THE REPUBLIC OF UGANDA,

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

CIVIL SUIT NO 319 OF 2009

MAVID PHARMACEUTICALS LTD}.....PLAINTIFF

VS

ROYAL GROUP OF PAKISTAN}.....DEFENDANT

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

JUDGMENT

The Plaintiff is a company incorporated and carrying on business in Uganda. The Defendant is a corporate entity incorporated in Pakistan. The Plaintiff filed this action against the Defendant on 27TH of August 2009 for immediate payment of US$62,093.79 or its equivalent in Uganda shillings being the purchase price of goods paid for but not used, US$5075 or its equivalent in Uganda shillings for freight charges, Uganda shillings 600,160/= charges for destruction of the goods, supervision thereof, storage, clearing agency fees and transport thereof, general damages for breach of contract and costs of the suit.

The Defendant denied the claim by averments in the written statement of defence.

The relevant facts in this suit are not controversial. The Plaintiff is represented by Lex Uganda Advocates and Solicitors Counsels Edmund Wakida and Richard Latigo. The Defendant on the other hand is represented by Counsel Andrew Bwengye of Messieurs MMAKS Advocates. Prior to MMAKS advocates the Defendant was represented by Impala legal advocates and consultants. In the joint scheduling memorandum signed by Counsels for the Plaintiff and the Defendant filed on court record on 11 September 2013, the agreed facts disclosed by the pleadings are that the Plaintiff was authorised by the Defendant to produce one of its products called 'Semodex Ointment' for sale in Uganda. Secondly upon the Plaintiff ordering for the raw materials that

were shipped under documentary credit terms of payment and on arrival in Uganda, the Plaintiff duly paid for the materials.

Additional facts are sufficiently covered in the written address of Counsels. In May 2008, the parties executed a memorandum of understanding for the Plaintiff to manufacture 'Semodex Ointment' under licence by the Defendant who is the trademark owner of the product. It was agreed that the Plaintiff would pay a sum of US$62,093 .79 as the cost of the raw materials. The terms of the transaction were to be met under terms of credit through the Plaintiff's banker, Orient Bank Ltd. In August 2008, the Plaintiff received the goods and paid the freight cost and additional expenses in the freight charges. The Plaintiff manufactured trial batches of the product and submitted trial batches of the product for approval to the National Drug Authority (NDA). The Plaintiff maintains that in November 2008 NDA deferred approval and requested the Plaintiff to clear several issues with the samples submitted. In February 2009 the Defendant cancelled the memorandum of understanding under which the authority to manufacture was granted. In March 2009 the Plaintiff invited the Defendant to collect its raw materials or else they would be destroyed. The Plaintiff filed this suit in 2009.

On the other hand the Defendant's Counsel gave a different perspective to the facts. According to the submissions of the Defendant's Counsel, the Defendant authorised the Plaintiff to manufacture the pharmaceutical product "Semodex ointment" under an undated memorandum of understanding signed only by the Defendant's general manager marketing Mr Syed Tariq Ali. The Defendant relies on the terms of the memorandum of understanding which I will consider in due course. The shipped raw materials and packaging materials were received and trial batches manufactured and submitted to the National Drug Authority for approval in August 2008. NDA declined to approve the manufacture of 'Semodex Ointment' in November 2008 and advised the Plaintiff to rectify certain anomalies observed in the samples submitted before permission to proceed to the next stage was granted. The Defendant asserts that no action was taken by the Plaintiff thereafter until the Defendant through its then lawyers notified the Plaintiff in a letter dated 17th of February 2009 of its cancellation of the authority to manufacture the Semodex ointment. The Plaintiff through its lawyers requested the Defendant's lawyers in a letter dated 25th of March 2009 to advise the Defendant to collect the pharmaceutical ingredients and

packaging materials that were supplied for the manufacture of ‘Semodex Ointment’ within seven days. The Plaintiff’s suit was then filed on 27 August 2009.

The following issues were agreed for resolution namely:

1. Whether there was breach of contract?
2. If so, whether the Plaintiff is entitled to the full sum of US$62,039.79 as the cost of the raw materials?
3. What remedies are available to the parties?

Whether there was breach of contract?

On this issue the Plaintiff's Counsel submitted that the Defendant conceded that there was a binding contract between the parties. Under the contract, the Plaintiff was given authority to manufacture the ‘Semodex Ointment’ for the Defendant. In other words, by admission of the contract, it is not in dispute that the Defendant received payment of US$62,093.79. This is supported by exhibits P1 2, 3, 4, 5, 6, and 7. The Plaintiff commenced the manufacturing process and submitted samples of the product to the National Drug Authority (NDA) to certify the samples of the product as worthy for production and human consumption. When NDA checked the samples submitted by the Plaintiff and responded by letter dated 11th of November 2008 admitted as exhibit P 14. In that letter they wrote inter alia that the product was not recommended for manufacture at the moment. The required the Plaintiff to address certain anomalies at the earliest before permission to proceed to the next stage is granted. The Plaintiff's Counsel submitted that it was within the knowledge of both the Plaintiff and the Defendant that the execution of the contract was subject to regulatory approval in Uganda by NDA. It was the opinion of NDA that at the time it checked the samples, there were three issues to be addressed as listed in exhibit P 14. The issues required time to address just that it took time to produce the samples. The issues were:

1. The batch number, date of expiry and manufacture were not easily legible and the batch coding equipment did not match with the label.
2. The containers did not effectively close tightly, iodide sublimed off the product which may affect the contents of the product.

3. The raw material analytical report for batch number 040750, results for solubility test did not reflect the specifications tested for.

From the evidence the Plaintiff's Counsel submitted that before the Plaintiff could work on resolving the issues raised by NDA, the Defendant cancelled the authority by its letter of 17th of February 2009 admitted as exhibit P 15.

In the premises Counsel submitted on the principles to determine breach of contract. He submitted that breach of contract is a legal cause of action in which a binding agreement is not honoured by a party to the contract by non-performance or interference with the other party's performance according to Black's Law Dictionary 8th Edition page 200. The breach may be due to failure to fulfil contractual promise, inform the other party that he or she would not perform his duty in the contract or by conduct be unable to perform the contract.

In this case the breach of contract occurred by determination of the memorandum of understanding between the parties. The Defendant had by conduct not honoured its obligations by non-performance or interference with the Plaintiff's performance. Counsel relied on H.G Beale, WD Bishop and MP Furmston, Contract – Cases and Materials, 3rd Edition page 13 where the learned authors wrote that contractual liability is based on the Defendant's failure to perform an undertaking or promise. The promise may be express or the court may infer one from the circumstances, but a promise is one of the essential elements of contractual liability and if the court finds that the Defendant did not promise anything, there can be no contractual liability. Counsel referred to the case of Victoria Laundry (Windsor) Ltd versus Newman Industries Ltd, Coulson and Company Limited (third parties) [1949] 2 KB 528. In that case it was held that "in order to make the contract breaker liable under either rule it is not necessary that he should actually have asked himself what loss is liable to result from a breach. As has often been pointed out, parties at the time of contracting contemplated not the breach of the contract, but its performance. It suffices that, if he had considered the question, he would as a reasonable man have concluded that the loss in question was liable to result."

It was the express promise by the Defendant that the Plaintiff had the authority to manufacture the ‘Semodex Ointment’ and it sent a letter cancelling the authority copied to NDA. The only conclusion is that the Defendant took away the promise made under the contract and is liable for

breach for not honouring its obligation by non-performance or caused interference with the Plaintiff's performance.

