

**IN THE HIGH COURT OF TANZANIA
COMMERCIAL DIVISION
AT DAR ES SALAAM**

COMMERCIAL CASE NO.96 OF 2009

M/S SHELY'S PHARMACEUTICALS LIMITEDPLAINTIFF

VERSUS

**M/S MSAFIRI PHARMACEUTICALS &
ASSOCIATES LIMITEDDEFENDANTS**

Dates of Hearing: 5th October 2010 and 3rd & 4th March 2011

Date of the last order: 18/05/2011

Date of final submission: 30/06/2011

Date of judgment: 29/07/2011

JUDGMENT

MAKARAMBA, J.:

This is judgment on the suit the Plaintiff filed in this Court on the 6th day of November 2009 against the Defendants.

Briefly the facts constituting the Plaintiff's case are as follows: The Plaintiff, a limited liability company registered in Tanzania engaged in production and supply of pharmaceutical products and the Defendant, also a limited liability company and agent of the Plaintiff in supplying various pharmaceutical products to customers, executed a **DISTRIBUTION AGREEMENT** in which the Defendant was constituted an agent liable to supply to consumers various pharmaceutical products produced and supplied by the Plaintiff and in return thereof, a commission would be paid

based on sales of products. The said products were to be supplied within the territory as described in the said agreement and which includes the township of Arusha, Moshi and Singida and such other geographical areas as would be designated in writing by the Plaintiff from time to time to be the territory. It was further agreed that, the Defendant should maintain one way bank account at CRDB BANK Arusha Branch Account **No.0780883003** and EXIM BANK LIMITED, Arusha Branch, Account **No.0780883003** on which all cash and cheque deposits realized out of sales of the said products would be effected after every forty five (45) days from the date of delivery of such products to the Defendant. The Plaintiff claims that the Defendant breached the above terms of the Distribution Agreement and is praying for the following orders:-

- 1) Declaratory Orders that the Defendant is in breach of the Distribution Agreement*
- 2) Payment of the sum of **TZS 530,351,247.01** being monies owing by the Defendant to the Plaintiff*
- 3) Payment of interest, at the commercial rate, of 18% p.a from the date the debt fell due, that is, 23^d September, 2008 to the date of payment in full.*
- 4) Payment of interest at the Courts' rate of 12%, from the date of judgment to date of payment in full.*
- 5) Payment of general damages for breach of contract.*
- 6) Costs of this suit.*

7) Any other relief(s) the Honourable Court will deem just and equitable to grant.

The Defendants have denied all the claims of the Plaintiff and contend that the Plaintiff supplied pharmaceutical products to a third party (wholesalers) contrary to the Agreement. The Defendants claim further that the Plaintiff had stopped to supply pharmaceutical products to the Defendant before the expiry date of their agreement. Alternatively, the Defendant raised a counter claim in his Written Statement of Defence against the Plaintiff for the following orders:-

- (a) Declaration that the plaintiff is in breach of the Distribution Agreement*
- (b) Payment of the sum of **TZS 607,130,735.00** being damages and loss as particularized in paragraph 18 herein above.*
- (c) Interest at the rate of 12% on the decretal amount*
- (d) Payment of general damages for breach of contract*
- (e) Delivery of Certificates of Title Nos. 18203 and 9241 to the Plaintiff*
- (f) Costs of this suit*
- (g) Any other or further relief(s) this Hon. Court may deem fit and just to grant*

In this suit, **MR. PETER KIBATALA**, learned Counsel, from the firm of lawyers of **TRUSTMARK ATTORNEYS** advocated for the Plaintiff, while **MR. NGALO**, learned Counsel from **NGALO & COMPANY ADVOCATES** represented the Defendants. At the close of the hearing of the matter, both learned Counsel prayed to file final submissions, which prayer this Court

duly granted. Unfortunately, however, Mr. Ngalo, learned Counsel for the Defendants failed to comply with this order.

At the first hearing of the suit, the following issues were framed and agreed by the learned Counsel for the parties and were accordingly recorded by this Court for the determination of this suit, namely:

- 1. As between the two Distribution Agreements dated 18th March 2004 and 23rd May 2005 respectively, which agreement is valid and binding on the parties?*
- 2. As between the Plaintiff and the Defendant who breached the terms of the Distribution Agreement?*
- 3. Whether or not the Defendant owes the Plaintiff the sum of TZS 530,351,247.01 being money due and outstanding as a result of supply of pharmaceutical products to it by the Plaintiff?*
- 4. Whether or not the Defendant suffered loss of TZS 607,130,735/= as a result of the breach of the Distribution Agreement by the Plaintiff?*
- 5. Whether the Plaintiff was entrusted with the Defendants Certificates of Title Nos. 18203 and 9241 as security for the performance of the Distribution Agreement?*
- 6. To what reliefs are the parties entitled to?*

The Plaintiff brought two witnesses to establish its case; **Mr. Jayesh Shah**, the Marketing Director of the Plaintiff's Company who testified as PW1, and Mr. **Richard Fredrick Olotu**, the Business Manager of the Plaintiff's Company who testified as PW2. The Defendants on their party

fielded three witnesses in defence; **Mr. Sylvanus Paul Maleto**, a businessman dealing with pharmaceuticals who testified as DW1; **Mr. John Paul Lyimo** a businessman dealing also with pharmaceuticals in Moshi who testified as DW2; and **Mr. Joseph Matie** a businessman also dealing with pharmaceutical products who testified as DW3.

