REPUBLIC OF SOUTH AFRICA

HIGH COURT, NORTH GAUTENG PROVINCIAL DIVISION (PRETORIA)

(1) REPORTABLE: Electronic reporting.
(2) OF INTEREST TO OTHER JUDGES: No.
(3) REVISED.

26-09-2014 P. A. Meyer

26/09/2014.

Case No. 70131/2011

In the matter between:

M & E TOOLS	Plaintiff
and	
DAVE SHEER GUNSMITHING AND FIREARMS EXHANGE CC	Defendant

Case Summary: Contract – Illegal and void – Application of the legal maxims ex turpi causa non oritur actio *and* in pari delicto potior est conditio defendentis *– Whether the maxim* in pari delicto potior est conditio defendentis *should be relaxed in favour of the plaintiff.*

JUDGMENT

MEYER, J

[1] The plaintiff, M&E Tools CC (M&E), in terms of the claim with which it presently persists, seeks condiction of what it performed in terms of an illegal contract that is void. The defendant, Dave Sheer Gunsmithing and Firearms Exchange CC (Dave Sheer), in terms of its counterclaim, claims damages founded on that illegal contract. This case, therefore, concerns the application of the principles enunciated in *Jajbay v Cassim* 1939 AD 537 seventy-five years ago.

[2] M&E and Dave Sheer concluded an agreement during April 2009, in terms whereof M&E ordered certain weapons (referred to as two LMG's, two Brownings, six M16 A1's, six M16 A3's, and twelve R1's)[1] from Dave Sheer for delivery to M&E's client, Pretoria Metal Pressings (PMP), which is a division of Denel (Pty) Ltd (Denel). PMP required the weapons for use in its proof range in order to test and determine ammunition performance and compliance. M&E was the successful tenderer in PMP's procurement process for the weapons.

[3] The agreed total purchase price payable by M&E to Dave Sheer was US $ 121 310, which amount was made up as follows: $ 9 053 for each LMG; $ 27 500 for each Browning; $ 1 850 for each M16 A1; $ 2424 for each M16 A3; and $ 1 880 for each

[1] The description of each LMG that was ordered from Dave Sheer is a '7.62 51 MAG FN LMG (Infantry) complete with spare barrel, tripod and bipod'; of each Browning a '0.50 Browning machine gun (Model – M2HB)'; of each M16 A1 a '5.56 mm M16 A1 rifles'; of each M16 A3 a '5.56 M16 A3 rifle'; and of each R1' a '7.62 R1 rifle'.

R1. The total purchase price was payable in advance. M&E was also obliged to pay to Dave Sheer all freight forwarding and customs costs upon delivery and acceptance of the weapons by PMP.

[4] Dave Sheer, in turn, ordered the weapons from a Belgian dealer, Amylam Limited (Amylam), which company sourced the weapons from other overseas suppliers; the LMG's from Arsenal JSCO in Bulgaria and the other weapons from Dince Hill in the United Kingdom. The agreed purchase price payable by Dave Sheer to Amylam was the same amount agreed upon between M&E and Dave Sheer, but an amount equivalent to 10% of the total purchase price was payable by Amylam to Dave Sheer as 'commission'.

[5] M&E duly paid the equivalent of US $ 121 310 in South African currency to Dave Sheer: on 27 May 2009 the sum of R504 043.05 (being 50% of US $ 121 310 at an exchange rate of 8.31) and the sum of R451 273.20 on 12 January 2010 (being 50% of US $ 121 310 at an exchange rate of 7.44).

[6] Some weapons were delivered to PMP at the beginning of April 2010, but PMP rejected all of them. It inter alia maintained that the weapons were not new (which was a requirement of PMP) and that 'Yankee Machine Company' weapons, instead of M16's, and 'FN' weapons, instead of R1's, were delivered to it. The Yankee Machine Company weapons and the FN weapons fire single shots as opposed to an M16 and a R1 that fire fully automatically (full automatic fire capability was another requirement of PMP). PMP's reasons for rejecting the Yankee Machine Company and FN weapons require no further elaboration since Dave Sheer accepted the cancellation of the orders

relating to those weapons. They were returned to Dave Sheer and it repaid to M&E the purchase price in the sum of R388 009.60 (R200 536.00 on 23 May 2010 and R187 473.60 on 29 November 2010) in respect of those weapons. M&E, in turn, repaid to PMP the purchase consideration which PMP had paid to it for those weapons.

