LEGAL OPINION IN RESPECT OF THE REPORT OF THE CONTROLLER AND AUDITOR GENERAL ("THE CAG") ON PHASE 1 OF THE SPECIAL AUDIT OF TANESCO – COVERING MATTERS RELATING TO THE PROCUREMENT OF CONTRACTS WITH M/S SANTA CLARA SUPPLIES COMPANY LIMITED AND M/S McDONALD LIVE LINE TECHNOLOGY LIMITED

INTRODUCTION

1. This Legal Opinion ("the Opinion") is in respect of the Report of the Controller and Auditor General ("the CAG") dated 27th September, 2012[1] on Phase 1 of the Special Audit of TANESCO, as commissioned by its Board of Directors ("the Board"), covering matters relating to the procurement of contracts with M/s Santa Clara Supplies Company Limited ("Santa Clara") and McDonald Live Line Technology Limited ("McDonald"). Upon receipt of the Report of the CAG ("the Report") vide Transmittal Letter, Ref. No. CA.27/442/02 dated 28th September, 2012 (see **ANNEXTURE 3**), as previously directed by the Board[2], the Committee of the Board responsible for Audit, Corporate and Governance affairs ("the ACGC") held a special meeting on 3rd October, 2012 to review the said Report in detail with a view to transmitting specific recommendations on actions to be taken and on the processes and procedures to be adopted by the Board in implementing the various findings, conclusions and recommendations contained in the Report. On 8th October 2012 the Board held a special meeting to receive and deliberate on the recommendations of the ACGC from its meeting of 3rd October, 2012.

2. On its transmittal letter to the Board dated 7th October, 2012 (see **ANNEXTURE 4**), particularly on the second paragraph, at page 2 therein, the ACGC observed, among other things that the Report *"has exposed very serious weaknesses in the management systems and controls, which... need immediacy in addressing them by Management and even closer oversight by... the Board."* With regards to matters of discipline of

[1] This Report is a revised version of the first version issued by the CAG on 30th August, 2012; same was presented to the Board of Directors of TANESCO ("the Board") on 12th September, 2012, the Board gave comments on the basis of which the Report was presented again. The Report of 27th September, 2012 is appended as **ANNEXTURE 1**; the Report of 30th August, 2012 as **ANNEXTURE 2**

[2] In its special meetings of 14th July, 2012 and 12th September, 2012 the Board delegated authority to its Committee of Audit, Corporate and Governance affairs ("the ACGC") to be dealing at first instances on matters of this special audit. Copies of Minutes of Special Meetings of the Board of 13th and 14th July, 2012 are attached as **ANNEXTURE 5**

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employees contained in the Report, the ACGC observed and recommended that: as recommended by CAG, disciplinary actions should be taken, but *"in pursuing the recommended disciplinary actions... a comprehensive legal opinion* (should be prepared) *from within the Company...* (which must cover) *a detailed analysis of evidence against all employees implicated in the Report and the process to be adopted..."*

In more precise terms, the ACGC at page 12, particularly paragraph 4 of its transmittal letter, recommended, thus:

> *"... the legal opinion must thoroughly cover -*
> *(i) an analysis of all the misconducts committed,*
> *(ii) identify all employees who are implicated in the Report,*
> *(iii) the disciplinary measures to be taken against each of them,*
> *(iv) the charges to be preferred, as well as*
> *(v) the process to be undertaken, including how to form the hearing committee..."*

3. The Board considered and adopted with approval the recommendation of the ACGC.[3] Thus, owing to the sensitivity and urgency of this matter, and taking into account the need to ensure and maintain confidentiality and the level of competence available at the Legal and Secretariat Unit of the Company, the Opinion should be obtained from within the Company.

4. Moreover, the Board emphasised that, since the Opinion is intended to be relied upon by the Board in making its decisions, it must be as specific as possible in respect of each disciplinary charge(s) to be recommended and, each charge must clearly be demonstrated by show of the evidence available, and the relevance and weight of each piece of evidence must be indicated.

5. **This Opinion has, therefore been prepared and is now being presented / submitted to the Board, through the ACGC based on the above cited background decisions taken by the Board. Indeed, these decisions and directives of the Board have been adopted <u>as instruction</u> and <u>specific terms of reference</u> for preparation of this Opinion.** For ease of cross referencing, see paragraphs 2, 3 and 4 above.

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[3] Notably, this decision took cognisance of the specific recommendations by the CAG recorded on pages 20 and 45 of the Report, which advised the Board to "secure competent legal advice" in pursuing disciplinary and other measures. The auditors representing the CAG who were invited at the Board proceedings of 8th October, 2012 clarified on reasons behind the recommendation that, it just meant to remind and advice Board to get proper legal guidance so that everything in terms of process to be adopted is properly and legally guided, and more importantly that, in the ordinary audit findings are always not necessarily "conclusive" (that is, auditors' findings and conclusions in special audits, depending on circumstances of each case, would only build inferences of *prima facie* cases); otherwise, it remains the responsibility of Management and Board to secure sufficient evidence to support disciplinary and other legal actions

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6. Nonetheless, according to standards / requirements of professional legal ethics applicable generally to legal practitioners in Mainland Tanzania, this Opinion has limited itself as far as practicable to matters of law and evidence, as they apply to the key findings, conclusions and recommendations contained in the Report. What's more, certain other matters of governance, risk management, management systems, controls environment *etc*. are referred throughout in the Opinion by way of passing, as it is not practically and entirely possible to disregard or avoid them. In other words and in view of the aforementioned professional ethics, lawyers are obligated to advise on matters of law; indeed, lawyers endeavour to advise on matters of law and not otherwise.

   The ACGC (and the Board, for that matter) is therefore reminded to exercise / reserve its full mandate to decide on these other aspects as they are referred in the Opinion and the Report of the Auditors, with or without regard to what is contained in this Opinion, because these are being referred necessarily just by way of passing (i.e. *obiter*[4]).

7. **Yet, and more important, this Opinion is given for the use of the Board and its processes only; otherwise, in itself this Opinion does not constitute a decision (or decisions). Decision(s) with regard to issues addressed in this Opinion will be / are taken by the Board and or Management in that behalf**.

8. This Opinion is, therefore divided into the following parts –

   (i). Brief Background to Phase 1 of Special Audit,

   (ii). Legal and Institutional Framework,

   (iii). Issues

   (iv). The Issue, Whether or not there are Misconducts Committed?

   (v). The Issue, if any, Whether or not Disciplinary or other Actions can be taken in respect of the alleged Misconducts?

   (vi). The Issue, Whether or not the alleged Misconducts will be sufficiently dealt with by simply the Board reporting the said Misconducts to certain other authorities?

   (vii). The Issue, Whether or not there is sufficient body of Evidence in respect of the identified Misconducts and, particularly Whether that body of Evidence is sufficiently relevant,

[4] Simply means, observations by way of passing, not necessarily forming part of core argument/reasoning for a decision, i.e. *ratio decidendi*

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weighty and admissible to justify disciplinary actions against employees implicated in the Report?

(viii). The Issue, What are the applicable Disciplinary Processes and Procedures to be adopted in taking disciplinary actions against the employees implicated in the Report?

(ix). Observations

(x). Recommendations.

BACKGROUND TO PHASE 1 OF THE SPECIAL AUDIT

9. As a matter of, briefly, recording the background to Phase 1 of the Special Audit ("the Audit") carried out by the CAG, on 16th June 2012 a meeting was held between the Board and the Hon. Minister of Energy and Minerals, Prof. Sospeter Muhongo (MP.) ("the Minister") at St. Gasper Hotel, Dodoma. During that meeting, the Minister among other things read out a list of allegations touching on various aspects of so-called mismanagement, embezzlement / misappropriation, corruption and abuse of office on the part of TANESCO's Management. According to the Minister, the allegations were obtained from his meeting with employees of TANESCO from Dar-es-salaam held at TANESCO head office, at Ubungo on 19th May, 2012. And, numerous other complaints were submitted by various stakeholders at the Ministry against TANESCO, as a public corporation. Therefore, the Minister directed that it would be prudent for the Board that these allegations are properly investigated[5] (see **ANNEXTURE 6**, a set of the list of allegations and brief proceedings of what transpired at the Dodoma meeting).

10. On 25th June, 2012 the Board held a special meeting, among other items on the agenda, to discuss and deliberate on Matters that arose from its Meeting with the Hon. Minister of 16th June, 2012 held at St. Gasper Hotel, Dodoma (see **ANNEXTURE 7**).

11. On 13th and 14th July, 2012 during the special meetings of the Board it was resolved that, following various allegations facing certain senior officers of the Company, (i.e. the Managing Director, Mr. William Geoffrey Mhando, Deputy Managing Director Corporate Services, Mr. Robert Shemhilu, Chief Finance Officer, Mr. Lusekelo Kassanga and Senior Manager Procurement, Mr. Harun Mattambo) be suspended pending finalisation of independent and smooth investigation of the allegations facing them[6] (refer back to

[5] Our view is that the directive of the Minister was (is) legally justifiable by virtue of the powers vested upon him under Section 6 of the Public Corporations Act, 1992 (as amended); this Section is reproduced here below under paragraph 39

[6] Notably, the suspension was made in line with Rule 27 (1) of Employment and Labour Relations (Code of Good Practice) Rules, 2007 (GN. No. 42 of 16th February 2002) ("the Code of Good Practice")

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copies of the relevant Minutes at ANNEXTURE 5 referred to above). In record, it is noted that during the special meeting of the Board held on 13th July, 2012, particularly when the Board was discussing the Agenda item number 5.1.2.1, under Any Other Business, the proceedings were held *in camera*.