PW1, (Mr. Jayesh Shah), who told this Court that he was a Marketing Director of the Plaintiff's Company since 1994 having been promoted from Sales Manager, it was also his testimony that look at the entire sells and market for products of the Plaintiff's Company was his duty and that the relationship between **M/S MSAFIRI PHARMACEUTICAL ASSOCIATES LTD**, the Defendant herein and **M/S SHELY'S PHARMACEUTICALS LIMITED**, the Plaintiff herein, was by way of contract. It was the further testimony of PW1, that **M/S SHELY'S PHARMACEUTICALS LIMITED** (the Plaintiff), was supposed to supply medical products to **M/S MSAFIRI PHARMACEUTICAL ASSOCIATES LTD** (the Defendants) who in turn was supposed to remit payment in accordance with the terms of the contract. PW2 testified further that the major reason the Plaintiff stopped supplying goods to the Defendants is that when the business was ongoing, the Defendants breached the contract. PW1 testified further that in accordance with Article 11.3 of the contract, the Defendants were required to remit payment within forty five (45) days, but sometimes the Defendants remitted payments even after 100 days. PW1 testified further that several times the Plaintiff had been reminded the Defendants without any improvement, so they decided not to continue supplying goods to the Defendant. In the course of his testimony, PW1 tendered an email dated

23rd August 2008 and another dated 29th August 2008, which were admitted by this Court and marked as **Exh.P1** collectively. PW1 testified further that according to Article 11.1 of the contract, all payments were supposed to be effected through the Plaintiff's joint accounts but till the filing of this suit, the amount remaining outstanding was to the tune of **TZS 518,000,000.00** (Say Five Hundred and Eighteen Million shillings), which amount has caused loss to the Plaintiff's Company because its business depends on the circulation of the money arising out of sale of products supplied and therefore by the Plaintiff supplying huge stocks of products to the Defendants without realizing any money, has very much affected the Plaintiff's business.

Upon being cross-examined by Mr. Ngalo, learned Counsel for the Defendants, PW1 testified that the DISTRIBUTION AGREEMENT dated 18th March 2004 was signed by Dr. Maleto on behalf of M/S MSAFIRI PHARMACEUTICAL & ASSOCIATES LTD and as per clause 15.1 of the Agreement, it had to commence on the 1st day of March 2004, and continue in force for a period of one year with option for renewal at the discretion of the Plaintiff for a further period of ten years. In addition, PW1 denied of being aware of the existence of an Agreement dated the 23rd May 2005. Further, PW1 testified that the Finance Department had prepared the Statement of Account which indicates invoices and dates of supplies based on the amount claimed in this Court. PW1 also testified further that according to Schedule 22 of the Agreement, the territory includes the towns of Arusha, Moshi and Singida in Tanzania and that it was among the agreed conditions that **M/S SHELY'S**

PHARMACEUTICALS LIMITED as principal shall not appoint any other agent in those regions for a period of ten years. PW1 testified further that another important condition of the Agreement was security for the performance of the contract whereby clause 3.8 of the Agreement required the Defendants to furnish a mortgage as security valued at **TZS 250,000,000/=**.

Testifying as **PW2, Mr. Richard Fredrick Olotu**, a Business Manager with **M/S SHELY'S PHARMACEUTICALS LIMITED** since 1997 testified that he was based in Arusha taking care of the entire business in Arusha, Moshi and Singida and that he knew very well the Company by the name **M/S MSAFIRI PHARMACEUTICAL ASSOCIATES LTD**. PW2 testified further that till the 30th day of September 2008, **M/S MSAFIRI PHARMACEUTICAL ASSOCIATES LTD** was supposed to pay **M/S SHELY'S PHARMACEUTICALS LIMITED** TZS 530,351,274.01/= (Say Five Hundred and Thirty Million Three Hundred and Fifty One Thousand, Two Hundred Seventy Four Shillings and Zero One Cents) being the outstanding amount as reflected in the Statement of Account prepared from the two accounts maintained by **M/S SHELY'S PHARMACEUTICALS LIMITED**. PW2 testified further that **M/S MSAFIRI PHARMACEUTICAL ASSOCIATES LTD** rented a godown and an office, and paid the rent while **M/S SHELY'S PHARMACEUTICALS LIMITED** was duty bound to pay commissions to **M/S MSAFIRI PHARMACEUTICAL ASSOCIATES LTD**.