[7] The present dispute, as far as E&M's claim is concerned, only relates to the Brownings that were delivered to PMP at the beginning of April 2010 and the LMG's, which were never delivered. The two Brownings were also rejected by PMP. It is undisputed that they were secondhand refurbished weapons with the original weapon numbers obliterated and new numbers engraved on them, which, according to the evidence of Mr Carel van der Merwe (an expert in explosive technology and who has worked for PMP in its quality control department since 1980 and responsible for the testing and development of ammunition), is not standard. He also testified that the method of refurbishment of the Brownings did not comply with the original manufacturer's specifications. PMP could not take the risk of using secondhand refurbished weapons, because they were required to determine ammunition performance and compliance.

[8] Ms Charmaine Wilson, who is employed by M&E as personal assistant to M&E's general manager, Ms Ilana Frosch, represented M&E in the conclusion of the agreement between M&E and PMP and in the conclusion of the agreement between M&E and Dave Sheer. Mr Gareth De Nysschen, who is the managing director of Dave Sheer, represented it in the conclusion of the agreement between M&E and Dave Sheer. Ms Frosch testified that M&E's core business is that of trading in arms and that PMP is its main client. Ms Wilson testified that all the orders which M&E had received

from PMP in the past had been for new weapons and that she accordingly accepted that the order for the weapons in question was also for new ones. Ms Wilson and Mr De Nysschen agree that they did not discuss whether or not the weapons must be new prior to the conclusion of the agreement between M&E and Dave Sheer.

[9] The undisputed evidence of Mr Van der Merwe is that it is essential to use new weapons in conducting testing of ammunition since any shortcoming, defect or inconsistency in the ammunition exhibited during such firing will then be attributable to the ammunition and not the firearm. During his cross-examination Mr De Nysschen agreed with Mr Van der Merwe's opinion and experience in the arms industry that it is common knowledge that only new weapons are used for the purpose of testing ammunition. Mr De Nysschen knew that too. His evidence that he was unaware at the time of the conclusion of the agreement between M&E and Dave Sheer that the end-user was to be PMP and that the weapons ordered from Dave Sheer were destined for use in the testing of ammunition, can, however, for the reasons that follow, safely be rejected.

[10] It is common cause that a pro-forma invoice dated 14 April 2009 from Amylam to Dave Sheer constitutes part of the written portion of the agreement concluded between M&E and Dave Sheer and that the conclusion of the agreement did not precede the date of the pro-forma invoice. Mr De Nysschen testified that the weapons were offered to M&E by means of the pro-forma invoice and M&E accepted that offer. E&M furnished a written order dated 11 March 2009 to Dave Sheer in respect of the LMG's and written orders dated 14 April 2009 in respect of the other weapons.

[11] It is undisputed that Ms Wilson obtained 'end user statements' from PMP at the request of Mr De Nysschen. The one relating to the LMG's is dated 11 March 2009 and the one relating to the other weapons is dated 7 April 2009. It is declared in the end user statements that 'Pretoria Metal Pressings a Division of Denel (Pty) Ltd' intends to purchase the weapons referred to therein (and the order numbers of its written orders furnished to M&E are also stated) and that the weapons will be used in PMP's proof range for testing and acceptance of ammunition manufactured by PMP.

[12] Ms Wilson's undisputed evidence is that she forwarded the end user statement dated 11 March 2009 relating to the LMG's and M&E's order dated 11 March 2009 together to Mr Denysschen. She also forwarded the other end user statement to Mr De Nysschen once she had received it from PMP. Mr De Nysschen testified that the information contained in the end user statements informed him for the first time that the weapons were destined for PMP. He, however, could not recall the dates upon which he received the end user statements from Ms Wilson.

[13] Although Mr De Nysschen denied that by 14 April 2009 (the date of the pro-forma invoice) he knew that new weapons were required, he conceded that by that date he could 'very well' have known that PMP was the end user. However, if the statement contained in the end user statement was the source of his knowledge that PMP was the end user then the same statement would also have informed him that the weapons will be used in PMP's proof range for testing and acceptance of ammunition manufactured by PMP.