The Plaintiff's Counsel further relied on the testimony of PW1 Hajji Suleiman Bukenya and that of PW2 Adam Kakande, an audit consultant. PW1 testified in cross examination that the 'Semodex Ointment' had originally been on the Ugandan market but had been deregistered in 2003. It was only reintroduced due to the tireless efforts of the Plaintiff. As a contract manufacturer the Plaintiff was under obligation to follow guidelines set by the manufacturer and a batch manufacturing record. DW2 Zam Namwesesa, a pharmacist testified that the pharmaceutical Manufacturing industry required the manufacturer of the product to check whether the raw material formula will produce the desired effect. According to documentary evidence, the Defendant supplied the Plaintiff with several analytical reports for the raw materials. These analytical reports contain the record of ingredients. The manufacturer has to produce test trial batches of the product which are submitted to the regulator NDA for approval. Without the approval of NDA the product cannot be put on the market. The Plaintiff manufactured the trial batches and submitted them to NDA. The approval was deferred as NDA noted some issues which are required rectification. Before the Plaintiff could rectify, the Defendant terminated the authority it had given to the Plaintiff.

In exhibit P 15 it may never be known the reason for cancellation of the memorandum of understanding because none was given. In paragraph 3 of the written statement of defence of the Defendant, it is averred that it had revoked the authority because the Plaintiff had failed to manufacture the drug to the requisite standards within the agreed period and was instead tarnishing the trade name and quality of the Defendant's product. The Defendant adduced no evidence in support of the averment in paragraph 3 of the WSD. The Defendant thought it fit to cancel the authority and should be penalised for breach by its own act which deprived the Plaintiff of the benefit of the contract.

Counsel submitted that the basic principles for damages for breach of contract is that the injured party is entitled as far as money can do, to be put in a position he would have been had the contractual obligation been properly performed. He is entitled to the benefit of the bargain. Counsel relied on the cases of **Hedley versus Baxendale (1854) 9 Exch 341; Victoria laundry**

versus Newman industries Ltd [1949] 2 KB 528; and Huxley Electronics and Construction Ltd versus Forsyth [1996] AC 344 per Lord Bridge.

The Plaintiff's Counsel submitted that the Plaintiff and Defendant entered into an agreement for the Plaintiff to manufacture a pharmaceutical product under licence by the Defendant. The Plaintiff paid for all the raw materials amounting to US$62,039.79 and manufactured trial batches which were submitted to NDA. NDA deferred approval of the product and requested the Plaintiff to address some outstanding issues. Before the issue could be addressed, the Defendant Counsel the authority it and given to the Plaintiff to manufacture the said products. The Plaintiff also incurred some expenses. The memorandum of understanding was required but the Plaintiff for the licence to manufacture the Semodex ointment. Upon withdrawal of the licence, the Defendant is liable for breach of contract and should have reasonably foreseen that the Plaintiff would suffer loss.

In reply the Defendants Counsel submitted that it is not true that the Defendant does not dispute the receipt of US$62,093.79. The memorandum of understanding exhibit D1 provides for payment of US$62,039.79. Counsel contended that the matter would be considered in detail under issue number two. On the submission that the cancellation of the licence of the Plaintiff amounted to breach of contract, this is a fundamental departure from the pleadings. In paragraph 4 (vi)-(viii), the basis for breach of contract averred in the plaint is that the Defendant supplied defective, worthless and/or substandard raw and packaging materials, not the cancellation of the memorandum of understanding. The law is that a party is expected and is bound to prove its case as covered in the pleadings. In **Interfreight Forwarders (U) Ltd versus East African Development Bank** and the judgment of Justice Oder JSC at page 9, it is held that issues are formed the basis of pleadings. A party is bound to prove the case alleged by him and as covered in the issues framed. He will not be allowed to succeed on the case not set up by him and be allowed at the trial to change his case and set up a case inconsistent with what was alleged in the pleadings except by way of amendment of pleadings.

Alternatively, the Defendant’s Counsel argued that the termination of the memorandum of understanding did not in any way interfere with the Plaintiff’s performance of the contract and neither was it an act in breach of contract.

It was an implied term of the contract that the manufacture of 'Semodex Ointment' as a pharmaceutical product was subject to the regulatory approval of NDA. Other terms were also implied under the contract. This included the quality standard to be adhered to in the manufacture of the product set by NDA. It was critical that the 'Semodex Ointment' as a pharmaceutical product for distribution in the Ugandan market had to be manufactured according to the standards required by NDA. It was further an implied term that a reasonable notice may be given by other party in terminating the memorandum of understanding.

The letter of NDA of 11th of November 2008 14 the trial batches according to the grounds mentioned in the Plaintiff's submissions. DW1 Mr Mohammed Ashraf, the Defendant's general manager in charge of procurement testified that the Defendant only supplied the blank labels without but members, manufacturing and expiry dates which were to be printed on by the Plaintiff once the manufacturing had been concluded. Secondly the date of manufacture and expiry was filled in by the manufacturer being the Plaintiff after the products were ready for packaging and not the supplier of the raw materials. Thirdly it was the absolute and sole duty of the Plaintiff to ensure that the containers used in the process of manufacturing were tightly closed to prevent evaporation and subliming and evidently it was not the Defendant's duty. Lastly the Defendant is not aware of batch number 040750 that was queried by NDA and the batch number does not appear in any of the and the analytical reports submitted by the Plaintiff to NDA along with the application for approval of production of Semodex ointment. This testimony of DW1 stood up to cross examination.

DW2 on the other hand as the manufacturing pharmacists testified that the batch manufacturing record does not indicate any batch number which makes the batch of the finished product untraceable. Save the manufacturing dispensing sheet does not indicate the board members of the raw materials described therein and this means that the Defendant's company's raw materials were never used in the process of production of Semodex ointment. The batch manufacturing record was not signed by all operators including the quality controller involved in the manufacturing process of Semodex ointment. The batch manufacturing record presented to the court in evidence is therefore incomplete. The responsibility for formulating the batch manufacturing record is that of the manufacturer and not supplier of the raw materials. A batch manufacturing record cannot be compiled where the raw materials used in the production of the

product are rejected by the QC of the manufacturer. In this case the Plaintiff claimed that it used part of the raw materials for manufacturing Semodex ointment. The documents presented to the court also suggest that the raw materials were never tested by the Plaintiffs QC and this is a requirement before raw materials can be used in the process of production of a pharmaceutical product.

There was therefore a glaring deficiency with the manufacturing of the product. The Plaintiff's oral testimony during cross-examination indicated that the Plaintiff was in the process of rectifying the anomalies. This does not salvage the situation. No evidence was adduced suggesting that the Plaintiff took any action to rectify the anomalies. It followed that the Plaintiff's performance of the contract was substantially defective and amounted to breach of the condition under the contract to manufacture to the standard or quality set by NDA. Where there is breach of the condition under the contract, the innocent party has a right to rescind the contract according to the case of **Sihra Singh Santokh vs. Faulu Uganda Ltd HCCS 517 of 2004**. Furthermore Black's Law Dictionary defines a rescission of a contract to mean to abrogate, annul, avoid or cancel the contract. Particularly it means nullifying a contract by the act of a party. The right of recession is the right to cancel the contract upon the occurrence of certain kinds of default by the other contracting party. The Defendant's action of terminating the memorandum of understanding was an act in the rescission of the contract which is a legally accepted act and is not in breach thereof. Furthermore there was a reasonable notice of termination of the memorandum of undertaking for failure by the Plaintiff to rectify the anomalies for about three months. In the premises the Defendant acted within the confines of the contract and the Plaintiff has no basis for claiming that the Defendant is in breach of the contract. Issue number one or to be answered in the negative.

In rejoinder the Plaintiff's Counsel submitted that according to the brief facts submitted by the Defendants Counsel, the value of raw materials was US$24,104 and an amount of US$30,000 would be included in the pro forma invoice against the Plaintiff's old D/A dues. In that case, the amount of the claim would be US$54,104 which is less than the US$62,039.79 claimed by the Plaintiff. The Plaintiff's Counsel expressed discovers by the view of the Defendant because in the written statement of defence paragraph 3 (b) the contention of the Defendant is that it is not true that the cost of raw materials was US$62,093. The actual price was US$22,381, the difference

between two prices being the over invoiced amount to recover the Plaintiff's outstanding invoices. It is averred that this fact was supported by the contents of the memorandum of understanding under clause 4 thereof and this is reflected in the customer balance of the team statement attached. So the question according to the Plaintiff's Counsel is what the Defendant was advancing?