On being cross-examined by Mr. Ngalo, learned Counsel for the Defendants, PW2 testified that he (PW2) was transferred from Dar es

Salaam to Arusha in 1999 as a Sales Representative, representing **M/S SHELY'S PHARMACEUTICALS LIMITED** in Tanga, Arusha and Kilimanjaro regions and that he (PW1) knew **M/S MSAFIRI PHARMACEUTICAL ASSOCIATES LTD.** since 2002 when became they were their agent for OTC products (*Over-the-Counter Products*). PW2 testified further that according to him (PW2), these are medicines that may be sold to a consumer without a prescription from a doctor. PW2 testified further that he (PW2) had seen the two contracts between the parties in this case and retained a copy for the same. PW2 testified further that the contract dated the 18th day of March 2004 includes both part of OTC products and other medicine and that this agreement was supposed to be renewed after every one year. PW2 testified further that there are delivery notes for the goods delivered to **M/S MSAFIRI PHARMACEUTICAL ASSOCIATES LTD** but have been left with the Logistic Department. PW2 further testified that there is no any invoice tendered by him (PW2) to support the claim in this case. PW2 testified further that there are two accounts used by the parties in their business transactions, the first being for an outstanding amount from **M/S SHELY'S PHARMACEUTICALS LIMITED** to **M/S MSAFIRI PHARMACEUTICAL ASSOCIATES LTD** and the second account was for an outstanding balance from **M/S MSAFIRI PHARMACEUTICAL ASSOCIATES LTD** to other customers. PW2 testified further that the calculations have been made from the total outstanding amount from **M/S SHELY'S PHARMACEUTICALS LIMITED** minus the total outstanding from **M/S MSAFIRI PHARMACEUTICAL ASSOCIATES LTD**, and that the balance obtained is the amount of money

which has been collected from the account of **M/S MSAFIRI PHARMACEUTICAL ASSOCIATES LTD**. PW2 testified further that the target set by **M/S SHELY'S PHARMACEUTICALS LIMITED** was for TZS 200,000,000/= (Say Two Hundred Million Tanzania Shillings).

Mr. Sylvanus Paul Maleto, a Clinical Officer with **M/S MSAFIRI PHARMACEUTICAL ASSOCIATES LTD** testifying as **DW1** told this Court that he was performing his duty Assistant Medical Officer and that he is running his business at Arusha, Morogoro and Mbeya. DW1 testified further that the shareholders of **M/S MSAFIRI PHARMACEUTICAL ASSOCIATES LTD** are JANET CHARLES, CLAY SILVANUS and NEVIN MALETA and that its Directors are Dr. SILVANUS MALETA, who is also the Managing Director and JANET CHARLES respectively.

DW1 testified further that he (DW1) knew **M/S SHELY'S PHARMACEUTICALS LIMITED** since 1999 and that in 1999 and 2002 they (**M/S MSAFIRI PHARMACEUTICAL ASSOCIATES LTD**) entered into agreements with **M/S SHELY'S PHARMACEUTICALS LIMITED** for selling OTC products. It was the further testimony of DW1 that in 2004 another agreement dated the 18th day of March 2004 was executed between **M/S SHELY'S PHARMACEUTICALS LIMITED** and **M/S MSAFIRI PHARMACEUTICAL ASSOCIATES LTD** and that he (DW1) was among the persons who signed that contract. DW1 testified further that under that Agreement, the principal was **M/S SHELY'S PHARMACEUTICALS LIMITED** while **M/S MSAFIRI PHARMACEUTICAL ASSOCIATES LTD**, as the distributor, became an agent. It was the further testimony of DW1 that this Agreement

commenced on the 1st day of March 2004 and was for a period of one year with an option for renewal at the discretion of the principal. DW1 testified further that the purpose of this Agreement was mainly for selling and distributing **M/S SHELY'S PHARMACEUTICALS LIMITED** (Shelly's) medicine. DW1 testified further that the distributor will be paid monthly commissions based on the sales of the products on the terms set out in the price list as per clause 7.4 of the Agreement dated the 18th March 2004. DW1 testified further that the areas appointed for the distribution of such products were Arusha, Kilimanjaro and Singida. DW1 testified further that as per clause 11.3 of the Agreement, the principal's term of remitting credit to the distributor was strictly within forty five (45) days. DW1 testified further that the previous agreement expired and was renewed on the 23rd May 2005, which as per clause 14 of the Agreement, continued to be in force for eight (8) years with an option to renew at the discretion of the principal for a longer term of not more than ten (10) years. DW1 tendered in Court the Distribution Agreement dated the 23rd May 2005 which this Court admitted and marked as **Exhibit D1**.

