortcomings, were caused by the failure of the bankers (CRDB) to supply his office with vital statistics in the form of monthly bank statements which could have enabled him to prepare the bank reconciliations. He said that he had constantly complained to the CRDB management but to no avail.

At the end of the trial, the learned trial judge found that the respondent's claim for wrongful termination of his employment had been proved, because, the appellant effected this termination without giving the respondent a hearing, and also that the respondent had proved his claim for defamation, because, even if the appellant had a duty to the respondent's professional body, it did not act fairly and honestly. It made the report to the National Board of Accountants and Auditors without sufficient enquiry into the allegations. Accordingly, he awarded the respondent a total of Sh. 48,000,000/= as damages for wrongful termination of employment and defamation.

The appellant Board lodged this appeal in a memorandum of appeal containing six grounds. We shall deal with the grounds seriatim.

In *ground 1*, the appellant complained that the learned trial judge erred in law and in fact in holding that the respondent was an employee of the appellant Board and/or that the respondent was on secondment to the Tanga Regional Trading Company Ltd. We are satisfied that this complaint has no substance. In the plaint, the respondent stated in paragraph 5 as follows:

That the plaintiff (present respondent) was at all material times the employee of the defendant (appellant) as the Chief Accountant to the Tanga Regional Trading Company. A copy of his letter of appointment is annexed hereto an Annexure "AI," and the plaintiff craves leave to refer to it as part of this plaint.

In its own written statement of defence, the appellant Board admitted in paragraph 5, the truthfulness and correctness of the above claim by the respondent, accordingly this was not made an issue and the case proceeded on that basis. In their respective evidence, both the General Manager of RTC, Mr. Jacob Bushiri (DW.1), and Sylvanus Hyera (DW.3) confirmed this position that Senior Personnel in the Group Companies are appointed by the Board and then posted to the Group Companies. The Chief Accountant is one of such officers. Both these witnesses gave evidence on behalf of the appellant at the trial. The appellant Board cannot therefore be allowed to change the nature of its case at this stage. The complaint in this ground therefore fails and it is dismissed.

In *ground 2,* the appellant Board complained that the learned trial judge erred in law, and in fact in holding that the respondent was not afforded an opportunity of a hearing. In resolving this complaint, we feel we should start from the beginning and restate the position we have taken on the evidence in the record that the respondent was at all material times an employee of the appellant but posted for duties to the Tanga Regional Trading Company Limited, where he was assigned the duties of an Accountant. He rose through the ranks to become the Chief Accountant of that company. It appears that the respondent performed well in his duties as Accountant for the time he was employed in 1979 to 1990. His promotion to the level of Chief Accountant during this period is testimony to this. However in 1990 an internal audit of books of account of Tanga RTC was carried out. The audit was carried out by auditors from the appellant Board. Following this audit gross mismanagement of Tanga RTC Account No. 1205 with CRDB was

unearthed. The General Manager of Tanga RTC thought the audit report revealed such serious professional misconduct on the part of the respondent that he decided to interdict him pending a full scale hearing by the Management Committee and a decision by the appellant Board. The letter of interdiction also asked the respondent to explain himself on the allegations against him in the audit report. The respondent reacted to this letter by sending to the RTC Management his written explanations on the allegations. Later on, the Management Committee of Tanga RTC was convened to deliberate on the respondent's affair. The respondent was called before the committee to give his explanation.

After hearing the account given by the General Manager as well as the respondent on the matter, the committee resolved that the allegations of financial mismanagement against the respondent as revealed in the audit report were fully justified and that therefore he was not fit to continue in the employment of Tanga RTC, that the appellant Board should take steps to have him dismissed and also that a written report be sent to the National Board of Accountants and Auditors which would then order that he be struck off from the register. When the appellant Board received this recommendation from the Management Committee of RTC Tanga, they considered it along with the respondent's explanation of the allegations against him. Having done so, the appellant's Board of Directors decided to summarily dismiss the respondent. This is the sequence of events leading to the respondent's dismissal. On this scenario, the respondent's contention at the trial was that as his disciplinary authority, the appellant Board terminated his services without first giving him the opportunity of being heard and that therefore his dismissal was unlawful. This contention seems to have found favour with the trial judge who accepted it in the following words:

> It is the plaintiff's contention that as his disciplinary authority, defendant terminated his service without first giving a right of hearing (sic). With respect there is substance in this complaint. The available evidence shows that at no time had the defendant required the plaintiff to defend

himself against the alleged misconduct before it took the complained disciplinary action. The only time when defendant communicated with the plaintiff is when it wrote to him Exh. P3 terminating his service. Admittedly in the said letter defendant claimed to have considered plaintiff's statements of defence vis-a-viz the charges. This claim, however, is negated by the evidence of what actually transpired prior to the said letter.