It is clear that what is admitted by the Defendant is that the Plaintiff paid US$62,093.79 as the cost of raw materials. The customer balance detailed statement indicates that this amount was received by the Defendant. The Defendant in an inexplicable manner attempted to split the amount into two as averred above. The contention by the Plaintiff is that the raw materials were worthless as they could not be used at all and once the memorandum of understanding was cancelled, the Defendant was called upon to collect the raw materials.

To the submission that reliance on cancellation of the memorandum of understanding as the basis of the claim amounts to a fundamental departure from the pleadings, is absurd considering that it was pleaded. A careful perusal of the plaint in paragraph 4 and 5 and 6 leaves no doubt that the matter was pleaded.

As regards the submission on the three implied terms in the letter of NDA exhibit P 14, other than the fact that the memorandum of understanding was cancelled prematurely, the rectification of the issues raised by NDA was dependent on the subsistence of authority under the memorandum of understanding. For instance item (b) of exhibit P14 dealt with the packaging containers not closing tightly and thereby causing iodine to sublime. It is not arguable that such an issue had to be addressed by the Defendant rectifying the containers it had supplied for the packaging.

The terms that the Defendant has submitted on in the memorandum of understanding relate to the quality standard to be adhered to in the manufacture of 'Semodex Ointment' as set by NDA. Secondly it was critical that 'Semodex Ointment' as a pharmaceutical product for distribution in Uganda had to be manufactured according to the standards so set. Thirdly reasonable notice may be given to either party in terminating the memorandum of understanding.

With regard to approval of the final product, the Defendant was aware that NDA approval was a requirement. The standard however would not be met when the raw materials were short of the required standard. Secondly when the trial batches were manufactured, NDA raised technical issues which needed addressing. Without the Plaintiff being possessed of the authority to address those issues, it could not remedy the issues raised by NDA. Thirdly the implied term of reasonable notice is a fallacy. The Defendant has not shown anywhere that it gave the Plaintiff any notice that it will terminate the authority under the memorandum of understanding.

The evidence of DW1 Mr Mohammed Ashraf was that it was the duty of the Plaintiff to ensure that the containers close tightly to prevent evaporation and subliming. The argument is flawed for the simple reason that the packaging materials were prefabricated and supplied to the Plaintiff.

Additionally the Plaintiff's Counsel submitted that there is no dispute that the Defendant is the trademark owner of ‘Semodex Ointment’ and that it supplied the raw material and granted the Plaintiff authority to manufacture the product. According to the Plaintiff the Defendant supplied the batch manufacturing record exhibit P 19. According to DW1 P 19 was supplied by the Defendant and sent to the Plaintiff as a guide for its manufacturing process. Even though the Plaintiff was the manufacturer, it could not be part from exhibit P14. The letter appears not to question the quality of the product. So the question to answer is how the Plaintiff then suffered loss.

The evidence of DW 2 contained in paragraph 32 of the written testimony is that NDA did not reject or fault the raw materials in its letter but rather the finished product highlighting anomalies in the product owing to faulty production process. If the Plaintiff had rectified these anomalies and reapplied, NDA would have approved the registration and manufacturing of Semodex ointment. Consequently even if there was a fault with the Plaintiff's processes, the rectification of anomalies and re-application to NDA could only be done during the subsistence of the authority granted by the Defendant. Once the authority ceased to exist, NDA was notified of the cancellation, the Plaintiff was left helpless. This was confirmed by DW1 who testified that once the memorandum of understanding was cancelled, they did not expect the Plaintiff to continue.

The cancellation of the memorandum of understanding was done without reason and as such the Defendant's submissions on cancellation based on alleged breach of a condition are untenable.

The Plaintiff's Counsel further submitted that under contract law, a right of recession and the right of termination have the practical effect of bringing the contract to an end. The causes for the discharge of the contract are different. Rescission ordinarily applies in cases of mistake, fraud or lack of consent and the contract is treated as never having come into existence and the parties are placed to their positions before the contract was made. By termination the injured party may accept the repudiation of the contract as a breach going to the root of the consideration. By the acceptance it is discharged from the remaining unperformed contractual obligations and may bring an action for damages but the contract itself is not rescinded. To terminate the contract means it is a contract prior to it being fully performed by the parties. To terminate the contract means to end of the contract prior to its being fully performed by the parties. In other words prior to the parties performing all of the respective obligations as required by the contract, the duty to perform these obligations ceases to exist.

The term rescission as sometimes been used to include termination. The court should look at the mutual understanding of the parties at the time of entering into the contract. In other words, rescission and termination are not interchangeable terms. In the instant case, the Defendant was malicious and had bad faith in the practice of cancelling the memorandum of understanding. The Defendant had received all the money for the raw materials and the Plaintiff was in possession of the raw materials. If it was for any reason other than malice/bad faith, it could have been possible that the Defendant would have given the Plaintiff the opportunity to resolve the issues raised by NDA and possibly declined to make an additional supply of the raw materials and packaging products. Counsel submitted that in the instant case the termination of the contract was wrongful and was in itself a material breach of the contract. It was not enough that the Defendant had assumed or in fact that the Plaintiff's performance of the contract was substantially defective. In the case of Sihra Singh Santokh vs. Faulu Uganda Ltd HCCS 517 of 2004, where the contract contains no indication on its face of the status of the terms, the trial court must review the contract within the context of its extrinsic circumstances to determine the intention of the parties. On the question of notice as regards the mission of the memorandum of understanding, the Defendant has attempted to make a case that the Plaintiff was given reasonable notice prior to

termination. It is wrong for the Defendant to assume notice. Notice is a legal concept in which a party is made aware of the legal forces affecting their rights, obligations or duties. Counsel relied on Black's Law Dictionary 8th Edition page 1094 for the meaning of notice. Notice cannot be assumed where none has been given. Furthermore the testimony of DW1 is that no reason was given for cancellation of the memorandum of understanding as can be discerned in exhibit P 15.

Resolution of Issue 1 as to whether there was breach of contract between the parties?

This issue was framed at the scheduling conference on the 19th of September 2013. It requires considering whether either any of the parties was in breach of contract.

I have carefully considered the submissions of Counsel on the first issue whether there was a valid contract between the parties and whether there was breach of contract. The question of whether there was a valid contract between the parties was conceded and was no longer an issue because the Defendant relies on having given reasonable notice of rescission of the said contract on the assumption that there was a valid and subsisting contract between the parties.

What is left to be considered is whether there was breach of contract?

It is an agreed fact that the Plaintiff was given authority to manufacture 'Semodex Ointment' by the Defendant. The terms of the agreement to manufacture 'Semodex Ointment' as a pharmaceutical product is primarily contained in a memorandum of understanding exhibit D1. It is the primary document relied upon by the Defendant as the basis of the relationship between the Plaintiff and the Defendant. It is the Defendant's defence that it cancelled the memorandum of understanding which gives authority to the Plaintiff to manufacture Semodex ointment. The Defendant's first line of defence is that the Plaintiff's submission that the Defendant breached the contract was a departure from the pleadings and cannot be sustained.

I have carefully considered the plaint. The Plaintiff's action against the Defendant is for immediate payment of US$62,093.79 or its equivalent in Uganda shillings being the purchase price of goods paid for but not used. The claim includes freight charges of US$5075, storage charges, clearing agency fees and transport thereof, general damages for breach of contract and costs of the suit.

The Plaintiff's case is that it had received raw materials from the Defendant to manufacture ‘Semodex Ointment’ and commenced on manufacturing samples for regulatory authority analysis. Thereafter the regulatory authority rejected the samples. The Plaintiff notified the Defendant of the non use of the raw materials for failure to meet the standard requirements set by the National Drug Authority. The Defendant reacted by writing a letter revoking the authority to manufacture. Subsequently the Defendant since the revocation of the authority failed or ignored to refund the Plaintiff’s money paid for the worthless raw materials and packaging materials and the Plaintiff had to incur destruction and supervision charges thereof and other incidental costs. Paragraph 5 avers that the Defendant's conduct was wrongful and amounted to a fundamental breach of the contract of sale of goods in as far as the goods were not fit for the purpose for which they were intended. As a result of the Defendant's actions, the Plaintiff avers that it suffered loss and damage and continued to plead particulars of special damage as well as claiming other remedies.

