



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

JUDGMENT

**Not Reportable
CASE NO: A20/2026**

In the matter between:

TRACETEC (PTY) LTD

Appellant

and

BUSINESS EQUIPMENT ASSET FINANCE (PTY) LTD Respondent

Neutral citation: *Tracetec (Pty) Ltd v Business Equipment Asset Finance (Pty) Ltd* (Case No: A20/2026) [2026] ZAWCHC ____ (28/08/2026)

Coram: **DA SILVA SALIE J, DAVIS J and MTHIMUNYE AJ**

Heard: 22 July 2026

Delivered: Electronically on 28 August 2026

Summary: Appeal against refusal of application for leave to amend particulars of claim – disputes of fact arising in application for leave to amend – task of court is not to resolve the triable issue, but merely to determine whether *prima facie* the amendment raises a triable issue.

ORDER

1. The appeal is upheld with costs, including the cost of counsel on scale B.
2. The order of the court *a quo* is set aside, and replaced with the following order:
 - 2.1 The appellant is granted leave to amend its particulars of claim, in accordance with its notice in terms of Rule 28(1) dated 31 May 2024.
 - 2.2. The costs of the application for leave to amend shall be costs in the cause.

JUDGMENT

DAVIS J and MTHIMUNYE AJ (DA SILVA SALIE J concurring):

Introduction

[1] This is an appeal against the dismissal of the appellant's application in terms of Rule 28(4) of the Uniform Rules of Court for leave to amend its particulars of claim. The appeal proceeds with the leave of the court *a quo*.

[2] For the sake of convenience, the appellant is referred to as ‘the plaintiff’ and the respondent as ‘the defendant’.

[3] It is not necessary to set out the relevant facts since they appear from the judgment of the court *a quo*, which should be read together with this judgment. It is sufficient, for present purposes, to refer to the various agreements referred to in the plaintiff’s particulars of claim.

- a) Firstly, it was alleged that the plaintiff entered into an oral agreement with Utrackit Manufacturers CC (‘Utrackit’), in terms whereof Utrackit undertook to manufacture purpose-built beacons for use by the plaintiff as part of its radio frequency vehicle tracking business, on receipt of written orders from the plaintiff, and the plaintiff undertook to pay for the beacons by means of finance obtained from a third party financier, which payments would be made directly to Utrackit by the financier (‘the Utrackit oral agreement’).
- b) Secondly, it was alleged that the plaintiff and the defendant, in the knowledge of the Utrackit oral agreement, entered into an oral agreement (‘the BEAF oral agreement’) in terms whereof the defendant undertook to finance the purchase of the beacons by:
 - i. concluding a supplier agreement with Utrackit to the effect that the defendant would purchase the beacons from Utrackit at the price agreed between the plaintiff and Utrackit;
 - ii. concluding a standard Master Rental Agreement with the plaintiff in terms whereof the plaintiff would rent the

beacons from the defendant against payment of the monthly rental stipulated in the Master Rental Agreement, which was to be amended to provide for the transfer of ownership of the beacons to the plaintiff upon payment of all the rentals due in terms of the Master Rental Agreement.

- c) Thirdly, it was alleged that the plaintiff and the defendant entered into two written Master Rental Agreements in respect of two orders for beacons placed by the plaintiff with Utrackit, duly amended to stipulate that ownership of the beacons would be transferred to the plaintiff at the end of 36 months, provided that the plaintiff had made all payments in full ('the MRAs').

[4] In its original particulars of claim, dated 5 April 2022, the plaintiff pleaded three alternative claims against the defendant, namely:

- a) a main claim founded on unjustified enrichment on the basis that the MRAs had been invalid from the outset due to impossibility of performance (because the beacons had not yet been manufactured), and that the defendant had accordingly been enriched by the payments made by the plaintiff in terms of the invalid MRAs;
- b) a first alternative claim, predicated on the assumption that the MRAs were valid, for damages for breach of the MRAs;
- c) a second alternative claim founded on unjustified enrichment, on the basis that the plaintiff had overpaid the defendant amounts which were not owed in terms of the MRAs, with the result that the defendant had allegedly been enriched.

[5] In terms of its notice of intention to amend dated 31 May 2024 ('the Rule 28(1) notice'), the plaintiff sought to:

- a) introduce a new main claim based on fraudulent misrepresentation for cancellation of the BEAF oral agreement and the MRAs, restitution of all amounts paid in terms of the MRAs and damages;
- b) introduce a new second alternative claim for rectification of the MRAs to reflect that the beacons had not yet been manufactured by Utrackit at the time when the MRAs were concluded, and for cancellation of the MRAs on account of the defendant's breach in failing to deliver the beacons to the plaintiff at the end of the 36-month period;
- c) preserve the old main claim as the new first alternative claim, the old first alternative claim as the third alternative claim and the old second alternative claim as the fourth alternative claim.