[14] Moreover, Ms Wilson's undisputed evidence is that shortly after the weapons had been delivered to PMP she received a telephone call from PMP's procurement manager, Mr Schalk Muller, who informed her that the weapons '... were secondhand and looked like toys off the shelf'. On the instructions of Ms Frosch she telephoned Mr De Nysschen and conveyed to him what Mr Muller had said to her. Mr De Nysschen's response to her was that the weapons '... must be new and there is no way they can be secondhand'.

[15] PMP's rejection of the weapons was followed inter alia by two meetings that were held between representatives of PMP, M&E and Dave Sheer at PMP's premises. Ms Frosch, on behalf of M&E, and Mr De Nysschen, on behalf of Dave Sheer were among those who attended the meetings. Mr Van der Merwe attended one of them. Even though Dave Sheer was confronted with PMP's reasons for rejecting the weapons that had been delivered, Mr De Nysschen did not mention that Dave Sheer was not obliged to deliver new ones. This evidence of Ms Frosch and of Mr van der Merwe is undisputed. Ms Frosch's undisputed evidence is further that when he inspected the weapons Mr De Nysschen was surprised that secondhand Brownings had been delivered.

[16] On 3 March 2011, PMP cancelled the agreement between it and M&E and it required repayment of its purchase consideration, also in respect of the Brownings and the LMG's. The parties concerned nevertheless attempted to rescue the transaction.

[17] PMP insisted that the Brownings be replaced with new ones or that it be refunded by M&E. Amylam, however, refused to refund the purchase consideration for

the Brownings. M&E, Dave Sheer and Amalym agreed to replace the two secondhand Brownings with new ones and to contribute equally to the price difference. PMP adopted the stance that it will first inspect the two new Brownings on arrival before it will indicate its acceptance or rejection thereof. This, Mr De Nysschen testified, was unacceptable to Dave Sheer and it accordingly did not proceed to order the two new Brownings.

[18] Dave Sheer collected them from PMP on 17 May 2011. Mr De Nysschen testified that the reason why Dave Sheer collected the Brownings was because PMP threatened to otherwise deliver them to the Pretoria West Police Station, which he could not allow because of the damage they can do in the wrong hands should they disappear.

[19] In terms of the agreement concluded between M&E and Dave Sheer the weapons were to be delivered to PMP within three to five months. The LMG's were not delivered within that period or at all. The reason for Dave Sheer's inability to comply with its contractual obligation as far as the delivery of the LMG's was concerned is common cause: no 'end user certificate' was issued to PMP, which is a requirement of the relevant authority of the exporting country (Bulgaria).

[20] An end user certificate is issued by the South African Government: Directorate for Conventional Arms Control (DCAC) to an end user of weapons that are to be imported into South Africa. Subsection 17(4) of the National Conventional Arms Control Act 41 of 2002 provides that-

'[w]henever controlled items and services are imported into the Republic, the competent authority of the South African Government may issue an end-user certificate wherein an undertaking is given that the controlled items in question will not be transferred, re-sold or re-exported to any other country without the prior approval of the relevant authority of the exporting country.'

[21] The evidence of Ms Wilson, and that of Ms Frosch, that DCAC required a written request for the end user certificate by and on the letterhead of the overseas supplier in order to issue an end user certificate to PMP, also in respect of the LMG's, is supported by the paper trail on which both parties rely, and is not refuted by Mr De Nysschen's response under cross-examination that such a requirement 'does not make sense'. It is to be noted that an end user certificate in respect of the other weapons forming the subject matter of the agreement between M&E and Dave Sheer appears to have been issued by DCAC pursuant to a written request dated 11 June 2009 on a letterhead of the overseas supplier, Dince Hill [Holdings] Limited, for the issue of an end user certificate to PMP.

[22] Dave Sheer was obliged to arrange the required export and import permits in respect of all the weapons. It is undisputed that Ms Wilson requested Mr De Nysschen to obtain the written request on a letterhead from Dave Sheer's overseas supplier. Mr De Nysschen conceded that Dave Sheer did not request it.

[23] During their negotiations Dave Sheer by letter dated 6 May 2011, inter alia advised E&M that its overseas supplier, Amylam, 'will be happy' to refund some of the weapons, which included the LMG's, 'through Dave Sheer Guns'. Dave Sheer did not arrange such a refund as far as the LMG's are concerned.