On the face of it the Plaintiff’s case is about alleged fundamental breach of the contract. Secondly the Plaintiff alleged that this was because the goods were not fit for the purpose. I therefore do not agree that the Plaintiff did not plead the breach of contract per se. The Plaintiff pleaded breach of contract and related it to the further pleading that the goods were not fit for the purpose.

Issues for determination arise from pleadings under order 15 rules 1 of the Civil Procedure Rules, issues arise where a material proposition of law or fact is affirmed by one party and denied by the other. The material propositions are those propositions of law or fact which the Plaintiff must allege in order to show a right to sue or a Defendant must allege in order to constitute a defence. Thirdly it is provided that each material proposition affirmed by one party and denied by the other shall form the subject of a distinct issue. Order 15 rule 1 (5) of the Civil Procedure Rules requires the court after the reading of the pleadings to ascertain what material propositions of law or fact the parties are at variance and proceed to frame and record issues accordingly. As far as the defence is concerned, the Defendant averred that it authorised the Plaintiff to manufacture the ‘Semodex Ointment’ and while the Defendant exhibited the agreement setting out the terms of each party, the Plaintiff refused to sign the same. The memorandum of understanding was never exhibited by the Plaintiff and is of no legal basis.

Secondly they dispute the price of the raw materials. The Defendant inter alia also alleged that it was the Defendant's duty to print the date of expiry and manufacture. In response to the allegation that the raw materials were not fit for the purpose, the Defendant averred in the written statement of defence that the raw materials supplied by the Defendant had been verified by NDA and the Plaintiffs quality controller and found to be of the required quality. The Defendant denied that the raw materials supplied by the Defendant were defective or substandard. Finally on the question of breach of contract, the Defendant avers in paragraph 3 (q) of the written statement of defence that it revoked the Plaintiff's authority to manufacture because the Plaintiff had failed to manufacture the drug to the requisite standards and within the agreed period and instead was tarnishing the trade name and quality of the Defendant's product. The question of whether the revocation frustrated the contract or amounted to breach of contract arises directly from the facts constituting the cause of action but was never pleaded as a specific cause of action. In those circumstances is there a cause of action for breach by revocation of the memorandum of understanding? In the case of Attorney-General v Oluoch [1972] 1 EA 392 Spry Ag P held at page 394 that: "In deciding whether or not a suit discloses a cause of action, one looks, ordinarily, only at the plaint (Jeraj Shariff & Co. v. Chotai Fancy Stores, [1960] E.A. 374) and assumes that the facts alleged in it are true. Furthermore in the Supreme Court decision in **Attorney General vs. Tinyefunza Const.** Appeal No. 1 of 1997 Judgment of Wambuzi, C. J relied on Mulla on the Indian Code of Civil Procedure to define a cause of action between pages 18 – 19 of his judgment where he held:

> "On the authorities referred to us, I find useful the definition given by Mulla on the Indian Code of Civil Procedure, Volume 1, and 14th Edition at page 206. The learned author says:
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> A cause of action means every fact, which, if traversed, it would be necessary for the Plaintiff to prove in order to support his right to a judgment of the court. In other words, it is a bundle of facts which taken with the law applicable to them gives the Plaintiff a right to relief against the Defendant. It must include some act done by the Defendant since in the absence of such an act no cause of action can possibly accrue. It is not limited to the actual infringement of the right sued on but includes all the material facts on which it is founded. It does not comprise evidence necessary to

prove the facts but every fact necessary for the Plaintiff to prove to enable him to obtain decree. Everything which if not proved would give the Defendant a right to an immediate judgment must be part of the cause of action. It is, in other words, a bundle of facts, which it is necessary for the Plaintiff to prove in order to succeed in the suit. But it has no relation whatever to the defence which may be set up by the Defendant, nor does it depend upon the character of the relief prayed for by the Plaintiff. It is a media upon which the Plaintiff asks the court to arrive at a conclusion in his favour. The cause of action must be antecedent to the institution of the suit."

The pleadings bring out clearly several factual and legal controversies. The legal controversy include whether there was a valid contract between the parties on the basis of failure of the Plaintiff to execute the memorandum of understanding. Both parties abandoned this issue on the concession of the Defendant that raw materials were supplied to the Plaintiff and the Defendant indeed granted the Plaintiff authority to manufacture Semodex ointment. Both parties relied on the memorandum of understanding which was undated and not signed by the Plaintiff but the relied upon by both parties.

The other controversy that arose from the pleadings is clearly whether the Defendant supplied substandard products which led to the rejection of the manufactured sample products for approval by NDA. To a certain substantial measure the submission of the Plaintiff's Counsel hinged on the revocation of the memorandum of understanding and not only on alleged substandard quality of the raw materials supplied by the Defendant. The question of substandard nature of the raw materials remained material issue in considering whether it was the basis of the rejection of the application for permission to manufacture Semodex Ointment. The further submission of the Plaintiff's Counsel on the basis of the evidence is that it is undisputed that NDA in their letter exhibit P14 dated 11th of November 2008 did not approve the samples provided by the Plaintiff for manufacture and marketing in Uganda. The submission hinged on the grounds for rejection of the samples. While this remained for determination as to who is responsible thereby the question of revocation of the memorandum relates to the defence of the Defendant and is still a matter in controversy. If the court finds that the rescission was in breach or frustration of the contract would this give a right of remedy to the Plaintiff? The question of rescission was pleaded as a fact constituting the Plaintiffs cause of action in paragraph 4 (vi),

(vii) and (viii) of the plaint. The summary of the above paragraphs of the plaint are that the Plaintiff notified the Defendant of the non use of its raw materials for failure to meet the standard requirements set by the National Drug Authority which had requested it to address the concerns of the regulatory authority. Secondly the Plaintiff instead received a letter from the Defendant's advocates revoking the authority to manufacture the "Semodex ointment" and the Plaintiff reiterated its earlier demands to the Defendant collected its materials. Thirdly the Defendant had since revocation of the authority failed or ignored to refund the Plaintiffs money paid for worthless raw and packing materials not collected. The question of revocation of the authority of the memorandum of understanding is clearly one of the grounds alleged against the Defendant for the remedies sought. In my opinion the nature of the pleadings is sufficient to consider the issue of whether the revocation frustrated the Plaintiff from further rectifying the matters raised by the National Drug Authority. The Plaintiff averred in paragraph 4 (vi) of the plaint that the Defendant had either to address the concerns of the regulatory authority or collect its raw materials and refund the purchase price but it simply ignored the Plaintiffs demand.

One of the grounds for rejection was that the batch number, date of expiry and manufacture were not easily legible and the batch coding equipment does not match with the label. The controversy that remained was whether the packaging material was supplied by the Defendant and could not be rectified by the Plaintiff. I do not need to consider this issue because it is subsumed within a wider issue of the revocation of the memorandum of understanding after receipt of exhibit P14. It is apparent from the written statement of defence that the Defendant alleges that the Plaintiff is responsible for the manufacture of substandard samples for evaluation and was also accused thereby of tarnishing the image of the Defendant.

I have carefully considered the relevant correspondence which is not in dispute both in the pleadings and in the testimony of witnesses from both sides. Starting with the grounds for rejection of the manufactured samples by National Drug Authority (NDA), this is contained in exhibit P14 which is a letter by the Executive Secretary/Registrar dated 11th of November 2008 of National Drug Authority addressed to the Plaintiff. The letter was on the subject of "introduction of new products: ‘Semodex Ointment’ 28G Mavid Pharmaceuticals Kireka."

Exhibit P14 writes as follows:

"The documents submitted for introduction of the product has been evaluated Vis-à-vis the sample product submitted. The following are the recommendations:

1. The batch number, date of expiry and manufacture are not easily legible and the batch coding equipment does not match with the label.
2. The containers do not effectively close tightly, iodine sublimes off from the product which may affect the contents in the product.
3. The raw material analytical report for batch number 040750, results for solubility test to not reflect specification tested for.

