IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: WAMBALI, J.A., MWANDAMBO, J.A. And KITUSI, J.A.)

CIVIL APPEAL NO. 209 OF 2019

BRITISH AMERICAN TOBBACO KENYA LIMITED .....APPELLANT

VERSUS

MOHAN'S OYSTERBAY DRINKS LIMITED .....RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania (Commercial Division) at Dar es Salaam

(Mansoor, J.)

dated the 24th day of September, 2016
in
Commercial Case No. 90 of 2014

JUDGMENT OF THE COURT

27th September, 2021 & 1st February, 2022

KITUSI, J.A.:

British American Tobacco Kenya Limited or BAT, the appellant, is a company registered in Kenya, and a manufacturer of different types of cigarettes and tobacco products, including Benson & Hedges and Dunhill. The respondent Mohan's Oysterbay Drinks Limited, a company registered in Tanzania, instituted a suit at the Commercial Division of the High Court, claiming that there exists a contract between it and the appellant, on the basis of which, it is the exclusive distributor of the

appellant's products in Tanzania. These facts were disputed by the appellant.

The essence of the suit was an alleged termination of that contract by the appellant, vide a letter dated 1st July, 2014 (Exhibit P9). The respondent claimed from the appellant, general and specific damages resulting from the alleged breach of contract by it.

On the other hand, as intimated above, the appellant disputed existence of the alleged contract between it and the respondent, and maintained that it did not breach any. It demanded proof of existence of that contract as well as the alleged damages. While admitting to have written the letter, exhibit P9, the appellant disputed the contention that the said letter constituted termination of any contract.

The High Court, Commercial Division, entered judgment in favour of the respondent, holding that there existed an implied contract between the parties, which the appellant unlawfully terminated, causing damages to the respondent. It awarded the respondent general and specific damages, costs and interests. Against that judgment and decree, the appellant appeals to the Court.

From the pleadings and evidence, there can be no doubt that the parties are not strangers to each other and as such, there are quite a few facts that are not disputed. There is no dispute, for instance, that the appellant used to supply the respondent with its products specifically, Dunhill and Benson & Hedges, so it is obvious that the parties had a business relationship. There is also no dispute that sometime in the course of the business relationship, the respondent participated in the appellant's re-evaluation of its business model, titled: 'Route to Market Review'. There is no dispute again that subsequent to that review programme, the appellant wrote the letter (Exhibit P9) forming the basis of the allegation of breach. By that letter, the appellant appointed an exclusive distributor other than the respondent. There are however, matters that remained disputed during the trial.

As it shall later be appreciated, determination of this case before the trial court and before us requires the following two main matters of controversy to be resolved, and incidentally, these were the first two issues that were agreed to by the parties before commencement of the trial: -

"(1) Whether there was the distribution agreement between the parties, if yes, whether that agreement was exclusive.

(2) Whether the defendant's appointment of a distributor breached any exclusive distribution agreement with the plaintiff."

During the trial, each side maintained its side of the story as regards those key issues. Rajesh Davda, (PW1), the Managing Director of the respondent, Michael Minja, (PW2), the Managing Director of Origin Resources (T) Limited and Mike Food and Drinks (T) Limited and Jacob Mlingi, (PW3), the Director of MNR Distributors Limited, testified in support of the respondent's case. They stated that the respondent had been an importer and exclusive distributor of the appellant's products in Tanzania for 15 years, since 2010. To prove that relationship, PW1 cited some instances from which an implied contract by conduct of the parties over that period of time, could be established.

PW1 first mentioned the written communications between the parties. Two, he referred to the directives that were being issued by the appellant to the respondent which were being carried out by the latter. Three, he referred to the fact that a trade representative of the appellant, one Herryad Malewo, working with British American Tobacco

(T) Limited, a company solely owned by the appellant, was operating from the respondent's offices. However, PW1 conceded that there were attempts to formalize the distributorship agreement by signing a written contract, but it did not materialize. He alluded to the Market Review programme in which the respondent company participated, and testified on the prospects it generated on the respondent's future relationship with the appellant. He blamed the appellant for granting the distributorship contract to another company, without offering the slightest of clue as to where the respondent may have gone wrong to deserve such punishment.