In the first place there had been no disciplinary charge preferred against the plaintiff against which he would have defended himself. The only allegations against him and which were communicated to him were those contained in the interdiction letter written by the then General Manager of Tanga RTC. The General Manager imputed gross professional negligence against the plaintiff to justify the interdiction. As directed, plaintiff submitted to the General Manager his written reply to those allegations. Being not the appropriate disciplinary authority neither the General Manager nor the Executive Committee of Tanga RTC could have legally instituted a formal charge against the plaintiff. As initial stage in the disciplinary process, institution of a charge can only appropriately be done by the disciplinary authority unless accepted in the relevant machinery.

In this paragraph the learned judge rejected the appellant's contention that it considered the respondent's written defence on the basis that there was no disciplinary charge laid against the respondent against which he could have defended himself, and that the charges by the Tanga RTC were irrelevant because Tanga RTC was not the respondent's disciplinary authority. In this the learned judge seems to have accepted the contention of counsel for the respondent in his final submission, in which he said that from the evidence produced, disciplinary proceedings against the respondent were initiated by the Tanga Regional Trading Company, but that since the company did not have any disciplinary powers over the respondent, any purported exercise of disciplinary authority by the company over the respondent

A was null and void. On this reasoning, any defence put up by the respondent before the Tanga RTC could not validly be used by the appellant Board. Hence in dismissing the respondent, the appellant Board neither considered the respondent's defence nor gave him a
B hearing. Dr. Lamwai learned Counsel for the respondent reiterated the same arguments. Dr. Lamwai had stated in his submission that according to the evidence of Sylvanus Hyera, the appellant's acting Director of Manpower and Administration, there was no evidence that the
C appellant's Board of Directors sat to discuss the respondent, therefore in his view the Director General of the appellant Board acted unilaterally and on his own when he wrote the dismissal letter to the respondent. It is along this line of reasoning that the learned judge proceeded to make
D the following remarks and findings:

> But even if the said interdiction letter had the effect of sufficiently
> E notifying the plaintiff of the charges against him the validity of the contention that the termination in question is wrongful remains strong. May be it is tolerable for a disciplinary authority to commission a separate organ to conduct investigation on allegations levelled against a worker.
> F However it is mandatory that a worker should be given opportunity to defend himself before the respective disciplinary authority. This could be done either by the worker appearing before the authority or by submission of a written defence. Short of this, will amount to condemning
> G the worker unheard. This is what happened in the present case. Plaintiff was never given opportunity to present his defence.

We would like at this stage to state that we are in agreement with both
H Counsel for the respondent and the learned judge that the appellant Board did not physically hear the respondent's defence. The respondent never appeared before its Board of Directors to make his case against the accusations levelled at him. But the appellant Board said that it
I considered the entire case against the respondent as presented to it by the Management Committee of Tanga RTC including his defences both

verbal and written. This procedure is attacked on the grounds that the appellant Board was the only disciplinary authority for the respondent and therefore the only competent authority to charge him. In our view this argument is flawed as it ignores the reality on the ground. It is true that the appellant Board was the respondent's employer, but this does not necessarily mean that it was his disciplinary authority or even the only one. According to the evidence, the appellant Board is the controlling and unifying authority for all Regional Trading Companies. To ensure the effectiveness of its controlling and unifying role, all Senior Personnel for all Regional Trading Companies were appointed by the appellant Board and then after consultations with the relevant Management Boards of the Trading Companies, posted them to the Trading Company concerned. Thus from that stage, the employee came under the control of the company to which he was posted and according to Mr. Hyera (DW.3), it was the duty of the Regional Trading Companies to interdict and take disciplinary measures against employees seconded to them, and that this is what happened in this case.