The product therefore is not recommended for manufacture at the moment; please address the above anomalies at your earliest before permission to proceed to the next stage is granted."

As for the batch number, date of manufacture and expiry, the issue is that they were not legible. I agree with the Defendant that the batch number, date of manufacture and expiry are to be inserted by the manufacturer and not the Defendant. The question of the batch coding equipment could not be determined as no evidence was led by either party as to whose responsibility it is. However on the second requirement that the containers do not close tightly, the controversy is about who is responsible for the containers to close tightly. According to the submissions, the Plaintiff asserts that the containers are prefabricated by the Defendant and the Defendant is responsible. On the other hand the Defendant denies responsibility or knowledge for batch number 040750. I will deal with that controversy by considering the evidence. Before that it is undisputed that in exhibit P 15 the Defendant through its lawyers Messieurs Bitangaro and Company Advocates wrote a letter dated 17th of February 2009 cancelling the memorandum of understanding.

In the letter the said lawyers indicate that they acted on behalf of the Defendant and in paragraphs 2 and 3 write as follows:

"Our client hereby notifies you that it has cancelled the authority given to you by our client to manufacture one of our client's products namely 'SEMODEX OINTMENT'.

The authority given to you under an undated memorandum of understanding which it did not execute hereby stands revoked. We attach a photocopy of the memorandum of understanding for your ease of reference.

Yours faithfully,

Bitangaro & Company Advocates…"

The letter was addressed to the Plaintiff and copied to the Defendant as well as the Executive Secretary of the National Drug Authority Kampala. Attached to the letter is the memorandum of understanding. The terms of the memorandum of understanding shows that it was intended to be between the Defendant who agreed to ship raw materials for 'Semodex Ointment' manufacture and the Plaintiff on the following conditions:

"1) As per agreement Royal group is supplying raw materials and packaging materials of 'Semodex Ointment' to Mavid Pharmaceutical Industries Ltd.

2) RG is supplying goods in the raw form @ US$ 0.3013 FOB Karachi per bottle 28 gms to factory.

3) RG will dispatch 2,228 kg (80,000 bottles) raw & printing material to MPI by end of June 2008 for onward production. This R/M (2o' fcl) container will ship in June 08.

4) The payment terms will be D/A 90 days for R/M goods US$24,104 and an amount of US$30,000 would be included in the pro forma invoice against old D/A dues of MP. This amount will be against L/C at 90 days. As the pro forma invoice will be US$0.6763 per bottle F.O.B Karachi (included O/I amount)..."

The memorandum of understanding is undated and was executed by the General Marketing Manager of the Defendant. It was not signed by the Plaintiff's managing director. It is however conceded that the Defendant supplied the raw materials.

The Plaintiff submitted that the cancellation of the memorandum of understanding made it impossible for it to rectify the defects pointed out in the letter of NDA exhibit P14 of 11th of November 2008 which required the Plaintiff to address the specified defects at the earliest before permission to proceed to the next stage is granted.

What happened between 11th of November 2008 being the letter of the NDA and the revocation of the memorandum of understanding dated 17th of February 2009? Even before answering that question, the contents of exhibit P 15 does not specify the grounds for the cancellation of the memorandum of understanding. The letter cynically refers to the MOU as an undated memorandum of understanding which the Plaintiff did not even execute. It however goes ahead to write that it stands revoked.

I have accordingly reviewed the evidence on the matter. The Plaintiff's managing director Mr Suleiman Bukenya testified as PW1 and a second witness a certified Public accountant Mr Adam Kakande testified as PW2. The Defendant called two witnesses namely Mohammed Ashraf general manager in charge of procurement of the Defendant as DW1 and Zam Namweseza, a pharmacist working with Abacus Perenteral Drugs Ltd, as DW2.

PW1 agreed with the memorandum of understanding and relied on it for the testimony that the Defendant agreed to supply raw materials and packaging materials for the Plaintiff to manufacture the Semodex ointment. The Defendant supplied a batch manufacturing record for Semodex ointment. The Defendant shipped the raw materials according to the agreement in which the Plaintiff was to pay for the freight and clearance. The Plaintiff cleared the container on 22 August 2008. The Plaintiff proceeded to manufacture trial batches to be submitted to NDA for evaluation and permit purposes according to exhibit P13. Exhibit P13 is a letter dated 18th of August 2008 addressed to the Executive Secretary of NDA being submission of dossier for new product. It informs NDA that pursuant to permission granted to manufacture new products, the Plaintiff submitted manufactured trial batches of the new product to be manufactured and batch manufacturing records for analysis and evaluation.

The response of the NDA is dated 11th of November 2008 exhibit P14. PW1 testified that on 24 November 2008 the Defendants illegally terminated the local technical representative status of the Plaintiff according to the e-mail written by the Counsel of the Defendant. Subsequently on 17 February 2009, the Defendant cancelled the authority of the Plaintiff to manufacture the 'Semodex Ointment' under the memorandum of understanding. PW1 was cross examined extensively about the transaction between the Plaintiff and the Defendant. In this testimony in cross examination, he contended that the Defendant did not respond on the question of the

standards pointed out by NDA by the time they revoked the local technical representative status of the Plaintiff. From the evidence I am satisfied that the Plaintiff tried to contest the change of status through revocation of its LTR status. This was between November 2008 and December 2008. According to DW1 the NDA did not reject or fault the raw materials supplied by the Defendant but rather sampled the manufactured products produced by the Plaintiff independently. It was the sole duty of the Plaintiff to ensure that the containers used in its processes of manufacturing were tightly sealed so as to prevent evaporation and evidently the duty was not on the Defendant. He maintained that the samples were rejected owing to the poor sealing, packing and printing done by the Plaintiff and its employees, agents or workers. He testified in paragraph 23 of his written witness statement that the Plaintiff failed to manufacture the 'Semodex Ointment' to the requisite standards and within the agreed period and therefore the Defendant revoked the authority to manufacture to protect its integrity and trade name and quality of the product.

I have duly considered the evidence on cross-examination of DW1 on the matter. He testified that when they found out about the rejection of the samples, they revoked the LTR status of the Plaintiff. He agreed that no reason was mentioned in the letter of cancellation of the memorandum of understanding. He further testified that they found out about the anomalies when the Plaintiff filed this suit. He testified that the agreed time for manufacture was between two and three months. The cancellation was because he had not produced the products. He contended that if the raw material was available, it will take about 30 to 40 days to manufacture the product. The batch manufacturing record is prepared by the Defendant. In re-examination he maintained that the Plaintiff never contacted the Defendant about the containers not closing tightly.

DW2 agreed that if the Plaintiff had rectified the matters pointed out by NDA in its letter exhibit P14, the Plaintiff would have been allowed to manufacture the product.

The grounds for revocation advanced by the manager of the Defendant DW1 are that the Plaintiff failed to manufacture within a period of a maximum of three months. It is true that the goods were cleared in August 2008 having been received some time in July 2008. Documents were submitted together with manufactured samples to NDA by the Plaintiff on 18 August 2008

immediately after receiving the goods. The authority only responded on 11 November 2008. The Plaintiff was the local technical representative of the Defendant and was authorised to manufacture the Semodex ointment. According to the terms of the memorandum of understanding which are the terms that apply to the contract according to the conduct of the parties, the Defendant was required to supply raw materials and packaging materials of 'Semodex Ointment' to the Plaintiff factory to produce the product and distribute it in the Ugandan market. The memorandum of understanding in clause 1 thereof provides that the packaging material would be provided by the Defendant.

The product could not be distributed in the Ugandan market without the approval of the National Drug Authority. According to exhibit P14 in a letter dated 11th of November 2008 the Plaintiff was required to rectify the issue of containers not closing effectively or tightly. It is clear from the memorandum of understanding that the Defendant was responsible for providing the packaging material.

As for the batch number, date of expiry and manufacture not being easily legible and the batch coding equipment not matching with the label, it is not apparent who was responsible for failure to have an easily legible and batch coding equipment not matching with the label. Was it a problem of the printing equipment? What was contained in the packaging material supplied by the Defendant?

