IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

Case no: 2199/2011

In the matter between:

MILLCREEK TRADING CC T/A PRO ARM

FIREARM TRAINING ACADEMY Plaintiff

and

PASSENGER RAIL AGENCY OF SOUTH AFRICA

(PRASA) T/A METRORAIL Defendant

Judgment

CHETTY J

[1] The plaintiff instituted action against the defendant based on a breach of contract, claiming R489 072 for loss attributed to what it describes in the particulars of claim as "*lost profit and opportunity*". The plaintiff contends further that it sustained loss from other work that it could have undertaken during the period it was contracted to the defendant, as well as loss of reputation and goodwill. A second claim is for R6580 based on special damages which it paid on behalf of the defendant to the South African Police Services ('SAPS').

Pleadings and background to the action

[2] The plaintiff is a close corporation which carries on business under the direction of its chief executive officer, Mr K Pillay ('Pillay'). Its core business is in the

area of firearm training, including the obtaining of competency certificates in terms of the Firearms Control Act 60 of 2000 ('the Act'). The plaintiff's case is essentially that in July 2008 Pillay was approached by a Mr Ivan Chami ('Chami') who was employed by the defendant at the time, to urgently undertake work on behalf of the defendant in securing competency certificates for its protection officers, who are required to carry firearms as part of their duties. The issuing of a competency certificate is regulated by the provisions of chapter 4 of the Act which provides for an application to be made in the prescribed form, which includes a full set of fingerprints of the applicant. The Act further provides that no licence for a firearm may be issued to a person who does not possess a competency certificate. In light of the defendant's officers not having the necessary certification, it exposed the defendant to prosecution under the Act.

[3] Due to the plaintiff's expertise in the area of processing applications for competency certificates, Chami verbally gave the instruction for this work to be carried out urgently to avert a crisis. The plaintiff commenced work without delay on the basis of this request by Chami, and took fingerprints as well as photographs of the applicants for certification. It also engaged with various service providers for the printing of firearm manuals in respect of each of the firearm unit standards applicable to the protection officers, as well as securing the services of trainers to conduct the necessary training. These various facets of work which the plaintiff contends it undertook at the instance and request of the defendant, will be considered in further detail.

[4] It is common cause that in August 2008 the plaintiff was invited and duly submitted a bid in respect of a tender put out by the defendant for training for its protection officers in terms of the new firearm standards. After submission of an initial quote for services, the plaintiff amended its quote, reducing its price. Despite this, in December 2008 the plaintiff was informed that it had not been successful in its bid. As it transpired the contract was awarded to a company called Thathe Training and Development. The plaintiff was aggrieved at this decision and lodged an appeal, which was unsuccessful.

[5] The essence of the plaintiff's claim is that in accordance with a verbal agreement concluded with Chami, who represented the defendant, it carried out

various work towards the acquiring of the competency certificates, only to have the tender allocated to a third party. It is common cause that there is no written agreement on which the plaintiff relies. Its version is that at all material times it believed that Chami was duly authorised to represent the defendant and that he was authorised to contract on the defendant's behalf. In light of the urgency of the situation, as conveyed by Chami, Pillay carried out visits to various railway stations to meet with the protection officers who were to be processed for certification. The plaintiff acted in good faith and at all times, paid the necessary amounts for the firearm licences to the South African Police Services and thereafter, made arrangements and paid for services associated with and related to the certification process. The plaintiff accordingly contends that the defendant is liable to compensate it for work done and monies paid on its behalf. It is trite that the onus is on the plaintiff to establish the essential requirements for a valid contract with the defendant, including the authority of Chami to contract on behalf of, and bind, the defendant.

[6] While the plaintiff in its particulars of claim did not particularise the amount of damages it claimed, the computation of the loss emerged during the course of the trial from a document (see below) prepared by the plaintiff. It is not disputed that despite demand, the defendant has refused to make payment of the total amount or any other.

DESCRIPTION	UNIT PRICE	TOTAL
• 94 x Fingerprints, Completion of Application Form & Travel	R 250.00	R 23 500.00
• 94 x Colour Prints – 4 Photos Per Person	R 40.00	R 3 760.00
• 94 x Saps Registration	R 70.00	R 6 580.00
• 120 x Five Sets of manuals = 600 manuals (unit stds. 117705,119649,123515,119652,123514)	See attached invoice	R 75 992.40
• 120 x Stationery Packs (incl. Five formative & five Summative assessments)	R 295.00	R 35 400.00
• 120 x Venue & Shooting Range for 32 days (four groups of 30)	R 1 500.00	R 48 000.00

• Facilitator fees for 32 days	R 1 750.00	R 56 000.00
• Moderator & Travel x 8 days	R 2 100.00	R 16 800.00
• Range Officer x 8days	R 1 500.00	R 12 000.00
• Ammunition (Handgun & shotgun)	Combined	R 25 740.00
• Meals & Refreshments	No cost incurred	No cost incurred
Total		**R303 772.40**

[7] The defendant's case is that in July 2008 its protection officers were required to attend a firearm training course in order to comply with new laws and regulations relating to the possession of firearms. The defendant does not concede that it was behind schedule or in a situation of crisis, and contends that it had until 2010 to comply with the applicable standards under the Act. It denies that any delays in the process of certification or training of its officers would have prejudiced it in any way. Consequently, in August 2008 the defendant invited tenders for the firearm training and certification process, of which the plaintiff was among these.

