IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO. 66 OF 2016

(Originating from Civil Case No. 40/2011, Ilala District Court at Samora Avenue)

INDUS PHARMA (PTY).....1ST APPELLANT
CONTINENTAL PHARMA ENTERPRISES LTD.....2ND APPELLANT

VERSUS

MOONA'S PHARMACY LTD.....RESPONDENT

JUDGMENT

The appellant above mentioned is appealing against the decision of the trial court, awarded the respondent a sum of USD 25,000 as compensation for breach of contract. In a memorandum of appeal, the appellant raised four grounds of appeal: one, the trial magistrate erred in law and fact in holding that basing on oral evidence and communication between the parties as evidence of existence of contract between the parties; two, the trial magistrate erred in law and fact in holding that the first appellant terminated the contract by appointing another distributor without evidence to that effect; three, the trial magistrate erred in law and fact

in holding that the respondent was entitled to compensation of USD 25,000 basing on email of 14th day of December, 2010 without having email to that effect; four, the trial magistrate erred in law and fact in granting a remedy which was not prayed/or pleaded in the plaint.

Arguing for the first ground, Ms. Victoria Gregory learned Counsel for the appellant submitted that, there was ample evidence led by DW1 that the respondent did not enter any sole distributor agreement with the first appellant, rather they were doing business of medicine and Moona's Pharmacy was importing medicine from Indus Pharma. That despite the ample evidence by the first appellant (first defendant at the trial court) witness and failure of the respondent to prove the existence of the alleged sole distributorship contract and the finding of the trial court that there was no written contract, the trial magistrate misdirected himself while answering issue number one and held that there was contract between the parties simply because of the alleged email correspondence which was totally denied by the first appellant. On reply, Mr. Dennis Magnus Mdope learned Counsel for respondent submitted that emails which were exchanged between the first appellant and the respondent were official emails, where

parties agreed to have an agency relationship as stated by PW1. That PW1 stated further that the appellant sent him registration fees for the products for the respondent to register the same with Tanzania Food and Drugs Authority (TFDA) and also the registered products were imported by the respondent, who marketed and distributed them on behalf of the first appellant.

Generally speaking, there was no any sort of so called "sole" distributor agreement whether oral or written. A letter reference No. IP/12/01-02 dated 25.11.2001 exhibit P1, is self-explanatory, I quote the whole letter for appreciation,

> *"We take this opportunity to bring to your kind notice that we are manufactures of small volume liquid parenterals (Injections) eye/ear drops and liquid orals/drops for the last 27 years. In addition to well established trade in our country, we have also been exporting the items manufactured by us to Nigeria, Kenya, Liberia and Afghanistan under our label and or under neutral label.*
>
> *We want to feel the presence of our company in your country too. We will appreciate if you join*

hands with us and send us a list of items and the packaging required to enable us to quote the most competitive prices. We are ready to provide the documents, if needed, for registration purpose if any"

I have taken trouble to the quote the whole contents of the letter above, because it was an initial correspondence which formed the basis of a relationship between the parties. Nowhere in the above letter show that the appellant had asked the defendant to be their agent or sole distributor in Tanzania. Even the emails printout exhibit P2 (communicated between 24th to 30th December, 2010) does not show any commitment between parties agreeing the respondent being a sole distributor in Tanzania. The alleged oral or verbal agreement as contended by PW1 at a trial, he did not say as to how, where and when was entered. In his testimony, PW1 stated that he visited the Indus Plants (appellant) in Pakistan to meet the owners and discuss further progress of their mutual benefits. PW1 did not say if at all his visit to Pakistan, included conversation about sole distributorship. A mere fact that the respondent assisted the appellant to register their products to TFDA or that he marketed and promoted the

products, that alone does on itself suffices to say amounted to creating or bestowing the respondent monopoly over appellant's products distributorship in Tanzania. To my opinion, terms of the alleged sole distributorship or exclusivity sales agent if any, ought to be express and clear and not by assumption. In **Eusto K. Ntagalinda vs Tanzania Fish Processors Ltd**, Civil Appeal No. 23 of 2012 C.A.T. at Mwanza (unreported) at page 15, cited **The British Bank for Foreign Trade Ltd vs Novinex LTD** (1949) 1KB 623 that,

> *"...if there is an essential term which has yet to be agreed and there is no express or implied provision for its solution, the result in point of law is that there is no binding contract"*

Herein the terms of the alleged sole distributorship were not proved on a preponderance of probability. The alleged oral agreement, was not pleaded in the plaint. As such there was no binding contract. Therefore, the trial court erred to rule that it was proved on evidence by exhibit P1, P2 and P3 that there was a contract between the parties. As the said exhibit are silent regarding sole distributorship. On similar vein, the trial court erred to rule that the appellant had breached the contract. As there was no binding contract between the

parties. The appellant cannot be said to had breached a contract which was not there in the first place.

That said an award of USD 25,000 have no leg to stand. Besides that, it was not impleaded in the plaint. It is a rule that a court should confine its decision to question raised in pleadings. The court cannot grant a relief which was not pleaded and which does not arise from the facts and the cause of action alleged in the plaint. Herein, the respondent did not claim a relief for payment of USD 25,000 in the plaint. In the plaint, no facts were pleaded regarding promise by the appellant to compensate the respondent the said USD 25,000. The said amount was raised by PW1 when was testifying.

Having premised as above, the findings by the trial court are faulted. An award of USD 25,000/- is set aside.

An appeal is allowed. Each party to shoulder it is costs for this appeal.

E.B. Luvanda
Judge
21.9.2020