Another controversy as a matter of fact is whether the Plaintiff reported the issue of refusal to license the Plaintiff to manufacture the 'Semodex Ointment' according to the letter of NDA dated 11th of November 2008 exhibit P14, to the Defendant. The managing director of the Plaintiff testified that he reported the matter and did not get a feedback. The Plaintiff was an agent of the Defendant on the matter of manufacture of the Semodex ointment. This is also apparent from the testimony of DW1 that the Plaintiff was tarnishing the image of the Defendant. Whatever the case may be, exhibit P14 was supposed to be rectified by the Plaintiff with the joint effort of the Defendant. As far as the containers not closing effectively is concerned, the packaging material was supplied by the Defendant.

I have further considered the raw material analytical report for batch number 040750 which batch was disowned by the Defendant both in the pleading and in the evidence of DW1. It is

written that the results for solubility test do not reflect the specifications tested for. The specifications are provided by the Defendant. The Plaintiff had obtained initial clearance for the manufacture of 'Semodex Ointment' from NDA. Subsequently the Defendant supplied the Plaintiff with necessary raw materials after the Plaintiff had paid for the same. PW1 testified that the Defendant remained the registered owner of the trademark and license holder of Semodex with the NDA. He testified that it was impossible for the Plaintiff to go ahead and manufacture the 'Semodex Ointment' without authority. Consequently on 25th of March 2009 the Plaintiff through its advocates wrote to the Defendant advising that since they had revoked the memorandum of understanding, they should go ahead and collect the worthless raw materials and packaging materials. This is in exhibit P 16 a letter from Kiwanuka and Karugire Advocates. The letter of the said advocates advises the Defendant through its lawyers to collect the pharmaceutical ingredients and packing materials that were supplied for the manufacture of SEMODEX OINTMENT. The letter followed the revocation of authorisation for the manufacture of 'Semodex Ointment' in a letter of the Defendant dated 17th of February 2009 already referred to above. In that letter the subject title is "Cancellation of Semodex Memorandum of Understanding". The lawyers threatened to hold the Defendant responsible for all damages and costs occasioned by the revocation.

In their submissions the Defendant used the word recession for the revocation and the Plaintiff's Counsel submitted that the letter of revocation did not amount to rescission. According to **Halsbury's Laws of England 4th edition reissue volume 9 (1) paragraph 986,** the term rescission in general is the name given to a process whereby an existing contract is brought to an end and the effects of its existence are cancelled or terminated. However it is noted that the terminology is somewhat imprecise due to its use in a number of different situations. In the case of **Buckland and others v Farmer & Moody (a firm) [1978] 3 All ER 929** Buckley LJ at page 938 held that:

> "The word 'rescind' may be used to describe the effect of the sort of relief that is normally granted where a contract has been obtained by fraud, misrepresentation or on some other ground which vitiates its character as a contract, where the court thinks it right to annul a contract in every respect so as to produce a state of affairs as though the contract had never been entered into. But it is often used to describe the consequence of

acceptance by one party to a contract of a repudiation of the contract by another party by breach of some essential term of the contract. ...

'To say that the contract is rescinded or has come to an end or has ceased to exist may in individual cases convey the truth with sufficient accuracy, but the fuller expression that the injured party is thereby absolved from future performance of his obligations under the contract is a more exact description of the position.'

In **Mussen v Van Diemen's Land Co ([1938] 1 All ER 210 at 215, [1938] Ch 253 at 260)** Farwell J pointed out that the word is capable of two meanings."

I have further considered the several situations in which a party may rescind the contract. I do not agree with the Plaintiff's Counsel that rescission remedy only applies before the contract is performed. There are situations where one party may elect to bring the contract to an end and the court can determine whether the other party is guilty of a breach. The words used by the Defendant were revocation of the memorandum of understanding. According to **Black's Law Dictionary 8th Edition page 1332** rescission is the unilateral unmaking of the contract for a legally sufficient reason such as the other parties material breach or a judgment rescinding the contract. It is written that rescission is generally available to a non-defaulting party and is accompanied by restitution of any partial performance and restoring the parties to the pre-contractual positions. It also applies to agreements to discharge all remaining duties of performance and terminated the contract. Other terms are "rejection" and "repudiation" as well as "revocation". A further definition by Osborn's Concise Law Dictionary 11th edition defines rescission as abrogation or revocation.

"Most typically, the termination of the contract, either by the act of the parties or the court, whether for breach of contract, mistake or misrepresentation (q.v.). It is only possible if restitution is feasible. In equity, it means restoring the parties to the position they would have been in had there been no contract. Law, the effect is to relieve the parties of any further obligation to perform the contract."

Using the terms employed as the unmaking of the contract unilaterally by one of the parties, the question here is whether the Defendant was justified in revoking the contract. For that reason I

have reviewed the memorandum of understanding to consider the obligations of either party. On the face of the memorandum of understanding which is what the Defendant purported to revoke, the Defendant was required to supply raw materials and packaging material of 'Semodex Ointment' to the Plaintiff. Secondly the Plaintiff undertook to produce the product and distribute it in the Ugandan market. The Defendant was required to supply the goods in a raw form FOB Karachi and at a specified price per bottle of 28 g to the Plaintiff factory. They were required to dispatch 2228 kg or 80,000 bottles raw material and printing material to the Plaintiff by the end of June 2008 for onwards production. The payment terms were specified.

The memorandum of understanding makes no mention of the fact that the Plaintiff is the local technical representative of the Defendant under the National Drug Authority Act. It does not indicate on what terms the Plaintiff was supposed to manufacture the Semodex ointment. The Defendant alleges failure to perform by the Plaintiff as the grounds for the rescission or revocation of the contract. According to the **Law of Contract Sixth Edition by G.H. Treitel** at page 569 failure to perform may not amount to breach because there is some lawful excuse for non-performance. According to the learned author, one of the excuses for non-performance by one party is failure by the other party to perform his part. An excuse for non-performance may also be provided by a supervening extraneous event. If a party has an excuse for non-performance, his refusal to perform is not in general a breach even though he did not rely on the excuse or even know of it at the time of the refusal (see Treitel (supra) at pages 628 - 630).

Coming back to the facts of this case, the Plaintiff was required by exhibit P 14 which is the letter National Drug Authority dated 11th of November 2008, to address the anomalies mentioned at the earliest before permission to proceed to the next stage is granted. The Plaintiff was required to rectify printing of the batch number, date of expiry and manufacture. Secondly the batch coding equipment did not match with the label and this had to be rectified. As to the containers not effectively closing tightly, it required the containers which were supplied by the Defendant to be worked on. It is a question of fact that the Plaintiff could not operate without permission from NDA. There was therefore by 11 November 2008 an intervening factor which rendered manufacture of 'Semodex Ointment' impossible. The manufacture of 'Semodex Ointment' could only be done with the permission or consent of the National Drug Authority. In those circumstances the failure to manufacture the 'Semodex Ointment' within the period

advanced by the Defendant was frustrated at that material time. That frustration could have been temporary if the matters raised by NDA were rectified.

The facts also demonstrate that the Plaintiff had paid for the raw materials in the terms stipulated in the memorandum of understanding. After revocation of the licence of the Plaintiff to manufacture the Semodex ointment, the Plaintiff could not go ahead to rectify the problems identified by NDA in their letter dated 11th of November 2008 exhibit P 14. Until otherwise rectified, the Plaintiff had no **permission** to manufacture the Semodex ointment. It follows that the question is whether the Defendant's defence that the Plaintiff did not act within time to rectify the issues raised by NDA should be upheld. The first plausible answer is that the rectification in terms of supply of tightly closing bottles required the intervention of the Defendant. I do not believe the testimony of DW1 that the issue was failure of the Plaintiff to seal the bottles properly. For that reason I have again considered the Defendant's written statement of defence. In paragraph 3 (f) of the written statement of defence the Defendant avers that the rejection of the application to manufacture was not occasioned by the raw materials but by manufactured products, independently manufactured by the Plaintiff. Secondly that it was the Plaintiff's duty to ensure that the containers using the process of manufacturing were tightly closed to prevent evaporation. In paragraph 3 (q) the Defendant averred that they revoked the Plaintiff's authority to manufacture the Semodex because the Plaintiff had failed to manufacture it to the requisite standards and within the agreed period.