Therefore, the decisions of the Board on that particular Agenda item are not recorded in the Minutes of that meeting of 13th July, 2012. In our opinion, this omission was unfortunately occasioned simply because immediately after the closure of the meeting the Company Secretary was not appraised of what was specifically decided *in camera*.[7]

However, the unrecorded decisions of the Board made on 13th July, 2012 in this regard were captured in the course of the meeting of 14th July, 2012, as were referred consistently and unanimously by Board members present. Yet again, the correctness of such record was confirmed by the Board in its 477th Meeting held on 28th August, 2012.

It is also important to note here that the Meeting of the Board of 14th July 2012 further decided on the following: one, bearing in mind the fact that TANESCO is a public corporation the Board decided to inform the general public of its decision to suspend the above mentioned senior officers of the Company pending investigation. Two, it directed the Chairman of the ACGC to ensure that immediately as it was decided, the suspended officers informed of their suspension. Notably, too, the letters of suspension were not restrictive of time when the suspended employees will stay in suspension. For this matter, and for purposes of this Opinion, the Opinion is guided by the letters of suspension signed as such by the Chairman of the ACGC (see **ANNEXTURE 8**, copies of letters of suspension and press release).

12. On 17th July, 2012 the Board in its special meeting decided to appoint the CAG to carry out investigation in respect of the allegations and approved the applicable terms of reference that would guide the CAG in the course of carrying out this investigation; and that the ACGC was mandated to handle the process, under the oversight of the Board. Subsequently, on that very day, i.e. 17th July, 2012 the Board through its ACGC wrote to the CAG, vide letter Ref. SEC.356/AUDIT/7/2012, requesting special audit to be carried out on TANESCO against certain terms of reference attached to that letter.[8] On 23rd July,

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[7] A meeting held *in camera* is held *in private* (or in chamber). The law in Tanzania, in strict legal sense, does not recognise meetings *in camera*, although in practice they are widely held and justified. Section 148 (1) of the Companies Act, 2002 states that *"Every Company **shall** cause **minutes** of **all proceedings** of general meetings, and **of all proceedings at meetings of its directors** to be entered in books kept for that purpose."* (emphasis supplied) Therefore, for whatever reasons, when meetings of Board are held ***in camera*** their proceedings must be recorded in minutes to be kept. See also Section 187 of Companies Act requiring boards to appoint company secretaries, and Articles 114 and 115 for Company Secretary of TANESCO. See also Minutes for the meeting of Board of 24th October, 2011, at page 9

[8] Note that on 3rd August 2012, vide letter Ref. No. SEC. 356/AUDIT/8/2012 the terms of reference for special audit

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2012 the CAG acknowledged receipt of the letter from the Board and promised to start working on the request (vide letter Ref. No. CA.27/442/41 dated 23rd July, 2012) (see **ANNEXTURE 9**).

Again, on 2nd August, 2012 the Board through the ACGC wrote to the CAG, vide letter Ref. No. SEC.356/AUDIT/8/2012, this time, specifically requesting for a special audit on the procurement of contracts signed between TANESCO and Santa Clara, and McDonald. According to this communication by the Board, on their point of view, the allegations relating to these contracts were somewhat very clear and specific, therefore requiring / deserving separate and quick treatment / reporting[9] (see **ANNEXTURE 10**).

Apparently, the CAG co-opted the services of M/s Ernst & Young (conveniently, we will refer to the CAG and Ernst & Young together as "the Auditors") (see letter Ref. No. DF.37/641/133/40 of 2nd August, 2012, **ANNEXTURE 11**).

13. As indicated above, on 12th September, 2012, the Auditors presented to the Board a report on Phase 1 of the Audit. The Board made several comments with a view to improving the said report. On 28th September, 2012, the Auditors submitted the revised version of the Report that incorporated changes relative to the comments / observations made by the Board on 12th September, 2012 (see paragraphs 1 and 2 above).

LEGAL AND INSTITUTIONAL FRAMEWORK

14. In our considered opinion, before the Opinion embarks on the issues and having gone through the background and facts surrounding the terms of reference given to us, it is important to identify and cite the relevant laws and institutions, internal or external that will govern this whole matter both substantively and procedurally.

    We propose to accomplish this task by way of listing. The analysis of the various relevant laws and institutions as they apply in this regard will feature clearly when we address the specific issues.

15. In our opinion, the following laws of the land (i.e. the Constitution, principal legislation or Acts of Parliament, Subsidiary Legislation or regulations and guidelines, case law and other relevant administrative instruments) are relevant to this matter and therefore will be applied variously:

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were refined further and communicated to CAG

[9] CAG was later briefed about this request; it was agreed that the Special Audit be divided in two Phases; Phase 1 covering matters of Santa Clara and McDonald, whilst Phase 2 to cover other matters in the terms of reference given. It was also agreed that Phase 1 Audit would take 10 days, while Phase 2 Audit would be finalized within 60 days

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- ***Laws***

The Constitution

(i). The Constitution of the United Republic of Tanzania, 1977, as amended, Cap. 2 of the laws,

Principal Legislation (Acts of Parliament)

(ii). The Companies Act, 2002, (Act No. 12 of 2002),
(iii). The Public Corporations Act, 1992 (Act No. 2 of 1992, as amended),
(iv). The Public Leadership Code of Ethics Act, 1995 (Act No. 13 of 1995, as amended),
(v). The Employment and Labour Relations Act, 2004 (Act No. 6 of 2004),
(vi). The Labour Institutions Act, 2004 (Act No. 7 of 2004),
(vii). The Evidence Act, 1967 (Act No. 6 of 1967, as amended),
(viii). The Prevention and Combating of Corruption Act, Cap. 329 of the laws,
(ix). The Penal Code, Cap. 16 of the laws,
(x). The Public Procurement Act, 2004 (Act No. 21 of 2004),
(xi). The Law of Contract Act, Cap. 345,
(xii). The Registration of Documents Act, Cap. 117 of the laws
(xiii) The Law of Marriage Act, Cap 29 of the laws of Tanzania

Subsidiary legislation / Regulations / Guidelines

(xiv). The Public Leadership Code of Ethics (Declaration of Interests, Assets and Liabilities) Regulations, 1995 (GN No. 108 of 1996),
(xv). The Employment and Labour Relations (Code of Good Practice) Rules, 2007 (GN No. 42 of 16th February, 2007),
- The Guidelines for Disciplinary, Incapacity and Incompatibility Policy and Procedures

(xvi). The Labour Institutions (Mediation and Arbitration) Rules, 2007 (GN. No. 64 of 24th March, 2007),
(xvii). The Labour Institutions (Mediation and Arbitration Guidelines) Rules, 2007 (GN No. 67 of 23rd March, 2007),
(xviii). The Public Procurement (Goods, Works, Non-Consultant Services and Disposal of Public Assets by Tender) Regulations, 2005 (GN No. 97 of 15th April, 2005),
(xix). The Public Procurement (Selection and Employment of Consultants) Regulations, 2005 (GN No. 98 of 15th April, 2005),

Case law

(xx). Various cases have been referred. They are specifically cited in the body of the Opinion

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Administrative / Internal Instruments

(xxi). The Memorandum of Association and Articles of Association of Tanzania Electric Supply Company Limited, 1931 (as amended),

(xxii). TANESCO Human Resources Policies, 2008,

- Standard Operating Disciplinary Procedures,
- Employee Handbook,
- TANESCO Code of Ethics and Conduct

- ***Institutions***

(i). The Board of Directors of TANESCO (when constituted as a disciplinary organ),
(ii). The Management of TANESCO (when constituted as a disciplinary organ),
(iii). The Tender Board of TANESCO,
(iv). The Company Secretary,
(v). The Prevention and Combating of Corruption Bureau (PCCB),
(vi). The Public Procument Regulatory Authority (PPRA),
(vii). The Minister for Energy and Minerals (the Ministry),
(viii). The President of the United Republic of Tanzania (the Office of President),
(ix). The Public Leadership Ethics Secretariat,
(x). The Business Registration and Licensing Agency (BRELA),
(xi). The Tanzania Revenue Authority (TRA)

ISSUES

16. With regard to the above background and in view of the need to properly address matters raised in the Report of the Auditors, it is in our considered opinion that the following issues are relevant and therefore must be properly addressed, as we hereby do:

I. Whether or not there are Misconducts Committed?

II. If any, Whether or not Disciplinary or other Actions can be taken in respect of the alleged Misconducts?

III. Whether or not the alleged Misconducts will be sufficiently dealt with by simply the Board reporting the said Misconducts to certain other authorities?

IV. Whether or not there is sufficient body of Evidence in respect of he identified Misconducts and, particularly Whether that body of Evidence is sufficiently relevant, weighty and admissible to justify disciplinary actions against employees implicated by the Report?