We think that this arrangement makes sense for it would be contrary to good management practice if the Regional Trading Companies were rendered powerless in controlling all employees working for them. If Parastatal Service Regulations state that the disciplinary authority in respect of Board employees is the Board, this cannot mean that other bodies or institutions to which Board employees are seconded cannot assume disciplinary powers over them. Therefore the Tanga RTC to which the respondent was posted, had full disciplinary authority over him and the steps which they took against him were fully in accord with their powers. The appellant Board of course retained the final authority over the respondent in such serious matters as dismissals and terminations, but even in these matters, the appellant Board could generally act only on the recommendation of the companies concerned, because it is the companies who would be dealing with the employee on a daily basis. What happened then was that the Tanga RTC to which the respondent was posted by the appellant Board, instituted disciplinary

proceedings against the respondent, he was invited to make representations in his own defence which he did both in writing and verbally before the Management Committee. The respondent may have doubted the effectiveness of his defence thinking that it was only cosmetic, but this is far from saying that he was not given a hearing. On receipt of the record of proceedings and the recommendations from the Tanga RTC, the respondent's immediate disciplinary authority, it would have been pointless, indeed a waste of time, to reopen the proceedings afresh by summoning the respondent. We do not see what such an exercise could have achieved, because the respondent could only have repeated what he had stated in writing and before the Management Committee of Tanga RTC, unless of course he decided to come up with after thoughts. The appellant Board of Directors was therefore perfectly entitled not to summon the respondent afresh and only considered what he had written and said in his defence before the Tanga RTC, his immediate disciplinary authority.

Dr. Lamwai attacked the appellant Board in another respect that its Board of Directors did not meet to consider the recommendations of the Tanga RTC, and that therefore its Director - General acted unilaterally. This contention is however not borne out by the record which indicates at page 70 that the appellant's Board of Directors did meet on Thursday 24th October 1991 and among other things deliberated and approved the summary dismissal of the respondent.

But perhaps without realising the contradiction, the learned judge made a finding that the respondent was heard in his own defence, only that the appellant did not give sufficient weight to it. The learned judge stated:

> And it appears that defendant did not seriously consider plaintiff's written defence (Exh. P2) though it claims to have done so. Otherwise defendant would not have decided as it did. I am saying this because the alleged accusation of gross professional negligence and misrepresentations of facts is based on the revelation that plaintiff was not preparing bank

reconciliation reports in respect of CRDB, account No. 1205. Plaintiff gave sufficient explanation to this anomaly. He blamed CRDB for failure to submit monthly statements in respect of the said account. And attached to his defence were a number of annexure being copies of letters which he writes to the Branch Manager complaining on this issue. Had the defendant considered this defence it would not have agreed with the finding of the meeting of the Executive Committee of Tanga RTC that plaintiff conspired with some employees of CRDB Tanga Branch to conceal some financial transactions on the account. It is a fact that it is not possible to prepare bank reconciliation without getting the relevant bank statements. In his testimony before this Court, plaintiff claimed that during the material time there had been general complaint from customers of CRDB Tanga branch on non availability of their respective monthly bank statements. No effort was done (sic) by the defendant to refute this claim.

It is obvious from this statement that the learned judge had completely changed the nature of the respondent's claim from one of unlawful termination because of breach of the rules of natural justice, i.e. failure to give him a hearing and therefore condemning him unheard to one based on the merits of the case i.e. misdirection on the respondent's defence. The two defences are for obvious reasons mutually exclusive. If as in this case the claim is that the termination is wrongful for non compliance with rules of natural justice i.e. denying the respondent the right of being heard, the complaint is merely on the procedure adopted not on substance, hence the remedy cannot be an award of damages as claimed by the respondent, the proper remedy is to order a fresh inquiry in which the proper procedure would be followed. If the complaint is based on substance i.e. inadequate consideration or misapprehension of the defence case, the remedy is to order reinstatement or damages if the employer failed to reinstate the worker. To award damages in the former case as the learned judge did in this case, amounts to awarding possible misconduct. But as we have already

found on the evidence, the respondent's defence was heard by his immediate disciplinary authority on which a recommendation to dismiss him was made. The appellant Board as the ultimate authority properly considered the proceedings before the Executive Committee of Tanga RTC and acted on its recommendations.