[8] In September 2008, the defendant cancelled the tender process as new specifications in the Act emerged, and it invited service providers to tender afresh. The plaintiff submitted a new bid and after consideration of the bids the tender was awarded to Thathe Training and Development.

[9] In so far as the plaintiff's contention that it contracted with a duly authorised representative of the defendant, this is denied by the defendant. It is contended that even if the plaintiff did engage in discussions or concluded an agreement with Mr Chami, the latter had no authority to enter into any agreements binding the defendant or to make promises of any kind on behalf of the defendant. As to the contention of the plaintiff that it carried out work on behalf of the defendant, this is denied by the latter which pleads that it was not aware of any work being done by the plaintiff during and after the tender process, and had it been so aware, it would have stopped the plaintiff from carrying out such work.

[10] Accordingly, the defendant contends that no legally binding and enforceable agreement had been entered into between it and the plaintiff, and even if the plaintiff contracted with Mr Chami, the latter lacked the necessary authority to do so on

behalf of the defendant. The defendant further specifically pleaded that the procurement of services and goods by the defendant, as a state entity, is regulated by the provisions of the Public Finance Management Act 1 of 1999 ('PFMA') read with s 217 of the Constitution of the Republic of South Africa, 1996. Accordingly, the procurement of goods and services by the defendant in excess of R350 000 had to be undertaken via a competitive bidding process involving the approval of the bid document by a committee; the advertisement of the bid in the Government Tender Bulletin and thereafter, the consideration of the bids by an evaluation committee.

[11] The defendant contends that the plaintiff's CEO, Mr Pillay, was fully aware of the procedures required to contract with the defendant, and knew or ought to have been aware that when it contracted with Chami, that such contract was in inevitably concluded in breach of the PFMA and that it would accordingly be unenforceable.

[12] The plaintiff filed a replication contending that the urgency of the certification process made it impractical for a competitive bid to be undertaken and this justified a departure from the norm. This urgent situation caused the plaintiff to engage specialist expert assistance to resolve the defendant's predicament. In the event of the Court finding that Chami did not have the authority to bind the defendant, the plaintiff pleads that the defendant held out that Chami had the ostensible authority to bind the defendant. In light of the defendant being a large state owned entity, by reason of the *turquand* rule, the plaintiff presumed that internal procedures had been met for Chami to have been given the authority to contract with the plaintiff. In so acting, the plaintiff contends that it was induced by Chami to render its services and therefore the defendant is estopped from asserting that there had been no statutory compliance in concluding the contract, or that Chami had not been properly authorised. As a last resort, and in the event of all other grounds failing, the plaintiff relies on unjust enrichment in respect of the amount of R489 072 in respect of expenses paid on behalf of the defendant.

Analysis of the evidence

[13] Mr K Pillay was called as the plaintiff's key witness. His evidence was that in July 2008 he was contacted by Chami, whom he knew to be second in charge of the defendant's protection services. Chami informed him that he needed to speak to him urgently and met him at the plaintiff's offices. He informed Pillay that the defendant

urgently required assistance in having its protection officers become compliant in terms of the recent amendments to the Firearms Control Act, effective from January 2008. Although these amendments to the regulations were not produced by either party during the course of the trial, as I understood the position, prior to 2008 entities such as PRASA employed security guards or protection officers and issued them with firearms in order to carry out their duties. These were made available on the basis of daily permits issued to the officers. The firearms remained at all times the property of the defendant, but were issued out to protection officers from the defendant's armoury as and when the need arose, and for a period not exceeding the particular shift work by the protection officer.

[14] As I understood the evidence, the new legislative amendments required each protection officer to be individually certified as competent to possess a firearm. There is obviously good reason for this in light of the high number of crimes committed with firearms more importantly, I would assume, to ensure that the person to whom a firearm is entrusted is suitably competent and responsible to possess such a weapon. Accordingly an application process, contemplated in s 6 of the Act had to be undertaken, with each protection officer applying in his or her own name.

[15] According to Pillay, in light of the defendant's protection officers not having the necessary certification, the defendant ran the risk that its officers could be in unlawful possession of firearms, and therefore liable to prosecution in terms of the Act. On the face of it, that contention appears to reflect a correct interpretation of the Act. However, no evidence was led as to whether all of the officers were new applicants, or whether they were applying for a renewal of existing certificates or licences. Pillay testified that he arranged for Chami to meet with the Designated Firearm Officer ('DFO') at Durban Central police station, whereupon the DFO confirmed that it was necessary for the protection officers to be urgently certified. Pillay stated that Mr Chami reverted to him with instructions to commence the application process.