V. What are the applicable disciplinary processes and procedures to be adopted in taking disciplinary actions against employees implicated by the Report?

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WHETHER THERE ARE MISCONDUCTS COMMITTED?

17. The labour law in Tanzania provides for rules / guiding principles on how employers should manage "***conduct***" and "***misconduct***" at places of work.

    According to the terms of Rule 11, sub-rule 1 of the Code of Good Practice, all employers are required to implement disciplinary policies and procedures that establish standard of conduct required of their employees. The Rule reads, thus:

    > ***"11.-(1) All employers shall implement disciplinary policies and procedures that establish the standard of conduct required of their employees."***

    Nonetheless, the Employment and Labour Relations Act, 2004 ("the Employment Act"), accordingly enacts certain various rules of law which have an effect of regulating the conduct of employees at work places notwithstanding the presence or absence of internal policies and procedures made by employers. For instance, Rule 12 sub-rule 3 enumerates acts which may justify the imposition on an employee of the disciplinary penalty of termination. The Rule states, thus:

    > ***"(3). The acts which may justify termination are-***
    > ***(a). Gross dishonesty,***
    > ***(b). wilful damage to property,***
    > ***(c). wilful endangering the safety of others,***
    > ***(d). gross negligence,***
    > ***(e). assault on a co-employee, supplier, customer or a member of a family of, and any person associate with, the employer; and***
    > ***(f). Gross insubordination."***

    In the same vein, the Guidelines for, among others, Disciplinary Policies and Procedures ("the Guidelines") forming part of the Code of Good Practice, provide at page 73 that:

    > ***"This Disciplinary procedure applies to all employees and is a guide for appropriate disciplinary action...***
    >
    > ***The list of disciplinary offences is not exhaustive and for that matter an employer may discipline an employee for good cause even though a specific offence may not be stated."*** (Emphasis supplied)

18. As already stated above, the Employment Act accommodates the applicability of other laws in handling disciplinary matters are work places. Specifically and bearing in mind that the Report has, in our point of view, correctly, made reference to the Public Leadership

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Code of Ethics Act, 1995 and the Public Procurement Act, it is our considered opinion that the two legislation have extra-applicability on matters of employment. In particulars Section 29 of the Public Leadership Code of Ethics Act and Section 76 of the Public Procurement Act are in support of extra-applicability of these laws on matters relating to employment, where they expressly provide that the measures / actions that may taken in the two laws do not preclude or prevent other measures / actions to be taken in accordance with any other law.

Before we proceed to identify the misconducts revealed in the Report, perhaps it is important to rightly explain, albeit briefly, how the provisions of the said Public Leadership Code of Ethics Act and Public Procurement Act apply to TANESCO employees.

19. To shade light on the applicability of the Public Leadership Code of Ethics Act, in particular Section 8 therein, the standards and principles set out under this law apply to ***"public leaders"*** wherever they are in their respective organisations / establishments. To be precise, Section 8 provides, thus:

> ***"The provisions of this Part[10] shall constitute part of the code of ethics for public leaders according to the Constitution, and breach of the code shall result in any of the following actions, namely-***
> ***(a) warning and caution;***
> ***(b) demotion;***
> ***(c) suspension;***
> ***(d) dismissal;***
> ***(e) advising the leader to resign from the office to which the breach relates;***
> ***(f) imposition of other penalties provided for under the rules of discipline related to the office of the leader; and***
> ***(g) initiating action for the leader to be dealt with under the appropriate law."***

Our interpretation of this provision of the law is that; firstly, in as far as "public leaders" are concerned; standards and principles of ethics and conduct applicable to them as provided in the Code, apply to anyone of them irrespective of the organisation or establishment in which he/she is employed. Secondly, therefore, a disciplinary authority (i.e. organ/body) of a particular public organisation can rightly apply the standards and principles set out in this law in respect of a "public leader" in that organisation, as if those standards and principles are just part of its internal policies and procedures. In our view, it is for this reason that this law allows such actions to be taken, like "*demotion, suspension or*

[10] Notably, here reference is made to Part III of the Act (i.e. Sections 8 – 15) which makes provisions in respect of "the Code of Ethics applicable to Public Leaders". Notably, however, in our point of view, this Part, i.e. Part III, is just part of the Code, meaning the entire Code. That means, Part III is not the entire Code, there are other parts of the Act which also constitute the Code, like Part II (Sections 5 – 7)

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dismissal" against "public leaders". Clearly, these actions cannot, at any rate, be taken by the Commissioner of Public Leadership Ethics Secretariat ("the Commissioner").

Obviously, some of the actions (i.e. demotion, suspension and dismissal) under Section 8 can only be exercisable by employers and not the Commissioner. This argument is merited on the facts that the Commissioner is not part of contracts of employment of public leaders in their respective organisations and, therefore he (the Commissioner) cannot enjoy rights or perform any obligation under these contracts of employment. Thus, it is unimaginable that the import of Section 8 was enacted to remain redundant!

From the policy background point of view, President Nyerere in his paper ***"Freedom and Development"***, published on 16th October, 1968 and, which was later accepted as a TANU policy document, observed among other things that: *"...if our leaders fail to observe discipline in their work, then they must be dismissed. ... or if they do their job badly, then the government will replace them..."* If one is to read this paper *in extenso*, he/she would realise that this was the policy behind the establishment of the Public Leadership Ethics Secretariat and the underlying Code, indeed, now incorporated in the Constitution of the United Republic of Tanzania, particularly under Article 132.

Shortly, afterwards and in the spirit explained by President Nyerere above, the Government established what Nyerere used call "the Commission on the Abuse of Power" (sic.), i.e. the Presidential Permanent Commission of Inquiry. Obviously, in our opinion, when actions are taken on abuse of power / office in contravention of the Public Leadership Code of Ethics Act, the nature of the said law must be regarded in the spirit of this policy behind it.

In respect of TANESCO, according to Section 4 (1) (xxiii) of the Public Leadership Code of Ethics Act a "public leader" is the *Managing Director*; where it is stated that "public leader" means *"any person holding any of the following public offices, namely-... (xxiii)... Managing Director... of a body corporate in which the Government has a controlling interest."* It should be cautioned here that, for avoidance of doubt therefore, the principles made under this will form part of TANESCO Code to regulate the conduct of the Managing Director only.

20. Similarly and as already indicated above, the procurement of goods, works and services in public bodies, including parastatal organisations like TANESCO is mandatorily regulated by the provisions of the Public Procurement Act, 2004 (Act No. 21 of 2004) ("the PPA") and its regulations. Section 2 (1) of this Act provides that it shall apply "*(a) to all procurement and disposal by tender undertaken by procuring entity..."* The PPA defines the phrase "*procuring entity*" as "*a Public Body or any other body, or unit established and*

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mandated by government to carry out public functions", while the phrase public body is defined to include "any parastatal organisation."[11]

TANESCO is therefore, for all intents and purposes of the PPA, a public body, parastatal organisation and public corporation regulated thereunder. It is for this reason that the requirements of this law and its regulations apply to employees of TANESCO, in particular the Accounting Officer, members of the Tender Board, members of Evaluation Teams, members of Procurement Management Unit ("PMU") and members of Negotiation Teams. Various standards of ethics and conduct are set out by this law, certain prohibitions as well as offences are created by the same law. All of those, form part of the standards, which are expected of employees of a procuring entity, like TANESCO. And, by virtue of Section 76 of the PPA, as we have already indicated above, should an employee breach them, the employer will be allowed to exercise disciplinary measures in accordance with the terms of the Employment Act and other applicable internal policies and procedures.

It is our opinion therefore that, contravention of the provisions of this law would constitute "misconduct(s)", as if this law is just one of the internal policies and procedures of TANESCO. This is notwithstanding other remedies or actions that may be taken by other authorities outside TANESCO.

21. **Accordingly, misconducts are therefore employees' actions which are in contravention with the employer's policies, procedures and various other laws of the land, like the ones mentioned above, namely the Employment Act, the Public Leadership Code of Ethics Act and the PPA. In other words, acting contrary to established standards of conduct required of an employee is to misconduct.**

Observably, too, in view of the import of Rule 11 (1) of the Code of Good Practice, cited above in paragraph 17, the Report of the Auditors, in our opinion, reveals several misconducts that are contrary to TANESCO Human Resources Policies, 2008 (as revised), particularly the TANESCO Code of Ethics and Conduct, the Standard Disciplinary Operating Procedures[12] and certain other laws of the land that are made to apply to employees of TANESCO. For the most part, the Report has made reference to the Public Leadership Code of Ethics Act and the PPA.

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[11] The phrase "parastatal organisation" is also defined under the same Section of this Act in line with the provisions of Section 3 of the Public Corporations Act, (as amended) where "public corporation" is defined to mean "any corporation established under this Act or any other law in which the Government or its agent owns a majority of the shares or it is the sole shareholder."