[24] Ultimately, on 3 August 2011, M&E cancelled the agreement between it and Dave Sheer and it demanded repayment of the amounts it had paid to Dave Sheer pursuant to the agreement which had not been repaid to it. Dave Sheer did not comply with the demand. On 7 December 2011, M&E instituted this action against Dave Sheer. Initially its claim was founded on contract only. Dave Sheer defended the action and a plea and counterclaim (for the freight forwarding, customs and other costs incurred by it pursuant to the conclusion of the agreement) was filed on its behalf. The counterclaim was defended by M&E and a plea thereto was filed on its behalf.

[25] The matter was enrolled for trial on 2 May 2013. Dave Sheer, on 7 March 2013, served a notice of intention to amend its plea. The amendment introduced a plea to the effect that the agreement between M&E and Dave Sheer was in contravention s 13 of the National Conventional Arms Control Act 41 of 2002 (the NCAC Act)[2] and unenforceable since M&E was not in possession of the required permit authorised by National Conventional Arms Control Committee (the NCAC)[3] and issued by its secretariat[4] to trade in conventional arms.[5] The proposed amendment was opposed by

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[2] Section 13 of the NCAC Act provides that '[n]o person may trade in conventional arms unless that person is registered with the secretariat and in possession of a permit authorised by the Committee and issued by the secretariat.' A person is, in terms of subsec 24(1)(a) of the NCAC Act, 'guilty of an offence if he or she ... trades in conventional arms in contravention of section 13' and in terms of subsec 24(2)(a) liable 'to a fine, or to imprisonment for a period not exceeding 25 years, or to both such fine and imprisonment'.

[3] Subsection 1(i) of the NCAC Act defines 'Committee' to mean '... the National Conventional Arms Control Committee established by section 2' and s 2 provides that '[a] committee to be known as the National Conventional Arms Control Committee is hereby established'.

[4] Subsection 1(i) of the NCAC Act defines 'secretariat' to mean '... the secretariat contemplated in section 8' and subsec 8(1)(a) provides that '[t]he work incidental to the performance of the functions of the Committee or a subcommittee must be performed by a secretariat consisting of administrative personnel.'

[5] Subsection 1(vi) of the NCAC Act defines and provides that '"conventional arms" includes- (a) weapons, munitions, explosives, bombs, armaments, vessels, vehicles and aircraft designed or manufactured for use in war, and any other articles of war; (b) any component, equipment, system, processes and technology of whatever nature capable of being used in the design, development, manufacture, upgrading, refurbishment or maintenance of anything contemplated in paragraph (a); and (c) dual-use

M&E. On 2 May 2013, Tuchten J allowed the amendment and the matter was postponed.

[26] On 23 May 2013, M&E responded by introducing an alternative claim in terms of which it seeks condiction of its performance under the agreement if the agreement is held to be an illegal one and void. In such event M&E seeks recovery of the amount of R567 306.40, being the difference between the amount of R955 316.00 which it had paid to Dave Sheer in terms of the agreement and the amount of R388 009.60 which Dave Sheer already had repaid to it. The amount of R567 306.40 represents the purchase consideration which M&E had paid to Dave Sheer for the Brownings and LMG's. At the commencement of the trial on 6 May 2014, M&E restricted the relief it seeks to that set out in its alternative claim based on enrichment.[6]

[27] This case concerns the application of the maxim *ex turpi causa non oritur actio* and of the maxim *in pari delicto potior est conditio defendentis*. In *Jajbay v Cassim* 1939 AD 537, Stratford, CJ said that '[t]he maxim *ex turpi causa* is self-explanatory and requires no elucidation. It is complete and unquestioned in our Courts as in the Courts of England.' It '... prohibits the enforcement of immoral or illegal contracts'.[7] The maxim *in pari delicto*, Stratford CJ said, '... curtails the right of the delinquents to avoid the consequences of their performance or part performance of such contracts.'[8] Stratford CJ said that '[t]he moral principle which inspired the enunciation of those two maxims is obvious and has often been expounded. It is to discourage illegality and

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goods, but does not include a weapon of mass destruction as defined in the Non-Proliferation of Weapons of Mass Destruction Act, 1993 (Act No. 87 of 1993)'.

[6] See: *LAWSA* Vol 5 Part 1 (2nd Ed) para 413.

[7] At 542.