The ground of the revocation averred by the Defendant was not due only to substandard work of the Plaintiff as alleged but also due to alleged failure to manufacture within the stipulated time. The facts speak for themselves. The drug could not be manufactured within the stipulated time because NDA required the Plaintiff to rectify certain matters such as the batch and expiry date as well as the labelling of the product. The Defendant's further maintained that they are not aware of batch number 040750 that was queried by NDA. I have perused the analytical reports referred to in the trial bundle. None of them relates to batch number 040750. The batch number is referred to in the letter of NDA and not the Plaintiff's pleadings. It is not a matter in controversy in this suit and it cannot be established at this stage whether it relates to products imported by the Plaintiff from the Defendant.

I do not agree with the Defendant's defence because they relied on delay in manufacturing rather than failure to manufacture to the requisite standards. In any case, the issues raised by NDA required the joint efforts of the Plaintiff and the Defendant. That being the case, the question of being unable to manufacture to the requisite standard is not the sole responsibility of the Plaintiff. I will further elaborate on this point later on. Consequently, the Defendant's defence on the pleadings is that what was rejected by NDA were not the raw materials supplied by the Defendant but the sample manufactured products independently manufactured by the Plaintiff. The evidence shows that some of the queries relate to the marketing containers. Secondly the batch coding equipment did not match with the label. It is not clear who is responsible for the batch coding equipment. Even if the Plaintiff was responsible for the batch coding equipment, paragraph 2 of the grounds for rejection clearly indicates that the containers do not effectively close tightly. The NDA faulted the containers which were supplied by the Defendant. The Defendant is therefore responsible for the faulty packaging materials. I preferred the version of the NDA to the testimony of DW1 that it was a question of failure to seal the containers. The report clearly indicates that it was the containers which do not effectively close tightly.

The Defendant had been paid its monies and this is acknowledged or admitted by the Defendant in its written statement of defence paragraph 3 (o) thereof in the following words:

> "The Plaintiff effected payment for the alleged "worthless" raw materials on 15 February 2009 over two months after the purported rejection of the same by the National Drug Authority by the letter dated 11th of November 2008. Copies of the remittances of the payment and the letter from the National Drug Authority are attached hereto and marked "F" and "G".

I have duly perused annexure "F" which is the customer balance details as of 11th of September 2009 of the Defendant. It shows that on 12th of June 2008 the Defendant received US$22,381.29 from Mavid Pharma against Lot# MP-06 LC (total Amount US$62,093). Again on 12 of June 2008 the Defendant received US$39,342.50 against old dues received. Furthermore on 15th of January 2009 the Defendant received US$60,000 from the Plaintiff against lot MP – 07A (MP DA/DP).

Going back to the revoked memorandum of understanding, the parties had partially performed the contract. The Defendant supplied raw materials and packaging material. Secondly the Plaintiff paid for the goods according to the express pleadings of the Defendant referred to above which admits this fact. Under section 57 of the Evidence Act, a fact admitted need not be proved in evidence unless otherwise ordered by the court. The fact that the Plaintiff paid for the raw materials is proved.

Thirdly what was left was the manufacture and distribution of the product in the Ugandan market. The terms for the manufacture and distribution of the product are not contained in the memorandum of understanding and I do not need to deal with it. The only consideration in the memorandum of understanding was payment for the raw materials. The contract was FOB Karachi in which case it was the Plaintiff to meet the freight and clearing charges for the raw materials.

Stretching the argument a little further, if the manufactured products are rejected, the Plaintiff would lose its investment in spending money to invest in the purchase of raw materials and meeting the cost of freight and clearing charges as well as processing the necessary permits for the manufacture of Semodex ointment. When the Plaintiff reached a critical stage in the manufacturing process, the contract was revoked. The revocation by its nature implies that there was a subsisting relationship between the parties. The relationship can only be based on the requirement for the Plaintiff to manufacture and distribute the product in the Ugandan market. Without the permit of NDA, the manufacture and distribution of the product in the Ugandan market could not take place. Secondly the product ‘Semodex Ointment’ is the Defendant's product and had to be manufactured according to its specifications. The Plaintiff’s Counsel submitted that the revocation was in bad faith. Whether it was in bad faith or through apprehension that it image was being tarnished, the revocation frustrated the Plaintiff from doing anything further to manufacture after paying the Defendant and therefore led to economic loss to the Plaintiff.

I am further mindful of the law that the product could not be manufactured without licence of NDA. The National Drug Policy and Authority Act Cap 206 laws of Uganda impose strict laws and regulations on the manufacture of drugs. Under section 38 no person shall manufacture any

drug or preparation which is not included on the national formulary unless the drug or preparation is approved by the Authority. Generally the Minister under section 39 has authority by statutory instrument to make regulations limiting persons who may manufacture any drug or preparation and the premises in which they may be manufactured and otherwise controlling their manufacture. Regulation 18 of the National Drug Policy and Authority (Issue of Licences) Regulations Statutory Instrument 206 – 3 prohibits manufacture of drugs without authority. It provides that no person shall engage in the business of manufacturing classified drugs unless he or she has obtained a licence to do so. Under regulation 19 manufacturing is carried out under the direct supervision of the registered pharmacies with the support of a suitably qualified personnel such as pharmacists, pharmacy technicians and dispensers. Quality control is under a qualified pharmacist with the support of suitably qualified personnel such as pharmacy technicians and chemists. More relevant to the controversy is the keeping of records of a pharmaceutical manufacturer.

Regulation 21 requires a pharmaceutical manufacturer to keep comprehensive records of all batches of starting materials and ingredients, including source, batch numbers, and expiry dates, certificates of analysis and any other relevant documents and samples of starting materials which are to be retained. Under regulation 22 quality control is under an independent adequately staffed qualified personnel.

The batch manufacturing record exhibit P 19 for ‘Semodex Ointment’ gives the formulation ingredients of ‘Semodex Ointment’ as well as the packaging materials. Because the Plaintiff was required to act under strict control of a regulatory regime but also act as an agent of the owner in manufacture the preparation under a trade mark standard, the Defendant’s revocation after receiving its payment amounted to breach of contract. This is because it amounted to wrongful prevention of performance. According to Treitel (Supra) at page 616 , where the Plaintiff has a contract which provides that the Plaintiff would not be paid until he completes performance and the Plaintiff begins that performance, the Defendant wrongfully thereafter refuses to let him complete, the Plaintiff could not doubt claim damages for breach of contract. Alternatively the Plaintiff can claim a quantum meruit for the work he has done.

It is my humble conclusion that the revocation was not justifiable. The Defendant had received payment from the Plaintiff. The Plaintiff could only act under the authority of the Defendant. The Defendant went ahead to revoke the contract to manufacture and distribute the product denying the Plaintiff the profit the Plaintiff would have made if the contract was executed while at the same time having benefited by having the raw materials paid for. The Defendant has not shown or demonstrated in its defence that it made every effort to rectify jointly with the Plaintiff matters of bringing the intended to manufactured product up to the standard required by NDA. There is no indication anywhere that there was anything wrong with the raw materials. NDA was open to grant the requisite permit to manufacture the 'Semodex Ointment' as soon as the Plaintiff (and the Defendant) remedied the issues raised. In the premises the Plaintiff is entitled to remedies against the Defendant.

Whether the Plaintiff is entitled to the remedies?

I have already held that the Plaintiff is entitled to remedies under basis of resolution of issue number one in favour of the Plaintiff.

In the main submissions the Plaintiff seeks special damages of US$67,168.79 as the cost of raw materials. Secondly the Plaintiff seeks for payment of Uganda shillings 600,160/= in agency fees, transport and storage charges. Thirdly the Plaintiff prays for general damages for breach of contract and interest on the general damages. Additionally the Plaintiff prays for interest at 25% from 9 July 2008 on the special damages till payment in full.