[12] The current TANESCO Human Resources Policies (2008) were adopted by Board on 10th September 2008 (Minutes of 462nd Meeting of Board, MIN: 35/ORD/2008, Board Paper No. 2791); notably, the Standard Operating Disciplinary Procedure and the TANESCO Code of Ethics Conduct are part of these policies, part 12.1 and 12.3 respectively. It is also in record that these Policies, on the authority of the Managing Director were slightly reviewed in April, 2012

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The Misconducts revealed

22. Having gone through the Report and the Appendices thereto and, after carefully juxtaposing the key findings, conclusions and recommendations in the Report with the various relevant provisions of the TANESCO Human Resources Policies and the laws we have touched on above, it is in our opinion that several misconducts have been committed by certain employees. In summary the following misconducts have been revealed:

    (i). conflict of interest,

    (ii). dishonesty,

    (iii). breach of trust,

    (iv). failure to declare declarable assets and liabilities,

    (vi). negligence, and

    (vii). abuse of office.

Conflict of Interest

23. ***Black's Law Dictionary***[13] defines "**conflict of interest"** to mean –

> *"... a term used in connection with **public officials and fiduciaries** and **their relationships** to matters of private interest or gain to them. Ethical problems connected therewith are covered by statutes in most jurisdictions[14]... also conflict of interest refers to a clash between public interest and the private pecuniary interest of the individual concerned... **A conflict of interest arises** when a government employee's **personal or financial interest conflicts** or **appears to conflict** with his official responsibility."* (Our own underscoring for emphasis).

[13] 6th Edition, 1990, at page 299

[14] For instance, as it is in the case of Tanzania, conflict of interest is covered in several statutes like the Public Leadership Code of Ethics Act and the PPA

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This Dictionary further clarifies the phrase "conflict of interest" by using case law. The Court of Appeal of Tennessee in the case of ***Gardner v. Nashville Housing Authority of Metropolitan Government of Nashville and Davison County***[15] defined a *conflict of interest* as *"a situation in which regard for one's duty tends to lead to disregard of another"*.

In our considered opinion, the relevance of this principle in TANESCO's day to day activities is pronounced by TANESCO's Code of Ethics and Conduct ("the Code"). In particular, **Clause 2.2** (at page 3 of the Code) defines *conflict of interest* as a situation which occurs when an individual's private interest improperly **interferes** or **appears to interfere**, with the interest of TANESCO. Again, it goes further to describe it as a situation which arises when an employee takes actions or has private interests that may make it difficult to perform his or her company work objectively and effectively. And, it may cause an employee make decisions based on personal gain rather than in the best interests of TANESCO. Further, the Code requires disclosure of **material transaction** or **relationship** (**including those involving family members**) to be promptly disclosed to supervisor / Company Secretary.

Justifiably, the definition given in the TANESCO's Code coincides with the definition under the ***Black's Law Dictionary***. Clearly, the two definitions portray the following to be the elements of *conflict of interest,* thus:

(i). conflict of private and public interests, or deemed conflict of private versus public interest,

(ii). the private interest includes personal or financial interest,

(iii). it results into derogation of objectivity or efficiency, or deemed derogation of objectivity or efficiency,

(iv). it covers relationships, including among others, those of family members.

24. Having expounded on the principle, concept and the law relative to *conflict of interest*, and particularly when it comes to TANESCO affairs, here below are analyses and our Opinion on TANESCO's contracts with **Santa Clara and McDonald** –

[15] 514 F. 2d 38, 41

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25. **In respect of Santa Clara**: notably, it is the conclusion of the Auditors in the Report that there are sufficient and compelling evidences that establish an undisclosed and unauthorised conflict of interest condition on the part of the Managing Director in gross violation of Section 2.2 of TANESCO's Code, Section 6 (a) and (e) of the Public Leadership Code of Ethics Act and Sections 73 (3) and 73 (5) of the PPA.[16]

Indeed, perusal of various Appendices to the Report has revealed that there truly exist a contract between TANESCO and Santa Clara, where Santa Clara was procured through Tender No. PA/001/11/HQ/G/011 for the supply of stationery. Further that, Santa Clara's shareholders at the time of the transaction were Eva Stephen William @ Eva Stephen Mhando, Fred William and Veronica William, all being family members of the Managing Director, Mr. William Geoffrey Mhando.

In view of the definitions of *conflict of interest* given above and Section 2.2 of the TANESCO's Code, Sections 33, 73 (3) and 73 (5) of the PPA, and Section 6 (d) and (e) of the Public Leadership Code of Ethics Act, we confirm positively that there was a *conflict of interest* on the part of Mr. Mhando relative to the contract with Santa Clara.

However, it is our Opinion that the Auditors' inference to Section 6 (a) of the Public Leadership Code of Ethics Act is, with due respect, irrelevant and therefore inapplicable because that provision of the law provides for general ethical standards applicable to public leaders, and clearly does not even mention conflict of interest.

Of interest, going through the TANESCO's Code, the same is silent as to the sanction / punishment of this misconduct, i.e. conflict of interest. However, as it has been argued in paragraphs 19 and 20 above, in employment matters, and their conducts, employees of TANESCO are further regulated by the Public Leadership Code of Ethics Act and PPA.

To begin with, the Public Leadership Code of Ethics Act categorically provides that the breach of its Code attracts the sanctions of demotion or dismissal. The PPA through its Section 76 justifies sanctioning of an employee who violates its requirements using the Employment Act.

Notwithstanding this position, in our opinion, it is understood that one can still argue that the absence of express sanction in the Code makes the misconduct of conflict of interest not to be punishable.

[16] See pages 16 and 33 of the Report

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Arguably, however, that interpretation would be ill-fated on the account of **the fact** that the way the whole transaction of Santa Clara was committed, there are other serious and gross misconducts to which this misconduct (i.e. of conflict of interest) is **inseparably interwoven**, like **dishonesty**, **fraud**, **breach of trust** and **abuse of office**.

As it will later herein below be shown and opined, all of these other misconducts / offences are punishable by way of termination.

We humbly take note that Mr. Mhando during the interview with the Auditors advanced various defences regarding his innocence, thus:

(i). At item 7.5 of the interview summary (Appendix 71 to the Report), Mr. Mhando stated that, and we quote, "in procurement process he is involved in the final stage of signing the contract and letter granting a contract to the bidder who won. His Company Secretary / Legal Officer is the one who used (sic.) to ensure him if the contract is proper in terms of content and cost and all other processes were done by the evaluation team and the tender board decided the winner. However, he mostly relied on the tender board approval to sign the contract..."

With all due respect to this defence and Mr. Mhando generally, this defence is, in our Opinion, inexcusably weak and incapable to change the law which bestows upon him the overall responsibility over and above the Tender Board, the Chief Legal Counsel and Company Secretary and the Evaluation Team to oversee procurement matter under the PPA (refer to Section 33 of the PPA).

Yet again, the conflict of interest was with him, particularly where he admitted that Santa Clara is owned by his wife (see item 7.10 on the summary of interview). Therefore, he ought to have known the conflict of interest and therefore disclose such interest to the Tender Board, PMU, Evaluation Team and Chief Legal Counsel who all, mistakenly approved or dealt with this contract based on his concealment of this material fact. Ordinarily, had he declared this, the burden would have shifted to the other persons to act differently.

(ii). Furthermore, Mr. Mhando at item 7.11 of the interview summary with the Auditors (Appendix 71) submitted that he did not remember to have signed the Code in his capacity as Managing Director, but he admitted knowledge that he would have to declare interest if anything came to his attention (sic.).

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In this regard, it is our strong opinion that the underlying requirement is not signing, but rather knowledge. To this effect, Mr. Mhando admitted to have had knowledge of the rule requiring him to declare his conflicting interest.

(iii). In spite of that, it is our humble opinion that Mr. Mhando cannot justifiably claim that Santa Clara never came to his attention and that it relates to his wife, Eva. In that regard, there is mammoth of direct evidence in the Report proving that Mr. Mhando:

(a) selected the Evaluation Team of bidders, including Santa Clara,

(b) he signed a letter awarding the tender to Santa Clara and, lastly,

(c) he signed the contract between TANESCO and Santa Clara.

It is unimaginable, in our humble opinion that would in all these instances Mr. Mhando could not know that he was dealing with his wife's transaction. In any case therefore, it would then amount to an act of gross negligence.

(iv). Yet still, the defence that he signed the contract for Santa Clara knowing that Santa Clara was no longer his wife's, is also lame and contradictory to the above, because indeed the said contract was signed by his wife in the capacity of Managing Director of Santa Clara, which fact sufficiently imputes conflict of interest on him.

(v). Again, looking at the evidence submitted by the Auditors, this evidence brings question as to his credibility as a witness; in our opinion, this is so because the Auditors have submitted documentary evidence which completely contradicts his defence.

26. **In respect of McDonald**: observably, again, it is the conclusion of the Auditors in the Report that on 17th July 2008, while in senior position of Executive Management at TANESCO, Mr. Mhando entered into undisclosed, unauthorised and conflicting Joint Venture Agreement (JVA) with one Mr. Donald George Mwakamele who is a director and shareholder of McDonald, a company whose core activities are similar and related to TANESCO's own core activities; and that, this violates Section 2.2 of TANESCO's Code.