PW2 testified in support of PW1's story as already stated. He stated that initially Mike Foods and Drinks, one of his companies, was the sole importer of the appellant's products to Tanzania, and the respondent was the sole distributor. He also referred to the conduct of the parties as establishing that relationship. One more instance cited by PW2 and confirmed by PW3 was an intervention that was made by the respondent and Mike Foods and Drinks. It happened when there was an attempt by MNR Distributors Limited Company to become a distributor of the appellant's products in Kilimanjaro and Arusha regions. PW1 and PW2 lodged a written protest to the appellant against that, and the

appellant responded by an apology to PW1 and PW2 and ceased further supply of its products to that company. They testified that since then, no other company imported and distributed the appellant's products in Tanzania. Further that on 14th September, 2010, PW2 wrote to the appellant notifying it that it would no longer be importing the products and that the respondent would henceforth step into its shoes and do both the importation and distribution.

On the other hand, one Mr. Mathu Kinjuri (DW1), the appellant's Marketing Operations Manager and Sophia Akako Mukoba (DW2), the appellant's Head of Finance for East Africa Markets, had a common story to the contrary. They testified that the respondent started selling the appellant's products by buying them from companies that were hitherto direct buyers of those products from the appellant in Nairobi. These direct buyers were MRM Distributors of Arusha, between 2001 to 2002, Origins Resources Tanzania Ltd, between 2001 to 2008, and Mike Foods and Drinks (T) Limited between 2009- 2010. So, the appellant's case was that the respondent started by buying products indirectly from Origins Resources Tanzania Ltd, not directly from the appellant in Kenya as alleged by it.

According to DW1 and DW2, the appellant started direct sales to the respondent in 2010 after it started manufacturing Dunhill and Benson & Hedges which it had not been manufacturing before, and that the supply was on per order basis. They disputed the contention that the relationship began in 1995. The witnesses further deposed that twice, that is, in 2008 and 2011, the respondent turned down the appellant's offer for execution of a formal distributorship agreement. The witnesses also alluded to the Review of the Market exercise and that at the invitation of the appellant, the respondent and four other dealers participated.

It is common ground that in the process of the review, each participant submitted for the appellant's consideration, a business proposal covering a span of 2 years. The appellant, according to DW1 and DW2, hired a professional business consultant to evaluate the proposals, and in the end, the consultant considered the respondent's unsuitable. The appellant's witnesses stated that the letter (Exhibit P9), which the respondent alleged it was for termination of the contract, was, in fact, communicating to the respondent the results of the review and suggesting the way forward.

In paragraphs 15 to 19 of the plaint, the respondent complained that: -

> *"15. The said termination notice did not give reasons that led to the termination. It did not mention any Plaintiff's shortfalls that were found during the review to the extent of making the plaintiff unsuitable. Further until 12th July, 2014 the review process was still ongoing and the auditors were still asking for more documents from the plaintiff.*
>
> *16. That plaintiff's efforts for an amicable settlement before the 1st August, 2014 when the newly appointed Distributor starts operation has proven futile.*
>
> *17. The plaintiff has made serious investments in the defendant's products on an understanding that the existing business relationship was solid as that there has never been any complaint from the defendant on the plaintiff's business conduct which the plaintiff failed to address.*
>
> *18. That in the said termination notice neither did the defendant disclose any faults committed by the plaintiff nor afford the plaintiff time to correct the faults, if any. Further, the defendant has not afforded the plaintiff sufficient notice prior to termination considering the amount of investments*

that the plaintiff has undertaken for the defendant's products saie marketing and distribution and that the plaintiff wili lose the impeccable goodwill and customer loyalty it has so vigorously built throughout the years.

