

A an indirect and improper motive. Such malice can be proved in a number of ways, such as by showing that the defendant did not honestly believe in the truth of the allegations or that he believed them to be false; or that the defendant was actuated by hatred or dislike, or a desire to injure the plaintiff and is merely using the privileged occasion to defame; or by showing that out of anger, prejudice or wrong motive, the defendant cast aspersions, reckless whether they are true or false. Lack of honest belief is destructive of privilege. Similarly is reckless publication of defamatory matter without considering or caring whether it be true or not. But if the defendant honestly believed in the truth of his allegations, the protection of privilege is not lost simply because he leaped to his conclusions on inadequate material or because he believed in the truth of the allegations on account of gross and unreasoning prejudice, although these factors along with other material may be used for holding that the dominant motive in publishing the statement was hatred or some other improper motive taking away the defence of privilege in spite of the defendant's belief in the truth of the allegations.

E In the instant case no evidence was adduced to prove that the defendants were actuated by hatred or ill-will, or a desire to injure the plaintiff and were merely using the privileged occasion to defame him. Hence apart from the inference from the falsity of the allegations there are no circumstances from which malice could be inferred. As it has not been shown that the defendants did not believe in the truth of the allegations in the said letter, the defence of privilege has not been destroyed. From the above reasons the appeal is allowed with costs.

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PLANT MANAGER: TANZANIA BREWERIES LTD MBEYA DEPOT v. REPUBLIC

HIGH COURT OF TANZANIA
AT MBEYA

(Mackanja, J.)

MISCELLANEOUS CRIMINAL APPLICATION No. 37 OF 1998

(From the District Court of Mbeya at Mbeya, in Original Criminal Case No. 623 of 1998 of the District Court of Mbeya)

Criminal Practice and Procedure – Criminal Prosecutions – Power to institute and prosecute criminal proceedings – Whether labour officers are public prosecutors with power to institute and prosecute criminal proceedings – Sections 91(1), 95(1) and (2), and 96 of the Criminal Procedure Act 1985.

Criminal Practice and Procedure – Criminal Prosecutions – Power to institute and prosecute criminal proceedings – Whether labour officers may institute and prosecute criminal proceedings under labour laws – Sections 8, 149(a) and 154 of the Employment Ordinance Chapter 366.

Labour Law – Criminal Prosecutions – Power to institute and prosecute criminal proceedings – Whether labour officers are public prosecutors who may institute and prosecute criminal proceedings under labour laws – Sections 8, 149(a) and 154 of the Employment Ordinance Chapter 366.

A labour officer had instituted criminal proceedings against the applicant in the District Court for the offences of (1) failure to attend before a duly constituted Conciliation Board, c/section 14(1)(b) of the Security of Employment Act 1964, Chapter 574, and (2) failure to pay wages to his employees c/sections 149(a) and 154 of the Employment Ordinance Chapter 366. An objection was raised against the labour officer conducting the prosecution on the ground that he was not a public prosecutor and therefore had no *locus standi* to conduct the prosecution. The objection was overruled, and the applicant applied for revision of the orders overruling the objection.

- A Held:** (i) Under section 96 of the Criminal Procedure Act 1985 the court may permit a public officer having legal or administrative responsibility for the enforcement of any law to conduct prosecution for an offence under such law subject to the directions of the Director of Public Prosecutions and under section 91(1) of the Act the Director of Public Prosecutions may, by notice published in the Gazette, appoint a public prosecutor;
- B** (ii) As the labour officer was neither permitted by the court nor appointed by the Director of Public Prosecutions under sections 96 and 91(1) respectively, of the Criminal Procedure Act 1985, he had no power to prosecute the applicant under the Act.
- C** (iii) There are no provisions under the Security of Employment Act 1964 vesting power on a labour officer to institute Criminal Proceeding in order to enforce the decision of a conciliation board.
- D** (iv) As a labour officer may, under section 8 of the Employment Ordinance and independently of the Criminal Procedure Act 1985, institute proceedings in respect of any contravention of any provision of the Ordinance the labour officer had the power to prosecute the applicant for failure to pay wages, which is an offence under section 149(a) of the Ordinance.