Similarly, in view of the definition of conflict of interest above, in particular Section 2.2 of the TANESCO's Code, there is a conflict of interest on the part of Mr. Mhando. As found by the Auditors, Mr. Mhando's conflict of interest in this matter is occasioned by the fact

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that he, apart from violating Code 2.2, he further proceeded to sit in the Tender Board and participate in approving various tenders to McDonald, notwithstanding the perpendicular conflict of interest occasioned by the JVA. Besides being the Tender Board member, Mr. Mhando was also by then the General Manager Marketing, of which he was in charge of the business unit in TANESCO, which was the user department in respect of almost all contracts awarded to McDonald (except the one for the rehabilitation of the transmission line for Arusha – Kiyungi).

Notably, in another interview with the Auditors, Mr. Mhando admitted to have signed the JVA with Mr. Mwakamele whereby the two would share profit of McDonald. As a piece of evidence, the admission by Mr. Mhando is relevant and admissible as to the fact that no one is expected to say bad things about / against himself. This is an admission of conflict of interest.

Nevertheless, in the interview, it is noted that Mr. Mhando advanced another defence that the JVA, which he loosely refers as a profit sharing agreement was a security against a loan that Mr. Mwakamele had taken from him in the past; and that the JVA ended after only three months from the date of its signing. In our opinion, as it is also correctly suggested by the Auditors, this defence is implausible, because, he ought to have known that a conflict of interest situation arises upon signing of a contract like that and not after three months thereafter. Besides, reading the phraseology of the JVA, on plain / literal meaning interpretation, this JVA was (is) not in the nature of a loan agreement.

By way of passing, in the course of our review and preparation of this Opinion, it has been established that the JVA as is, is a valid and lawful agreement and enforceable at law. In this regard, we paid attention to the provisions of section 2 of the Law of Contract Act, which recognises as valid, promises exchanged with present and / or future consideration (price or value). This is so said considering that an argument may be brought to state that the JVA was (is) not a valid contract at law. Notably, in our opinion, although the JVA is valid *inter partes* (as between the parties), under the Registration of Documents Act, it is not compulsorily registrable.

Lastly, in this regard, this Opinion takes note of the fact that the Auditors did not make reference to the Public Leadership Code of Ethics Act; this is correctly so because in the Report and the Appendices there is no evidence to indicate that at the time of signing the JVA, in July 2008 until June 2010, Mr. Mhando was (perhaps) not a “public leader” in accordance with the terms of Section 4 (1) (xxiii) of that law. However, we understand that by virtue of Section 4 (2) the list of public leaders is subject of expansion by the President from time to time. The Auditors did touch on this. As such, it is assumed that this is a none-issue, which otherwise would have been an issue of the Auditors would have brought evidence on the expansion to include General Manager Marketing into the list.

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Yet again, the Auditors established that Mr. Mhando did not declare his conflict of interest situation in respect of contracts signed with McDonald. In this regard, the Auditors established that sometime in July 2008 Mr. Mhando in his purported capacity as a "businessman" signed the JVA with one, Donald George Mwakamele, as director of McDonald; in that JVA the arrangement was such that the two parties would search, tender, procure and undertake construction, maintenance and perform all works and projects **in relation to or connected with electricity projects**. In particular, **Mr. Mhando was responsible for search of electricity projects** and that upon completion of projects the parties would share revenue and profits.

Dishonesty

27. **Dishonesty** and **Gross Dishonesty** are phrases referred in the Code of Good Practice and the Disciplinary Procedures thereto which have been cited herein above under paragraph 17, and both have the effect of termination if committed by an employee. According to ***Black's Law Dictionary***, cited above, at page 468, "*dishonesty*" means –

> *"... disposition to lie, cheat, deceive, or defraud; untrustworthiness; lack of integrity. Lack of honest, probity or integrity in principle; lack of fairness and straightforwardness; disposition to defraud, deceive or betray."*

In the definition above, dishonest is related to **deceit**, **defraud** and **cheating**. In order to better understanding this word with its intrinsic value, case law in Tanzania will be of much help. In the case of ***Joseph Mapema v. Republic*, (1986) TLR 144**, the High Court of Tanzania, Msumi, J., quoted with approval the case of Re London and Globe Finance Corporation [1903], 1 Ch. 728, Buckley, J. defining "**deceive**" and "**defraud**" interchangeably as follows:

> *"to deceive is... to induce a man to believe that a thing is true which is false, and which the person practicing the deceit knows and believes to be false. To defraud is to deprive by deceit; it is by deceit to induce a man to act to his own injury... to deceive is by falsehood to induce a state of mind; to defraud is by deceit to induce a course of action..."*

Again, relevant to this, the ***Black's Law Dictionary,*** at pages 288 – 289, defines the words conceal and concealment as follows: to "**conceal**" is *'to hide, secrete, withhold from the knowledge of others. ... to cover or keep from site. To hide or withdraw from observation or prevent discovery of'*; while "**concealment**" is *'to conceal. A withholding of something which one knows and which one, in duty is bound to reveal...*'

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From the foregoing various definitions relative to **dishonesty** above, dishonest may be as a result of active or passive conduct, which is intended to defraud or deceive and to induce a course of action. An active dishonest is that which is occasioned by commission, whilst passive dishonest is that which is occasioned by omission. Acts of deceit would be active dishonest, while concealment would be passive dishonest; both of them are meant or capable of inducing a person to act to his own injury.

Generally, in our point of view, throughout the Report, the Auditors have established various instances of active and passive dishonesty in the transactions involving Santa Clara and McDonald.

Indeed, for his failure to disclose his interests in the two companies, Mr. Mhando was being dishonest and thus breaching his duty of care and loyalty to the Company. The Code of Good Practice provides that acts of such behaviour amounts to serious misconduct, which may lead to termination of employment.

28. **With respect to Santa Clara**: the Auditors in the 5th paragraph of the Report, at pages 5 and 6, found that Mr. Mhando did not disclose his interest or relationship with Santa Clara to the Chief Legal Counsel and Company Secretary. More so, this fact, when read with paragraph 6 (ii), Santa Clara through the Form of Tender declared having no conflict of interest in TANESCO; all of these facts together bring about the following conclusions, that –

    (a) Mr. Mhando knowing that Eva was (is) his wife, had a duty to disclose that fact, and particularly as required under the Section 2.2 of the TANESCO Code;

    (b) Mr. Mhando further allowed his wife to act in a manner contrary to / defeating TANESCO's policies that she had no conflict of interest; and,

    (c) These acts together were concealments which resulted / occasioned dishonesty on the part of Mr. Mhando, mandatorily had a duty of honesty to the Company.

29. **With respect to McDonald**: the Auditors, once again, have established in the Report that the act of dishonesty on the part of Mr. Mhando was proved through his own admission that he signed the JVA. Further, the Auditors found that there was no evidence in the Company's record to show that Mr. Mhando had declared the existence of the JVA, bearing in mind its conflicting nature to the interest of TANESCO. To shade more light, the said contract was one which was designed in a manner, which if executed could defraud among others TANESCO's procurement processes; if not, it arose a potential conflict of interest situation. Passively, Mr. Mhando concealed this vital information which ordinary

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was required to disclose by virtue of the requirements of Clause 2.2 of the TANESCO Code, occasioning or amounting to an act of dishonest.

Similarly, Mr. Mhando had several repeated incidences of concealing the fact that he signed the JVA, that is, when he signed it, when acting as member of the Tender Board and participating in deliberations concerning McDonald contracts, at the time of his appointment and becoming Managing Director of TANESCO and continued to do so until the Audit brought this fact into the open. As to his defence that the JVA lasted for only three months, as we agree with the Auditors, is implausible, as there is no evidence to indicate that the same has ever been terminated; and even if it would have been terminated, he ought to have disclosed that fact to the Company within the alleged three months the JVA was in existence.

Also, it is our opinion that in relation to a supplier or a potential supplier, the duty of disclosure continues to exist even after the termination of the impugned JVA. This is so because the TANESCO's Code prohibits both actual and deemed conflict of interest. In the case of ***St. Lewis v. Rancourt***, the Judge was requested to withdraw himself from presiding over a case for **failure to disclose past connections** with one of the parties to the case. In another Tanzanian case, a High Court Judge who was once an advocate to one of the parties to a case was asked to withdraw himself in presiding over that matter on account of past connection; and he did. In this analogy it is learnt that **past interests** held are relevant to be disclosed.

It is our considered opinion that, all these were incidences of **gross dishonesty** deserving sanction in terms of the Employment Act and the TANESCO Human Resources Policies.

Breach of Trust

30. **Breach of trust** is one of the disciplinary offences which justify termination of contract of employment if committed by an employee. The Code of Good Practice, as page 74, where it provides for the disciplinary offences which constitute serious misconduct and leading to termination, paragraph 5 therein cites "***any other breach of trust***" as one of these serious misconducts.

The Auditors have established in the Report, in several occasions that there **was breach of trust**, as we have already opined under paragraph 25 of this Opinion in relation to Conflict of Interest, it has been clearly shown that conflict of interest is closely connected with one's **fiduciary** duty. In as far as TANESCO is concerned and in view of the fact that it is a limited company established under the Companies Act, Act No. 12 of 2002, Section 181 of that law provides that directors of a company have all the powers necessary for

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managing, directing and supervising the affairs of the company. In relation to that, Section 185 of the same law imposes upon directors a duty of care, which is commonly referred to as **fiduciary obligation,** involving a duty which requires directors to act with care and skills, diligence and in the best interest of the company.