DW1 testified further that on the 20th day of April 2009, there was a meeting in Arusha convened between the Marketing Manager-in-Charge of **M/S SHELY'S PHARMACEUTICALS LIMITED**, Mr. J. Shah and Dr. Maleta of **M/S MSAFIRI PHARMACEUTICAL ASSOCIATES LTD** where **M/S MSAFIRI PHARMACEUTICAL ASSOCIATES LTD** agreed that the money which **M/S SHELY'S PHARMACEUTICALS LIMITED** is claiming is correct although there was need for making reconciliation of the same. DW1 testified further that thereafter the contract continued and that it was

then agreed that the amount of money claimed by **M/S SHELY'S PHARMACEUTICALS LIMITED** was not in the hands of **M/S MSAFIRI PHARMACEUTICAL ASSOCIATES LTD** but was in the hands of its (**M/S MSAFIRI PHARMACEUTICAL ASSOCIATES LTD**) debtors. In his testimony DW1 conceded that it is true that as per email **M/S MSAFIRI PHARMACEUTICAL ASSOCIATES LTD** wrote to **M/S SHELY'S PHARMACEUTICALS LIMITED** that **M/S MSAFIRI PHARMACEUTICAL ASSOCIATES LTD** owe **M/S SHELY'S PHARMACEUTICALS LIMITED** money amounting to **TZS 518,000,000/=** but they made a proposal on how to pay such an outstanding amount. According to DW1, that amount was generated since 2004 but unfortunately, **M/S SHELY'S PHARMACEUTICALS LIMITED** did not accept that proposal and decided to stop supplying products to **M/S MSAFIRI PHARMACEUTICAL ASSOCIATES LTD**. DW1 testified further that at the meeting, **M/S MSAFIRI PHARMACEUTICAL ASSOCIATES LTD** agreed to collect only TZS 21,000,000/- (Twenty One Million Shillings), the amount which had been deposited in the credit account of **M/S SHELY'S PHARMACEUTICALS LIMITED** and that the remained outstanding amount was still in the hands of debtors. DW1 testified further that they (**M/S MSAFIRI PHARMACEUTICAL ASSOCIATES LTD**) had entered into negotiation with the Plaintiff on how to collect the money from the debtors and that the Defendants were still planning to pay the outstanding amount. Surprisingly, DW1 further testified, the Plaintiff brought them to this Court to answer the claim set out in the plaint even without serving them with a demand notice. DW1

testified further that the case therefore was premature and that the Plaintiff has to pay them (Defendants) the costs for the salaries for his (Defendant's) staff, costs for hiring godowns and vehicles, and costs of this suit and interest thereof.

It was the further testimony of DW1 that soon after the meeting held in Arusha, **M/S SHELY'S PHARMACEUTICALS LIMITED** started to supply products directly to the other customers in Arusha, Moshi and Kilimanjaro, for example, they supplied to MLATIE MEDICS, MAUA CENTRAL PHARMACEUTICAL, M.M.T PHARMACEUTICALS and JOSEPH MALENGA in Moshi contrary to the Agreement. DW1 testified further that this was wrong because **M/S SHELY'S PHARMACEUTICALS LIMITED** was not supposed to stop supplying products even if there was an outstanding amount before the expiration of ten years. DW1 testified further that in April or May 2008, **M/S SHELY'S PHARMACEUTICALS LIMITED** sold and transferred the majority of shares to a company known as ASPEN FARM CARE AUDIENCE without informing the Defendants, which is contrary to clause 15.3.4 of the Agreement. DW1 testified further that this made the Defendants not to reach the target set by the parties to the Distribution Agreement. DW1 testified further that, **M/S SHELY'S PHARMACEUTICALS LIMITED** stopped supplying goods to **M/S MSAFIRI PHARMACEUTICAL ASSOCIATES LTD** in May 2008 without notice. DW1 testified further that from such situation the Defendants decided to write a letter to **M/S SHELY'S PHARMACEUTICALS LIMITED** complaining to them about the termination of the Agreement without notice. DW1 tendered in court the letter dated the 18th day of July

2009 from the Managing Director of **M/S MSAFIRI PHARMACEUTICAL ASSOCIATES LTD** which was admitted by this Court and marked as **Exhibit D2**. DW1 testified further that they (**M/S MSAFIRI PHARMACEUTICAL ASSOCIATES LTD**) drafted a demand notice dated the 25th day of August 2009 and sent it to the Managing Director of **M/S SHELY'S PHARMACEUTICALS LIMITED** demanding for costs to the total sum of **TZS 865,915,434.00/=**, which they (**M/S MSAFIRI PHARMACEUTICAL ASSOCIATES LTD**) incurred following breach of the contract by **M/S SHELY'S PHARMACEUTICALS LIMITED**. DW1 tendered in Court the letter dated the 25th day of August 2009 which was admitted by this Court and marked as **Exhibit D3**.

It was the further testimony of DW1 that he (DW1) had rented two godowns, one from Mr. SAMWEL LEMA and another from Mr. HONEST MARIKI at a cost of TZS 4,250,000/= per month. DW1 tendered in Court the original agreements entered between **M/S MSAFIRI PHARMACEUTICAL ASSOCIATES LTD** and Mr. HONEST MARIKI which was admitted by this Court and marked as **Exhibit D4**. DW1 testified further that their claim is for the following costs: TZS 625,000/= being salaries paid to security guard; TZS 3,700,000/= times twenty one (21) months being payment of salaries to his staff; TZS 1,800,000/= being payment of salaries to Mr. OSCAR JOHN KITAMBI who is their pharmacist; TZS 270,000/= being payment of electricity charges; and TZS 250,000,000/= being compensation for the termination of the contract as per clause 15.12 of the Agreement dated the 23rd day of May 2005. DW1 also put up a claim for unpaid commission for the month of May 2009

amounting to TZS 6,900,000/- (Say Six Million Nine Hundred Thousand Shillings) and tendered in Court the commission report and summary which was admitted by this Court and marked as **Exhibit D5** collectively. DW1 further made a claim for the payment of TZS 7,600,000/= (Say Seven Million Six Hundred Thousand Shillings) being charges for hiring motor vehicles. DW1 tendered in this Court the agreement for the hiring such motor vehicles (*Mkataba wa Kukodi Magari*) dated 18th December 2004 between **M/S MSAFIRI PHARMACEUTICAL ASSOCIATES LTD** and Mr. KELVIN, particularly for hiring of Toyota Hilux Pickup, Toyota Hiace and Fuso 10 tone truck with registration number T 920 EFD, T275 AGU and T65 AGU, which was admitted by this Court and marked as **Exhibit D6**. DW1 further told this Court that, **M/S SHELY'S PHARMACEUTICALS LIMITED** should return the Title Deeds with numbers 18203 and 8241, and all other document belonging to **M/S MSAFIRI PHARMACEUTICAL ASSOCIATES LTD** for breaching the contract.

On being cross-examined by Mr. Kibatala, learned Counsel for the Plaintiff, DW1 testified that it is true that **M/S MSAFIRI PHARMACEUTICAL ASSOCIATES LTD** is indebted to **M/S SHELY'S PHARMACEUTICALS LIMITED** to the sum of TZS 518,000,000/= although they (**M/S MSAFIRI PHARMACEUTICAL ASSOCIATES LTD**) have actually remitted TZS 21,000,000/= to the credit account of **M/S SHELY'S PHARMACEUTICALS LIMITED**. DW1 testified further that apart from that, there is unsold stock amounting to TZS 65,000,000/- (Say Sixty Five Million Shillings), which was returned to **M/S SHELY'S PHARMACEUTICALS LIMITED**. DW1 testified further under cross-

examination that ASPEN PHARMACEUTICALS did not interfere with or affect in anyway the business of **M/S MSAFIRI PHARMACEUTICAL ASSOCIATES LTD** and that under paragraph 15.33 of the Agreement dated 23rd May 2005, the phrase "*transfer of shares*" does not feature. DW1 however, admitted having been supplied with motor vehicle and other accessories from **M/S SHELY'S PHARMACEUTICALS LIMITED** only for promotional purposes. DW2 further told this Court that **M/S MSAFIRI PHARMACEUTICAL ASSOCIATES LTD** could employ staff even if it could not enter into contract with **M/S SHELY'S PHARMACEUTICALS LIMITED**.

In re-examination, DW1 testified that there is a bank slip and an acknowledgment by the Plaintiff on the payment of TZS 21,000,000/= made by the Defendants through bank. DW1 testified further in re-examination that the agreement for hiring motor vehicles was dated 2004 instead of 2005 because he (DW1) was using the said vehicles even before be given an authority by **M/S SHELY'S PHARMACEUTICALS LIMITED**.

Mr. **John Paul Lyimo** testifying for the defence as **DW2** stated that he (DW2) is a businessman dealing with a pharmacy at Moshi town since 1997. DW2 testified further that he lives at Kiboroloni in Moshi and that he owns a company by the name of MAUA CENTRAL PHARMACEUTICAL and that he deals both as a whole seller and retail shops. DW2 testified further that he has been purchasing products from **M/S MSAFIRI PHARMACEUTICAL ASSOCIATES LTD** in Arusha and from ASTRA PHARMACY in Dar es Salaam and that he knew the company by name of **M/S SHELY'S PHARMACEUTICALS LIMITED** located in Dar es Salaam.

DW2 testified further that he has been doing business with **M/S SHELY'S PHARMACEUTICALS LIMITED** since March 2008 and that in 2008, he (DW2) bought from **M/S SHELY'S PHARMACEUTICALS LIMITED** products worth TZS 500,000/= for which he was issued with a cash receipt dated 20th March 2008 which he tendered in this Court and was admitted and marked as **Exhibit D7**. DW2 testified further that he decided to buy such products from **M/S SHELY'S PHARMACEUTICALS LIMITED** because they were cheap compared to the products from **M/S MSAFIRI PHARMACEUTICAL ASSOCIATES LTD**.

On being cross-examined by Mr. Kibatala, learned Counsel for the Plaintiff, DW2 testified that the receipt admitted and marked as **Exhibit D7** had been issued by one Mr. TIMAN, an officer from **M/S SHELY'S PHARMACEUTICALS LIMITED**, however it was sealed with the seal of the Plaintiff's Company. In re-examination, DW2 testified that he purchased products from **M/S SHELY'S PHARMACEUTICALS LIMITED** in cash and sometimes by invoice.