As far as special damages are concerned, the Plaintiff submitted that the damages which the law will not presume to be the consequences of the Defendants act. It depends on the special circumstances of each case. They must be specifically pleaded and proved in evidence both that the loss was incurred and that it was the direct result of the Defendant's conduct according to the case of **Musoke versus Departed Asian Property Custodian Board (Supreme Court of Uganda) reported in (1990 – 1994) EA 419** at page 420. The cost of the raw materials and clearance charges prayed for fall in the category of special damages.

As far as general damages are concerned, the Plaintiff's Counsel submitted that they are for demand monetary aspects of the specific harm suffered by the Plaintiff. It has been shown that

the Defendant Counsel of the authority it ever given to the Plaintiff to manufacture the Semodex ointment. It did not give back the money that the Plaintiff had paid for the more raw materials. The Plaintiff had expected to make earnings from the business transaction in the form of profits.

In reply the Defendant's Counsel submitted that PW2 is not a competent person to conduct a legal audit. The audit report was never tendered into evidence and should be disregarded by the court. The Plaintiff failed to establish the basis in court for breach of contract and is not entitled to any sum. The Defendant's Counsel relied on the memorandum of understanding clause 4 which indicated the payment terms would be documents against acceptance. The value for raw material goods was US$24,104 and an amount of US$30,000 would be included in the pro forma invoice against the Plaintiff's old documents against acceptance dues. No mention was made under the contract for payment of the sum of US$62,039.79. In those circumstances the Plaintiff is not entitled to the full sum prayed for.

As far as general damages are concerned, the Plaintiff did not mitigate its damages arising out of the alleged breach of contract. The raw materials could have been sold or used in the production of the Plaintiffs other pharmaceutical products but instead the continued to lie idle in the Plaintiff's premises.

In rejoinder the Plaintiff's Counsel prayed that the court accepts the report of PW2 was an auditor or testified on the basis of his report which was also admitted. As far as the full amount claimed is concerned, he contended that the Defendants Counsel did not give any grounds why the Plaintiff can only be entitled to the full amount claimed. The Plaintiff relies on the commercial invoice exhibit D5.

On the question of whether the Plaintiff should have mitigated its losses through the sale of raw materials, the argument was misguided because the material was shipped to Uganda for a particular purpose within the knowledge of the National Drug Authority. The option of using raw materials for other products is not available in pharmaceutical manufacturing which was only conducted in a structured manner under the law. It was a registered product with the National Drug Authority and the packaging materials were labelled. They were supposed to be manufactured for Royal Group Karachi Pakistan.

Resolution of issue on remedies:

I have already held that the Plaintiff is entitled to some remedies. The question is what remedies? Secondly I have held that the Defendant admitted that the Plaintiff paid for the raw materials. On the other hand it has been proven in evidence that the total amount paid by the Plaintiff included US$30,000 in the pro forma invoice for old D/A dues. This evidence which is in the memorandum of understanding admitted by both parties as reflecting the terms of the relationship cannot be ignored. In the premises the Plaintiff is awarded the pro forma invoice value of US$62,093.79 less the sum of US$30,000 paid for old D/A dues giving a total of US$32,093.79 as the value of the raw materials.

Secondly the Plaintiff is awarded freight charges of US$5075 for shipping the raw materials which were paid FOB Karachi, Pakistan.

Additionally the Plaintiff incurred Uganda shillings 600,160/= clearing charges and other costs which is awarded to the Plaintiff.

As far as the claim for general damages is concerned, the Defendant's Counsel submitted that the Plaintiff did not mitigate its loss through sale of the product for other purposes. I have carefully considered the submission. The Plaintiff's cause of action arose sometime in March 2009. The plaint was filed on 27 August 2009. The goods were imported in Uganda around August 2008. The testimony of DW1 is that the product had to be manufactured within three months of receipt. Secondly the batch manufacturing record exhibit P 19 which also contained the batch release certificate for 'Semodex Ointment' clearly writes that the shelf life would be two years from the date of manufacture. Thirdly the drug had to be manufactured according to permits granted by the National Drug Authority. Fourthly no evidence was led as to what other use it could have been put to. In the premises the question of mitigation of damage does not arise under the premises of putting the raw materials to other uses. What was required was to rectify issues raised by the NDA.

I agree with the Plaintiff's submissions that the Plaintiff expected to make profit over and above the expenditure it had incurred after the time of the revocation of its authority to manufacture the 'Semodex Ointment' on behalf of the Defendant. I do not have to rely on the testimony of PW2

who concluded that the Defendant owes the Plaintiff US$105,357.21. That is not the Plaintiff's case in this suit. The only question that remains is whether the Plaintiff should be awarded general damages and interest.

The principles upon which general damages are awarded is enunciated in the celebrated East African Court of Appeal case of **Dharamshi vs. Karsan [1974] 1 EA 41** as the common law doctrine of *restitutio in integrum.* The Plaintiff has to be restored as nearly as possible to a position he or she would have been had the injury complained of not occurred. This principle is also spelt out in **Halsbury's laws of England fourth edition reissue volume 12** (1) paragraph 812 by way of definition of general damages as those losses, usually but not exclusively non-pecuniary, which are not capable of precise quantification in monetary terms. They are presumed to be the natural or probable consequence of the wrong complained of; with the result that the Plaintiff is required only to assert that such damage has been suffered. As far as the quantum of general damages is concerned, the principles for award of are laid out by Lord Wilberforce in **Johnson and another v Agnew [1979] 1 All ER 883** at page 896 that general damages are compensatory:

> "compensatory, i.e. that the innocent party is to be placed, so far as money can do so, in the same position as if the contract had been performed."

The Plaintiff went into the business of pharmaceutical products manufacture with the Defendant. The Plaintiff expected profits from the venture but the venture was curtailed at the last minute by the revocation of his licence to manufacture the product. By that time the Plaintiff had invested monies by way of purchasing the necessary raw materials, obtaining the necessary permits to build the initial manufacturing, corresponding with the Defendant and the various authorities on the issue, making efforts to manufacture samples and submitting them for a valuation. The loss to the Plaintiff cannot be quantified exactly. They include loss of business opportunity to market the product for distribution in the Ugandan market as well as earning some money for the manufacture of the pharmaceutical products.

I have not received much assistance in this endeavour of assessment of general damages. It is unknown what the Plaintiff would have earned from the batch of products it had purchased from the Defendant for purposes of manufacture and marketing in the Ugandan market. The Plaintiffs

managing director however was able to demonstrate that the company suffered loss not only of reputation but also could not meet its obligations. In the premises doing the best I can, and having in mind the price of the raw materials, the Plaintiff is awarded US$30,000 as general damages.

Interest

Section 26 (2) of the Civil Procedure Act gives the court discretionary powers in so far as the decree is for the payment of money to order interest at such rate as the court deems reasonable to be paid on the principal sum. This may be from the date of the suit to the date of the decree in addition to any prior date to the institution of the suit as well as further interest from the date of the decree to the date of payment or such earlier date as the court deems fit.

Had the anomalies pointed out by the National Drug Authority been rectified, the product would have been manufactured within three months asserted in the testimony of DW1. Three months from March 2009 would be around June 2009. The Plaintiff prayed for interest at the rate of 25% per month from 9 July 2008. I do not agree with interest prior to the filing of the action which cause of action arose around March 2009.

In the premises the Plaintiff is awarded interest at the rate of 20% per annum on the special damages awarded with effect from August 2009 up to the date of judgment.

Secondly the Plaintiff is awarded interest at the rate of 20% per annum on the aggregate amount awarded in this judgment from the date of judgment until payment in full. Costs follow the event and the Plaintiff is awarded costs of the suit.

Judgment delivered in open court on 24 July 2015.

Christopher Madrama Izama

Judge

Judgment delivered in the presence of:

Andrew Bwengye Counsel for the Defendant

Plaintiffs MD Hajj Suleiman Bukenya in court

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

24/July 2015