[8] At 540-541.

immorality and advance public policy.'[9] Stratford CJ held that '... the rule expressed in the maxim *in pari delicto potior est conditio defendentis* is not one that can or ought to be applied in all cases, that it is subject to exceptions which in each case must be found to exist only by regard to the principle of public policy.'[10]

[28] Stratford CJ concluded that:[11]

'... Courts of law are free to reject or grant a prayer for restoration of something given under an illegal contract, being guided in each case by the principle which underlies and inspired the maxim. And in this last connection I think a Court should not disregard the various degrees of turpitude in delictual contracts. And when the delict falls within the category of crimes, a civil court can reasonably suppose that the criminal law has provided an adequate deterring punishment and therefore, ordinarily speaking, should not by its order increase the punishment of the one delinquent and lessen it of the other by enriching one to the detriment of the other. And it follows from what I have said above, in cases where public r [illegible] 's nc foreseeably affected by a grant or a refusal of the relief claimed, that a Court of law migi [illegible] decide in favour of doing justice between the individuals concerned and so prevent unjust enrichment.'

[29] Cachalia AJA, in *Klokow v Sullivan* 2006 (1) SA 259 (SCA), said the following:

'[17] Before dealing with the facts germane to this issue, a brief explanation of the genesis and application of the *par delictum* rule is necessary. Before the now famous decision in *Jajbhay v Cassim* in 1939, a party seeking to extricate himself from the consequences of an illegal or immoral contract had to demonstrate that he had come to court with clean hands. The 'clean hands doctrine' derived from English law, is similar in effect to the Roman law maxim *in pari delicto potior est conditio defendentis*, which operated as an absolute bar to the grant of relief to the plaintiff. As a general rule, a plaintiff who was found

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[9] At 542.
[10] At 544.
[11] At 544-545.

to be *in pari delicto* was hence unable to recover any money paid or property handed over to a defendant pursuant to it; and if a plaintiff based his case on such a contract in formulating his pleading, he would fail on this basis alone.

[18] In *Jajbhay v Cassim*, this court, while affirming the principle underlying the *par delictum* rule — that courts must discourage illegal transactions — nevertheless recognised that its strict enforcement may sometimes cause inequitable results between parties to an illegal contract. To prevent inequities, therefore, it thus enunciated the principle that the rule must be relaxed where it is necessary to prevent injustice or to promote public policy. One such instance where the rule would be subordinated to 'the overriding consideration of public policy' was where the defendant would be unjustly enriched at the plaintiff's expense. The approach that commended itself in *Jajbhay* was that:

'...(W)here public policy is not foreseeably affected by a grant or a refusal of the relief claimed...a Court of law might well decide in favour of doing justice between the individuals concerned and so prevent unjust enrichment.'

[30] It is common cause that the agreement is illegal and void. M&E, although registered with the NCAC secretariat, was not in possession of a permit authorised by the NCAC and issued by the NCAC secretariat as contemplated in s 13 of the NCAC Act in order to trade in the weapons that formed the subject matter of the agreement. The weapons, it is also common cause, are 'conventional arms' within the meaning of s 13 read with s 1(vi) of the NCAC Act.

[31] M&E argues that Dave Sheer was also not in possession of the permit contemplated in s 13 to trade in the weapons concerned. The permit issued to Dave Sheer in terms of the NCAC Act, it is common cause, authorised it to '[m]arket products locally and abroad to Government and other law enforcement agencies in South Africa.'

PMP, so it is argued, is neither government nor a law enforcement agency. I disagree with this argument.

[32] PMP is a division of Denel (Pty) Ltd (Denel). Denel is a fully owned subsidiary of the Armaments Corporation of South Africa, Limited (Armscor). Armscor was established by s 2 of the Armaments Development and Production Act 57 of 1968 (the ADP Act), which Act was repealed by the Armaments Corporation of South Africa, Limited Act 51 of 2003 (the Armscor Act). Subsection 2 of the Armscor Act provides for the continued existence of Armscor despite the repeal of the ADP Act. The state, in terms of ss 2(2)(a), remains the sole shareholder of Armscor, and the Minister of Defence, in terms of ss 2(2)(b) read with ss1(k), exercises ownership control over Armscor on behalf of the State. Section 21 empowers Armscor to form wholly owned subsidiaries subject to the Public Finance Management Act and with the approval of the Minister of Defence. Denel is such a subsidiary.