19. *That as a result of the defendant's termination, the plaintiff stands to suffer damage and loss to the tune of Tanzania Shillings Twelve Billion and Seventy-Nine Million Only. (Tshs. 12,079,000,00.00) as follows: -*

As we said earlier, after considering the evidence before her, the learned trial judge concluded that there existed an implied distributorship agreement between the parties. She observed that while the appellant had not adduced evidence to prove that the respondent was buying products from Mike Foods & Drinks and Origins Resources Tanzania Ltd as alleged by it, the respondent adduced evidence to prove that though the two companies were direct buyers from the appellant, they left the distribution to be done by the respondent. The learned judge further held that the minutes of joint meetings involving the appellant, the respondent and the two other companies that were direct buyers, tend to prove that the respondent was being recognized as the

distributor. Therefore, the learned trial judge answered part of the first issue in the positive.

However, the trial court concluded that the distributorship was not exclusive, the reason for taking that view being that there was no restriction on the appellant to supply its products to any other dealer in Tanzania, nor was the respondent restrained from selling tobacco products manufactured by other companies. Thus, the answer to the second part of the first issue was in the negative.

In the end, the learned judge accepted the respondent's version that the appellant terminated the contract and did so unlawfully. The respondent complained, and the judge accepted, that it was unlawful termination for the appellant to bring to an end the long-standing business relationship without assigning any reasons and without giving the respondent reasonable notice. The appellant further alleged, and the judge accepted again, that considering the respondent's good track record, it was incumbent upon the appellant to explain to it what was wrong with the business plan it had submitted for review, instead of unilaterally disqualifying it as unsuitable.

The respondent claimed that it suffered damages as a result of the appellant's termination of the contract. In his testimony, PW1 stated in

relation to damages, that, " *Plaintiff has made considerable investments in terms of business infrastructure investments, shops, offices and had to invest, as a condition from the defendant, TZS 800 Million for primary stocks and TZS 300 Million for buffer stock per consignment, payable on order; money that could have been allocated to other business. The company has also made investments in its branches and warehouses in consideration for the defendant's business as enunciated in the Plaint".*

The trial court awarded the respondent TZS 1,600,000,000.00 on capital and stock investment with interest at 15%, TZS 1,000,000,000.00 damages for loss of goodwill, TZS 354, 835, 855.00 for warehouse investments, branch investment and vehicle investments and TZS 280,000,000.00 for investment on stocks. As indicated earlier, that decision did not sit well with the appellant, hence this appeal comprising of 13 grounds. However, we are immediately preoccupied by only grounds 1, 2 and 4. They run as follows: -

> *"1. The trial judge erred in law and in fact by holding that there existed a distributorship agreement between the Appellant and the Respondent.*
>
> *2. the trial judge erred in law and fact by holding that the appellant breached the distributorship*

agreement between the appellant and the respondent.

4. *The trial judge erred in law and fact by finding for the Respondent without supporting evidence.*

We are keenly interested in the first, second and fourth grounds of appeal, because they are relevant to the two main issues, and in any event, the remaining grounds are mainly on the reliefs, which are consequential and shall be looked at later at an appropriate time.

Before us it was Mr. Gasper Nyika, learned counsel, who entered appearance and argued the appeal on behalf of the appellant. Despite the high stakes involved in this case, the respondent did not enter appearance. There was evidence by affidavit taken by the court process server that Kesaria & Co. Advocates, as well as DKM Consultant Attorneys, who were on record as previously acting for the respondent, had been served with notices of hearing, yet they did not enter appearance. Therefore, hearing proceeded under rule 112 (2) of the Tanzania Court of Appeal Rules, 2009, (the Rules), in the absence of the respondent. Mr. Nyika had earlier filed written submissions, which he adopted before highlighting on a few selected areas.