For these reasons, we accept the complaint in ground 2 of the memorandum and hold that the learned trial judge erred in law and in fact in holding that the respondent was not afforded an opportunity of being heard.

Our findings on *grounds 1 and 2* make it unnecessary for us to consider the complaints in *ground 3*. In ground 4 the appellant Board complained that the learned trial judge misdirected himself on the law in holding that the defence of privilege was not available to the appellant in the circumstances of this case.

The alleged defamatory letter was written by the appellant Board to the National Board of Accountants and Auditors, the respondent's controlling body after the Board had dismissed the respondent from its employment. The letter was in the following terms:

"BIT/CA/CONF.PF/523 30th March 1992

The Registrar,
NBAA,
P.O. Box 5128,
DAR ES SALAAM (Attention: Mr. F.S. Kutolie)

Dear Sir,

RE: EMPLOYMENT OF ACCOUNTANTS AND AUDITORS
IN THIS COUNTRY

We refer to your letter dated 15th October 1991 under Ref. NBAA/CF/EDC.1/1 addressed to the General Manager, Tanga RTC and Tanga RTC's letter Ref. RTC. GM/30/126/91, dated 23rd October 1991 addressed to you.

We wish to confirm that Ndugu Mapenzi D.K. Yonah who was Chief Accountant of Tanga RTC and earlier interdicted was summarily dismissed in November 1991. Ndugu Mapenzi was dismissed on the following charges.

a) Demonstrating gross professional negligence and misrepresentation of facts leading to Tanga RTC's loss of purchasing power.

b) Deliberately, and in an organized and systematic manner, concealing mismanagement of the company's finances thereby leading to a pecuniary loss of shs. 3.3m. property of Tanga RTC.

c) Colluding with parties outside the company to defraud the company of the said shs. 3.3m.

The above deeds, which are unbearable to our group of companies, were unearthed through an investigation into the management of Tanga RTC's CRDB Account and the Transport Wing. A photocopy of the Report is herewith attached for your ease of reference.

Assuring you of our highest cooperation in regulating the conduct of Accountants and Auditors in this country.

Yours faithfully,

M.R. Mfikirwa
for DIRECTOR GENERAL

The respondent stated that by publishing the above words, the appellant was stating that he, respondent, was a dishonest unprofessional man who is prepared to undermine his employer for the sake of stealing from such employer and that the publication of such words seriously

injured his credit as an accountant and exposed him to disciplinary action by his professional body, the National Board of Accountants and Auditors.

At the trial, the appellant's Director of Administration and Manpower Development, Mr. Sylvanus Hyera, told the trial Court in connection with this allegation that they wrote the letter to the NBAA in response to an enquiry which it made on the respondent's conduct. The NBAA wanted to be furnished with a report on the respondent after hearing of some allegations of professional misconduct by the respondent and that for this reason they communicated to the NBAA on their decision against him. Mr. Hyera could therefore see nothing wrong with this. But the learned trial judge rejected this defence, saying that even if the appellant had a duty to report to the NBAA, it did not act fairly and honestly because it was made without sufficient enquiry into the allegations. For instance, the learned judge went on, the allegation about the loss of sh. 3.3m was a wild allegation, "a clear demonstration that the defendant was all out to make sure that plaintiff was struck from the register of Accountants and Auditors."

We wish at this stage to trace the history of the alleged defamatory letter quoted above. Sometime in 1990, the appellant Board initiated an internal audit of Tanga RTC Account No. 1205 with the then Cooperative and Rural Development Bank (CRDB) Tanga branch. Following this audit, serious discrepancies in the form of concealments and falsification of documents concerning this account were unearthed. The respondent as Chief Accountant of Tanga RTC was held accountable and the Executive Committee of Tanga RTC interdicted him pending the completion of a full scale investigation. The Tanga RTC notified the appellant Board of this interdiction. But it appears that after interdicting the respondent on 18th June 1991 and this interdiction reported to the appellant Board, neither the Tanga RTC nor the appellant Board reported the incident to the respondent's professional controlling body, the NBAA. But according to the record, the NBAA itself heard of the respondent's suspension through it own

sources and wrote the General Manager of Tanga RTC the following letter on 15/10/91:

NATIONAL BOARD OF ACCOUNTANTS AND AUDITORS
TANZANIA
NIC INVESTMENT HOUSE 4TH FLOOR INDEPENDENCE AVENUE
P.O. BOX 5128
TELEGS: NBAA DAR ES SALAAM
TELEPHONE: 31466/7/8

Our Ref. No. NBAA/CF/EDC.1/1 Date: 15th October, 1991

The General Manager,
Tanga RTC,
Box 116,
TANGA

Dear Sir,

RE: EMPLOYMENT OF ACCOUNTANTS AND AUDITORS IN THIS COUNTRY

The above subject refers.