[33] Armscor is the entity through which the South African National Defence Force and other government institutions inter alia procure weapons. It is also not without significance that the DCAC sanctioned the transaction by issuing the import permit for the conventional arms in question in terms of the NCAC Act. I am of the view that Armscor's subsidiary, Denel, and accordingly PMP, is included in the permission given to Dave Sheer in terms of s 13 of the NCAC Act to market the conventional weapons in question to the South African Government.

[34] M&E also argues that the permit issued to Dave Sheer which permits it to trade in the conventional weapons in question does not include the M16's. This is conceded

by Mr De Nysschen. It appears from his evidence, however, that he only realised the omission to have produced the permit issued to Dave Sheer in terms of s 13 of the NCAC Act in respect of the M16's when he was confronted with the fact that the M16's are not amongst the weapons listed in the permit upon which Dave Sheer relies. Mr De Nysschen testified that, even though they are not included in the trial bundle, a valid permit had indeed issued to Dave Sheer to trade in the M16's. He was not challenged to produce the permit for the M16's. But I need not decide this point for I am prepared to assume in favour of Dave Sheer that it also possessed a valid permit for the M16's. The order for the M16's has been consensually cancelled and both parties have made restitution. Neither party can claim that the other has been unjustly enriched at its expense as far as the M16's are concerned.

[35] M&E is not seeking to enforce the illegal contract but to extricate itself from its consequences. It is therefore only the maxim *in pari delicto potior conditio defendentis* that concerns its claim against Dave Sheer. In *Klokow* (supra), Cachalia AJA said[12] that-

'[t]he *par delictum* rule is concerned with the moral guilt of the contracting parties, not their criminal liability. Whether or not the plaintiff is also *prima facie* liable for prosecution under the Act, albeit as an accomplice as found by the Full Court, has no bearing on the question of his moral turpitude.'

And also:[13]

'The parties entered into a written agreement for the purchase of a business, which contemplated a contravention of the Act. *Prima facie* they were therefore *in pari delicto*.'

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[12] Para 13.
[13] Para 25.

[36] In *Henney v Annesley* 1960 (4) 462 (SR), Hathorn J said[14] that-

'[s]ince the plaintiff, though unknowingly, made the payments pursuant to an illegal transaction, I assume in favour of the defendant that the maxim *in pari delicto potior est condition defendentis* applies.'

[37] The same holds true in the present instance. The agreement concluded between M&E and Dave Sheer contemplated a contravention of s 13 of the NCAC Act and M&E and Dave Sheer are therefore prima facie *in pari delicto*. Whether or not M&E is liable for prosecution under s 24 of the NCAC Act has no bearing on the question of its moral turpitude. Both parties were unaware that M&E was not in possession of the required permit contemplated in s 13 of the NCAC Act.

[38] Mr De Nysschen testified that he is not a policeman and he accordingly did not enquire from M&E whether it was in possession of the required permit. Dave Sheer only ascertained that E&M was not in possession of the required permit when enquiries were made at the DCAC shortly before the service of Dave Sheer's notice of intention to amend its plea on 7 March 2013, wherein the defence of illegality and voidness of the agreement was raised for the first time.

[39] The DCAC originally issued a permit with number 6-04-00356 in terms of s 13 of the NCAC Act to M&E. It is stated in this permit that its date of issue is 4 November 2004 and its date of expiry 31 October 2007. The services which E&M were authorised to undertake in terms of this permit are recorded as:

'Acts as an agent in negotiating/arranging a contract for conventional arms; Acts as an intermediary between buyer / supplier of conventional arms.'

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[14] At 467H.

[40] Ms Frosch testified that she, on behalf of E&M, applied to the DCAC for a renewal of the original permit during 2007. As a result of that application the DCAC issued a renewal permit to M&E. The number of this permit remained the same as that of the original one, the date of issue reflected on this permit is also stated to be 4 November 2004, but its date of expiry is stated to be 17 November 2011. Ms Frosch accordingly believed that the original permit was renewed and that E&M was remained authorised to undertake the same services as those recorded in the original permit, although the services are not recorded in the renewal permit. I consider the belief held by Ms Frosch, although it is common cause mistaken, as bona fide and honest. Ms Wilson also testified that E&M applied for a renewal of its original permit and that she in her dealings with Dave Sheer accepted that E&M was duly authorised to enter into the agreement.