Orders accordingly

Cases referred to:

- F** 1) *Tanzania Breweries Ltd v. Republic*: HC – Mwanza Miscellaneous Criminal Application Number 28 of 1998 (unreported)
- 2) *Salomon v. Salomon and Company Ltd* [1897] AC 22

Statutory provisions referred to:

- G** 1. Criminal Procedure Act 1985, Act Number 9 of 1985 sections 90(4), 91(1), (2), (3), and 96
2. Employment Ordinance Chapter 366, sections 8, 149(a) and 154
- H** 3. Security of Employment Act 1964 Chapter 574, sections 14(1)(b), (2) and 50(1)

Mr Mbwambo, for the Applicant

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RULING

(Delivered 27 September 2000)

Mackanja, J.: This is an application for an order that the proceedings and order that were conducted and issued by the District Court at Mbeya in Criminal Case Number 623 of 1998 on the 16 December 1998, against the applicant be revised. There is also a prayer for costs and the traditional prayer that the court do grant the applicant any other and further reliefs it may deem appropriate to grant. The application originates from a criminal employment cause in which the Labour Officer instituted criminal proceedings against the applicant in relation to the alleged failure by the applicant to attend before a duly constituted Conciliation Board c/section 14(1)(b) of the Security of Employment Act Number 62 of 1964 as amended by Act Number 13 of 1991. After several appearances before the Trial Court Mr Mbwambo, learned counsel for the applicant, raised a preliminary objection arguing that the labour officer who was prosecuting the case lacked the requisite *locus standi*. He pointed out that since he is not a public prosecutor as defined under section 2 of the Criminal Procedure Act and one who has not been appointed by the Director of Public Prosecutions under section 95 of that Act a labour officer has no right to be heard in a criminal proceeding. So he prayed that the case be dismissed. In the end the case was not dismissed, it is the preliminary objection that was dismissed. In dismissing the objections the Trial Court held that labour officers have *locus standi* to prosecute any person under labour laws, in this case the security of Employment Act. That this was so because it was the view of that Court that labour officers are public officers, hence they are public prosecutors who are empowered to prosecute. It is this order which it is desired should be revised.

The application is supported by the affidavit of Mr Rosan Mbwambo, learned counsel for the applicant. There are two grounds of complaint which have been raised in the supporting affidavit evidence. One,

- A that the decision did not address the issue of whether or not the labour officer is also a public prosecutor nor did it touch on the requisite conditions of seeking and obtaining leave of the court and directions of the Director of Public Prosecutions. Two, that the impugned
- B decision should be revised because allowing Government officials to prosecute criminal cases at their pleasure does not only contravene the law of criminal procedure, it also avoids the court's and powers of the Director of Public Prosecutions to control criminal proceedings.
- C One would have expected that the respondent would have filed a counter affidavit; none is in place.

- Mr Mbwapo, learned counsel, has argued the application on behalf of the applicant. He submits that sometimes on or about 6
- D August 1998 and 16 December 1998 charges were drawn against the Applicant Corporation following the labour officer's complaints accusing the former for failure to attend a duly constituted Conciliation Board and to pay salaries to its employees, respectively. The statements
- E of offence were signed by the Senior Labour Officer of Mbeya Region who styled himself as a public prosecutor and in fact appeared to prosecute the matters. The accused filed notice of preliminary objection on points of law that the case is bad at law in as much as the labour
- F officer is not a public prosecutor in law and that he has neither sought and obtained leave of the court nor directions of the Director of Public Prosecutions. Learned counsel makes the point that much as they do not question the powers of the labour officer being one of
- G the government officials enshrined under section 96 of the Criminal Procedure Act Number 9 of 1985, (hereinafter referred to as the Act) their contention is that his powers under that provision is not without qualification. For ease of reference he quotes the provision in extensor.