In the case of TANESCO, in terms of Article 111 of the Articles of Association of the Company, the Board bestows its powers to manage, direct and supervise the day to day operational activities of the Company to the Managing Director by specifically appointing him as such (see **ANNEXTURE 12**). This Article is reinforced by Article 113, whereby the Board is empowered to give a contract of service to any person to serve as Managing Director. By so doing, the Board is in fact **entrusting** that person with its authority.

In Company Law, generally, once a person is **entrusted** with the powers that are naturally powers of the Board, a duty of loyalty arises, whereby personal interests of that person (i.e. managing director / chief executive officer) must always be subordinate to the Company's. In the most, the duty of loyalty requires a person to place the best interests of the Company above his personal interests or that of his relationships. Perhaps is worthwhile reciting part of the TANESCO's Code of Ethics and Conduct, Clause 2.2, at page 3 thereon, it provides thus:

> *"... If a conflict of interests (sic.), and **there is no failure of good faith** on the part of the employee, TANESCO policy generally will be to allow a reasonable amount of time for the employee to correct the situation in order to prevent undue hardship or loss. **However, all decisions in this regard will be in the discretion of the Managing Director** and the Company Secretary **whose primary concern** in exercising such discretion **will be the best interest of TANESCO.**"*
>
> (Emphasis supplied... "...**the best interest of TANESCO**")

Based on the appointment letter and in respect of all what transpired in the transactions involving **Santa Clara** and **McDonald**, as established by the Auditors in the Report, it is our opinion that, Mr. Mhando breached his duty of trust and loyalty to the Company. This being a serious misconduct ordinarily would attract disciplinary action and sanction under the Employment Act.

Similarly, Mr. Mhando being the Managing Director is on behalf of the Board, the custodian of all policies, and more so, takes leadership and accountability in the implementation of such policies leading to achieving the desired end. In that capacity, he is an apex of fairness, integrity, probity and a symbol of the organisation to its stakeholders. Such roles demand for confidence of all stakeholders, within and outside the organisation. Now, by failure to act in a manner expected of a Managing Director, it is commercially prudent and in the interest of the organisation itself for him to take

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accountability. This is the policy behind the underlying principles of the Code of Ethics for Public Leaders where by virtue of Section 6 (b) (i) of the Public Leadership Code of Ethics Act, the distinction between law and morality is forfeited. Yet again, the same principles legitimize the justification of public leaders conduct both in private and public by the public through public scrutiny. We cannot ignore the first audit that was done by the employees, which emerged with 74 findings. At least, this is our opinion in that regard.

Failure to Declare Declarable Assets and Liabilities

31. Looking at the misconducts analysed so far from above, it is apt to note that, the said misconducts constitute breach of the Code of ethics for Public Leaders as established under the Public Leadership Code of Ethics Act. In effect, that Code prohibits conflict of interest, dishonesty, requires upholding the highest possible ethical standards, discharging public confidence and trust **by not simply acting lawfully** (see the wording and the intended policy behind Section 6 of the Public Leadership Code of Ethics Act) such that, at all time, the conduct of the Public Leaders is supposed to be beyond reproach.

    However, there is another very specific breach under the Code of Ethics for Public Leaders which requires them to declare declarable assets and liabilities. Under the terms of Sections 9, 10 and 11 of the Public Leadership Code of Ethics Act, a Public Leader is specifically required to declare assets that are not non-declarable assets. In particular, these would be any such assets involving interests of commercial character.

32. In this regard, the Auditors have established in the Report (at page 10, paragraph 5) that Mr. Mhando as a public leader did not declare his interests relative to JVA signed with Mr. Mwakamele in relation to **McDonald**. It is in our opinion as we have opined above, that a breach of the Code would attract certain actions by a disciplinary authority under Section 8 of the Public Leadership Code of Ethics Act. Needless to say more that, the Code therein is imported to all organizations and establishments where there are public leaders.

    Of much interest, in relation to the Code of Ethics for Public Leaders and in relation to what we have opined under paragraph 31 herein above, the Code provides that, a public leader may be advised to resign from the office to which the breach relates.

    In the ordinary, it is in our considered opinion that, in law this would not constitute a disciplinary action but rather an act of saving the image and reputation of the organization in relation to that Public Leader and the impugned transactions committed.

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33. In relation to **Santa Clara**, it is our considered opinion that, the key finding by the Auditors recorded at paragraph 7 of page 8 of their Report might be unfortunately misconceived. In our opinion, after reviewing the Law of Marriage Act, 1971 in particular Sections 58, 59 and 60 in relation to matters relating to ownership of properties by husbands and wives and the presumptions as to properties acquired during marriage, it will be very difficult, in the absence of particular knowledge about the existence or non existence of **prenuptial agreement**[17] between Mr. Mhando and his wife, Eva, that the interest under Santa Clara is declarable. In this respect, the challenge is that of establishing joint or separate ownership of that interest. The Auditors have not addressed this issue in the Report.

Negligence and Gross Negligence

34. Negligence, as it has been indicated above in particular, rule 12 sub rule 3(d) of the Code of Good Practice is one of the acts which may justify termination. Accordingly, under paragraph "**j**" of the TANESCO's Disciplinary Operating Procedures, **negligence of duties** is a misconduct referring to *non-performance of a duty without due care and attention or failure to obey established rules and procedures relating to work safety*. Under the general law, negligence refers to failure to perform to the level of standard one is expected of.

35. It is our considered opinion that, looking at the key findings and conclusions of the Auditors in the Report, clearly, a number of employees were negligent in the manner they dealt with in the course of executing the Contracts of Santa Clara and McDonald. This would include members of the PMU, Tender Board, Evaluation Teams and officers in the Finance Department who processed payment in respect of the two Companies. The list of employees implicated is covered the analysis of evidences herein below. Appropriately, the list will contain employees who are implicated for being negligent and employees who are implicated for being gross negligent.

Abuse of Office

36. **Abuse of Office** is one of the misconducts that has both criminal and civil aspect. It refers generally to making a bad use of one's position, taking undue advantage, committing malfeances in office and may include corrupt practices of various natures while in public office. To specifically borrow the meaning used under the Prevention and Combating of Corruption Act, in particular Section 3, *abuse of office* refers to intentional performance or failure to perform in the discharge of one's function or use of position to

[17] Simply, these are agreements entered into persons intending to marry as to the manners they would want to deal with properties, either jointly, severally or both jointly or in exclusion of each other

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obtain undue advantage for one's personal gain, or another person or entity.

The TANESCO's Standard operating disciplinary procedure provides particularly under Paragraph "**u**" the misconduct of abuse of office where an employee by virtue of his/her office conducts himself in an unacceptable manner contrary to laid down policies and work procedure. The Misconduct justifies termination if committed.

37. Our review has failed to find any finding or conclusion recorded by the Auditors pointing conclusively at the abuse of office and without any inference to the contrary. In this regard, it is our considered opinion that while abuse of office is generally and widely couched as a misconduct that would ordinarily include a combination of some of the above analysed misconducts, but it is very unsafe legally to prefer charges without actual and specific instances of abuse of office. In our opinion, defence lawyers are always quick and in most cases successful in challenging such broad provisions / charges on grounds of duplicity / multiplicity of what would otherwise constitute several other independent charges; thus, those charges might easily be declared to be malicious, embarrassing and prejudicial treatment.

    And, normally they would successfully argue that such charges occasion miscarriage of justice. In our opinion, the Report is full of circumstantial evidences that may tempt one to arrive to the misconduct of abuse of office. However, the challenge that one would always face, when dealing with circumstantial evidences is to satisfy the up-hill task of drawing logical and connected inferences from disconnected pieces of evidence and particularly where Courts have set high standards of proving cases by circumstantial evidences. Ordinarily, circumstantial evidence must necessarily point irresistibly at the guilty of the person complained of without any inference to the contrary.

IF ANY, WHETHER DISCIPLINARY OR OTHER ACTIONS CAN BE TAKEN IN RESPECT OF THE SAID MISCONDUCTS

38. Corollary to the Opinion that has been submitted thus far, the answer to this issue, now, flows like the stream in the course of a river. That is, where there are misconducts, disciplinary and other administrative actions are justifiable. Indeed, in our opinion this is the spirit of Rule 11 sub-rule 1 of the Code of Good Practice and the Guidelines we have cited repetitively above.