[41] It follows, therefore, that the maxim *in pari delicto potior est conditio defendentis* applies. It remains to decide whether the *par delictum* rule should be relaxed in favour of E&M on grounds of public policy or that Dave Sheer has been unjustly enriched at the expense of E&M. The equities, in my view, clearly favour E&M.

[42] Pursuant to the conclusion of the agreement and in ignorance of its illegality, E&M duly paid the full purchase price to Dave Sheer. The agreement, also in respect of the orders for the Brownings and the LMG's, was cancelled for reasons unconnected with the illegality. The two Brownings were rejected, because they were not new, but secondhand refurbished weapons that furthermore did not comply with the original manufacturer's specifications and their original numbers were obliterated and new numbers engraved on them. I have rejected Mr De Nysschen's evidence that he was

unaware at the time of the conclusion of the agreement between M&E and Dave Sheer that the end-user was to be PMP and that the weapons ordered from Dave Sheer were to be used for testing ammunition, and accordingly that they were required to be new. And the reason why the agreement failed as far as the LMG's are concerned is because of Dave Sheer's failure to have taken the necessary steps to obtain a written request from the overseas supplier for the issue of an end user certificate to PMP.

[43] All the weapons that had been delivered to PMP have been returned to PMP, not because of the illegality of the agreement, but as a result of Dave Sheer's breach of the agreement. Dave Sheer refuses to repay the purchase price which M&E had paid for the Brownings and the LMG's. It is now in possession of the money and the Brownings and it is entitled to delivery of the LMG's from its overseas supplier. Dave Sheer is a licenced dealer in arms and in the better position to sell the Brownings and the LMG's. M&E may not legally possess the Brownings or the LMG's. Dave Sheer may legitimately import the LMG's from Bulgaria (once it finds a buyer for them and an end user certificate is obtained) or it may obtain a refund for them from Amylam (as stated in Dave Sheer's letter dated 6 May 2011).[15] Dave Sheer may legitimately sell the Brownings and the LMG's. The fact that, according to Mr De Nysschen's evidence, it may be difficult to find buyers for those kinds of weapons and that time and effort will be required, does not sway the equities in Dave Sheer's favour. It has until now not attempted to find buyers.

[15] Para 23 (supra).

[44] Dave Sheer has thus been enriched at the expense E&M. Dave Sheer did not show that it has not been so enriched. In *Klokow* (supra) Cachalia AJA held that:[16]

'The defendant was left with both the business and R250 000. The equities clearly supported the return to the *status quo*. . . . Once it had been alleged that the defendant was in possession of the business as well as the money (which at the exception stage must be accepted as true) it was he, not the plaintiff, who needed to show he had not been enriched.'

[45] I now turn to Dave Sheer's counterclaim. Counsel for Dave Sheer, in my view correctly, conceded that Dave Sheer has dismally failed to prove the quantum of its alleged damages and, moreover, that the counterclaim is legally unsustainable. The counterclaim is for damages founded on the illegal agreement that is void. The maxim *ex turpi causa non oritur actio* is inflexible.[17] The counterclaim falls to be dismissed.

[46] Finally, the matter of costs. E&M only seeks the costs of suit as from 23 May 2013, it being the date upon which its alternative enrichment claim was introduced.

[47] In the result the following order is made:

1. The defendant is to pay the sum of R567 306.40 to the plaintiff together with interest thereon at the rate of 15.5% *a tempore morae* from 23 May 2013 until 31 July 2014 and at the rate of 9% *a tempore morae* from 1 August 2014 until date of payment.
2. The defendant is to pay the plaintiff's costs of suit as from 20 May 2013.
3. The defendant's counterclaim is dismissed with costs.

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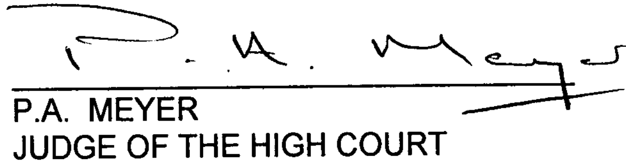
[16] Para 26.
[17] Para 27 (supra).



P.A. MEYER
JUDGE OF THE HIGH COURT

26 September 2014

Date of trial:	6, 7, 8 and 15 August 2014
Date of judgment:	26 September 2014
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