- H In any prosecution for an offence under any law other than the Penal Code, the court may permit either generally or in relation to any particular case, a public officer having legal or administrative responsibility for enforcement
- I of such law to conduct the prosecution, notwithstanding that he has not been appointed a public prosecutor; save that such other officer shall be

subject to the directions of the Director of Public Prosecutions in the conduct of the prosecution.

It is learned counsel's argument that from the contents of these provisions it is obvious that the labour officer wishing to prosecute a case under that legislation must meet two prerequisite conditions, namely: that he should first seek and obtain leave of the court; and, two, that he must seek and obtain directions of the Director of Public Prosecutions. According to Mr Mbwapo these prerequisite conditions are mandatory, the contravention of which renders the case null and void. It is further submitted that these conditions are in line with the intention of the legislature under Part IV of the Act on the control of criminal proceedings which is exclusively vested in the Director of Public Prosecutions. In support of his arguments he cites the decision of this Court in *Tanzania Breweries Ltd v. Republic* (1) where it was directed that the trial magistrate and the labour officer had to adhere to the provisions of Part IV of the Act in instituting criminal proceedings. I am urged to take a similar position as observed by my brother. However, no copy of that decision has been brought to my attention. Learned counsel winds up his submissions saying the labour officer in this case had all along maintained that his powers under section 96 of the Act are exclusive and had no qualification, hence he did not have to seek the leave of the court and the direction of the Directors of Public Prosecutions. In his opinion such blatant refusal to adhere to the provisions of section 96 of the Act strictly offends Part IV of the Act on the control of criminal proceedings and is tantamount to interfering with the powers of prosecution exclusively conferred upon the Director of Public Prosecutions. In the circumstances he would have one say that indeed the labour officer lacks *locus standi* and, there, the criminal case of the applicant should be dismissed.

The Republic opposes the application. Mr Mulokozi, learned State Attorney, opens his submissions by stating the obvious, that the powers of the DPP as the over-all-in-charge and controller of all public prosecutions in the country cannot be overemphasized. They are impeccably expressed as put by the statutory provisions of Part IV

- A of the Criminal Procedure Act 1985. Their sanctity, he says, traces its origin from the fact that the DPP is a presidential appointee, and as stated expressly in section 90(4) of the Act that in the exercise of the powers conferred on him ...
- B the Director of Public Prosecutions (DPP) shall have and exercise his own discretion and shall not be subject to the directions or control of any person except the President
- C Mr Mulokozi joins issue with Mr Mbwambo regarding the powers of the DPP to appoint public prosecutors under section 95(1) of the Act which provides thus:
- D The Director of Public Prosecution may, by notice Published in the Gazzete, appoint Public Prosecutors for Tanzania or for any specified area of Tanzania, and either generally or for any specified case or category of cases.
- E And that section 95(3) of the Act gives the undisputed condition that every public prosecutor shall be subject to the express directions of the DPP. Learned Senior State Attorney contends that labour officers are public prosecutors under this section 95(1). It is worthy to note here that labour officers are public prosecutors under section 8 of the Employment Ordinance Chapter 366.
- F The express wording of section 96 of the Act as employed by the applicant does not suggest public prosecutors of the category of our labour officers. Under this section, he says, the court may permit a public officer having legal or administrative responsibility
- G to conduct prosecution in cases relating to his office "... notwithstanding that he has not been appointed a public prosecutor ..." That this Part of this provision means that prosecutors under this section are of category different from that of prosecutors under section 95(1).
- H He is, therefore, of the view that a prosecutor under section 96 is created on emergency where and when in a given Court jurisdiction there is no prosecutor appointed by the DPP that can serve as a public prosecutor, and the court finds it necessary to invite the services of
- I a certain public officer in prosecuting cases relating to the field of administration or office of that public officer and, specifically, in

respect of offences other than those under the Penal Code. Labour officers are not public prosecutors of this making. That prosecutors created under section 96 operate with leave of the court; labour officers being prosecutors not falling under this section do not operate with leave of the court. I am, therefore, invited to dismiss the applicant's contention. In order to have *locus standi* labour officers need the leave of the court. So what remains is that labour officers as public prosecutors operate under one condition, namely, that they are subject to the express directions of the DPP.