Arguing the first ground of appeal, Mr. Nyika submitted that the learned trial judge erred in concluding that there existed a long-term business relationship between the parties while there was evidence to the contrary. The learned counsel referred to the evidence of Rajesh Davda (PW1) admitting the fact that there was no written contract of distributorship. He also cited the evidence of PW2 to the effect that the respondent was not buying BAT products directly from the appellant, but that his company; Mike Foods and Drinks Limited, was the one supplying it with BAT products. He further drew our attention to the testimony of DW1 who stated that the appellant only started selling its products to the respondent in November 2010 on per order basis, as before that, the appellant was selling its products to MNR Distributors Limited and Origins Resources Tanzania Limited. Concluding, the learned advocate argued that neither the pleadings, nor the evidence on record support the learned judge's conclusion on the issue. He cited the cases of **Hotel Travertine Limited and Two Others vs National Bank of Commerce Limited** [2006] T.L.R 133 and; **Anthony Ngoo & Another vs Kitinda Kimaro**, Civil Appeal No. 25 of 2014 (unreported).

As observed a while ago, grounds 1, 2 and 4 are not only intertwined but are, in our view, very critical. Mr. Nyika submitted, and

we entirely agree with him, that where necessary to deliberate on other grounds, ground 4 will be argued along with each such ground of appeal. This is because ground 4 criticizes the judge's findings allegedly for not being supported by evidence.

We shall first address counsel's arguments on ground 1. With respect to Mr. Nyika, his argument that the evidence on record shows that there was no written agreement of distributorship has hardly any bearing to the issue whether or not there was an implied contract by conduct of the parties, and by extension, whether the learned judge was correct in concluding that there was one. The learned judge concluded from the evidence, that the business arrangement between the parties established existence of an implied distributorship agreement between them. This is what we need to interrogate at this point.

Implied contracts are a creature of the statute. Section 9 of the Law of Contract Act, [Cap 345 R. E. 2019] (the Act) provides: -

> *"In so far as the proposal or acceptance of any promise is made in words, the promise is said to be express; and in so far as such proposal or acceptance is made otherwise than in words, the promise is said to be implied."*

In **Catherine Merema vs Wathaigo Chacha,** Civil Appeal No. 319 of 2017 (unreported), the Court reproduced the following passage from **Combe vs Combe** [1951] I All E. R. 767 which reflects section 9 of the Act: -

> *" The principle as I understand it, is that where a party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance has been made by him, but must accept their legal relations subject to the qualification which he himself has so introduced, even though it is not supported in point of law by any consideration, but only his word."*

In yet another case of **Merali Hirji and Sons vs General Tyre (E.A) Ltd** [1983] T.L.R. 175, the Court concluded that the appellant was the respondent's agent in Mbeya and Tukuyu because "*There was some understanding between the parties regarding selling of tyres of the defendant in Mbeya (sic) and Kyela Districts".*

Back to our case, and considering the entire evidence, did the conduct of the parties create an implied contract between them? The learned trial judge considered as relevant, the correspondences, joint meetings and the fact that one of the officers of the appellant was accommodated in the respondent's premises.

In resolving this fundamental issue, we have decided to consider the relationship between the parties in two lots. The first is the period before 2010, because that year is relevant for several reasons. 2010 is the year PW2 wrote to the appellant notifying it of its decision to cease being an importer of its products. According to PW2, the respondent's own witness, before 2010, his companies were the importers of the appellant's products, and the respondent was left to do the distribution of those products. The evidence of DW1 and DW2 is that 2010 is the year the appellant started direct sale of its products to the respondent.