The National Board of Accountants and Auditors has learnt through a reliable source that Mr. Mapenzi D.K. Yonah who according to our records is employed by your Company as a Chief Accountant has been suspended/terminated from your employment.

The NBAA through its establishing Act of 1972, has been charged with the responsibility of regulating the conduct of Accountants and Auditors in this Country. We would therefore appreciate if you could confirm whether the allegations are correct and if it is true what are the charges against him to enable us determine whether there was any professional

misconduct, negligence or violation of the NBAA's Code of Conduct. Your early response will highly be appreciated.

Yours faithfully,

F.S. Kutolie
for Registrar.

On receipt of this letter, the General Manager Tanga RTC responded by informing the NBAA by his letter of 31/10/91 as to what had happened and the action taken against the respondent. This letter is not part of this record, but it appears that it was copied to the appellant Board, because the letter had its details. At this stage (31/10/91) when RTC wrote this letter to NBAA, the respondent's affair had not been finalised, he was still on interdiction. Therefore when this affair was finalised by the respondent's dismissal, the appellant Board as the respondent's highest authority, informed the NBAA of the respondent's fate in their letter quoted above in full. This is the letter which is being complained against, that it is defamatory and that it was written with malice and that therefore the defence of privilege was not available to the appellant Board. When the NBAA received this letter from the appellant Board, they wrote the respondent a letter which is in the following terms:

NATIONAL BOARD OF ACCOUNTANTS AND AUDITORS
TANZANIA
NIC INVESTMENT HOUSE 4TH FLOOR
INDEPENDENCE AVENUE
P.O. Box 5128
TELEGS: NBAA DAR ES SALAAM TELEPHONE: 31466/7/0

Our Ref. No.NBAA/CF/EDC.1/II Date: 7th May, 1992

Mr. Yonah Mapenzi,
c/o Mrs. O. Mapenzi,
Box 178,
TANGA.

Dear Mr. Mapenzi

RE: YOUR EMPLOYMENT WITH RTC – TANGA AS CHIEF ACCOUNTANT

We have learnt through BIT's letter to us with Ref. No. BIT/CA/ CONF./ PF.523 of 30th March, 1992 that you were first interdicted and then summarily dismissed from BIT's employment in November, 1991.
We have been informed that the charges against you were as follows:

1. Demonstrating gross professional negligence and misrepresentation of facts leading to Tanga RTCs loss of purchasing power.
2. Deliberating, and in an organised and systematic manner, concealing mismanagement of the company's finances thereby leading to a pecuniary loss of shs. 3.3 million property of Tanga RTC.
3. Colluding with parties outside the company to defraud the company of the said shs. 3.3 million.

The charges levelled against you are indeed serious and very unethical to professional accountant like yourself.

The Board therefore seeks a plausible explanation from you as to why your issue should not be deliberated by it and appropriate disciplinary punishment metted against you.

We expect to receive your written explanation within 3 weeks from the date of this letter.

Yours faithfully,

L.S.L. Utouch
REGISTRAR

c.c: 1. Director General,
Board of Internal Trade,
P. O. Box 883,
DAR ES SALAAM - (Att. Mr. M.R. Mfikirwa)

2. The General Manager,
Tanga RTC,
Box 116,
TANGA

As indicated, the learned judge agreed with the respondent because, in his view, the appellant was actuated by malice when it wrote the alleged defamatory letter to the NBAA concerning the respondent. What then is the law which is applicable in such circumstances? The General rule is that in certain circumstances, it is thought desirable that reflections on the reputation of another although untrue, should not give rise to tortuous liability, provided that they were not published with malice. This is what is known in law as the defence of qualified privilege and this malice can be proved by the plaintiff by showing either that the defendant did not believe in the truth of his statement or that he was recklessly careless whether the statement was true or not. But even here, there is an exception to the rule that a person who does not believe in the truth of his statement forfeits the privilege, for instance in circumstances where the obligation to communicate the defamatory matter is so pressing that the defendant should be free to do in the public interest where such information as the defendant has, is properly requested by another concerned in the matter. In the case of *Clark v. Holyneux (1)* at page 244 Lord Bramwell stated this exception in the following words:

> A person may honestly make on a particular occasion a defamatory statement without believing it to be true; because the statement may be of such a character that on that occasion it may be proper to communicate it to a particular person who ought to be informed of it.