From the foregoing submissions the issue boils down to this: whether the labour officer who instituted the criminal proceedings in (DC) Criminal Case Number 623 of 1998, the subject of these proceedings, has power under the law to initiate a criminal prosecution as a labour officer. Mr Mulokozi, learned Senior State Attorney, has made it quite clear that the labour officer is a public prosecutor who does not need the leave of the court before he initiates any criminal proceeding against any employer. For that purpose he is not one of the category of prosecutors whose powers are derived from section 96 of the Criminal Procedure Act 1985.

After careful consideration of legal arguments I have formed the firm view that there are only two ways in which anyone may prosecute a criminal proceeding in addition to what section 96 of the said Act makes provision for. First, anyone will not need the leave of the court if the law under which the prosecution is founded expressly designates who will enforce its provisions. Such legislation is section 8 of the Employment Ordinance Chapter 366 which expressly provides that:

The Labour Commissioner or any labour officer may institute proceedings in respect of any contravention of any of the provisions of this Ordinance or any regulations made hereunder and may prosecute and appear in his own name in respect of such proceedings.

The third category of prosecutors is that of public prosecutors who may be appointed under section 91 of the Act. These are appointed

A by the DPP and in order for the appointment to take effect, subsection (1) makes a requirement the DPP may do so

...by notice published in the Gazette ...

B It follows that if the labour officer's appointment falls under these provisions he can easily establish his right to be heard by producing the notice for his appointment which was gazetted. That being the law, which is quite precise, there can be no room for reading into it appointments which are obviously excluded. As Salmond says in his book entitled **Jurisprudence** (11 ed) at pages 132, 133:

The essence of the law lies in its spirit, not in its letter, for the letter is significant only as being the external manifestation of the intention that underlies it. Nevertheless in all ordinary cases the court must be content to accept the *litera legis* as the exclusive and conclusive evidence of the *sentential legis*. They must in general take it absolutely for granted that the legislature has said what it has meant, and meant what it has said. *Ita scriptum est* is the first principle of interpretation. Judges are not at liberty to add, or take from or modify the letter of the law, simply because they have reason to believe that the true *sentential legis* is not completely or correctly expressed by it...

F Let me add here, in order to underscore the need to apply the law as Parliament, in its undoubted wisdom, intended, wise words of Lord Watson in *Salman v. Salan and Company Ltd* (2) at 38 where he said:

G "Intention of legislature" is a common but very slippery phrase, which popularly understood, may signify anything from the intention embodied in positive enactment to speculate opinion as to what the legislature probably would have meant, although there has been an omission to enact it. In a court of law or equity, what the legislator intended to be done can only be legitimately ascertained from what it has chosen to enact, either in express words or by reasonable and necessary implication...

I Unless, therefore, the labour officer's endeavours to prosecute the applicant find legitimacy in some other piece of legislation, he clearly

A lacks power to prosecute the applicant under the Criminal Procedure Act 1985. I will, in that behalf, examine the provisions of the Security of Employment Act Chapter 574, to see if the labour officer derives his powers therefrom.

B Penal sanctions which attach to disobedience of the powers and functions of a conciliation board are provided for under section 50 of the Security of Employment Act. It provides, as far as the same is relevant here, that:

(1) Any person who refuses or neglects to comply with the decision of a ... Board on a reference to which he is a party... shall be guilty of an offence...