Was there, prior to 2010, an implied contract between the parties to this appeal? No doubt, as argued by Mr. Nyika, there was a contract between PW2's companies and the appellant, but there was none between the appellant and the respondent, even if it seems, the former was somehow aware of the existence of the latter. The appellant was supplying PW2's companies with its products, and by a separate

arrangement between PW2's companies and the respondent, the latter was the distributor of those products. If we concluded that there was, at this period, a contract between the appellant and the respondent, it would be against the evidence on record and against the principle of privity of contract, which we recently emphasized in the case of **Austack Alphonce Mushi vs Bank of Africa Tanzania Limited & Another**, Civil Appeal No. 373 of 2020 (unreported). The Court stated: -

> *"However, by way of emphasis, we would add that contract, as a juristic concept, is the intimate if not exclusive relations between the parties who made it".*

It is, therefore, inconceivable, that the distributorship relationship between the respondent and PW2's companies before 2010 would form a basis for the respondent suing the appellant, whose direct obligation was to those importers and not to the respondent.

But there is more to it. As submitted by Mr. Nyika, there was evidence from DW1 and DW2, which PW1 did not challenge, that in 2008 the appellant had offered to sign a contract with the respondent, but the latter declined. This is a period when there was no formal relationship between the appellant and the respondent because it is common ground that the appellant was hitherto dealing with Mike Foods

and Drinks Limited; PW2's companies. The totality of all this is that there was neither express nor implied agreement between the appellant and respondent prior to 2010.

The second lot is the period after 2010. On 14th September, 2010 PW2 decided to stop being the sole importer of BAT products and wrote a letter addressed to the appellant (Exhibit P 13), to the following effect-

> ***"RE: CHANGE OF IMPORTING COMPANY FOR TANZANIAN MARKET.***
>
> *Kindly be informed that our company was the sole importer of cigarettes from BAT (K) LTD for the Tanzanian market. At the same time Mohans Oysterbay Drinks Limited was the distributor of the products in the same market for the purpose of ensuring effective and efficient run of the business, we hereby officially notify you from now on, the importation will be done directly by Mohans Oysterbay Drinks Limited for the Tanzanian market.*
>
> *We thank you for the cooperation and understanding. We sincerely believe that Mohans Oysterbay Drinks Limited will be very much efficient and effective in importing as well as distributing BAT products/ brands in the Tanzanian market.*

Yours sincerely

Mike Foods and Drinks Ltd".

We are settled that ours is a duty of construction of the parties' conduct and whether they amounted to conclusion of a contract. It is not an easy task as Cheshire, **Law of Contract**, 11th Edition, 1986, writes at pages 36 to 37: -

> *"Whatever the difficulties, and however elastic their rules, the judges must either upon oral evidence or by the construction of documents, find some act from which they can infer the offeree's intention to accept or they must refuse to admit the existence of an agreement. The intention, moreover, must be conclusive."*

So, we are going to construe the evidence so as to decide whether or not the parties had concluded a contract from 2010. The letter reproduced above, Exhibit P13, has two main significances, in our view. One, it confirms what we have just stated in relation to the period prior to 2010, that Mike Foods and Drinks Limited was the sole importer of BAT products to Tanzania. Two, the letter attempts to promote the respondent as being suitable to take over the contract that was being performed by Mike Foods and Drinks Limited. There is evidence by DW1 and DW2, which again PW1 did not dispute, that in 2011, the appellant

made another proposal for signing a formal contract, and that no contract was ever signed. Our construction of the oral and documentary evidence on this point leads us to the conclusion that by repeating the proposal for signing of a formal contract, it is clear in our view, that it was not the intention of the appellant to be governed by implied terms of the contract, and nothing would be said to have been conclusive as between the parties.

We feel called upon to address the issue, both prior to and after 2010, whether a contract has to be implied when one of the parties insists on concluding a written one. Would one be justified in concluding, in such circumstances, that the parties had intended to be bound by the implied terms of the contract? There have been discussions whether a binding implied contact may be said to have been concluded even when there is evidence showing that the parties intended to sign a formal contract subsequently. In **Air Studio (Lyndhurst) Limited T/A Air Entertainment Group vs Lombard North Central PLC** [2012] EWHC 3162 (QB) which we find persuasive, the Queen's Bench cited the following passage from the case of **Bear Stearns Bank plc vs Forum Global Equity Ltd** [2007] EWHC 1576 (Comm) at [171]: -

"The proper approach is, I think, to ask how a reasonable man, versed in the business, would have understood the exchanges between the parties. Nor is there any legal reason that the parties should not conclude a contract while intending later to reduce their contract to writing and expecting that the written document should contain detailed definition of the parties' commitment than had previously been agreed".