The third witness for the defence was Mr. **Joseph Aloyce Mlatie** who testifying as **DW3** stated that he is business man operating a pharmacy at Karatu, since 2007 and that he also owns a company by the name of **MLATIE MEDICS & GENERAL SUPPLY**. It was the further testimony of DW3 that he is both a whole seller and also dealing with retail shops and that he has been purchasing products from **M/S SHELY'S PHARMACEUTICALS LIMITED** since April 2008 and was issued with receipt No.0312 dated 1st April 2008 and another receipt No.0325 dated 10th April 2008 which he tendered both in this Court and were admitted

and marked as **Exhibit D8** collectively. DW3 testified further that he has also conducted business with another company by the name of **M/S MSAFIRI PHARMACEUTICAL ASSOCIATES LTD**, purchasing medicines on credit and that he is still indebted to **M/S MSAFIRI PHARMACEUTICAL ASSOCIATES LTD** to the tune of TZS 4,000,000/= (Say Four Million Shillings) for some of the products he purchased on credit but he has now stopped purchasing medicine from **M/S MSAFIRI PHARMACEUTICAL ASSOCIATES LTD** because there is not enough stock for the products they need. On being cross examined by Mr. Kibatala, learned Counsel for the Plaintiff, DW3 stated Mr. Msafiri is his relative.

Such as summarized above is the testimony of witness and the documentary evidence tendered in this Court at the hearing of this suit. It behoves upon me now to consider the issues framed and recorded by this Court for resolving this suit in the context of the evidence on record and the forceful final submissions of learned Counsel for the parties.

As between the two distributions Agreement dated 18/03/2004 and 23/05/2005 respectively, which agreement is valid and binding on the parties? This is the first issue for consideration. In his final submissions, the Plaintiff's Counsel submitted that DW1 acknowledged that **M/S MSAFIRI PHARMACEUTICAL ASSOCIATES LTD** recognizes both sets of agreements as being valid for their commercial relationship. The learned Counsel for the Plaintiff submitted further in his final submissions that in determining the real question, the issue is not what set of agreement is valid but rather what the vital terms of both sets of contracts are and thus

finally the pertinent question is which party by his acts or omissions breached the agreement.

I must admit that having gone through the final submissions by learned Counsel for the parties and the evidence on record, it seems to me that there has been no strong argument fronted on the first issue. The learned Counsel for the parties were busy arguing the rest of the issues framed for resolving this suit at the expense of the first issue which seemingly they completely forgot to address in their submissions.

The testimonies of the witnesses for the Plaintiff was based much on the Distribution Agreement dated 18th March 2004 while the testimonies of the witnesses for the Defendant hinged on both the Distribution Agreement dated **18th March 2004** and **23rd May 2005** respectively. The Defendants accept both agreements as being valid and capable of being relied upon by this Court, while the Plaintiff in its side, only PW1 denied being aware of the existence of the Distribution Agreement dated **23rd May 2005**. At the same time, PW2 told this Court that he is aware of the existence of both Agreements. However, PW1 did not comment anything on the validity of the Distribution Agreement dated **23rd May 2005**. I have also noted that the two Distribution Agreements were a subject for renewal after every year, and that the Distribution Agreement presented to this Court have been executed within an interval of one year, that is 2004 and 2005 respectively. Clearly, the parties were likely at liberty to decide to change terms of their agreement for a further period of time. As rightly submitted by the Plaintiff's Counsel, what is important here is to determine the real question basing on the terms specified in both Agreements. It is

also important in my view, to point out whether these two agreements constitute valid contracts duly enforceable under Tanzanian law. In this regard I have in mind the provisions of section 10 of the *Law of Contract Act* [Cap.345 R.E 2002] which provides as follows:

"All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.....".

Upon going through the Distribution Agreements duly filed in this Court, it is my considered view that they were properly executed according to the law. This Court has not been told that any of the parties to the agreements was forced into concluding them or that none of them was incompetent to contract or it was not for a lawful consideration and lawful object. It is for this reason that I find that both Distribution Agreements, the one dated 18th March 2004 and the other dated 23rd May 2005 which were entered into between **M/S SHELY'S PHARMACEUTICALS LIMITED** and **M/S MSAFIRI PHARMACEUTICAL ASSOCIATES LTD** to be valid for purposes of determining this suit. I so declare and hold that both the Distribution Agreement dated 18/03/2004 and the other dated 23/05/2005 are valid and binding on the parties.

As between the Plaintiff and the Defendant who breached the terms of the Distribution Agreement is the second issue to be determined by this Court. In his final submissions the Plaintiff's Counsel submitted that the Defendants caused the breach of the contract on the following grounds: First, that the Defendants opened and operated parallel accounts with

customers such that proceeds of sales that were to be deposited in Account Number 0780883003 at CRDB Arusha Branch and No.0780883003 at Exim Bank, Arusha Branch were utilized by the Defendants for their own use in violation of the Distribution Agreement. Secondly, that the Defendants failed to credit the Plaintiff's accounts with monies realized from sale of products within 45 days as stipulated in the Distribution Agreement. Thirdly, that the Defendants owed to the Plaintiff, at the time of the institution of the suit, a total of **TZS 530,351,247.01**. In my view, and on the evidence on record, the Plaintiff has failed to prove how the amount of money deposited in Account Number 0780883003 at CRDB Arusha Branch and No.0780883003 at Exim Bank, Arusha Branch was utilized by the Defendants for their own use. There is no iota of evidence on record to justify such claim. The allegation by the Plaintiff that the proceeds of sales that were to be deposited in Account Number 0780883003 at CRDB Arusha Branch and No.0780883003 at Exim Bank, Arusha Branch were utilized by the Defendants for their own use in violation of the Distribution Agreement have legs on which to stand and accordingly they crumble.

As to the second allegation that the Defendants failed to credit the Plaintiff's accounts with monies realized from sale of products within 45 days as stipulated in the Distribution Agreement, I am at one with the submissions by the Plaintiff's Counsel but only to the extent that the Defendants failed to credit the Plaintiff's accounts mentioned herein above with monies realized from sales of products within forty five (45) days as stipulated in Clause 11.3 of the Distribution Agreement dated 18th March

2004. Accordingly, the same ground was supported by the testimony of both PW1 and DW1 that it was strictly in their agreement that the Defendants were required to credit the accounts after 45 days from the date of delivery of the goods. The delay by Defendants has clearly been proved by the Plaintiff when DW1 acknowledged before this Court in the course of his testimony that they (the Defendants) owe money to the Plaintiff for the products they (the Defendants) were supplied by the Plaintiff in 2004 and 2005 respectively. It is also my considered view, and as rightly submitted by the Plaintiff's Counsel in his final submissions, that the delay by the Defendants for over two years in effecting payment automatically frustrated the contract and hence entitled the Plaintiff to rescind the contract. This trite legal principle was succinctly restated by the High Court of Zanzibar in the case of **HAJI HASSAN CHIMBO V. MSHIBE IDDI RAMADHANI (1996) TLR 292**. On the reasons I have explained above, this Court finds the Defendants to have been in breach of the Distribution Agreement as covenanted between them.

On their part the Defendants allege that the Plaintiff breached the contract by selling and transferring shares to ASPEN PHARMACARE HOLDING contrary to their agreement. In his final submissions the Plaintiff's Counsel submitted that the question of the transfer of shares by the Plaintiff has not been adequately pursued during the trial. I find that the Defendants have failed to prove their allegation for these reasons. First, in the course of his testimony DW1 clearly stated before this Court that there is no any clause in the Distribution Agreement which provides for the transfer of shares. Secondly, it was the testimony of DW1 at the

hearing that Clause 15.3.3 of the Distribution Agreement dated 23rd May 2005 provides for the transfer of rights and obligations to the agent and not transfer of shares. It is for the above reasons that the allegation by the Defendants that the Plaintiff breached the contract by selling and transferring shares to ASPEN PHARMACARE HOLDING contrary to their agreement stands dismissed.

The Defendants came up with another allegation that the Plaintiff breached the agreement by supplying and selling products to third parties within the geographical zones in which the Plaintiff was prohibited to do so by the Distribution Agreement. I have thoroughly gone through the evidence on record and could not find any proof of supply by the Plaintiff of products to third Parties contrary to the agreement. **Exhibit D7** and **Exhibit D8** explicitly prove that in 2008, **M/S SHELY'S PHARMACEUTICALS LIMITED** supplied products to MAUA CENTRAL PHARMACEUTICAL and MLATIE MEDICS & GENERAL SUPPLY. The Plaintiff cannot deny this fact. The critical question this Court asks itself is this: does the act of the Plaintiff of supplying products to third parties in 2008 within the geographical zones restricted by the Distribution Agreement amount to the breach of contract? The Plaintiff supplied goods to third parties after the Defendants had already breached the contract. The evidence on record show that the Defendants defaulted and were indebted to the products they were supplied with by the Plaintiff even under the Distribution Agreement dated 18th March 2004. It is also on record that the Defendants are in default and are still indebted under the latter Agreement dated 23rd May 2003. **Exhibit D7** and **Exhibit D8** collectively show clearly

that **M/S SHELY'S PHARMACEUTICALS LIMITED** supplied goods to third parties in 2008, which was quite too long from the time when the Defendants defaulted. It is for these reasons that the allegation by the Defendants of the purported breach of the contract by the Plaintiff of supplying products to third parties contrary to their agreement also crumbles and accordingly stand dismissed.