D There are no provisions under that legislation which vest power on a labour officer to institute criminal proceedings in order to enforce the decision of a conciliation board. I am satisfied, therefore, that the labour officer does not have *locus standi* in respect of Criminal Case Number 623 of 1998 of the District Court of Mbeya District at Mbeya, which is the basis of this Court's Miscellaneous Criminal Application Number 37 of 1998. As the submissions show Miscellaneous Criminal Application Number 7 of 1998 of this Court was consolidated with Miscellaneous Criminal Application Number 7 of 1998 which, though they involve the same parties, the charges differ. In the latter case the applicant is charged with failure to pay wages to his employees contrary to sections 149(a) and 154 of the Employment Ordinance. Section 149(a) of the said Ordinance creates the following offence:

C An employer shall commit an offence against this Ordinance if he shall be guilty of any of the following acts or omissions, that is to say:

(a) if he shall fail to pay the wages due to any employee, unless he has reasonable and probable cause for thinking that those wages are not due ...

I No doubt, as I have endeavoured to say earlier in this ruling, the labour officer has power to prosecute offences created under the Ordinance to enforce its provisions independently of the Criminal

A Procedure Act. It follows that Miscellaneous Criminal Application Number 7 of 1998 would fail.

B Upon the foregoing considerations the application succeeds in relation to Criminal Case Number Miscellaneous Criminal Application Number 37 of 1998 which originates from Criminal Case Number 623 of 1998 where upon the proceedings are so revised as to declare them invalid. They are quashed in *toto* and the accused is discharged. The application in relation to Miscellaneous Criminal Application Number 7 of 1999 which is founded on Criminal Case Number 935 of 1998 of the same Trial Court is dismissed, with directions that proceedings shall mere fact that TTCL has been declared a Specified Public Corporation, that, *per se*, does not render it to be a bankrupt Public Corporation within the provisos of the Bankruptcy Ordinance Chapter 25. Mr Galati referred me specifically to page 12 of the cyclestyled copy of the judgment in the *Saidi Mnimbo* case (*supra*) where, he submitted, lay the *ratio decidendi* of that case.

E With regard to this legal point raised by Mr Nasimire learned advocate, I am not prepared to make a definite finding on it as I am quite convinced in my mind that the point raises quite important triable issues. First the question whether the suit filed by TTCL against the applicant is covered and governed by GN Number 543 of 97 whose effective date was not specified until on 3 December 1999 under GN Number 424 of 99? Although the effective date in question was specified in December, 1999, yet that date was the very date on which Government Notice Number 543 of 97 was published, that is on 22 August 1997. This proceed from where they had reached. There shall be no order as to costs.

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GERARD CHUCHUBA v. RECTOR, ITAGA SEMINARY

HIGH COURT OF TANZANIA
AT TABORA

(Masanche, J.)

(HC) CIVIL APPEAL No. 12 OF 2000

(Original Civil Case No. 3 of 1999 of Tabora District Court at Tabora)

Civil Practice and Procedure – Res Judicata – Essential elements for application of the plea of res judicata.

In Civil Case Number 16 of 1995 the appellant sued the respondent and was awarded TZS. 401 719. Later having got a promise from a priest, who subsequently got fired from priesthood, that he would now be paid TZS. 1 274 991 he filed a suit in the Resident Magistrate's Court to enforce that promise in Civil Case Number 3 of 1999. The appellant lost the case because the court decided that the matter was *res judicata*. Aggrieved by the decision of the court the appellant appealed to the High Court. The court heard arguments from counsel whether or not Civil Case Number 3 of 1999 was *res judicata vis-à-vis* Civil Case Number 16 of 1995.

Held: (i) Before the doctrine of *res judicata* is applied the following essential elements must be shown to exist: that the judicial decision was pronounced by a court of competent jurisdiction, that the subject matter and the issues decided are substantially the same as the issues in the subsequent suit, that the judicial decision was final, and that it was in respect of the same parties litigating under same title;

(ii) The case of the appellant against the seminary, the subject matter of which was his dismissal, was adjudicated upon fully in Civil Case Number 16 of 1995; he got awarded damages and never appealed and the matter, therefore, is *res judicata*.

Appeal dismissed