[16] According to Pillay, his mandate entailed the taking of fingerprints of the applicants, their photographs and the completion of application forms for certification. In addition, the defendant would have to give each of the officers the necessary training, which entailed lectures, and thereafter, practical shooting at its range.

Once this process was complete, they would be issued with their competency certificates. During Pillay's testimony on the mandate given to him by Chami, there was nothing placed before me as to what amount the defendant had agreed to pay in respect of the certification for each applicant, or for that matter, how many applicants would have to be processed. This was not pursued under cross examination either.

[17] In my view, this is a crucial omission, as it would suggest from the plaintiff's perspective that it was given an open mandate, without any budgetary constraints, which is a most unlikely scenario. When pressed for details as to the number of applicants changing from 120 to 110, Pillay attempted to avoid blame and stated that this was the duty of Ms R Pillay, his administrative assistant. The absence of any evidence from the plaintiff as to pricing (other than in the submission of its tender) is also relevant to the defendant's contention that any contract in excess of R350 000 was required to follow a competitive bidding process.

[18] Mr Pillay testified that the DFO, after discussion with him and Mr Chami, agreed for Pillay to carry out the task of fingerprinting all of the applicants, where after, all of the prints would be brought to the offices of the DFO, to be downloaded onto the database of the SAPS. In this regard Pillay testified that he had visited the north, south and central depots of PRASA where the protection officers were made available for the taking of fingerprints. In other instances, arrangements were made with the heads of the regional depots for the remaining applicants to be sent to the defendant's head office, where the fingerprinting exercise continued. Once all the fingerprints were taken, Pillay took them to the DFO, and upon payment of the prescribed fee of R70 per applicant, each applicant's details were logged on to the database, to be processed for their competency certificates.

[19] During the course of the trial, I enquired whether the DFO would be called to testify as Pillay's evidence had sought to attribute various components of the fingerprinting exercise to what had been said by the DFO. As it turned out neither the DFO nor anyone from the Firearm Registry office was called upon to testify in relation to the process followed, and the Nett results of any work allegedly carried out by the plaintiff.

[20] Equally important is that the Act calls for applications for competency certificates to be submitted in the "prescribed form". The sum total of the evidence by

Pillay in this regard, if one is to accept his version as being probable, is that he took the fingerprints of each officer as well as their photographs and took these to the office of the DFO where they were captured. No evidence was led by the plaintiff from which it can be ascertained whether what was provided to the DFO was sufficient for the purposes of an application in terms of s 9(2) of the Act. The Court was not given the benefit of sight of any one of the numerous application forms that ought to have been completed on behalf of the applicants.

[21] It is prudent to point out that despite Mr Pillay's prior employment in the SAPS and his numerous qualifications through the Safety and Security Sector Education and Training Authority ('SASETA') and the South African Qualifications Authority ('SAQA'), no documentation was placed before the Court which confirms that he is authorised, even as a peace officer, to take fingerprints of applicants for competency certificates. Mr Madlala, who appeared for the defendant, pointed out that there is no legislative provision for this task to be outsourced by the police services. I am in agreement with that submission and even if, as Mr Pillay indicated, the DFO had authorised him to take fingerprints of the defendant's protection officers in light of the urgent predicament which the defendant faced, the DFO is bound by the provisions of the Act and any action contrary thereto would be *ultra vires*. The obvious reason for the police to take fingerprints is so that they can be satisfied as to the identity of the person applying for a competency certificate or firearm licence, and that the applicant is not someone who is prohibited, for one or more reasons set out in s 9(2) of the Act.

[22] In any event, Pillay confirmed that he had taken the fingerprints of all of the protection officers who were required to be registered for certification. As he did not keep a list of the persons who were processed by him, the plaintiff put up a reconstructed list of 94 protection officers whom he fingerprinted. Under cross examination, it was put to him that of the persons on this list, 31 joined the defendant's employ after January 2010, and accordingly could not have been part of the group of officers for whom he was required to obtain certification as at July 2008. The witness pointed out that the list relied upon was reconstructed for the benefit of his attorneys, but conceded that 31 names on that list were not employed by the defendant at the time when he was contacted by Mr Chami.

[23] This concession by Pillay has significant implications for the plaintiff's case, as the plaintiff is unable to substantiate the basis of its claim, in that it cannot contend to have processed applications for 110 applicants, as 31 of those have been shown to not have been in the defendant's employment at the time. This calls into question the probity and value of the evidence of Pillay, who relied on was reconstructed to me his claim,

[24] Apart from the taking of fingerprints and payment of the prescribed fee, Pillay testified that he had to make the necessary arrangements for the printing of handbooks or training manuals for each protection officer on the five new unit standards and regulations in terms of the Act. For this purpose he ordered 120 learner guides or training manuals from Sleek Signs and Safety CC . Each applicant was to be handed a pack comprising of five training manuals. In addition, he placed a request for a quotation for stationery packs comprising of pens, pencils, rulers, and exam pads as well as the printing of what is referred to as the Formative and Summative Assessments in respect of each of the unit standards applicable.

[25] Pillay dispatched a request to Sleek Signs and Safety on 3 September 2008 requesting them to provide a quote for the items referred to above. When questioned as to how he arrived at the quantity of items required, he stated that his administrative assistant was responsible for those aspects. She was never called to testify. The request for the quotation indicates that the manuals were required for training in December 2008, which raises the question why the manuals were procured as early as September 2008.

[26] On 11 September 2008 the plaintiff wrote to Sleek Signs and Safety advising that it was satisfied with their quote. This quote was not placed before the Court. What is before the Court are two invoices dated 24 September 2008 from Sleek Signs and Safety for R35 400 for the stationery packs including the formative and summative assessments and, R75 992,40 in respect of the learner guides. Both invoices were paid in cash in the amount of R111 392,40. As proof for this payment the plaintiff relies on a handwritten acknowledgment of receipt, on two numerically consecutive pages bearing the name and details of Sleek Signs.

[27] Pillay was cross examined as to why Sleek Signs had been paid in cash, without there being any independent method of verification of the payment, which

considering the amount of the invoices, should generally be paid by cheque or via an electronic funds transfer ('EFT'). Pillay stated that these are small enterprises and he was committed to empowering their development. For this reason, the plaintiff kept a significant amount of cash on its premises, which it used to pay for services to small business.

[28] The plaintiff called Mr Sewlall Rampershad, the owner of Sleek Signs and Safety to testify in support of its case. Rampershad confirm the version given by Pillay, that he was paid in cash for the stationery and workbooks which he supplied. Under cross examination Rampershad testified that he paid Value Added Tax in respect of the revenue from his business, but was unable to provide a plausible answer as to how he would account for his earnings from the plaintiff, as he ran a cash business. When confronted with this question, he responded that these questions could be answered by his accountant.

[29] I considered Rampershad to be evasive in his answers on the method of payment, especially as his regarded himself as a "small business". What I also found surprising is that the witness received a request to quote from Pillay on 3 September 2008. He testified that he had not printed firearm training manuals previously and was given the material on a compact disc. The request to quote from Pillay on 3 September 2008 refers only to 120 manuals to be printed. It contains no reference as to the number of pages for each manual, nor did either Pillay or Rampershad testify in relation to this. It therefore seems that a quote was generated by Rampershad without any regard for the number of pages required to be printed for each manual. This, one would think, would be an intrinsic ingredient for any printer or publisher to have in order to formulate a quotation.

[30] Rampershad's answers were also evasive when questioned as to the existence of his receipt book in which he allegedly recorded the payment received from Pro Arm Firearm Training Academy. He said he had no need to keep his receipt book for five years. Similarly, when asked of the whereabouts of his quotation given to Pillay, he remarked that this could have been verbal, but if it was submitted in writing, he would not have a copy after the passage of time from 2008. He further

testified to paying his suppliers and overheads with the cash received from the plaintiff.

[31] When Pillay was questioned regarding the stationary packs ordered from Sleek Signs, he conceded that these had not been used by the defendant, but was unable to explain why this had been recorded as a loss, as it could have been easily used for another of the plaintiff's client's. At first, Pillay responded that the manuals "expire" or are valid for a specific period, although no expiry date could be ascertained from the exhibits before Court. It was then discovered that he had testified with regard to the incorrect exhibits before Court. When Pillay was recalled to testify to introduce the correct set of manuals into evidence, it was found that these were not branded or compiled using or making reference to the defendant's corporate logo or branding, such that would make them unsuitable for use by other companies wanting to have their staff trained in the use of firearms. Pillay's response that he had no other clients who could use the training manuals is unconvincing, particularly as it was found that the manuals were valid until 2011. It should also be pointed out that no evidence was led to indicate that the plaintiff had tendered the delivery of the stationary packs and firearm manuals to the defendant against the claim for the costs their production.

[32] The next component of the plaintiff's claim was the expense it incurred for engaging the services of Mr AS Bam ('Bam') of Rapid Dawn 1086 CC trading as Indlovana Firearm Training Academy of Greytown, KwaZulu-Natal. In this regard, Mr Pillay testified that he directed a request on 4 November 2008 to Mr Bam for a quotation for facilitating and moderating the training sessions, as well for serving the function of a range officer. In total, he required the service provider to be available for a total of 32 days, commencing from 8 December 2008 until 28 January 2009.

[33] On 7 November 2008 Pillay received a letter from Bam confirming that he (Bam) was available for training on the dates mentioned in the letter from the plaintiff. On 8 November 2008 an invoice was sent by Bam to the plaintiff for the rendering of services as a facilitator for 32 days; as a moderator for eight days and as a range officer for eight days. The amount of the invoice was for R84 800. The plaintiff testified that this amount was paid in cash to Bam. When Bam was called to testify in support of the plaintiff's version he stated the amount was collected over a

period of two days due to the vast sum involved. He testified that although his invoice indicated his company's banking details, he preferred payment in cash as a result of having had negative experiences regarding payment in the past.

[34] Under cross examination, Pillay conceded that as a result of his tender to the defendant being unsuccessful, the services of Bam or his company were never utilised. There was no evidence of a cancellation fee being charged by Bam, against a refund of the balance of the amount paid to him. When Bam testified, he simply stated that he had been paid for the facilitation a month in advance, and that he had set aside time for this purpose. He further stated that no one called him to notify him of the cancellation of the training.

[35] Under cross examination, Bam did not fare well as a witness. When asked to provide details of his experience or qualifications as a moderator and trainer in firearms, Bam stated that he had left his certificates at home in Greytown, and was not aware that this would be an issue in dispute. The request for training from Pillay to Bam, dated 4 November 2008, does not contain a facsimile or email address. Similarly, Bam's response as to his availability, his invoice and his acknowledgment of payment reflect no indication of him having transmitted these documents to the plaintiff by facsimile. Furthermore, if the plaintiff had been in possession of these documents, it would be relatively easy to prove the manner of their transmission. The underlying thrust of the questioning by the defendant's counsel was to sow doubt that these documents were ever transmitted between the parties, the contention being that the plaintiff had manufactured these expenses, which were never incurred in the first place.

[36] The pattern of paying service providers in cash is a recurring theme throughout the plaintiff's evidence. As with Rampershad before him, Bam too was paid a substantial amount of money in cash. In my view, it is inconceivable and improbable that the plaintiff would pay an amount of R84 800 within three days of receiving an invoice where the only "benefit" received by the plaintiff was the securing of Bam's services as a facilitator and moderator. There was no evidence placed before the Court as to why 32 days specifically were required for training, and how many officers would be trained per day. All of these permutations are placed

under scrutiny in light of Pillay's concession that at least 31 persons he fingerprinted, only joined PRASA in 2010.

[37] It was also apparent from Bam's evidence that he suffered no direct loss as a result of the training not taking place. He testified that he owned a tavern in Greytown and would certainly have been busy over the December 2008 festive period, including a public holiday of 16 December 2008, when he was scheduled to do training.

[38] In so far as the payment which he received from Pillay, Bam's answers as to how he was paid, when and why he was paid in cash were unconvincing and certainly cast doubt as to whether he was paid at all. The circumstances of the hurried request to do training, the speedy confirmation of availability, followed by payment of the full amount three days after confirmation, cannot resist the glare of suspicion. Bam was unable to state why, as someone who is VAT registered, he would accept payment in cash for work done, if his intention was to avoid paying tax on this amount, especially at the quote of R84 800 clearly states "Taxes included". It also seems improbable that despite a supplier providing its banking details on the invoice; it would nonetheless seek payment in cash. Unlike in the case of Sleek Signs, there was no evidence to suggest that a cash payment was intended to "empower" Rapid Dawn, nor was there any evidence to suggest that it was a "small business". Bam conceded that there was no independent "paper trail" which could establish that he had indeed been paid and what this money was subsequently used for. Bam also stated that in 2008 he was invited by the defendant to quote for the same services for which he charged the plaintiff.

[39] The last component of the plaintiff's claim relates to the purchasing of ammunition for the practical training of the defendant's protection officers. Pillay testified that his company directed a request on 26 September 2008 to Pronto Security Consultants to quote for the supply of 1 200 shotgun rounds and 6 000 9mm handgun rounds. The total spent on the purchasing of ammunition, according to Pillay, was R25 740. This amount was paid in cash to a Mr Mkhize, who signed an acknowledgement of receipt of payment on the plaintiff's letterhead. It bears noting that as with the three other suppliers of goods or services to the plaintiff, all of the vendors have been paid in cash without there being any independent verification of

the payments. As with the other three vendors whose evidence has been canvassed above, the period from the date of a request for a quote to the date of final payment was remarkably short, suggesting an urgency to conclude business. Payment to these service providers was always made in cash.

[40] In my view, it is inconceivable that a supplier of ammunition will not issue a receipt for payment, even if it were in the form of cash. Chapter 7 of the Firearms Control Act imposes particular obligations on a dealer trading in the sale of ammunition, including the keeping of a register to record all transactions (see s 39(5) of the Act). This register could easily have been produced and would have dispelled any suspicion as to the sale of the ammunition. In light of the absence of any independent verification, counsel for the defendant cast doubt over this transaction suggesting that no ammunition had been bought and paid for by the plaintiff.

[41] Pillay testified that despite the plaintiff not having secured the tender for the certification process, the ammunition purchased for the intended training sessions was not returned to the supplier. Instead, although the bullets would not have reached an expiry date until a few years from the date of their purchase, Pillay and others in the employ of the plaintiff "shot up" this ammunition.

