



**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN**

Case No: 3449/2022

In the matter between:

TRACETEC (PTY) LTD

Applicant/Plaintiff

and

BUSINESS EQUIPMENT ASSET FINANCE (PTY) LTD

Respondent/Defendant

Heard on: 29 January 2025

Delivered Electronically on: 29 April 2025

JUDGMENT

LEKHULENI J

Introduction

[1] This is an opposed application in terms of Rule 28(4) of the Uniform Rules, in which the plaintiff seeks leave to amend its particulars of claim in accordance with its notice to amend in terms of Rule 28(1) dated 31 May 2024. The plaintiff also applies

in terms of Rule 6(15) of the Uniform Rules of Court, alternatively in terms of the common law for paragraphs 8 to 18 of the defendant's answering affidavit in the application for leave to amend to be struck out on the basis that the allegations in those paragraphs constitute argument and are accordingly irrelevant. The defendant opposed both applications.

Relevant Background

[2] The plaintiff issued a summons against the defendant for payment of R3,392,340.00, including VAT plus interest thereon arising from an oral agreement concluded in 2017. The plaintiff has also instituted two alternative claims against the defendant arising from the same agreement. The plaintiff pleaded in the particulars of claim that during 2016, the plaintiff, Ultrakit Manufacturers CC ("Ultrakit"), and the defendant, duly represented by authorised representatives, concluded an oral contract in terms of which Ultrakit Manufacturers undertook to develop and manufacture purpose-built fully functional and fit for purpose beacons for use by the plaintiff as part of the technology required by the plaintiff to conduct its radiofrequency vehicle tracking business.

[3] According to the plaintiff, in terms of that agreement, the plaintiff undertook to place a written order or written orders, with Ultrakit for the supply by Ultrakit to the plaintiff exclusively of the beacons so ordered. The plaintiff agreed to pay for the beacons ordered from Ultrakit through a financier, who would pay Ultrakit directly on behalf of the plaintiff. Pursuant thereto, in September 2017, the defendant and the plaintiff, duly represented by authorised representatives, concluded an oral agreement in terms of which the defendant undertook to finance the purchase price of the beacons. The plaintiff asserted that the defendant undertook to finance the purchase price of the beacons on the basis that the defendant would conclude a supplier agreement with Ultrakit in terms of which the defendant would buy the beacons from Ultrakit on behalf of the plaintiff at a price agreed between the plaintiff and Ultrakit.

[4] In addition, in terms of the said agreement, the defendant and the plaintiff would conclude the defendant's Standard Master Rental Agreement in terms of

which the plaintiff would rent the beacons from the defendant against payment of the monthly rental provided for in the Master Rental Agreement, which agreement was to be amended to provide for the transfer of ownership of the beacons by the defendant to the plaintiff upon payment by the plaintiff of all the rental provided for in the Master Rental Agreement. Pursuant to this agreement, on 28 September 2017, the plaintiff placed two separate orders for the beacons, amounting to a total of two hundred beacons, to be financed by the defendant monthly over a period of 36 months. Following this order, the plaintiff and defendant concluded a Master Rental Agreement concerning the beacons.

[5] The written Master Rental Agreement provided that at the end of the 36-month period, full ownership of the goods would be transferred by the defendant to the plaintiff on condition that the plaintiff has made all payments in full. The plaintiff asserted further that it had paid all rentals payable to the defendant in terms of the Master Rental Agreement and became entitled to the transfer of ownership of the beacons from the defendant to the plaintiff. However, the beacons that were supposed to form the subject matter of the Master Rental Agreement concluded between the plaintiff and the defendant did not exist at the time of the conclusion of such agreements. Accordingly, the performance undertaken by the parties in terms of the Master Rental Agreement was not possible at the time of the conclusion of the contract.