Other instances which can demonstrate malice and therefore destroy the privilege include the introduction of extraneous matter to the subject in hand, unreasonable publication of the defamatory statement to persons outside the scope of the privilege and exceeding the limits of the privilege, for instance where statements unconnected with the main statement are introduced. But the general principle governing the defence of qualified privilege was neatly put by Lord Uthwart in *Perera v. Perris (2)* at page 20 as "they, (the defences of qualified privilege) exist for the common good of Society" and PARKER B. had more than a hundred years earlier described the nature of this defence in *Toogood v. Sprying (3)* at page 193 in the following words:

> The defendant is liable for a defamatory publication unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral in the conduct of his own affairs, in matters where his interest is concerned. If fairly warranted by any reason, occasion or exigency and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits.

It is on this principle that instances of qualified privilege include fair and accurate reports meant to provide for or safeguard the interests of any trade, business, industry, or profession of persons engaged in them.

On this analysis of the law, we are satisfied that if the learned judge had correctly directed his mind on the law applicable, he would have found that the appellant's letter to the NBAA came squarely within the remarks of Lord Bramwell in *Clark v. Holyneux* (1), the general principle laid down by Lord Uthwart in *Perera v. Perris* (2), the statement

of Parker J. in *Toogood v. Sprying* (3) and, nearer home and time, within the statement of the law by Georges C.J. in *Chimala Stores v. Zambia Tanzania Road Services Ltd.* (4) He would also have found that the appellant Board did not lose the defence of qualified privilege because there were no extraneous matters in the letter, it was not published to any body outside the scope of the privilege, and the privilege was not exceeded. The learned judge would have found that the letter was a fair and accurate report on matters the appellant Board had been requested to furnish information on for the purpose of safeguarding the interests of the profession of accountancy. As the learned judge will no doubt realise on reflection, there are many classes of statement which can be held to be protected by the defence of qualified privilege as set out in *Gatley on Libel and Slander*, 5th Ed. p. 190, where we think the present case falls in Class 2, - that "statements made on a subject matter in which both the defendant and the person to whom the statements are made had a legitimate common interest." Lord Fisher in the case of *Hunt v. Great North Railway Company (5)* at page 191, expressed the general principle as follows:

> A privileged occasion - arises if the communication is of such a nature that it could be fairly said those who made it had an interest in making such a communication, and those to whom it was made had a corresponding interest in having it made to them - when these two things co exist, the occasion is a privileged one - In other words, there must be a reciprocity of interest.

This case is such a privileged one; the appellant Board as the respondent's highest authority, had unearthed through an internal audit what they believed to be gross professional misconduct on the part of the respondent, on request, they reported this to the NBAA the respondent's professional controlling body. They never published this information to anyone else outside this controlling professional body and the BIT system. The NBAA as a controlling professional body

had an interest in the matter. The reciprocity of interests between the appellant Board and the NBAA was thus complete. A

We think we must add that if in the face of this enquiry from the respondent's controlling professional body, the Tanga RTC and the appellant Board had remained silent without providing the information requested, the two bodies would have been very irresponsible. Indeed, even without any enquiry from the respondent's professional body, they were still duty bound to report to it both the incident and the respondent's fate. The publication of the letter to NBAA would still have been privileged. B C

Accordingly, we agree with the complaint in ground 4 that the learned trial judge erred in law in holding that the defence of privilege was not available to the appellant Board in the circumstances of this case. With these findings on grounds 2 and 4 we are not called upon to consider the complaints in grounds 5 and 6. D

For all these reasons, we allow the appeal by setting aside the whole of the judgment and decree of the High Court and award the appellant Board the costs of this appeal and in the Court below. E