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WHETHER THE BOARD HAS THE POWERS TO TAKE DISCIPLINARY ACTIONS AGAINST THE IMPLICATED EMPLOYEES

39. It is trite law and practice in this jurisdiction that, Boards of Directors of corporate bodies like TANESCO are empowered with full authority to manage, supervise and exercise control and direct the affairs of the companies. For ease of reference, we reproduce here below the relevant provisions of the Memorandum and Articles of Association of TANESCO, the Companies Act, and the Public Corporations Act, thus;

Article 103 of the Memorandum and Articles of Association of TANESCO –

"The business of the Company shall be managed by the Board, which may exercise all such powers of the Company as are not by the Ordinance or by these presents required to be exercised by the Company in general meeting, subject nevertheless to the provisions of these presents and of the Ordinance and to such regulations, being not inconsistent with such provisions, as may be prescribed by the Company in general meeting, but no regulations made by the Company in general meeting shall invalidate any prior act of the Board which would have been valid if such regulations had not been made. ***The general powers given by this Article shall not*** *be* ***limited*** *or* ***restricted*** *by any special authority or power given to the Board by any other Article."*

Section 181 of the Companies Act, 2002 –

"Subject to any modifications, exceptions, or limitations contained in this Act or in the Company's articles, the ***directors*** *of a company* ***have all the powers necessary for managing****, and of* ***directing*** *and* ***supervising*** *the management of, the business and affairs of a company."*

Section 8 of the Public Corporations Act, 1992 (as amended):

"(1) There shall be for each public corporation a Board of Directors which shall subject to section 6 be responsible for its policy, control, management and commercial results of the affairs of the public corporation.

(2) Without prejudice to the generality of the functions of the Board referred to in subsection (1), the Board of Directors may, upon the terms and conditions which it may deem fit and for proper and efficient conduct of the business and activities of the public corporation-

(a) establish or cause to be established an efficient scheme of service for the staff of the public corporation;

(b) appoint at salaries and upon any terms and conditions which it may deem fit any other officers and employees of the corporation whom it deems necessary or desirable for the

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effective discharge of the purposes and functions of the public corporation;

(c) ... (N/A);

(d) grant gratuities, benefits and allowances to the officers and public employees of the public corporation; and

(e) exercise supervision over the management team of the public corporation."

Section 6 of the Public Corporations Act, 1992 (as amended):

"Where the government is the sole shareholder the responsible Minister may, in writing under his hand, give the Board of Directors of the public corporation directions of a general or specific character as to the performance of its functions."

40. It is logical therefore that, the powers as contained in Section 181 of the Companies Act include setting up of policies, supervision in the implementation of such policies including recruitment and termination of the employees contracts of employment. More so, Article 103 of the Articles of the Company reinforces the aforementioned Section 181, by vesting upon the Board with management powers.

    From the foregoing, much as the powers to take disciplinary actions are not expressly provided for in the two provisions above, it is observed that, it is utterly wrong for one to think that, there can exist management powers without powers to take disciplinary action. In this regard, it is our humble opinion that, powers of the Board include powers to take disciplinary action.

WHETHER THE ALLEGED MISCONDUCTS WILL BE SUFFICIENTLY DEALT WITH BY SIMPLY THE BOARD REPORTING THE SAME TO CERTAIN OTHER AUTHORITIES?

41. After carefully reviewing the law and considering the specific recommendations of the Auditors in the Report, thus: the Board should cause reporting of certain irregularities to the Public Procurement Regulatory Authority ("the PPRA"), the Commissioner of the Public Leaders Ethics Secretariat, the Tanzania Revenue Authority ("the TRA") *etc*., it is our considered opinion that **this is without prejudice** to the rights and powers of the Board to take disciplinary and other internal administrative actions.

    Conversely, in this regard, as it has been demonstrated above, the Board has powers to use its governance and administrative authority to take various other actions / measures, including disciplining actions to all responsible employees of the Company implicated in the Report. Indeed, reporting to various other organs, as the case may be, should happen after the Board has taken its measures, as it deems appropriate.

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As it has been shown above and, now specifically, under Section 76 of the PPA, the measures that PPRA can take in respect of any procuring entity are without prejudice to any other actions that can be taken under any other law. Similarly, the provisions of Section 29 of the Public Leadership of Code of Ethics Act have the same effect.

In our point of view, however, the only challenge that the Board needs to carefully consider is the fact that there might be adverse implications, should these other organs take certain actions before the Board completes its own. For instance, Guideline 9 (5) of the Guidelines for Disciplinary Procedures made under the Code of Good Practice provides, thus:

> *"It is recognised that an employee's misconduct may in certain circumstances result in criminal proceedings being instituted against the employee. A clear distinction should be made between criminal proceedings and internal disciplinary proceedings. Disciplinary proceedings should be instituted and decided fairly, irrespective of the process and outcome of any criminal proceedings instituted."*

In more precise terms, Section 37 (5) of the Employment Act provides that –

> *"No disciplinary action in form of penalty, termination, or dismissal shall lie upon an employee who has been charged with a criminal offence which is substantially the same until the final determination by the Court and any appeal thereto."*

Whatever happens, in the course of taking disciplinary and / or other internal administrative actions, the law particularly under the provisions of Rule 27 (5) of the Code of Good Practice provides as follows –

> *"... any employee charged with a criminal offence **may be suspended on full remuneration** pending a final determination by a court and any appeal thereto, on that charge."*
> (Our own underscoring)

That means, in the particular circumstances of TANESCO, if any of the institutions vested with criminal jurisdiction chooses to charge any of the employees implicated in the Report before or in the middle of the Board's actions being taken, the only remedy available is to suspend the employee concerned on full remuneration pending a final determination of that criminal matter.

Besides, the Board also needs to be advised that one of the consequences of reporting this matter to other regulatory or law enforcement agencies would be to be ceased of authority or powers in certain respects. For instance, under the provisions of Sections 16 and 17 of the PPA, such actions would include suspension of officers, replacement of

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PMU and even transferring the procurement function to third party agent!

Otherwise, it is our considered opinion that the disciplinary remedies under the Employment Act can only be taken or exercised by the "employer", who in this case, is the Board.

WHETHER THERE IS SUFFICIENT BODY OF EVIDENCE IN RESPECT OF THE MISCONDUCTS, AND PARTICULARLY WHETHER THAT BODY EVIDENCE IS SUFFICIENTLY WEIGHTY, RELEVANT AND ADMISSIBLE TO JUSTIFY THE BOARD TO TAKE, OR DIRECT DISCIPLINARY ACTIONS TO BE TAKEN, AGAINST EMPLOYEES IMPLICATED IN THE REPORT?

42. Having carefully reviewed the Report and various other evidences as submitted by the Auditors in support of their various conclusions, it is our general remark that, the evidences as contained in the Report have different characteristic values relative to their relevancy, admissibility and weight. In the main, we have developed a matrix containing our own analysis of all evidences available relative to the identified misconducts. See attached the said Matrix as **ANNEXTURE 13**.

43. That aside, perhaps it is worthwhile mentioning here that, as we were developing the said Matrix of body of evidence, we were guided by various principles of the Law of Evidence as they apply in TANZANIA.

    That, the Tanzanian law exerts that, the Best Evidence Rule is that which is direct.[18] Secondly, unlike other civil / criminal disputes where the burden of proof lies mostly with "*he who alleges*", however, in employment matters the burden of proof lies with the employer; and that, it lies with the employer throughout the proceedings in labour matters. This position finds its way to Tanzania through Rule 9 (3) of the Code of Good Practice.

    More so, the law further provides that, the standard of proof is on the balance of probabilities.

    Finally, the Tanzanian Law of Evidence provides that, an evidence may be relevant but not necessary admissible. This would mean that, for a relevant evidence to be admissible (to be allowable to be received and thereby used in determining the facts in issue), it must necessarily, meet various standards as set by the law.

[18] See Sections 66 and 100 of the Evidence Act, 1967

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WHAT ARE THE APPLICABLE DISCIPLINARY PROCEDURES / PROCESSES TO BE ADOPTED IN TAKING DISCIPLINARY ACTIONS AGAINST EMPLOYEES IMPLICATED IN THE REPORT?

The Procedure

44. When it comes to taking disciplinary actions, the Employment Act and the Code of Good Practice are very emphatic and repetitive on **fairness** of processes and procedures to be adopted.

For instance, under the provisions of Section 37 of the Employment Act, a **termination is unlawful if the employer terminates** the employment of **an employee unfairly**.

The logic of this continues, simply, like this –

- **a termination** of employment **is unfair if the employer fails to prove** that –
    - (a) the **reason**(s) **for termination is valid**,
    - (b) the **reason is** a **fair reason** and
    - (c) the **termination** was in accordance with **a fair procedure**.

Notably, as it has been observed above, in all these aspects, it is the employer who has to prove the validity of the reasons for termination, the fairness of the reasons and the fairness of the procedure adopted.

Rule 8 sub-rule 1 (c) of the Code of Good Practice provides that an employer may terminate the employment of an employee if he follows **a fair procedure** before terminating the contract.

Further, Rule 13 provides that, **the employer shall conduct an investigation** to ascertain whether there are grounds for hearing to be held. Under sub-rule 2, **where a hearing is to be held** the **employer shall notify the employee** of **the allegations** using a form and language that the employee that the employee can reasonable understand.

Sub-rule 3 of Rule 13 provides that, **the employee shall be entitled to a reasonable time to prepare for the hearing and to be assisted by** a **trade union representative** or **fellow employee**. What constitute **a reasonable time** shall depend on the

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circumstances and complexity of the matter, but it **shall not normally be less than 48 hours**.

Sub-rule 4 of Rule 13 provides that the hearing shall be held and finalised within a reasonable time and chaired by a sufficiently Senior Management representative who shall not have been involved in the circumstances giving to the case.

Sub-rule 5 of Rule 13 provides that evidence in support of the allegations against the employee shall be presented at the hearing. The employee shall be given a proper opportunity at the hearing to respond to the allegations, questions any witness called and to call witnesses, if necessary.