The other allegation by the Defendants is that the Plaintiff has terminated the contract without notice to the Defendants and therefore this amounts to breach of the contract. In my view, in this suit, the question of breach of contract is so fascinating because the Defendants belabor under the assumption that the act of the Plaintiff of stopping to supply goods without giving notice to the Defendants probably amounts to breach of contract, while forgetting that even the Defendants act of stopping to effect payment for the goods they were supplied by the Plaintiff also amounts to breach of contract. The delay or non-payment by the Defendants of money was in all respects clearly a fundamental breach which goes to the root of contract and therefore supersede any other act purported by the Defendants to be a breach committed by the Plaintiff thereafter. It is for the foregoing reasons that the allegation by the Defendants that the Plaintiff has terminated the contract without notice to the Defendants and therefore this amount to breach of the contract also crumbles and accordingly stand dismissed.

The third issue is whether or not the Defendants owe the Plaintiff the sum of **TZS 530,351,247/=** being money due and outstanding as a result of supply of pharmaceutical products to the Defendants by the

Plaintiff. I wish to state here at the outset that the Plaintiff has miserably failed to prove before this Court how they arrived at such figure. In the same vain the Defendants have also has failed to prove before this Court as to whether they have deposited TZS 21,000,000/= with the credit account of **M/S SHELY'S PHARMACEUTICALS LIMITED**. The Defendants never produced any bank pay-in-slip to establish any cash deposit made by the Defendants in the credit account of the Plaintiff as the Defendants allege. In such circumstances, this Court can only rely on the testimonies of PW1 and DW2 as corroborated with **Exhibit D2** and **Exhibit P1** respectively that the Defendants are indebted to the Plaintiff to the total amount of **TZS 518,548,368.00**.

The fourth issue is *whether or not the Defendant suffered loss of TZS 607,130,735 as a result of the breach by the Plaintiff of the distribution agreement*. It cannot be overemphasized here and at the risk of sounding rather repetitive that it is trite law that special damages must be specifically pleaded and proved as was succinctly restated in the case of **ZUBERI AUGUSTINO V. ANICET MUGABE (1992) T.L.R 137** and **MASOLELE GENERAL AGENCIES V. AFRICAN INLAND CHURCH OF TANZANIA (1994) T.L.R. 192**.

The evidence on record does not lead to a conclusion that the Defendants have managed to lead any evidence to prove loss to the amount stated. The Defendants have not told this Court how much they have been earning in their business. Assessment of loss cannot be based on figures which were not clearly substantiated as was clearly stated in **RUGARABAMU ARCHARD MWOMBeki V. CHARLES KIZIGHA AND**

THREE OTHERS (1984) T.L.R 350 (HC). The Defendants in this suit did not prove before this Court on balance of probability how the amount claimed as being loss to the tune of TZS 607,130,735/= has been arrived at. In the absence of such proof, this Court is not in position to award damages for the alleged loss merely basing on the figure given by the Defendants which in my view seems to have been derived from vacuum without any basis for it. Besides, this Court having found the Defendants to have been in breach of the contract, their claim for loss equally must also fail.

In the upshot and for the foregoing the fourth issue whether or not the Defendant suffered loss of TZS 607,130,735 as a result of the breach of the distribution agreement by the Plaintiff is to be answered in the negative.

The fifth issue is *whether the Plaintiff was entrusted with the Defendant's certificate of titles Nos. 18203 and 9241 as security for the performance of the Distribution Agreement.* It is without any doubt that the Certificate of Title Nos. 18203 and 9241 belonging to the Defendants were entrusted with the Plaintiff as security for the recovery of the outstanding amount. Thus, since the Defendants still owe money to the Plaintiff, the Plaintiff is still entitled to be entrusted with the said Certificates of Titles until the Defendants satisfactorily settle payment of the amount due.


The issue whether the Plaintiff was entrusted with the Defendant's certificate of titles Nos. 18203 and 9241 as security for the performance of the Distribution Agreement is to be answered in the affirmative.

The last issue is *to what relief the parties are entitled*. I have already determined that the Plaintiff is entitled to be paid by the Defendants **TZS 518,548,368.77** being the outstanding amount, interests and costs of this suit. As I clearly stated above, there is no basis for awarding general damages.


For the reasons explained above, the counter claim by the Defendants fails and is hereby dismissed. Judgment and decree is hereby entered against the Defendants in the main suit jointly and severally. The Plaintiff in the main suit, **M/S SHELY'S PHARMACEUTICALS LIMITED**, is entitled to the followings reliefs;

- 1) The Defendants shall pay the Plaintiff the total sum of **TZS 518,548,368.77** being monies owing by the Defendants to the Plaintiff;*
- 2) The Defendants shall pay interest on the decretal sum at the commercial rate of 18% p.a. from the date the debt fell due, that is, 23rd September, 2008 to the date of judgment.*
- 3) The Defendants shall pay interest on the decretal sum at the Courts' rate of 12%, from the date of judgment to date of payment in full.*
- 4) The Defendants shall also pay costs of this suit.*

Order accordingly.


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R.V. MAKARAMBA
JUDGE
29/07/2011

Judgment delivered this 29th day of July 2011 in the presence of Mr. Mayenga for Ngalo, Advocate for the Defendant and in the absence of the Plaintiff.


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R.V. MAKARAMBA
JUDGE
29/07/2011

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