The objection to the proposed amendment

[6] The defendant objected to the proposed amendment on the main ground that the plaintiff had allegedly exercised an election to enforce the MRAs, not to cancel them, and was therefore precluded from belatedly claiming cancellation of the MRAs.

[7] It contended in this regard that the plaintiff had not sought to cancel the MRAs in its original particulars of claim, but had instead elected to affirm the MRAs by claiming damages in lieu of specific performance. It alleged, further, that the plaintiff had had knowledge of the facts pertaining to the alleged fraud at the time when it issued summons, and that its failure to institute a claim for

cancellation, in the knowledge of the relevant facts, indicated an election not to cancel the MRAs.

The relevant legal principles

[8] The principles governing amendments are trite. It was held in the *locus classics* of *Moolman v Estate Moolman*¹ that:

‘[T]he practical rule adopted seems to be that amendments will always be allowed unless the application to amend is *mala fide* or unless such amendment would cause an injustice to the other side which cannot be compensated by costs, or in other words unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleading which it is sought to amend was filed.’

[9] In *Trans-Drakensberg Bank Ltd (Under Judicial Management) v Combined Engineering (Pty) Ltd and Another* 1967 (3) SA 632 (D) it was held (at 641 A) that:

‘Having already made his case in his pleadings, if he wishes to change or add to this, he must explain the reason and show *prima facie* that he has something deserving of consideration, a triable issue; he cannot be allowed to harass his opponent by an amendment which has no foundation.’

[10] A triable issue is one that, if proved by the evidence foreshadowed in the application for leave to amend, will be viable or relevant, or, as a matter of probability, will be proved by the evidence so foreshadowed (See *Ciba Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd en 'n Ander* 2002 (2) SA 447 (SCA) 462I – 463 A; *Best Drive Holdings (Pty) Ltd and Another v Lewis* A 2022/027541)[2026] ZAGPJHC 406 (23 February 2026) para 12).

¹ *Moolman v Estate Moolman* 1927 CPD 27 at 29.

[11] To sum up, a court seized with an application for leave to amend will exercise of its discretion in favour of granting leave to amend where it is satisfied a) that the proposed amendment is *bona fide*, b) that it raises a triable issue, and c) that it occasions no prejudice to the party affected thereby which cannot be cured by a postponement and/or an order for costs.

[12] A court seized with an application for leave to amend is required to exercise its discretion judicially. The discretion to grant or refuse amendments relates to a Judge's control of the business in his or her own court, and an appellate court will not interfere unless the court *a quo* has failed to exercise its discretion judicially, i.e., where the decision is capricious, based on a wrong principle, not reached by unbiased judgment or not based on substantial reasons (see *Ex Parte Neethling and Others* 1951 (4) SA 331 (AD) 335B - E; *Tjospomie Boerdery (Pty) Ltd v Drakensberg Botteliers (Pty) Ltd* 1989 (4) SA 31 (TPD) 36 C – I and *Ciba Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd en 'n Ander* (*supra*) para 32).

The issue in this appeal

[13] The Court *a quo* refused leave to amend on the grounds that the proposed new claims were precluded by the doctrine of election,² and further that the amendment would cause prejudice to the defendant.³ In effect, the Court *a quo* found that the proposed amendment did not raise a triable issue, because the doctrine of election meant that the new claims for cancellation were unsustainable.

² Paragraphs 35 to 45 of the judgment.

³ Paragraph 47 of the judgment.

[14] The issue in this appeal is whether or not the Court *a quo* exercised its discretion judicially in refusing leave to amend on the grounds of election and prejudice.

The election issue

[15] The Court *a quo* correctly held that the doctrine of election involves a waiver, and that the onus rests on the party alleging election / waiver to prove that the other party had full knowledge of its rights when it allegedly abandoned them.⁴

[16] Being a matter of intention, election or waiver can only occur when the party concerned had full knowledge of the legal right he is said to have waived, and of the facts from which the right arose (see *Coppermoon Trading 13 (Pty) Ltd v Government of the Province* 2020 (3) SA 391 (ECB) at para 26, citing *Ex parte Sussens* 1941 TPD 15 at 20, *The Road Accident Fund v Mothupi* 2000 (4) SA 38 (SCA) at para 17 and *Borstlap v Spangenberg* 1974 (3) SA 695 (A) at 704.)

[17] It bears emphasis that the question whether or not a party has made an election is a question of fact to be decided on the evidence. Watermeyer AJ, as he then was, explained it thus in *Segal v Mazzur* 1920 CPD 634 as 644 – 5:

‘Now, when an event occurs which entitles one party to a contract to refuse to carry out his part of the contract, that party has the choice of two courses. He can either elect to take advantage of the event or he can elect not to do so. ... Whether he has made an election one way or the other is a question of fact to be decided by the evidence. If, with knowledge of the breach, he does an unequivocal act which necessarily implies that he has made his election one way, he will be held to have

⁴ Paragraph 33 of the judgment.

made his election that way; this is, however, not a rule of law, but a necessary inference of fact from his conduct.’

[18] In the affidavit in support of the application for leave to amend, the plaintiff denied that it knew the relevant facts pertaining to the alleged fraudulent misrepresentation which forms the subject of the amended main claim at the time when it instituted action against the defendant. It alleged that it only became aware of the alleged fraudulent misrepresentation on receipt of the defendant’s response to its request for trial particulars, delivered on 23 February 2023.

[19] It alleged in this regard that it was only on receipt of the trial particulars that it became apparent to it that the defendant had never intended to purchase the beacons from Utrackit at the price agreed between the plaintiff and Utrackit, and that the defendant had always intended to negotiate a more favourable price with Utrackit. The alleged fraud lay therein that, at the time the BEEF oral agreement was concluded, the defendant falsely represented to the plaintiff that it would purchase the beacons from Utrackit at the price agreed between Utrackit, while knowing that it intended to negotiate a more favourable price from Utrackit.

[20] The Court *a quo* found that the plaintiff had indeed exercised an election not to cancel the MRAs at the time when it issued summons because:

- a) the plaintiff did not claim cancellation of the MRAs in the original particulars of claim, but instead kept the MRAs alive by claiming damages in lieu of specific performance;⁵ and

⁵ Paragraph 35 of the judgment.

- b) the plaintiff knew the relevant facts regarding the alleged fraud at the time when it issued summons, and nonetheless claimed specific performance rather than claiming cancellation on the grounds of fraudulent misrepresentation, thereby exercising an election.⁶

[21] The Court *a quo*'s finding that the plaintiff knew the relevant facts pertaining to the alleged fraud at the time when it issued summons was based on:

- a) correspondence exchanged between the parties before summons was issued;
- b) the fact that the defendant in its plea, delivered on 23 June 2022, denied that it was agreed between the parties that the defendant would purchase the beacons from Utrackit at the price agreed between the plaintiff and Utrackit, and expressly pleaded that the true agreement was that the defendant would purchase the Beacons from Utrackit at the most favourable price which the defendant could secure from Utrackit.⁷

[22] In our view, the Court *a quo* misdirected itself in finding, based on the affidavits in the amendment application, that the plaintiff made an election to uphold the MRAs, and waived its right to cancel the MRAs, when it instituted action on 5 April 2022. We say that for the reasons which follow.

[23] Firstly, while it is so that the plaintiff made reference in correspondence to a fraud, its accusations of fraud were aimed at Utrackit, not the defendant. The correspondence does not reveal any knowledge on the part of the plaintiff that the defendant was party to the alleged fraud. The absence of any concrete

⁶ Paragraphs 39 and 43 of the judgment.

⁷ Paragraph 37 of the judgment.

knowledge on the part of the plaintiff is evident from the following paragraph in an email written by the plaintiff's CEO on 14 May 2021 [emphasis added]:

'I demand to know on what basis you paid UTrackit R2 million in December 2017, while apparently seeking no proof, other than UTrackit's allegedly fraudulent email to the effect that the products existed, or alternatively proof that Tracetec, presumably Colyn, indicated – in writing – that it was satisfied that payment could be made. This lack of documentation over the release of funds, apparently based solely on an allegedly fraudulent e mail from UTrackit, seems to indicate either negligence, or that your company was a willing party. Alternatively you can easily supply the authorisation from Tracetec to release the funds, if such exists.

Please therefore be advised that in the light of your repeated evasions, our Attorneys are now to assume your company was part of the alleged fraud of R 2m plus interest and therefore will be part of the summons to sue for recovery of the money paid to UTrackit, plus damages.'

[24] Secondly, the defendant's denial of the terms of the BEEF oral agreement in its plea did not serve to alert the plaintiff to the alleged misrepresentation on which it seeks to rely in the proposed amended main claim. The alleged false representation consists of the defendant's conveying to it that it agreed to purchase the beacons at the price agreed between the plaintiff and Utrakit, while secretly harbouring an intention to negotiate a lower price with Utrakit. The plaintiff states that it only became aware of this alleged mindset on the part of the defendant when it received the defendant's reply to its request for trial particulars, i.e., on 23 February 2023. In my view, there was no basis on the evidence before the Court a quo to reject its version in that regard out of hand on the affidavits. This is a matter which should be determined at trial, with the benefit of *viva voce* evidence and cross-examination.

[25] Moreover, the contents of the defendant's plea, delivered on 23 June 2022, were irrelevant to question of whether the plaintiff had knowledge of the

alleged fraudulent misrepresentation at the time when it issued summons on 5 April 2022, that being the operative time to assess the plaintiff's knowledge if one is to infer an election from the contents of the original particulars of claim.

[26] Thirdly, the Court *a quo*, in our view, failed to appreciate that the first alternative claim pleaded in the original particulars of claim⁸ was exactly that: an alternative claim. The claim was conditional on the failure of the main claim, being a claim in enrichment predicated on the MRAs being void from the outset. Given the conditional nature of the alternative claim, it cannot, in our view, be said to amount to an unequivocal, final choice to affirm the MRAs. Moreover, there is no indication in the affidavit that the plaintiff was aware, at the time when it issued summons, of its right to cancel the MRAs. In the absence of evidence in this regard, there was no basis for the Court *a quo* to find that the plaintiff had in fact made an election to uphold the MRAs.

[27] Fourthly, the Court *a quo*, in our view, failed to appreciate that, faced with the factual dispute on the affidavits regarding the plaintiff's knowledge of the relevant facts at the time when it issued summons, its task was not to resolve that dispute, but merely to determine *prima facie* whether the amendment raised a triable issue: a court considering an application for leave to amend should not usurp the role of the trial court and decide the point as if all the evidence were before the court (*Best Drive Holdings (Pty) Ltd and Another v Lewis (supra)* paras 12 and 20). In our view the Court *a quo*'s approach was misdirected, as it misconstrued its task.

[28] In our view, the plaintiff met the threshold of a triable issue, and the amendment ought to have been allowed. The election issue should not have

⁸ For damages in lieu of performance.

been decided by the Court *a quo*: it should be raised in the defendant's plea and determined at trial.

The prejudice issue

[29] Prejudice is an important consideration in determining whether to grant an application for leave to amend. If it is shown that the amendment would cause prejudice to the other party which cannot be cured by a postponement or costs, leave to amend cannot be granted.

[30] The high-water mark of the prejudice asserted by the defendant is the speculative allegation that there was '*a possibility*' that evidence relevant to the proposed new claims, which was not relevant to the causes of action previously pleaded in the original particulars of claim, had been lost, and that witnesses whose testimony was not relevant '*may similarly have been lost or their whereabouts no longer known to the Defendant*'.

[28] Having regard to the contents of the documents annexed to the founding and answering affidavits, it seems to us that the documentary and oral evidence required to deal with the amended claims is the same as that required to deal with the claims as originally pleaded.

[29] But even if that is not the case, it seems to us that the Court *a quo* erred in attaching too much weight to the entirely speculative nature of the allegations of prejudice raised by the defendant. The defendant did not identify any lost evidence or witnesses. It merely raised the possibility of prejudice: it did not establish actual prejudice.

[30] In our view, therefore, the Court *a quo* misdirected itself on the facts by finding that the defendant would indeed suffer prejudice if the application for the amended were allowed.

Conclusion and costs

[31] It follows from the foregoing that, in our view, the Court *a quo* misdirected itself materially and this Court is at large to intervene and substitute its decision for that of the Court *a quo*.

[32] For all the reasons set out above, we are of the view that the plaintiff ought to be granted leave to amend, as prayed.

[33] The costs of the appeal must follow the result, in accordance with the usual rule. Regarding the costs of the application for leave to appeal, we are mindful of the usual rule that the party seeking leave to amend is ordered to pay the costs of reasonable opposition to the amendment. This is not an inflexible rule. While we cannot say that the defendant's opposition was unreasonable, we do not think that it would be fair to order the plaintiff to pay the defendant's costs of the application for leave to amend. In our view, the fairest course of action in the circumstances would be to order that the costs of the application for leave to amend be costs in the cause.

[34] We therefore propose the following order:

1. The appeal is upheld with costs, including the cost of counsel on scale B.
2. The order of the court *a quo* is set aside, and replaced with the following order:
 - 2.1 The appellant is granted leave to amend its particulars of claim, in accordance with its notice in terms of Rule 28(1) dated 31 May 2024.

2.2 The costs of the application for leave to amend shall be costs in the cause.

D M DAVIS
JUDGE OF THE HIGH COURT

S MTHIMUNYE
ACTING JUDGE OF THE HIGH COURT

I agree, and it is so ordered.

G DA SILVA SALIE
JUDGE OF THE HIGH COURT

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