[42] There was nothing which stopped Pillay from offering the ammunition to the defendant, which could have been used by it. Alternatively, no plausible explanation was provided for why this ammunition could not be lawfully sold off to other licensed firearm owners or sold to users at the plaintiff's range. The version that they were "shot up"- all 7 200 rounds of ammunition – seems to me to be highly improbable. There was no evidence before the Court as to whether this ammunition had reached an "expiry date" or even if it had, what that entailed for their usability. Although no expert evidence was led, as I understand the position, ammunition does not *per se* expire, but the potency of the gunpowder may be lost over the years. In respect of the payment for the ammunition, no evidence was received from Mr Mkhize to confirm the version of Pillay. According to him, payment for the ammunition was made by Ms P Pillay, an employee of the plaintiff. As such, Pillay's testimony on this aspect is unhelpful as he was not present at the time.

[43] The plaintiff also called Mr Chandres Sigamoney ('Sigamoney'), a retired former employee of the defendant, who was employed as the area supervisor of the

Redhill Station on the north coast depot. He testified that Chami, whom he described as the Administration and Training Co-ordinator at PRASA's head office, informed him that the plaintiff would be calling at his station to take fingerprints for firearm competency certificates, and that he (Sigamoney) should make the necessary arrangements for the process to take place.

[44] Sigamoney testified that he together with his officers complied with the request and had his fingerprints taken by Pillay. His photograph was taken later at the head office of the defendant. What is significant is that Sigamoney had no knowledge of whether his officers were licenced to possess firearms at the time and was unable to shed any light on the contention of Pillay of the crisis situation supposedly confronting the defendant in respect of outstanding compliance with the new firearm regulations.

[45] Sigamoney's evidence corroborates that of Pillay with regard to the taking of fingerprints and the taking of photographs of the defendant's protection officer. Beyond that, Sigamoney's testimony offered little or no corroboration for the plaintiff's case of a contract concluded with the defendant through Chami. He was also unable to dispute the defendant's contention that some of the applicants whose fingerprints were taken, were part of a learner ship programme and not security officers applying for firearm competency certificates. Sigamoney also did not keep a list of persons who were part of the group who had their fingerprints taken. As such, he was unable to corroborate Pillay's evidence as to the number of applicants processed.

[46] This concluded the evidence of the plaintiff after which, the defendant applied for absolution, which application was refused. Mr Madlala then proceeded to close his case without calling any witnesses.

[47] The essence of the plaintiff's case is that Pillay was called upon by Chami, who represented the defendant, to undertake urgent work relating to firearm certification in terms of the Act. While the plaintiff contends that the scope of the work extended to the securing of competency certificates in terms of the Act, no evidence was led by the plaintiff to establish what precisely the mandate from Chami was. All that the evidence establishes, on the plaintiff's version, and which is not

common cause, was that the plaintiff was contracted to secure firearm certification for the defendant's protection officers.

[48] There is no evidence as to what steps had to be taken in securing the certificates, and most importantly, how much the defendant was prepared to pay for the successful delivery of the certificates. There was no evidence from Pillay as to what Chami may have said regarding costs of the contract, or alternatively, whether he was given an open ended mandate without any budgetary constraints. The latter scenario seems too far-fetched as the defendant, being a state owned entity, is governed by the provisions of the Public Finance Management Act despite Mr Manikam, who appeared for the plaintiff, not wanting to make this concession at the outset of the trial. No basis in law was advanced for an interpretation to the contrary.

[49] The arguments advanced by Mr Madlala in the application for absolution were very much the same in respect of his arguments on the merits after closing the defendant's case. The fundamental difficulty with the plaintiff's case was that it bore the onus to establish that Chami had the necessary authority to contract with Pillay and to conclude a contract, binding on PRASA, in the process. The plaintiff's woes were compounded by the fact that Chami was no longer in the defendant's employ, but this did not stop the plaintiff from securing his attendance in Court via a subpoena. The defendant adopted the stance that there was no obligation on it to assist the plaintiff with its case. To the extent that the plaintiff was relying on these representations as the basis for its contract, it bore the onus to ensure that Chami testified.

[50] The evidence as to the existence of a contract between the plaintiff and the defendant rests on the sole evidence of Pillay. There are remarkably no letters or emails exchanged between the two representatives of the contracting parties. Moreover, it is the plaintiff's contention that by the time it had been asked by Chami to submit a bid in response to the tender put out by the defendant, it (the plaintiff) had already completed most of the work in respect of the certification process and incurred significant expenses towards the completion of the contract. This contention is factually incorrect as the payment for ammunition to Pronto Security was in made September 2008; the printing of training manuals and the stationary packs by Sleek Signs was made in September 2008 and the reservation of Mr Bam to facilitate

training in the new unit standards was made and paid for in November 2008. These were expenses that were incurred after the notice of invitation to tender.

[51] Even if the plaintiff believed that it was entitled to proceed with work on the basis of a verbal agreement with Chami, that belief would have been interrupted upon the receipt of the invitation to tender on 8 August 2008. The plaintiff must have realised as at that date that any work done by it to date was being done at risk, as it had not been formally appointed in terms of a competitive bidding process. Pillay ought to have reasonably foreseen, irrespective of whatever assurances were given to him by Chami, that he was part of a competitive bid and that there was likelihood that another company might secure the contract despite Chami's assurance to the contrary. In these circumstances, the plaintiff proceeded to incur expenses (if it did) in a manner reckless as to the outcome of the tender, and without due and proper consideration as to whether any expenses incurred by it could be enforceable against the defendant.

[52] Pillay's evidence of the urgency to obtain the certification, on his version alone, extends only to the taking of fingerprinting and photographs. All of the other expenses were incurred after the plaintiff submitted its bid for the contract, in September 2008, thereby undermining the claim of urgency. Even the testimony of Sigamoney did not bolster the claim of Pillay on this aspect. There was also no evidence led as to whether what the plaintiff did in respect of protection officers, either directly or indirectly, contribute towards their certification. One does not know whether the plaintiff's contribution was incidental and minimal to the process as another service provider, Thathe, was appointed following the tender process. There is no certainty as to when, or if all, of the applicants processed by the plaintiff received their competency certificates.

Application of legal principles

[53] Mr Manikam for the plaintiff submitted that the evidence presented by the plaintiff establishes that there was an offer made by Chami of certain work to be undertaken urgently, and a corresponding acceptance by Pillay to do the work. This is evidenced by the endorsement given to the fingerprinting exercise carried out Pillay. In this regard the plaintiff relies on the supporting evidence of Sigamoney,

who confirmed that Chami had asked him to make his protection officers available to have their fingerprints done by Pillay.

[54] As set out above, the defendant disputes the authority of Chami to enter into a binding contract on behalf of the defendant. The plaintiff failed to call Chami to prove its claim that he had the necessary authority to enter into contracts on behalf of the plaintiff. In this regard see *Rand Cold Storage & Supply Co Ltd v Alligianes* 1968 (2) SA 122 (T) the Court held at 124D-E that:
'It is axiomatic that a party need not, and cannot be blamed if he does not, call all the witnesses who may give pertinent evidence; he is entitled to take the risk of offering less than all the evidence available to him if he is of the opinion that what he has offered would suffice to win.'

[55] Notwithstanding, the burden of proving lack of capacity lies on the party setting it up as a defence (see *Fick & others v R* 1904 ORC 25; *Serobe v Koppies Bantu Community School Board* 1958 (2) SA 265 (O)). In support of its contention that Chami did not have the requisite authority to bind the defendant, it was pointed out to the plaintiff's witness that Chami was not the second in charge of the security matters at the defendant. Even the tender documents to which the plaintiff submitted a bid described Chami as a "technical officer". There is no communication between Pillay and Chami from which one can establish or infer that Pillay was justified in believing that Chami had the requisite authority to bind the defendant. Moreover, as the defendant is a state owned enterprise, its procurement of services is regulated by the PFMA and s 217 of the Constitution as well as Treasury Regulations requiring procurement to take place by way of competitive bidding. It is improbable that one employee of the defendant can have the authority to bind the defendant where he decides to act of his own accord (see *President of the Republic of South Africa & others v South African Rugby Football Union & others* 2000 (1) SA 1 (CC) para 198).

[56] To the extent that the plaintiff contends that Chami was an agent or representative of the defendant, counsel for the plaintiff referred to *Standard Bank v University of the North* [2006] JOL 16229 (T) which sets out the following at 59-60:

'I agree with the following submissions made on behalf of the plaintiff:

1. The defendants have to prove actual authority on the part of Nashua Bethlehem or that the plaintiff is precluded from denying such authority by virtue of the principles of estoppel.

2. Actual authority may be either express or tacit/implied and may be established by direct proof of an express authorisation by the principal to the agent to conclude the particular agreement, or by way of inference, on a balance of probabilities on all the admissible facts given in evidence."

3. To establish an estoppel the defendants have to establish:

3.1 a representation;

3.2 that it reasonably acted or relied upon the representation;

3.3 that it acted or relied upon the representation to its detriment; and

3.4 that the person who made the representation could bind Technofin by means of a representation.'

[57] On the other hand, the defendant correctly submitted in my view that there is nothing from the evidence presented, being that of a sole witness in the form of Pillay, from which it can be inferred that a valid contract was concluded with the defendant. It was submitted by the defendant that the plaintiff, through its witnesses, sought to disavow reliance on facts pleaded in the summons. The particulars of claim aver that despite the applicability of the tender processes, Chami insisted that Pillay commence work because of the urgency of the matter. He also promised Pillay that it was "almost impossible" for him not to be awarded the tender. This is critical to the plaintiff's case as it presupposes that Pillay had knowledge that procurement of services by the defendant was subject to a tender process. He relied on the assumption that the tender would be awarded to him at a later stage. It is for this reason that I have stated earlier that the plaintiff, to the extent it relied on Chami's assurances, did so at its peril, fully aware that a tender process involving other entities would eventually take place.

[59] The test to be applied in determining whether a valid contract was concluded between the plaintiff and the defendant is to determine whether it has been established '. . . by a process of inference . . . that the most plausible probable conclusion from all the relevant proved facts and circumstances is that a contract

came into existence.' (See *Joel Melamed & Hurwitz v Cleveland Estates (Pty) Ltd; Joel Melamed & Hurwitz v Vorner Investments (Pty) Ltd* 1984 (3) SA 155 (A) at 165B-C and discussion in R H Christie *The Law of Contract in South Africa* 6 ed (2011) at 87.) The Court must consider the facts of the matter, the conduct of the parties and the circumstances, and

'. . . unless that conduct and those circumstances were so clear, so unequivocal, so unambiguous that the parties must have regarded themselves as being in agreement there is no contract.'

(See *Christie* above at 89, referring to *Boerne v Harris* 1949 (1) SA 793 (A).) As stated in *Reid Bros (SA) Ltd v Fischer Bearings Co Ltd* 1943 AD 232 at 241 what is required to create a binding contract:

'. . . is that acceptance of an offer should be made manifest by some unequivocal act from which the inference of acceptance can be logically drawn.'

[60] Having regard to the evidence of the witnesses and the documentary evidence relied on by the plaintiff, I am unable to conclude that a valid contract was concluded with the defendant, or that Chami was authorised to contract on its behalf in respect of the process for securing firearm competency certificates. Of utmost significance is the realisation on the part of the plaintiff of the tender processes applicable to the defendant when entering into a contract. This is evident from the particulars of claim.

[61] Whatever the exigencies of the situation, Pillay in my view proceeded at risk before the tender could be awarded in respect of the contract. Even after commencing work (on his version), when he was sent an invitation to tender, he duly submitted a bid. This bid was rejected. The plaintiff appealed that decision unsuccessfully, but took no further steps to set aside the award of the tender to Thathe Development and Training. Instead, it chose to sue the defendant for work which it would have otherwise claimed had it been awarded the tender.

[62] The plaintiff's evidence suffered from several difficulties, the most glaring of which was the pattern of cash payments, made in much haste, after the service providers had supposedly supplied goods and services associated with the completion of its mandate. This entire thread of evidence, leads me to agree with the submission of the defendant's counsel, that on a balance of probabilities, the

evidence of such goods and services having been rendered cannot be sustained. It is too much of a coincidence that parties would be engaged at short notice to produce goods, paid for in full in cash, within a few days of the request being generated.

[63] All of the evidence of the service providers, as well as that of Pillay, had a hollow ring to it. The absence of a “paper trail” against which one can test whether payment was made, is telling. The Court must determine whether they were truthful witnesses and whether their version must be preferred over that of the defendant. In assessing the credibility of a witness, Mahomed J (as he then was) in *Hees v Nel* 1994 (1) PH F11 (T) said the following at 32:

‘Included in the factors which a Court would look at in examining the credibility or veracity of any witnesses, are matters such as the general quality of his testimony, (which is often a relative condition to be compared with the quality of the evidence of the conflicting witnesses), his consistency both within the content and structure of his own evidence and with the objective facts, his integrity and candour, his age where this is the relevant, his capacity and opportunities to be able to depose to the events he claims to have knowledge of, his personal interest in the outcome of the litigation, his temperament and personality, his intellect, his objectivity, his ability effectively to communicate what he intends to say, and the weight to be attached and the relevance of his version, against the background of the pleadings.’

[64] The plaintiff, in the alternative relied on unjust enrichment. In light of the plaintiff conceding that at least 31 of the names of persons whom it contends it took fingerprints of, not being in the employ of PRASA at the time, the claim of unjust enrichment in respect of amounts paid by the plaintiff to the SAPS is thrown into doubt. In any event, I am not satisfied that the plaintiff has made out a case for unjust enrichment, and I am accordingly not disposed to accede to the request for judgment on that basis in the sum of R489 072, or any other amount. There was no evidence before me of what benefit was derived from the fingerprinting exercise carried out by the plaintiff, and to what extent (if at all) it lead to the competency certificates being issued. Moreover, there was no evidence led as to which of the defendant’s officers were successful in securing their competency certificates and whether this was attributable in any manner to the actions of the plaintiff.

[65] In the result, I make the following order:

a. The plaintiff's action is dismissed with costs.

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JUDGE MR CHETTY

Appearances:

For the Plaintiff	:	**Adv M Manikam**
Instructed by	:	Reg Thomas Attorney
c\o	:	Excel House, Durban
		Ref: MRTHOMAS\NP\S0153\4
For the Defendant	:	**Adv S.K Mdladla**
Instructed by	:	A P Shangase & Associates
		Durban- 031 307 7200
		Ref: PS\L1757\nd
Date of Hearing	:	7th to 11th September 2015
Date of Judgment	:	**26 February 2016**