[6] The plaintiff asserted that Ultrakit did not develop or manufacture the beacons ordered by the plaintiff. On 12 January 2021, the plaintiff received the Accounts Payable Transactions Statement of Ultrakit's account with the defendant (the plaintiff's financier of the beacons) from the defendant by email. The plaintiff stated that from the Accounts Payable Transactions Statement, it appeared that the defendant had not paid Ultrakit the amount of 2.4 million excluding VAT, being the purchase price of the beacons agreed by the plaintiff and Ultrakit, on the conclusion of the supplier agreement between the defendant and Ultrakit. Instead, the defendant had paid only R1,721, 739.31 excluding VAT, to Ultrakit, as reflected in the Accounts Payable Transaction Statement.

[7] The plaintiff asserted that before receiving the Accounts Payable Transactions statement, it was of the bona fide and reasonable belief that the defendant had paid the full purchase price of the beacons, as agreed between the plaintiff and Ultrakit and as financed in terms of the Master Rental Agreement. Subsequently, the plaintiff sought information from the defendant to enable it to institute legal proceedings against Ultrakit for the non-delivery of the beacons. The plaintiff also sought copies of invoices from the defendant, including copies of invoices from Ultrakit to the defendant. The defendant dismissed the plaintiff's request for this information, stating, amongst others, that the terms of the supplier agreement were not relevant to the plaintiff's claim as the plaintiff was not a party thereto.

[8] The plaintiff stated that there was no indication at the time of any fraudulent misrepresentation by the defendant that led to the conclusion of the oral agreement. Subsequently, the plaintiff decided to institute action against the defendant. The plaintiff posits that based on the information at its disposal when the summons was issued, the plaintiff's claim against the defendant was formulated based on the basis set out in the particulars of the claim. The plaintiff was in possession of the Accounts Payable Transaction statement, which reflects the payments made by the defendant to Ultrakit. According to the plaintiff, this statement seemed to indicate that the defendant (the financier) had not paid the purchase price of the beacons as agreed by the plaintiff and Ultrakit.

[9] The plaintiff's main claim against the defendant was that as the beacons did not exist at the time of the conclusion of the agreement and the performances undertaken by the parties in terms of the agreement were not possible at the time of contracting, the agreements were invalid from the outset and that the obligation of the defendant to transfer ownership of the beacons to the plaintiff at the end of the 36 months was physically impossible.

[10] In the circumstances, the plaintiff asserted that the defendant was unjustifiably enriched at the expense of the plaintiff as the plaintiff had made payment to the defendant of all instalments payable in terms of the Master Rental Agreements, entitling the plaintiff to claim repayment of the total amount paid to the defendant in terms of the Master Rental Agreement. In the alternative, the plaintiff claimed the

difference between the aggregate of the instalments paid to the defendant in terms of the Master Rental Agreement and the total amount paid by the defendant (the financier) to Ultrakit.

[11] In its plea dated 23 June 2022, the defendant pleaded that it was at all material times contemplated by the parties that the defendant would purchase the beacons from Ultrakit at the most favourable prices that could be secured by the defendant from Ultrakit. Furthermore, the defendant pleaded that it was a tacit term of the Master Rental Agreements that the defendant would buy the beacons from Ultrakit at the most favourable price that the defendant could secure. Additionally, the defendant pleaded that it had made payments of the purchase price of the beacons to Ultrakit. The defendant stated further that the payments made by the plaintiff to the defendant and by the defendant to Ultrakit were made in accordance with the terms of the Master Rental Agreement.

[12] The plaintiff requested further particulars to the plea. Amongst others, the plaintiff requested the defendant indicate whether it bought the beacons from Ultrakit and, if so, at what price the defendant had bought them from Ultrakit. The plaintiff also requested the defendant to indicate whether the price at which the defendant had purchased the beacons from Ultrakit was the most favourable price and, if so, whether the defendant negotiated such price with Ultrakit. In answer to the plaintiff's request for further particulars, the defendant indicated that, indeed, the purchase price was negotiated by one Wayne Robertson on behalf of the defendant with Robert Austin of Ultrakit. According to the defendant, the purchase price was the most favourable prize that the defendant could obtain from Ultrakit.

[13] The defendant stated in response to the request for further particulars that the negotiations between the defendant and Ultrakit about the price for the beacons were verbal and were conducted in September 2017. The discussions were that Ultrakit would supply the beacons to the plaintiff, and the defendant would pay Ultrakit's purchase price on a drawdown basis. Further, the beacons would be manufactured, supplied and delivered directly to the plaintiff by Ultrakit as and when they were manufactured. In response to the plaintiff's questions as to whether the defendant paid the purchase price of the beacons to Ultrakit by way of a single

payment or in instalments, the defendant asserted that the defendant made payment of the purchase price to Ultrakit on a drawdown basis. The aggregate amount constituting the purchase price of the beacons is R1.969,035.09.

[14] Pursuant to the defendant's response to the plaintiff's request for further particulars that the defendant never had any intention of complying with the provisions of the oral agreement pleaded in paragraph four of the plaintiff's particulars of claim particularly that the defendant will conclude a supplier agreement with Ultrakit in terms of which the defendant will purchase the beacons from Ultrakit at the price agreed between the plaintiff and Ultrakit, the plaintiff stated that the defendant had misrepresented to the plaintiff that it would conclude a supply agreement with Ultrakit on the terms agreed by the plaintiff and Ultrakit, particularly on the pricing of the beacons.

[15] To this end, the plaintiff proposed amending the particulars of claim to insert its new main claim, which is based on misrepresentation. In the proposed amendment, the plaintiff avers that at the time of the conclusion of the oral agreement pleaded in the particulars of claim, the defendant knew that its representation to the plaintiff that the defendant will conclude a supplier agreement with Ultrakit in terms of which the defendant would purchase the beacons from Ultrakit at the price agreed between the plaintiff and Ultrakit was false and that the defendant never intended to and never concluded a supplier agreement with Ultrakit on such terms. Instead, the defendant agreed with Ultrakit at a price favourable to the defendant despite its agreement with the plaintiff to the contrary. The plaintiff points out that it was unaware of the relevant facts (the alleged misrepresentation) on which the new main claim (in terms of the proposed amendment) is based when the original particulars of claim were prepared. It only became aware of the alleged misrepresentations after the defendant's plea was filed and a response to the further particulars was delivered.

[16] In the plaintiff's view, the misrepresentation was calculated to induce the plaintiff to conclude the oral agreement pleaded in the particulars of claim and, pursuant thereto, to conclude the Master Rental Agreement with the defendant. In the proposed amendment, the plaintiff accordingly claims cancellation of the oral

agreement and the Master Rental Agreement. The plaintiff also sought to introduce a second alternative claim in terms of the amendment. In this alternative claim the plaintiff seeks rectification of the Master Rental Agreement to reflect the intention of the parties that the beacons that were supposed to form the subject matter of the Master Rental Agreement had not been manufactured by Ultrakit at the time of the conclusion of the agreement or the commencement date of the agreement and as such, the Master Rental Agreement contained provisions that do not reflect the common intentions of the parties which resulted in the parties signing the Master Rental Agreement in the bona fide but mistaken belief that it recorded a true agreement between them.

[17] To this end, the plaintiff avers that the defendant breached the Master Rental Agreement as rectified in that the defendant at the end of the 36 months as provided for in the Master Rental Agreement and after the plaintiff had made all payments as provided for in the agreement, failed to transfer ownership of the beacons to the plaintiff. Accordingly, the plaintiff seeks an order to cancel the Master Rental Agreement and claims repayment of all amounts paid to the defendant in terms of the said agreements, which payments constitute damages allegedly suffered by the plaintiff.

The Defendant's Objection

[18] The defendant objected to the plaintiff's proposed amendment and stated that the plaintiff is precluded by the doctrine of election from amending the particulars of claim. The defendant averred that the existing particulars of claim encompass causes of action based on impossibility of performance, unjust enrichment and breach of contract. The defendant asserts that in terms of the proposed amendment, the plaintiff belatedly seeks to introduce entirely new causes of action based on fraudulent misrepresentation in respect of the proposed new main claim, and rectification, cancellation and restitution of amounts paid by the plaintiff to the defendant in terms of the proposed new second alternative claim.

[19] The defendant's primary objection to the proposed new main claim for rescission and restitution of the Master Rental Agreements based on alleged

misrepresentations is that, in terms of the doctrine of election, the plaintiff was faced with a choice whether to uphold these contracts or to cancel them. The defendant postulated that the notional innocent party is put to an election. Such a party may elect to keep the contract alive and claim damages or to cancel the contract and claim restitution and or damages. The defendant asserted that there are two components of the doctrine of election. First, the innocent party must exercise the election within a reasonable period of becoming aware of the misrepresentation. Secondly, once the innocent party makes the election, it is bound by it. The innocent party cannot thereafter change its mind.

[20] The defendant further stated that one of the original causes of action in the plaintiff's particulars of claim includes a claim for breach of the Master Rental Agreements and damages. According to the defendant, the plaintiff accordingly elected to enforce the obligations created by the Master Rental Agreements. The defendant posits that the plaintiff did not, in the original particulars of claim, as they presently stand, make any averment that the Master Rental Agreements had been cancelled, nor was such cancellation claimed. Put differently, the defendant stated that the plaintiff, by its own words or conduct, elected to uphold the Master Rental Agreements instead of cancelling them. In the defendant's view, the plaintiff belatedly seeks to cancel the Master Rental Agreements through the proposed amendment.

[21] The defendant mentioned that the plaintiff is prevented from doing so for the following reason: Firstly, having made the election to uphold the Master Rental Agreements and to claim damages thereon, the plaintiff is bound by that election. According to the defendant, the plaintiff cannot both approbate and reprobate. Secondly, the defendant claimed that the plaintiff had failed to make the election to cancel the Master Rental Agreement within a reasonable time. It has been almost two and half years since the combined summons was issued. According to the defendant, no facts are pleaded in the proposed amendment which would satisfactorily explain the unreasonable delay. More so, the plaintiff did not plead when it became aware of the purported misrepresentation and or the true facts. The defendant denied all the allegations of fraud that the plaintiff levelled against it.

[22] In this regard, the defendant claims that despite the unsubstantiated protestation to the contrary, the plaintiff clearly had knowledge of all the relevant facts before the institution of the action and that the plaintiff made a binding election to uphold the Master Rental Agreements by seeking to enforce the allegations created thereby in the combined summons. In doing so, the plaintiff consciously chose not to pursue proceedings based on fraud, as the plaintiff belatedly attempts to do now. Consequently, the defendant prayed that the application for amendment be dismissed with costs including the costs of counsel on scale B.

The plaintiff's application to strike out

[23] The plaintiff applied to strike out paragraphs 8 to 18 of the defendant's answering affidavit in the application for leave to amend. According to the plaintiff, these paragraphs constitute argument and are, accordingly, irrelevant. The plaintiff stated that it would be prejudiced if such allegations were allowed to remain in the answering affidavit.

Applicable legal principles and discussion.

[24] For convenience, I consider it proper to first deal with the plaintiff's application to strike out the disputed paragraphs in the defendant's answering affidavit, as that application is relevant to determining the application for leave to amend. Rule 6(15) of the Uniform Rules provides that the court may on application order to be struck out from any affidavit any matter which is scandalous, vexatious or irrelevant, with an appropriate order as to costs, including costs as between attorney and client. The court may not grant such an application unless it is satisfied that the applicant will be prejudiced if the application is not granted.

[25] The main ground upon which this application is predicated is that the averments in these paragraphs constitute argument. A court may in terms of its rules strike out from any affidavit any matter which is scandalous, vexatious, or irrelevant

(the latter including argumentative matters) but will not do so unless it is satisfied that the applicant will be prejudiced in the conduct of his case if it is not granted.¹

[26] I have considered the averments in the impugned paragraphs and do not agree that these paragraphs are irrelevant or argumentative as alleged or at all. In my view, the paragraphs the plaintiff seeks to strike out are the basis upon which the opposition is predicated. In other words, the paragraphs the plaintiff complains of are the basis of the defendant's objection to the notice to amend. Paragraphs 8 to 18 of the defendant's answering affidavit explain why it is of the view that the plaintiff is prevented from introducing a new cause of action based on misrepresentation through an application to amend as the plaintiff is bound by the election it had made when it issued the summons against the defendant.

[27] The defendant asserts in these paragraphs that having made an election to uphold the Master Rental Agreements and to claim damages thereon, that election binds the plaintiff. Furthermore, in these paragraphs, the defendant pointed out that the plaintiff failed to make an election to cancel the Master Rental Agreement within a reasonable time and that it is not correct that the plaintiff became aware of all the relevant facts on 17 February 2023 as these averments are contradicted by the pleadings and the necessary documents filed of record. In my view, these paragraphs detail the fact that the plaintiff made its election and is bound by it. The case pleaded by the plaintiff in the summons is the case that the defendant was called to meet and the plaintiff cannot change its mind at this late stage.

[28] To my mind, these paragraphs are not argumentative and should not be struck out. They serve the function of both delineating the defendant's case in the manner of pleadings and containing the necessary factual averments to sustain the defendant's case. Most importantly, the plaintiff did not establish prejudice that it would suffer in the conduct of its case should the paragraphs remain. As pointed out by Mr Cutler, the defendant's counsel, the plaintiff's application is hyper-technical. In

¹ *Swissborough Diamonds Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others* 1999 (2) SA 279 (T) at 337B; See also *Parow Municipality v Joyce & McGregor (Pty) Ltd* 1973 (1) SA 937 C) at 939 C-D.

Msunduzi Municipality v Natal Municipal Pension/Provident Fund and Others,² it was held that the striking out procedure was never intended to allow a party to gain an advantage based on technicalities.

[29] Given all these considerations, the plaintiff's application to strike out paragraphs 8 to 18 of the defendant's answering affidavit must fail. Against this backdrop, I turn to consider the plaintiff's application to amend.

[30] It is common cause that the plaintiff's particulars of claim as they stand now encompass causes of actions based on impossibility of performance, unjust enrichment and breach of contract. In the plaintiff's particulars of claim, the plaintiff asserts that the beacons that were supposed to form the subject matter of the Master Rental Agreements concluded between the plaintiff and the defendant did not exist at the time of the conclusion of such agreements. Ex facie the pleadings itself, the performance undertaken by the parties in terms of the Master Rental Agreements was thus not possible at the time of contracting. The plaintiff pleaded that the defendant is liable to restore to the plaintiff all payments received by the defendant from the plaintiff on the basis that the defendant has been unjustifiably enriched at the expense of the plaintiff and the plaintiff impoverished by the receipt of such payments by the defendant.

[31] In the proposed amendment, the plaintiff seeks to introduce a new cause of action based on fraudulent misrepresentation (the proposed new main claim) and rectification, cancellation and restitution of amounts paid by the plaintiff (the new second alternative claim). As foreshadowed above, the defendant opposed the amendment on the basis that in terms of the doctrine of election, the plaintiff was faced with a choice whether to uphold these contracts or to cancel them. The defendant fervently asserted that the plaintiff in the combined summons sought to enforce the Master Rental Agreements with a claim for damages and not to cancel them. In the defendant's view, the plaintiff made an election and is bound by it and cannot change its mind at this late stage.

² 2007 (1) SA 142 (N) at para 8.

[32] It is trite that a party to a contract who has been induced to enter into such a contract by means of fraudulent misrepresentation will lose his right to repudiate if, with knowledge of the fraud, he thereafter does any act which may be construed to be an affirmation of the contract or fails to repudiate it within a reasonable time. In other words, an innocent party to a contract induced by fraud has an election to abide the contract, or to rescind it.³ Trollop JA, as he then was, observed in *Feinstein v Niggli and Another* that the innocent party induced by fraud has an election to abide by the contract or to rescind it. This is known as the doctrine of election. Where a plaintiff affirms the contract by claiming damages in lieu of specific performance instead of cancelling it, there is an onus on the plaintiff to plead; in so doing, he was unaware of the fraud.

[33] In other words, the plaintiff must demonstrate that it was unaware of the facts underlying the fraudulent misrepresentation. The party alleging a waiver of a contractual right retains throughout the proceedings the overall onus of proving that the other party had full knowledge of the right when he allegedly abandoned it.⁴ The doctrine of election generally involves a waiver: one right is waived by choosing to exercise another right, which is inconsistent with the former. Indeed, election and waiver have been equated as being species of the same general legal concept.⁵ The doctrine of election also arises in the context of a breach of contract, where the innocent party is similarly faced with an election to keep the contract alive and claim damages or to cancel the contract and claim restitution and/or damages.

[34] Put differently, once a breach that justifies cancellation has occurred, the innocent party is faced with an election: either to affirm or to cancel the contract. An innocent party is, of course, never obliged to cancel, and he or she need not make an election immediately – the innocent party has a reasonable period of time in which to do so.⁶ An election, once made, is however final and irrevocable unless the other party consents to its reversal.⁷ Thus, if the innocent party elects to uphold the contract, he or she cannot thereafter change his or her mind and cancel the contract,

³ *Feinstein Naggli and Another* 1981 (2) SA 684 (A) at 697 – 698.

⁴ *Netlon Ltd and Another v Pacnet (Pty) Ltd* 1977 (3) SA 840 (A) at 872 G-873H.

⁵ *Moyce v Estate Taylor* 1948 (3) SA 822 (A).

⁶ *Oatorian Properties (Pty) Ltd v Maroun* 1973 (3) SA 779 (A) at 785.

⁷ *Bowditch v Peel & Magill* 1921 AD 561 at 572-3; *Culverwell v Brown* 1990 (1) SA 7 (A) at 17.

unless the other party commits a fresh breach justifying cancellation. Enforcement and cancellation, being inconsistent with each other or mutually exclusive, the innocent party must make an election between them and cannot both appropriate and reprobate the contract.⁸

[35] As discussed above, the plaintiff's claim as presently pleaded encompasses causes of action based on impossibility of performance, unjust enrichment, and breach of contract. The plaintiff elected to enforce the obligations created by the Master Rental Agreements. The plaintiff did not claim cancellation of the agreements. Instead, the plaintiff sought damages for specific performance. The plaintiff elected to uphold the contracts by claiming specific performance instead of cancelling them.

[36] In the notice to amend, the plaintiff seeks to cancel the Master Rental Agreements based on misrepresentation, a new cause of action. The plaintiff asserts that it was not aware of the true facts of the misrepresentation until the defendant's plea was filed. The plaintiff also asserts that it was only when the defendant answered the request for further particulars on 17 February 2023 that it became apparent that the defendant never intended to comply with the provisions of the oral agreement pleaded in paragraph 4 of the particulars of claim.

[37] In my view, this cannot be correct. From the plaintiff's founding affidavit, the discovered documents filed, as well as the correspondence exchanged by the parties before the summons was issued, contradict the plaintiff's version that it was not aware of the fraud at the time the summons was issued. As pointed out by Mr Cutler, the defendant expressly pleaded in its plea that the true agreement was that it would buy the beacons from Ultrakit at the most favourable price that could be secured by the defendant from Ultrakit. The defendant's plea was delivered on 23 June 2022. Evidently, the argument that the plaintiff only became aware when the further particulars were filed on 17 February 2023 cannot be correct. Simply put, the defendant made it clear in its plea delivered in June 2022 that the true agreement between the parties was that it would buy the beacons for the plaintiff from Ultrakit at a cheaper price.

⁸ *Segal v Mazzur* 1920 CPD 634 at 644 – 645.

[38] Furthermore, from the discovered documents, in particular items 50 and 49 of the plaintiff's discovery documents, it is clear that the defendant provided the information that the plaintiff requested. From these documents, the plaintiff knew or should have known that there was a difference between the amounts paid by the plaintiff to the defendant and the amount paid by the defendant to Ultrakit. The suggestion that the plaintiff only became aware of the defendant's alleged fraudulent conduct after the delivery of the plea and further particulars cannot be correct. Item 50 of the discovered documents indicated that the defendant did not pay 2.4 million plus VAT. This information was at the disposal of the plaintiff at the time the summons was issued.

[39] A careful consideration of all the documents filed clearly demonstrates that the plaintiff had knowledge of all the relevant facts before the institution of the action and that the plaintiff made a binding election to uphold the Master Rental Agreements by seeking to enforce the obligations created thereby in the combined summons. In doing so, the plaintiff consciously chose not to pursue proceedings based on fraud, as the plaintiff belatedly seeks to do now. The plaintiff made its election, and it is bound by it.

[40] Most importantly, in the founding affidavit, the plaintiff asserts that based on the information at the plaintiff's disposal at the time of the issuing of the summons, the plaintiff's claim against the defendant was formulated on the basis set out in the particulars of claim as it stands now. The plaintiff further asserted that it possessed the Accounts Payable Transactions statement, which reflects the payment made by the defendant to Ultrakit, which statement came to the plaintiff's knowledge on about 12 January 2021. The plaintiff further stated that this statement seemed to indicate that the defendant had not paid the purchase price of the beacons as agreed by the plaintiff and Ultrakit upon the conclusion of the supplier agreement between the defendant and Ultrakit, as agreed between the plaintiff and the defendant.

[41] This assertion supports the defendant's version that the plaintiff was aware that the defendant had not remitted the payment to Ultrakit in accordance with their

agreement. Furthermore, the documents that were discovered, particularly items 44 and 45, demonstrate that the plaintiff's CEO, Stephen Leggatt, repeatedly asserted that the defendant and Ultrakit, were implicated in an alleged fraud against the plaintiff. He also indicated that both civil and criminal proceedings would be pursued against them. I have noted the argument presented by Mr Malan, the counsel for the plaintiff, regarding the defendant's assertion that the plaintiff possessed sufficient knowledge of the pertinent facts to allege fraud based on the email sent by Mr Leggatt, the Chief Executive Officer of the plaintiff. Mr. Malan contends that this assertion lacks factual support. According to Mr Malan, in the email, Mr Leggatt referred to the fraudulent conduct of Ultrakit and not to the defendant's fraudulent misrepresentation as pleaded in the proposed new main claim. I do not agree with this proposition.

[42] For completeness, in item 45 of the email dated 14 May 2021, Mr Leggatt stated as follows:

'Please therefore be advised that in the light of your repeated evasions, our attorneys instructions are now to assume your company was part of the alleged fraud of R2m plus interest and therefore will be part of the summons to sue for recovery of the money paid to UTtrackit, plus damages. *Please also be advised that criminal charges are to be laid against all parties with the Serious Commercial Crimes Division of SAPS and in your company's case also with the FSCA.* I will defer this serious set of actions until the end of today in case your company changes its mind and provides the information or explanation to which we are entitled.' (emphasis added)

[43] In my view, the plaintiff had the necessary facts to allege fraud in the main claim at the time of the issuing of the summons. Notwithstanding, the plaintiff determinedly chose not to pursue proceedings based on fraud but on specific performance. The plaintiff's counsel argued that there was never such an election to cancel the Master Rental Agreement as the plaintiff did not, by means of an alternative claim, purport to uphold the Master Rental Agreement. This argument, in my view, cannot be correct.

[44] In the first alternative claim set out in paragraph 16 of the particulars of claim, the plaintiff seeks damages for specific performance. The plaintiff did not seek to cancel the contract. A claim for specific performance underscores the importance of maintaining the contract alive, as it ensures that both parties remain committed to their obligations and expectations. The plaintiff, by its conduct, elected to uphold the Master Rental Agreement instead of cancelling it. Accordingly, the plaintiff is bound by its election.

[45] I am mindful that the primary object of allowing an amendment is to obtain proper ventilation of the dispute between the parties and to determine the real issues between them so that justice may be done.⁹ I am also cognizant that the practical rule adopted in respect of amendments is that amendments will always be allowed unless the application to amend is mala fide or unless such amendment will cause an injustice to the other side, which cannot be compensated by costs.¹⁰ However, in my view, in contractual disputes, where a party makes an election arising from a breach of contract, he is bound by his election. He cannot thereafter seek to introduce a new cause of action inconsistent with his election through an application to amend. The plaintiff sought to hold the defendant to the contract, claiming damages, and that election binds it.

[46] Even if I am wrong in my finding, I am of the view that the argument raised by the plaintiff in its founding affidavit that it was only when the defendant answered the request for further particulars on 17 February 2023 that it became apparent that the defendant never had any intention to comply with the provisions of the oral agreement pleaded in paragraph 4 of the particulars of claim, is mistaken and is at variance with the pleadings filed of record. In paragraph 27.6 of the defendant's plea, the defendant pleaded that in terms of the agreement, the defendant would purchase the beacons from Ultrakit at the most favourable price that the defendant could secure. The plea was served upon the defendant on 24 June 2022. At the very least, the defendant was aware on 24 June 2022 that the true agreement, according to the

⁹ *Cross v Ferreira* 1950 (3) SA 443 (C) at 447; *YB v SB* 2016 (1) SA 47 (WCC) at 51C-D.

¹⁰ *Moolman v Estate Moolman* 1927 CPD 27 at 29; *Villa Crop Protection (Pty) Ltd v Bayer Intellectual Property GmbH* 2024 (1) SA 331 (CC) paras 64 – 67 and 87.

defendant, was that it would acquire the beacons from Ultrakit at the most favourable price that could be secured by the defendant from Ultrakit.

[47] I am also of the view that there is prejudice that the defendant will suffer if the amendment is granted. The plaintiff seeks to introduce new causes of action that are completely different from the case the defendant has previously been required to meet. The application will give rise to a new case altogether if granted. The defendant notes in the answering affidavit that this will require fresh evidence, including new preparation and discovery. There is also a possibility that evidence that was not previously relevant to the causes of action pleaded in the original summons but which would be relevant to the proposed amended causes of action has been lost.

[48] Additionally, the defendant may not know the whereabouts of witnesses whose testimony could be relevant if the proposed amendment with a new cause of action is granted. After all, the pleadings have closed, and it is incontestable that the defendant has preserved evidence and secured witnesses for a case that the plaintiff pleaded in the summons, which differs significantly from the one the plaintiff intends to introduce through the proposed amendment. The indications are thus that the prejudice the defendant will suffer if the amendment is granted is of such a profound nature that it cannot be cured by a postponement or through a cost order.

[49] Given all these considerations, I am of the view that the plaintiff's application for leave to amend must fail.

Costs

[50] As a general rule, costs follow the result, and successful parties should be awarded their costs.¹¹ One of the fundamental principles of costs is to compensate a successful litigant for the expenses incurred in unjustly having to initiate or defend litigation. I have considered, the complexity of this matter; and the value of the claim

¹¹ *Union Government v Gass* 1959 4 SA 401 (A) 413.

raised in the pleadings, and I am of the view that costs should be awarded in favour of the defendant on scale B.

Order

[51] In the result, the following order is granted:

51.1 The application to strike out as well as the application for leave to amend are hereby dismissed.

51.2 The plaintiff is ordered to pay the costs of this application, including the cost of counsel on scale B.

LEKHULENI JD
JUDGE OF THE HIGH COURT

APPEARANCES

For the plaintiff: Mr Malan

Instructed by: Alant Gell and Martin Inc

For the Defendant: Mr Cutler

Instructed by: Ashersons Attorneys