Sub-rule 7 of Rule 13 where the hearing results in the employer being found guilty of allegations under consideration, the employee shall be given the opportunity to put forward any mitigating factors before a decision is made on the sanction to be imposed.

Sub-rule 8 of Rule 13 provides that after the hearing, the employer shall communicate the decision taken and preferably furnish the employee with written notification of the decision together with brief reasons.

From the foregoing, clearly, the Code of Good Practice through Rule 13 establishes a process that must be complied with for a procedure to be a fair procedure.

45. Summarily, sub-rule 1 through to sub-rule 8, certain aspects of what the law considers to be a fair procedure emerge: one, is the fact that the employer might have to conduct investigation; two, there must be notification of the allegation in not less than 48 hours; three, the hearing of the employer and employee before an impartial Chairman; four, mitigation before the decision, and finally, five, notification of the decision.

What does this mean?

Obviously, in our opinion, the procedures under the Code of Good Practice attempt to ensure that the rules of natural justice are complied with. For clarity purposes, in so far as natural justice is concerned, H. W. R. Wade, a leading scholar in Administrative Law, in his book ***Administrative Law***, fifth edition, at page 441 argues that;

> *"It is fundamental to fair procedure that both sides should be heard: audi alteram partem, 'hear the other side'".*

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He goes on to argue that:

> *This is the more far reaching of the principles of natural justice, since it can embrace almost every question of fair procedure, or due process, ... It is also broad enough to include the rule against bias, since a fair hearing must be an unbiased hearing."*

Accordingly, this was elaborated in simple and basic terms in the case of ***R v. University of Cambridge,* (1723) 1 STR 557**, by Fortesque, J., that –

> *"I remember to have heard it observed by a very learned man upon such an occasion, that even God Himself did not pass sentence upon Adam, before he was called upon to make his defence. 'Adam' says God, 'where art thou? Hast though eaten of the tree, whereof I commanded thee that though shouldst not eat? And the same question was put to Eve also."*

Moreover, at page 73 of the Code of Good Practice, there a flexible concluding Guideline which is put, like this:

> *"This disciplinary procedure applies to all employees and is a guide for appropriate disciplinary action. As such,* ***it does not detract from management's right to depart from it depending on the circumstances of each case*** *(if) it aims to achieve flexibility and consistency, and to ensure fairness in the application of disciplinary action."* (Emphasis supplied).

46. On account of this, clearly, it is our humble opinion that the situation at TANESCO is two faced: it is two faced because the employees implicated by the Report are of two categories. **One**, there are those whose appointing authority is the Board and, **two**, those whose appointing authority is the Management.

It is our considered opinion that, in view of those who were appointed by Management, the disciplinary action to be taken against them should be taken by Management; of course, the Board retains its authority to oversee the process. The rules to govern the process there should be under in line with Rule 13 of the Code of Good Practice and the applicable TANESCO's Standard Disciplinary Operating Procedures.

Moreover, those whose appointing authority is the Board; the Board should deal with them. The big question here is **HOW**?

47. As we proceed to address the procedure and process to be used in respect of the employees implicated in the Report who fall under the authority of the Board, it is important to note here that, our review of all the existing Human Resources Policies has indicated that the procedure and process to discipline appointees of the Board,

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including the Managing Director is codified under the TANESCO Standard Disciplinary Operating Procedure cited above. Clearly, the unfortunate draftsmanship failed to contemplate the members of senior executive management could also be disciplined!

In this regard and in view of the fair procedure required by the import of Section 37 of the Employment Act, here below are various scenarios / propositions that contain procedure / process that may be adopted by the Board in taking disciplinary action against the implicated employees falling under the jurisdiction of the Board.

Scenario 1 - The Board to directly Discipline

In this scenario, it is assumed that the Board in its entirety constitutes itself to form A disciplinary body where those implicated employees will be given charges and afterwards be afforded with the opportunity to defend themselves and eventually the Board will make decision(s) in respect of each one of them.

However, in our considered opinion, this procedure poses one big legal risk; that is; the Board will be the complainant/accuser, perhaps, the prosecutor and subsequently, the Judge. This will be contrary to the rules of natural justice, cited above, particularly relative to the rule against bias, i.e. 'no one will be a judge of his own case'.

Reluctantly, it is opined, this procedure administratively offers problem to the Board in terms of how this procedure can be conducted.

Scenario 2 –a Select Team comprised of two (2) members of the Board

Alternatively, the Board may appoint two members from amongst its composition with the view to holding hearings of the alleged misconducts in respect of the implicated employees. In this case, the Company will charge, the Select Team will hear and bring up report(s) to the Board with specific recommendations on actions to be taken. Once again, the Board will afford the "accused employees" with the opportunity to give mitigation factors and finally, the Board will make decision(s).

At a bigger picture, an analogous situation similar to this is the model that was recently used by the National Assembly ("Bunge") in respect of the Richmond Scandal; in that, a select team was formed, it submitted a report to the whole body of the National Assembly, which ultimately passed certain decisions.

Arguably, this method is not free of weakness; that is, despite the fact that, the appointed members of the Select Team will not ultimately participate in decision making at the Board's level, there could still be deemed bias on the part of the Board for

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reasons that, the Select Team is an extended arm of the Board. As such, one may still argue that the Board will be a judge of its own case.

<u>Scenario 3</u> - Select Team comprised of two (2) members of the Board and one (1) Independent Person

This procedure is somewhat similar to Scenario 2 above only that under this Scenario, in our point of view, there is an addition of one (1) Independent Person. It is our humble opinion that, the weaknesses under this Scenario are slightly lesser than those in Scenario 2. The challenge here would be on how to procure that independent person relative to time and cost, and perhaps in terms of controlling the final output.

<u>Scenario 4</u> – the ACGC to do it

Under this Scenario, the ACGC will handle this matter on behalf of the Board. In this regard, the Board will charge, the ACGC will carry out hearings of the matters, including affording the implicated employees with right to be heard. Afterwards, the ACGC will report to the Board, which once again will afford the employees concerned with right to be heard. At this juncture, ACGC will not participate in the decision making of the Board. One major weakness in this regard is that, the absence of the ACGC in the Board may have adverse impact on the quorum of the Board or rather legitimacy of any quorum.

Scenario 5 - Independent Person(s) as the Chairman of the Hearing Body

This scenario recommends for an appointment of a person of an impeccable record, integrity and requisite experience for the purposes of hearing; the Board charges. This scenario guarantee adherence to the rule against bias. However, it brings challenges as to how to procure this person, time and cost, and in some way the Board may lose its control over the process.

In view of the foregoing, in our considered opinion, the ranking of these scenarios in terms of the most preferred one to the least is thus: 5, 3, 2, 4 and then 1.

OBSERVATION

48. As you will have noted in our Opinion thus far, we have noted and we hope you have also noted, our analyses to most of the issues (if not all) tend to have a conclusion which revolves around the Managing Director, Mr. Mhando. In this regard, we state here that, it may tempt readers of this Opinion to misconceive a feeling that, there is mischievousness on the part of the drawers of this Opinion. All the same, one needs to

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take note that, it is not true that, it is Mr. Mhando alone who has been a subject of this Opinion. But, this Opinion addressed itself to various Auditors' findings relative to the contracts with Santa Clara and McDonald. All these directly, albeit one would say, unfortunately, touch on the moral turpitude of Mr. Mhando.

As a result, the Auditors' key findings, conclusions and recommendations are centrally based, yet indeed, as they were commissioned by the Board itself. It is from the Board's very specific terms of reference of 2nd August, 2012 that everything is now springing. We are opining on the Board's instruction and specific terms of reference as highlighted above. All other officers (as one must have noted), are implicated as a result of the two contracts, unfortunately again centred on the alleged conduct of Mr. Mhando.

It is our strong opinion that, we have all along exercised professionalism and objectivity in rendering this Opinion.

RECOMMENDATION

49. From the foregoing, it is our opinion that, various misconducts were committed by various officers of the Company. This Opinion has established misconducts which include Conflict of Interest, Dishonesty, Breach of Trust, Failure to Declare Declarable Interest and Abuse of Office.

In that regard, this Opinion in view of the misconducts committed, proposes for appropriate disciplinary actions.

Nonetheless, this Opinion submits five scenarios of processes that may be adopted by the Board towards implementation of the disciplinary action.

It is our strong opinion that, in view of the misconducts committed, the appropriate disciplinary action be taken whilst ensuring that, there is compliance

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Prepared by:

Godwin S. Ngwilimi (Advocate)

Crispin B. Mwebesa (Advocate)

Ms. Sundi Mahalu (Advocate)

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2. The Companies Act 2002, Act no. 12 of 2002
3. The Constitution of United Republic of Tanzania of 1977 (Cap. 2 R.E 2002)
4. The Labour Institutions Act 2004, Act no. 7 of 2004
5. The Penal Code Cap 16 , R:E 2010
6. The Prevention and Combating of Corruption Act, Cap. 329 R.E 2002
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9. The Public Procurement Act 2004, Act no. 21 of 2004
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12. The Workers Compensation Act 2008, Act no. 20 of 2008

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