From the foregoing, and having considered the evidence on record, it is our conclusion that the appellant wanted to be governed by the terms of a written contract, which conduct, is inconsistent with the alleged existence of an implied contract. Our conclusion therefore is that the learned judge erred in concluding that there existed a distributorship agreement between the parties. This resolves the first ground of appeal in favour of the appellant.

In paragraph 12 (b) of the Reply to the Written Statement of Defence, the respondent gave her reason for declining to sign the draft agreement, in the following terms:-

" In completion of paragraph 11 (b) above, the Draft Distribution agreement required the plaintiff not to stock or sell any other cigarette brands except the Defendant's products, point

that was vigorously opposed by the plaintiff as that would be in direct contravention of subsisting anti competition laws, rules and regulations".

As we indicated earlier, the learned judge concluded that the distributorship was, nevertheless, not exclusive. Mr. Nyika has submitted that; *"...it is folly for the court to proceed to hold in the same utterance that there existed a breach of the alleged distributorship agreement".* With respect, we find the learned counsel's argument logical and the learned judge's course not quite consistent. If the respondent refused to sign the agreement on the ground that it required her to exclusively deal with the appellant's products, why would she later complain in paragraphs 11 and 12 of the plaint, that the appellant offered the distributorship agreement to another person without assigning any reason and without giving it notice. The truth of the matter is that the respondent was in effect complaining for being denied what it had been offered twice and rejected. Since formation of a contract is a free undertaking, and the respondent having turned down the appellant's offer twice, nothing would preclude the appellant from extending its offer to another person. And the appellant was not thereby obliged to give the respondent any explanation.

Here we wish to examine the Market Review exercise and its relevance, which is what the second issue at the trial was all about. It is what forms the second ground of appeal, whether the trial judge was correct in concluding that the appellant's appointment of another distributor amounted to a breach of contract between it and the respondent. We are aware that the issue of the alleged termination of contract is now moot. Having found merit in the first ground of appeal, that the judge erred in holding that there was a distributorship agreement between the parties, there could not be termination of a non-existing contract. We however wish to observe that Exhibit P9 was merely disclosing to the respondent, the results of the Market Review exercise. We find nothing in it that could be construed as termination of any contract. Therefore, we find merit in the second ground of appeal, because the evidence on record does not support the trial judge's conclusion that there was breach of contract. Incidentally, in view of our foregoing evaluation and finding, the fourth ground of appeal which criticises the trial judge's findings for lacking evidential support, is also meritorious. There was no evidence to prove existence of a distributorship agreement between the parties, nor its breach.

These findings are, in our view, sufficient to dispose of this appeal. Consequently, we need not address the rest of the grounds of appeal which we had earlier promised to deal with at a later stage. We quash the judgment of the trial court and set aside the orders resulting therefrom. The appeal is allowed in its entirety, with costs.

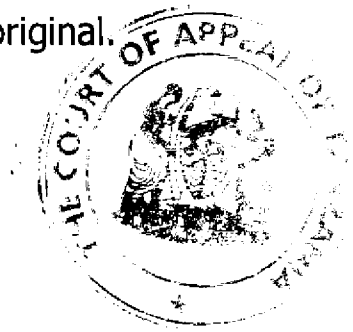
DATED at **DAR ES SALAAM** this 26th day of January, 2022.

F. L. K. WAMBALI
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

I.P. KITUSI
JUSTICE OF APPEAL

The Judgement delivered this 1st day of February, 2022 in the presence of Mr. Gasper Nyika, learned counsel for the appellant and in absence for the Respondent is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL