

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 2023-078878

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
27/09/2024	
DATE	SIGNATURE

In the matter between:

FILTAQUIP (PTY) LTD	Applicant
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and

GLENCORE OPERATIONS SOUTH AFRICA (PTY) LTD	Respondent
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In re:

GLENCORE OPERATIONS SOUTH AFRICA (PTY) LTD	Plaintiff
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And

FILTAQUIP (PTY) LTD	Defendant
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Judgment

McCafferty, AJ

Introduction

1. This is a Rule 30 application and exception relating to an action (“the action”) instituted by Glencore Operations South Africa (Pty) Ltd (“the plaintiff”), against Filtquip (Pty) Ltd (“the defendant”).
2. In addition, the defendant seeks an order for specific performance for the delivery by the plaintiff of a detailed quantification of the plaintiff’s claims against the defendant by virtue of certain pre-arbitral dispute resolution provisions contained in the agreements concluded by the parties and referred to below.
3. The parties are referred to herein as they are cited in the action.
4. The action is a claim for contractual damages based on two agreements:
 - 4.1 the Design, Construction and Erection Agreement in respect of the detailed engineering, design, draughting and construction of a slurry dewatering plant for Tweefontein between the plaintiff, as principal, and the defendant, as supplier (“the Design Agreement”)¹; and
 - 4.2 the Operation and Maintenance Agreement in respect of Tweefontein Filter Press Plant between the plaintiff, as principal, and the defendant, as operator (“the Operation Agreement”)².
5. The Design Agreement and the Operation Agreement both have dispute resolution clauses which, subject to written notice and the failure by the parties to reach an agreement which resolves their dispute or differences, culminate in an arbitration. The two clauses are similar in their wording and purpose³. For convenience, both parties rely upon the provisions of Clause 12 of the Design Agreement.⁴
6. Before instituting the action, the plaintiff delivered a notice to the defendant in terms of Clause 12 of the Design Agreement (“the Notice”). The defendant took issue with the sufficiency of the Notice on a number of grounds but only one of which is relevant for present purposes, namely the alleged failure to comply with

¹ Caselines 06-57-164

² Caselines 06-165-256

³ Clause 12 in the Design Agreement and Clause 11 in the Operations Agreement.

⁴ Caselines 06-91-92

Clause 12.1(c)(iv) of the Design Agreement which provides that written notice of any dispute or difference must be given to the other party, and that notice must “(iv) contain detailed particulars of the quantification of the claim”.

7. Briefly, there then followed numerous exchanges between the parties without the sufficiency issue being resolved and ultimately plaintiff instituted the action on 8 August 2023.
8. On 22 September 2023, the defendant delivered its notice calling on the plaintiff to remove eleven discrete causes of complaint.⁵
9. On 28 September 2023, and in response to the notice to remove cause of complaint, the plaintiff’s attorneys addressed a letter to the defendant’s attorneys, wherein the former stated⁶ as follows:

“Our client does not intend to amend its particulars of claim based on the contents of the Notice.”

10. On 16 October 2023, the defendant issued a Rule 30 application wherein it also seeks, as substantive relief, specific performance – that the plaintiff be directed to deliver a detailed quantification of its claims as contemplated in Clause 12.1(c) of the Design Agreement.⁷ Also, on 16 October 2023, the defendant delivered its exception.⁸
11. On 20 November 2023, the plaintiff delivered a notice of intention to amend its particulars of claim.⁹ Also on 20 November 2023, the plaintiff delivered its answering affidavit in the Rule 30 application¹⁰.

The Rule 30 Application and the Exception

12. The Rule 30 application seeks to set aside the plaintiff’s particulars of claim for non-compliance with Rule 18, and Rules 18(4) and 18(10) specifically (and an

⁵ Founding Affidavit para 10, Caselines 06-7 read with Annex FA1, Caselines 06-19
⁶ Relying Affidavit para 26, Caselines 06-397 read with Annex RA1, Caselines 06-426
⁷ Notice of Motion, Caselines 06-1-3
⁸ Exception, Caselines 07-1-28
⁹ Notice of Intention to Amend, Caselines 04-2-92
¹⁰ Answering Affidavit, Caselines 06-282

application for specific performance). The exception is brought on the grounds that the plaintiff's particulars of claim are vague and embarrassing.

13. The Rule 30 application and the exception are, in effect, the same. Each of the grounds of complaint originally identified in the notice to remove cause of complaint is mirrored in the exception.

The Applicable Legal Principles related to Pleadings

14. Before dealing with the individual grounds of complaint and exception it is appropriate to briefly set out the relevant legal principles relating to pleadings.
15. Rules 18 provides the rules relating to pleading generally.
16. Rule 18(4) provides that:
 - 16.1 “every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his or her claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposing party to reply thereto”.
17. It is a basic principle that particulars of claim should be phrased in such a manner that a defendant may reasonably and fairly be required to plead thereto; a defendant must know what case it is required to meet. The object of pleadings is to enable each side to come to trial prepared to meet the case of the other and not be taken by surprise. Pleadings must be lucid and logical and in an intelligible form¹¹.
18. As explained in *Jowell v Bramwell Jones* (“*Jowell*”), a pleader is only required to “plead a summary of the material facts” and to “furnish only those particulars as are strictly necessary to enable the defendant to plead” and, further:¹²

“The plaintiff is required to furnish an outline of his case. That does not mean that the defendant is entitled to a framework like a crossword puzzle in which every gap can be filled by logical deduction. The outline may be asymmetrical and

¹¹ *Trope v South African Reserve Bank and Another and Two Other Cases* 1992 (3) SA 208 (T) at 210 H-J

¹² 1998 (1) SA 836 (W) at 901C-H, and 913E-G.

possess rough edges not obvious until actually explored by evidence. Provided the defendant is given a clear idea of the material facts which are necessary to make the cause of action intelligible, the plaintiff will have satisfied the requirements.”

19. Neither exceptions nor applications to enforce Rule 18 are intended to allow a defendant to pose interrogatories at the plaintiff or to demand that the plaintiff disclose the evidence behind particular averments in the pleadings. If the meaning of an averment in a pleading is clear there can be no demand for the plaintiff to disclose the basis of the averment.¹³
20. As the courts have repeatedly had occasion to say: “the Court should not look at a pleading with a magnifying glass of too high power”.¹⁴ For “[i]f it does, it will be almost bound to find flaws in most pleadings... It is so very easy, especially for busy counsel, to make mistakes here or there, to say too much or too little, or to express something imperfectly”.¹⁵
21. Similarly, “*minor blemishes in and unradical embarrassments caused by a pleading*” may be cured by further particulars, but do not warrant setting aside the pleadings.¹⁶
22. If a pleading does not comply with the sub-rules of Rule 18 requiring specified particulars to be set out, prejudice is *prima facie* established.
23. Rule 18(10) provides in relevant part that: “A plaintiff suing for damages shall set them out in such manner as will enable the defendant reasonably to assess the quantum thereof”.
24. The approach to the pleading of quantum is robust and practical: the plaintiff must plead its damages such that the defendant may reasonably assess whether to plead. As explained in *Minister van Wet en Orde v Jacobs*¹⁷ -

¹³ Jowell at 901A (“While it is of course fundamental is that the party should be adequately apprised of the case he has to meet, the ingenious inquisitor should not be permitted, under the guise of a request for further particulars to a pleading, in effect to submit a series of interrogatories of the opposite party”) and see also at 916

¹⁴ Kahn v Stuart and Others 1942 CPD 386 at 391 (“Kahn”); repeated and applied in, among others, Jowell.

¹⁵ Kahn at 391 to 392

¹⁶ Jowell at 900I – 901E

¹⁷ 1999 (1) SA 944 (O) at 952J-953B.

“[A] defendant is not entitled to insist on such specified details and information which would enable him to make a precise, measured and accurate calculation of the plaintiff’s damages or to mathematically verify the correctness of the amounts claimed.

The defendant is also not entitled to insist on an abbreviated statement of the plaintiff’s intended evidence to substantiate the respective claims.

What is therefore required is only such details as would reasonably enable the defendant to estimate the quantum of the plaintiff’s damage, in accordance with the guidelines of Court Rule 18(10); and not such details as would reasonably enable the defendant to check whether the plaintiff’s estimate of the quantum is correct”.¹⁸

25. By doing so, the other party should be adequately put into the picture as to the basis of the damages so that “it can plead or decide to tender and plead”.¹⁹ But “there is no present duty upon the plaintiffs to give, as it were, an advance abridged edition of their evidence to establish their damages at the trial.”²⁰

The Grounds of Irregularity and Excipiability of the Plaintiff’s Particulars of Claim

26. In its written argument, the defendant, relying on *Sasol Industries (Pty) Ltd t/a Sasol 1 v Electrical Repair Engineering (Pty) Ltd t/a LH Marthinusen*²¹ (“Sasol”) which references *Getz v Pahlavi*²² (“Getz”), contends that if the plaintiff fails to plead that its damages are an estimate, this is irregular. The defendant makes

¹⁸ Translation. The original provides:

“n Verweerder is egter nie geregtig om aan te dring op sodanige gespesifiseerde besonderhede en inligting wat hom in staat sou stel om 'n presiese, afgemete en akkurate berekening te maak van die eiser se skade of om die korrektheid van die gevorderde bedrae matematies te kontroleer nie.

Die verweerder is ook nie geregtig om aan te dring op 'n verkorte uiteensetting van die eiser se voorgenome getuienis vir staving van die onderskeie eise nie.

Wat dus wel vereis word, is slegs sodanige besonderhede wat die verweerder redelik in staat sou stel om die quantum van die eiser se skade te skat, ooreenkomstig die riglyne van Hofreël 18(10); en nie sodanige besonderhede wat die verweerder redelik in staat sou stel om na te gaan of die eiser se skatting van die quantum korrek is nie.”

¹⁹ *Coop and Another v Motor Union Insurance Co Ltd* 1959 (4) SA 273 (W) at 277H .

²⁰ *Ibid* at 278A.

²¹ 1992 (4) SA 466 (WLD)

²² 1943 WLD 142

this claim as a justification for the second, third, fourth, fifth, sixth, seventh, eighth and tenth grounds of complaint.²³

27. The plaintiff in its written argument, correctly in my view, argues that nowhere in Getz or Sasol does the court state that if the damages are an estimate, then a party must plead that they are an estimate otherwise the pleadings are irregular.²⁴
28. I also agree with the plaintiff's submission that when damages claimed are prospective and not based on costs that have already been incurred, they will by necessary implication be estimated and there is no need to plead that they are estimates.²⁵
29. In any event, this ground of "irregularity" was not taken in the notice to remove cause of complaint, or the exception, and the defendant may not argue for a new exception but is bound to the exception actually taken by it.²⁶ This applies equally to a notice to remove cause of complaint.²⁷
30. Against this backdrop, I will now deal with the individual grounds of exception and complaint.

The first ground

31. The first ground of exception and the first ground of objection was twofold:
 - 31.1 Firstly, the particulars of claim plead in paragraph 12 that "Filtaquip warranted that when the supply was completed it would be fit for its intended purpose and would fulfil the other requirements of the Design Agreement (Clause 2.1(b) of the General Terms of the Design Agreement)".

²³ Defendant's Heads of Argument p 24 para 51; p24-25 paras 54-56, p25 para 59, p26 para 62, p28 para 71; Caselines 07-37-77

²⁴ Plaintiff's Heads of Argument p 15 para 41.2, Caselines 07-112

²⁵ Ibid

²⁶ Ibid at 898F – 899B

²⁷ Tembani and Others v President of The Republic of South Africa and Another 2023 (1) SA 432 (SCA) at para 21, see similarly, for irregular proceedings: TJ v TA (2019/22224) [2021] ZAGP JHC 39 (31 March 2021) para 12

However, the plaintiff did not state what other requirements of the Design Agreement it relies on or refers to.

31.2 Secondly, Clause 2.1(b) of the Design Agreement does not relate to the term pleaded by the plaintiff.²⁸

32. As to the second concern:

32.1 It is obvious, in the context of the paragraph, that the reference to Clause 2.1(b), rather than to Clause 2.2(b) of the General Terms of the Design Agreement, was a typographical error;

32.2 That much would have become clear when one has regard to the fact that paragraph 12 of the particulars of claim is concerned expressly with what it is alleged the defendant warranted with regard to the supply. Clause 2.1(b) is obviously not a warranty. Clause 2.2(b) on the other hand is a warranty.

32.3 This is a minor blemish and the court should not look at a pleading with a magnifying glass with too high a power.²⁹ The error does not present embarrassment which amounts to prejudice. It is frivolous rather than substantial.³⁰

33. As to the first concern:

33.1 In paragraph 12 of the particulars of claim the plaintiff pleads the following:

“Filtaquip warranted that when the supply was completed it would be fit for its intended purpose and would fulfil the other requirements of the Design Agreement (Clause 2.1(b) of the General Terms of the Design Agreement)”.³¹

33.2 Clause 2.2 is titled “Specifics: Design–related obligations (without limitation in general).

²⁸ Exception, Caselines 06-20-21

²⁹ See Jowell at 900I

³⁰ See Nxumalo v First Link Ins Brokers (Pty) Ltd 2003(2) SA 620(T), at para 6

³¹ Particulars of Claim, Caselines 02-6

- 33.3 Clause 2.2(b) reads “The Supplier warrants that the Supply completed will be fit for their intended purpose and fulfills the other requirements of the Agreement.”
- 33.4 The plaintiff has, in paragraph 12 of its particulars of claim, pleaded the said clause almost verbatim.
- 33.5 The plaintiff accepts that if it wishes to rely on aspects of the Design Agreement that it alleges were not fulfilled, then it must plead those³². In my view, having pleaded the design-related obligations (without limitation in general), it did plead the specific obligations warranted but not fulfilled by the defendant under the Design Agreement at paragraphs 13 to 13.5 (with reference to Clause 3.1(a) of the General Terms)³³, 14,15, and 16 of the particulars of claim³⁴. These are the “other requirements” upon which the plaintiff relies under the Design Agreement.
- 33.6 In its written submissions, the defendant in alleging prejudice, links the first ground of irregularity and excipiability with the reference to “other requirements” in the second ground where the plaintiff relies on “other requirements” in support of its claim for damages.
- 33.7 The response from the plaintiff in its written submissions is that it has indeed relied upon the “*other requirements*” and that these have been pleaded in paragraph 22 as follows:

“22. Filtaquip breached the warranties under the Design Agreement in that the plant was and is not fit for its intended purpose and was and is not designed and constructed in accordance with the specifications detailed in schedule 2 and schedule 3 in that:

22.1 the plant could not and cannot treat 250mtph solids nominal and 300mtph maximum with standby capacity utilized; and

22.2 the plant could not and cannot achieve 3 to 3,5 cycles per hour.”

³² Plaintiff's Heads of Argument para 55.3, Caselines 07-118

³³ Caselines 02-40-41

³⁴ Amended Particulars of Claim, Caselines 02-6-7

77.8 Further, that because of the “*other requirements*” identified, as above, the plaintiff pleads in paragraph 23.1 of the particulars of claim how it intends to quantify its damages caused by the breach, i.e., by proving the reasonable costs of modifications required to make the plant fit for its intended purpose and that fulfills the other requirements of the Design Agreement and states that (linking it back to paragraph 22) the modifications will include “*the replacement of the four filter processes of the plant with high capacity filter presses and the associated works to the plant required to effect the replacement to meet the specifications of being able to treat 250 mtph solids nominal and 300 mtph maximum with standby capacity utilized*”.

34. In my view, there is no need for the defendant to request further particulars in order to clarify what “*other requirements*” the plaintiff relies upon. These have been set out. Further, it cannot be said that the defendant is plainly unaware of the case it is required to meet.

35. The first ground of exception and ground of complaint falls to be dismissed.

The second ground

36. The second ground of exception and complaint is that:

36.1 Paragraph 23.1³⁵ pleads that the plaintiff’s damages are calculated as follows:

“It is an amount of R152 755 245.00, being the difference between the value of the plant supplied by the defendant and the value of the plant that the defendant was required to supply and that is fit for the intended purpose and is designed and constructed in accordance with the specifications detailed in schedule 2 and schedule 3 as detailed in annexure POC-5 hereto. As appears from annexure POC-5, the amount of R152 755 245.00 comprises the reasonable cost of modifications to the plant to procure that the plant is fit for its intended purpose and fulfils the other requirements of the Design Agreement, including the replacement of the four filter presses in the plant with high-capacity filter presses and the associated works to the plant required to effect the replacement to meet

³⁵ Caselines 02-9

the specifications of being able to treat 250 mtph solids nominal and 300 mtph maximum with standby capacity utilised.”

- 36.2 In its written submissions the defendant complains that there is a “*contradiction*” in paragraph 23.1 such that it renders the pleading vague and embarrassing. That is because, so it is argued, the plaintiff does not plead the value of the plant supplied by the defendant, or the value of the plant that is fit for purpose in order to arrive at the amount of R152 755 245.00, which is stated to be the difference between them.
- 36.3 There is no ‘*contradiction*’ as contended for by the defendant between the first sentence in paragraph 23.1 which deals with what, as matter of law, the measure of damages is and the second sentence in paragraph 23.1 which deals with how, as a matter of fact, the damages are to be quantified.³⁶ The distinction between the two does not lead to prejudice on the part of the defendant.
- 36.4 In its written submissions, the plaintiff contends that, in the ordinary course, a party may prove the damages that they suffered from a failure to reinstate a lease with reference to the reasonable costs of reinstating the premises. Further, that the legal measure of the damages is the difference between the value of the un-reinstated premises and the value of the premises had they been reinstated.
- 36.5 The plaintiff correctly asserts that this may be quantified by proving the reasonable costs of reinstating the premises. Amongst its authorities for this proposition, plaintiff relies upon *Getz*, where Judge Schreiner said that, “*The difference between the values of the premises at the commencement and at the end of the tenancy is no doubt, what is ultimately the measure of damages, but this is commonly established not by comparisons of valuations but by the more practical, concrete method of proving the cost of restoration.*”³⁷

³⁶ Swart v van der Vyfer 1970 (1) SA 633 (A) at 643C

³⁷ Getz at 146

- 36.6 In paragraph 23.1, the particulars of claim plead that the plaintiff must be placed in the position that it would have been had the defendant performed its obligations under the Design Agreement. The plaintiff correctly submits that this will be proven at the trial by the plaintiff proving the costs of modification that it will have to incur in order to modify the plant to put it in the same position that the plaintiff would have been had the defendant performed as set in POC- 5.
- 36.7 The defendant is correct that the values are not detailed in annexure POC- 5, as is stated at the end of the first sentence. But this does not result in prejudice to the defendant when one reads the paragraph as a whole and the clear statement that POC-5 comprises the reasonable costs of modifications to the plant to procure that the plant is fit for its intended purpose (as set out in paragraph 23.1 quoted above). The defendant is not *“left guessing”* as to how the plaintiff arrived at an amount of R152 755 245.00. That appears from paragraph 23.1 alone.
- 36.8 The plaintiff has pleaded further particularity as to the make-up of this amount in POC-5 which sets out the costs of the modifications required to the plant to replace the four filter presses to make the plant compliant with the requirements of the Design Agreement. The quantification is broken into various heads (A to G) including detailed design, filter presses with auto-cloth wash and feed pumps, structural modification etc., with a narrative explanation for the item, reflecting what it is or the other, smaller items of work it comprises, with a lump sum cost in respect of each phase resulting in the total amount of R152 755 245.00.
- 36.9 The plaintiff has averred that, ordinarily, building projects are priced on a globular basis and the pricing of individual items is largely for the purpose of regulating payment certificates. What matters, both to the principal and to the contractor, is the overall cost of the project.³⁸

³⁸ Answering Affidavit para 41, Caselines 06-294

- 36.10 The defendant denies the plaintiff's averments in this regard and states that such averments are unsupported by any evidence.³⁹ There is simply no proof as to what so-called "industry norms" are, or that the quantification of the plaintiff's alleged damages or the annexures comply with such "norms".⁴⁰
- 36.11 The defendant avers that the plaintiff's statement is further patently false as demonstrated by comparing annex POC-15/NIA8 which purports to be a quotation from Vent Gear and Pump Services (Pty) Ltd to Pentalin Processing (Pty) Ltd, both of which are role players in the industrial pump industry in South Africa. The defendant avers that POC15 appears to accord with the standards for estimating and assessing costing accepted in the industry. By contrast, however, the defendant avers that annexures POC-5/NIA3, POC6/NIA4, POC7/NIA 5, POC13/NIA6 and POC14/NIA7 are all in the form of "*spreadsheets*". In any event, the defendant concludes with the averment that an "*industry norm*" cannot displace the provisions of the Rules, nor excuse non-compliance therewith.⁴¹ I agree with this submission.
- 36.12 Nevertheless, the detail provided by the plaintiff to the defendant is more than adequate to enable the defendant to plead. The contention in the second exception and ground of complaint that the defendant the defendant is "left guessing" at how the plaintiff arrived at R152 755 245.00 cannot be sustained in the face of the explanation in paragraph 23.1 of the particulars of claim read with the detail provided in POC-5.
- 36.13 The second exception and ground of complaint falls to be dismissed.

³⁹ Replying Affidavit paras 87-88, Caselines 06-411

⁴⁰ Replying Affidavit para 62, Caselines 06-405

⁴¹ Replying Affidavit para 36 Caselines 06-406

The third ground

37. The third exception and ground of complaint is that the plaintiff was required to provide a break-down of its damages of R152 755 245, together with a detailed explanation of each of the items in POC-5.⁴²
38. From a reading of POC5 with paragraph 23.1 of the particulars of claim (as described above), the costs of modification that the plaintiff would have to incur to place the plant in the position that it would have been had the defendant properly performed under the Design Agreement, are clearly set out.
39. It follows that the defendant is not entitled to the seven pages of additional particulars that it demanded, and, in my view, this constitutes an inappropriate use of both the exception procedure and the irregular step procedure. I find that the defendant's exception is, in substance, a request for further particulars which is impermissible at this stage. A vague and embarrassing exception cannot be sustained if the defendant is able to understand adequately, as here, what the case against him is and where any lack of particularity can be met in due course, with a request for further particulars.⁴³
40. The third exception and complaint falls to be dismissed.

The fourth and fifth grounds

41. The defendant has abandoned the fourth and fifth exceptions and grounds of complaint, save for its submission that it is irregular not to plead that the damages are an estimate.
42. I have addressed why, in my view, this position is not warranted. Accordingly, the fourth and fifth exception and grounds of complaint fall to be dismissed.

⁴² Exception 07-6-10 to 07-14-13.2; FA1 06-24-10 to 06-32-13.2

⁴³ Hassim v Lishiva 2021 JDR 1769 (GJ) at paras 22-23

The sixth, seventh and eighth grounds

43. The sixth, seventh and eighth exceptions and grounds of complaint are a repeat of the earlier exceptions, albeit directed at claim 2.
44. They have already been addressed above, and for the reasons stated, these fall to be dismissed.

The ninth ground of exception

45. The defendant does not persist with this exception and ground of complaint.

Tenth ground

46. The tenth exception and ground of complaint is that the plaintiff has not given a proper “breakdown as to how its alleged damage in the amount of R7 976 579,60” is calculated, with reference to five alleged deficiencies in POC-13.
47. The complaints relate to paragraphs 38.1, 38.3, 38.4, 38.5 and 38.6 of the notice to remove cause of complaint. The defendant, by virtue of the plaintiff’s amendment, does not persist with its complaint in respect of paragraph 38.2.
48. Each remaining alleged deficiency is dealt with below, in turn:

The first alleged deficiency

- 48.1 The defendant alleges that the plaintiff must provide “what the basis of the assumption is in respect of the defendant’s cost, where POC-13 states ‘assume same increase as previous – 6%’”.
- 48.2 The workings in POC-13 under the heading “Filtaquip Cost” explains “due for an increase from 1 April 2023 – assume same increase as previous – 6%.” This is followed by two tables which then apply this new increase to the defendant’s price. The defendant knows why the “previous” amount of 6% has been chosen – because that was the increase previously afforded to the defendant and so the plaintiff assumes that it would have been given the same increase on this occasion.

- 48.3 It seems to me that the basis for the assumption is properly set out in POC-13. It states that in respect of “Filtaquip Cost” that it is “due for an increase from 1 April 2023.” On this basis the assumption adopted is that the same increase would apply on this occasion. This is self-evident.

The second alleged deficiency

- 48.4 The defendant alleges that the plaintiff must provide an explanation of what “*the Fixed Cost portion of March 2023*” is comprised of or how the corresponding globular amount of R737 430 is quantified.
- 48.5 The particulars of claim plead that “*On 24 February 2023, Glencore terminated the Operations Agreement effective from 17 March 2023*”⁴⁴ and that the defendant had to procure substitute services from Pentalin Processing (Pty) Ltd for the operation and maintenance of the plant.⁴⁵
- 48.6 POC-13 explains that “*Fixed costs are the fixed monthly costs payable to Pentalin*”. These are the fixed costs payable to Pentalin, separating them into the short March 2023 month, from the remaining full months.

The third alleged deficiency

- 48.7 The defendant alleges that the plaintiff must explain what the “*Fixed Cost*” is comprised of or how the corresponding globular amount of R22 685 052 is quantified.
- 48.8 POC-13 explains that Glencore must pay Pentalin a fixed monthly amount.

The fourth alleged deficiency

- 48.9 The defendant alleges that the plaintiff must explain what the “*variable cost*” is comprised of, or what the price of R15,69 at a quantity 390 000 relates to in order to arrive at a corresponding amount of R6 119 100.00.

⁴⁴ Particulars of Claim para 55, Caselines 02-21

⁴⁵ Particulars of Claim para 56, Caselines 02-21

48.10 This is detailed in POC-13 which explains that the “*variable costs*” are the variable costs payable to Pentalin for each tonne of material processed.

48.11 As to where the figure of 390 000 comes from, POC-13 explains that the plaintiff has used for the first six months, a monthly average of 65 000 tons.

The fifth alleged deficiency

48.12 The defendant alleges that the plaintiff must state what the “*Variable cost*” is comprised of or what the price of R15.69 at a quantity of 510 000 relates to in order to arrive at a corresponding amount of R8 001 900.00.

48.13 POC-13 explains that the defendant has used an average of 85 000 tons for the next six months.

48.14 In my view, the plaintiff has been provided with detailed particularity. The tenth exception and ground of exception accordingly falls to be dismissed.

Eleventh ground

49. The defendant does not persist with this exception and ground of complaint.

The Specific Performance Relief

50. To recap, in addition to the procedural relief already dealt with, the defendant seeks a substantive order that the plaintiff provide it with “*a detailed quantification*” of its claims as contemplated in Clause 12.1(c) of the Design Agreement.

Background

51. In the summary of events set out below, the parties corresponded through their attorneys of record but for the sake of simplicity, I have referred to the parties as exchanging correspondence, not their attorneys.

52. On 28 March 2023, Glencore wrote to Filtaquip⁴⁶ referring to a letter from the latter dated 15 March 2023.⁴⁷ In substance, Glencore stated that, as appears from its letter of 24 February 2023⁴⁸, Filtaquip had committed material breaches of the Design Agreement and Operation Agreement. In addition, that in a proposal made by Filtaquip to it on 16 March 2017, Filtaquip made a number of misrepresentations to Glencore which induced Glencore to enter into the Design Agreement and subsequently the Operation Agreement. Then, referring to the nature and ambit of the disputes, Glencore stated that it would be futile for the parties to comply with the pre-arbitration jurisdictional requirements contained in both agreements and that it would “*make sense*” for the parties to agree to refer to all their disputes directly to arbitration, without first having to comply with the pre-arbitration jurisdictional requirements.
53. On 28 June 2023, Glencore delivered the Notice.⁴⁹ Attached to it was an annexure titled “*Annexure to Notice declaring dispute in terms of the Design and Operation Agreements*”⁵⁰. Attached to this document were several more annexures marked “A” to “H”⁵¹. Glencore called for a without prejudice meeting between the Representatives of the parties as required by Clause 12.1(d) and 11.1(c) of the Design and Operation Agreements, respectively. Glencore proposed dates and times for the meeting.
54. On 13 July 2023, Filtaquip wrote a letter marked “*without prejudice*” in relation to the Notice.⁵² The letter rejected the Notice as in Filtaquip’s view it did not comply with either the express provisions or the purpose of Clause 12.1 of the Design Agreement. It pointed to aspects of the Notice which it stated were “*unclear*”. Three of them related to the purported concern relating to the legal basis for the claims, one related to the facts upon which the claim was based, and two related to the inadequacy of the detailed particularity of the quantification of certain amounts. On this basis, Filtaquip asserted that it had “*no choice*” but to insist that

⁴⁶ FA Annexure FA2, Caselines 06-47-48

⁴⁷ The letter of 15 March 2023 is not part of the record

⁴⁸ The letter of 24 February 2023 is not part of the record

⁴⁹ FA Annex FA3, Caselines 06-49-50

⁵⁰ Caselines 06-51-56

⁵¹ Caselines 06-57-280

⁵² Answering Affidavit, Anex AA2, Caselines 06-368-370

Glencore remedy the Notice to ensure that it complies with the relevant clause by no later than 28 July 2023.

55. Notwithstanding the above, Filtaquip, without prejudice to its rights, expressed its confidence that meaningful negotiations directly between the parties are best placed to resolve the disputes in an amicable, expedient, and cost-effective manner. Accordingly, Filtaquip proposed that pending the rectification of the Notice, the parties Executive Managers meet on an informal, without prejudice basis, in an attempt to find common ground and to possibly resolve the disputes.
56. On 17 July 2023, Glencore wrote to Filtaquip and recorded that the claims against the Notice were without merit and that the plaintiff was not prepared to participate in informal negotiations outside of the dispute settlement procedure provided for under the two agreements.⁵³ Filtaquip was again invited to attend a meeting between the parties as contemplated under the relevant dispute resolution clauses.
57. On 20 July 2023, Filtaquip reverted⁵⁴ and repeated its contention that the Notice does not comply with either the express provisions or the purpose Clause 12.1 or 11.1 of the respective agreements. It stated that in light thereof, it was premature for the meetings contemplated in the aforesaid clauses to be held at that juncture, suggesting that the plaintiff was only intent on a “*farcical tick-box exercise*” in calling to hold the meeting with Filtaquip. Filtaquip continued to insist that the Notice be remedied and that once this had been done, a suitable date and time could be arranged for the meetings contemplated under the relevant dispute resolution clauses.
58. On 21 July 2023, Glencore reverted⁵⁵ and rejected the suggestion that Glencore was only interested in “*box ticking*”. It stated that, given Filtaquip’s continued refusal to participate in the meetings of representatives, Glencore hereby referred the disputes the respective General Managers of the parties as required by Clause 12.1(d) of the Design Agreement. For this purpose, it identified its

⁵³ Answering Affidavit, Annex AA3, Caselines 06-372-373

⁵⁴ Answering Affidavit, Annex AA4, Caselines 06-375-376

⁵⁵ Answering Affidavit Annex AA5, Caselines 06-378-379

General Manager for the purpose of the meeting with Filtaquip and extended the time period for a meeting to take place.

59. On 28 July 2023, Filtaquip reverted⁵⁶ and stated that in order for any disputes/differences to be properly discussed/addressed between the parties' representatives, it is necessary that the express provisions and purpose of the dispute resolution clause be adhered to. It stated further that Glencore had still not remedied the Notice. That the procedures required in the dispute resolution clauses are peremptory and that non-compliance meant that the meetings suggested by Glencore are premature, adding that once remedied, meetings can be arranged. However, notwithstanding this point, it again suggested an *"informal, without prejudice meeting"* (outside of the provisions of Clauses 12.1 and 11.1 of the respective agreements). Filtaquip stated that the aforesaid meeting is suggested in an attempt to find common ground to possibly resolve the disputes in a cost effective and pragmatic manner.
60. On 4 August 2023, Glencore sent a further letter to Filtaquip⁵⁷ and disputed that the Notice did not comply with Clause 12.1(c) of the Design Agreement and stated that it was apparent that Filtaquip's intention was to delay the process for as long as possible, that Filtaquip had no intention of meaningfully engaging with Glencore and that any contentions to the contrary by Filtaquip were insincere, Further, without prejudice or making of any concession, and in a *"last attempt"* to obtain Filtaquip's co-operation, Glencore attached as annexures A and B details of the quantification of the amount of R152 755 245.00 (referred to in paragraph 13 of the Notice) and the amount of R21 006 816.00 (referred to in Annexure H of the Notice). Glencore again tendered a meeting with senior members of Filtaquip as required by Clause 12.1(d) of the Design Agreement. Glencore also stated, as it had advised previously, that it was not agreeable to an *"informal"* meeting as suggested by Filtaquip because such meeting is not catered for by the respective agreements and no purpose would be served by such meetings except, perhaps to further delay the process.

⁵⁶ Answering Affidavit Annex AA6, Caselines 06-381-382

⁵⁷ Answering Affidavit Annex AA7, Caselines 06-384-389

61. Filtaquip apparently did not respond and on 8 August 2023 Glencore instituted the action.
62. Glencore later met with Filtaquip on 8 November 2023 and again requested that the matter be referred to arbitration which request was not accepted.⁵⁸
63. On 20 November 2023, Glencore delivered a notice of intention to amend its particulars of claim and added further detail to the quantification of its claims.

The Issues for Determination

64. In the joint practice note, with regard to the specific performance relief, the parties identified the issues for determination to be whether the plaintiff has complied with the dispute resolution steps in Clause. 12.1 (c) by providing a detailed quantification of its claim to the defendant and whether the plaintiff can and should be ordered to comply therewith and whether the defendant may seek such relief.⁵⁹

The Legal Principles

65. In *Nkengana and Another v Schnetler and Another*⁶⁰ (“Nkengana”), the Supreme Court of Appeal held that: “It is settled law that every party to a binding contract who is ready to carry out its own obligations under it, has a right to demand from the other party, so far as it is possible, performance of that other party’s obligations in terms of the contract.”
66. An order for specific performance should only be granted if the party seeking specific performance has counter-performed or has tendered its own counter-performance when this is required concurrently.⁶¹
67. In *Stanhope v Holdings & Industries*⁶² (“Stanhope”) the court held that:

⁵⁸ Replying Affidavit para 3, Caselines 06-446

⁵⁹ Joint Practice Note, Caselines 07-29-36

⁶⁰ [2011] 1 All SA 272 (SCA) at para 12

⁶¹ *Cradle City (Pty) Ltd v Lindley Farm 528 (Pty) Ltd* 2018 (3) SA 65 (SCA) paras 20 -24 (“Cradle City”)

⁶² 1950 (3) SA 52(E) at 57D

67.1 “If either party to a submission commences legal proceedings against the other in respect of a matter agreed to be referred, the other party may apply for a stay of such proceedings on the ground of the submission ... It is then necessary for him to satisfy the Court that he was at the commencement of the proceedings, and still is, ready and willing to do all things necessary for the proper conduct of the arbitration.”⁶³ Further, “(I)t does not seem to me that it is necessary for a party who resorts, for the purpose of obtaining a stay of the proceedings, to the practice of filing special plea of agreement to arbitration, either to allege or show the readiness or willingness referred to in the Arbitration Acts.”⁶⁴ And further, “It may be that a party resisting the stay of proceedings is able to show the party seeking such a stay through a special plea is not ready and willing to do all things necessary for the proper conduct of the arbitration, the Court might exercise its discretion against the latter and refuse a stay.”⁶⁵

Submission by the Parties

68. The defendant seeks to compel the plaintiff to comply with the pre-arbitral steps contemplated in Clause 12.1 (c) – (e) of the Design Agreement, specifically the first step contained in Clause 12.1(c) which *inter alia* obliges the plaintiff to provide a written notice to the defendant containing “*detailed particulars*” of the quantification of the plaintiff’s claim.
69. In its written submissions, the defendant makes it clear that it does not apply for a stay of the proceedings in terms of section 6 (1) of the Arbitration Act 42 of 1965 (“the Act”). Thus, the defendant submits that it only has a claim for specific performance to compel the plaintiff to comply with the express provision of the dispute resolution clause. Further, that it is important to distinguish between the “*arbitration agreement*” contained in Clause 12.1 (g), and the service of the notice under Clause 12.1 (c) which is a condition precedent to such arbitration agreement.

⁶³ Stanhope at 57A

⁶⁴ Stanhope at 57C-D

⁶⁵ Stanhope at 57E

70. The defendant also submits that it is premature, at this stage, to seek relief in terms of section 6(1) of the Act where the condition precedent to such arbitration has not been properly complied with.
71. Related to this, the defendant avers that it has not waived its common law right to insist that the dispute with the plaintiff be referred to arbitration and that the defendant “*may*” still raise the point by way of a special plea.⁶⁶
72. I have difficulty with the approach of the defendant and find myself in agreement with the submissions made by the plaintiff that by filing an exception and bringing a Rule 30 application at the same time as seeking only partial enforcement of the arbitration agreement by objecting to the Notice but not requesting a stay of the court proceedings in order to pursue arbitration, the defendant is able to simultaneously delay and postpone both the High Court proceedings (by refusing to plead) and the resolution of the dispute by an arbitrator.
73. I also agree with the plaintiff’s submission that the defendant’s conduct is an unacceptable form of approbation and reprobation.
74. On this basis alone, I believe that the application for specific performance should be dismissed.
75. However, even if I am wrong in this regard, as will appear from the analysis and reasons set out below, the defendant has not been able to prove all of the essential elements necessary in order to succeed with a claim for specific performance.
76. In the defendant’s written argument it is contended, correctly, that in order to succeed with a claim for specific performance, a party must allege and prove⁶⁷:
- 76.1 The terms of the contract;
- 76.2 Compliance with any antecedent or reciprocal obligation or must tender compliance⁶⁸; and

⁶⁶ Founding Affidavit para 18, Caselines 06-396

⁶⁷ Harms, Amler’s Precedent of Pleadings 9th ed, at p.124

⁶⁸ Nkengana at para 12

76.3 The non-performance or breach of the contract by the other party.

The terms of the contract

77. In this matter, the terms of the contract (more particularly the terms of the dispute resolution clause) are not in dispute between the parties.

Has the defendant complied with any antecedent or reciprocal obligations or tendered compliance?

78. An order for specific performance should only be granted if the party seeking specific performance has counter-performed or has tendered its own counter-performance when this is required concurrently.⁶⁹

79. In this case, that would require that the defendant prove that it was and remains willing to comply with its obligations to co-operate in good faith in the finalization of the dispute under Clause 12 of the Design Agreement.

80. The defendant has not tendered to submit itself to arbitration and has not evidenced a willingness to do so.

81. It seems to me to be implicit that upon receipt of the Notice, even if the recipient is of the opinion that it is insufficient, it is nonetheless obliged to have its Representative meet with the plaintiff's Representative to resolve their dispute or difference. This is what the plaintiff sought to achieve but it was unnecessarily frustrated by the defendant. The plaintiff then sought to escalate the dispute or difference to the General Managers of the parties for resolution. The defendant refused to go this route and insisted that the notice be "*remedied*".

82. The "*service*" of the Notice under Clause 12.1(c) of the Design Agreement is stated to be a condition precedent to the commencement of any arbitral proceedings in respect of a dispute or difference. As I understand this clause, the dispute or difference regarding the claim, including any dispute or difference regarding the sufficiency of the notice, can be referred to arbitration. All that is required is that the notice be served first.

⁶⁹ Cradle City at para 20-24 and Nkengana at para 12

83. As a matter of commercial common sense, if the position were otherwise, then an unwilling recipient of a notice could delay the resolution of a dispute or difference and derail an arbitration by conveniently taking issue with the adequacy of the notice. For example (as had happened in this matter), by taking the view that it did not believe that the plaintiff had set out the legal basis for its claim or even, the factual basis for its claim, in addition to the alleged insufficiency of detailed particulars in respect of the quantification of the claims. The *bona fide* claimant could be frustrated by the defendant, perhaps indefinitely, from pursuing its claim to adjudication in the agreed manner and forum.
84. For its part, the defendant submits that Clause 12.1(c) of the Design Agreement does not provide or create any reciprocal obligations on the party receiving the notice. I disagree.
85. The defendant submits that this accords with the view in *Stanhope*, where the court held that it is not necessary for a party seeking a stay of proceedings pending the arbitration of a dispute, either to allege or show the readiness or willingness to arbitrate.⁷⁰
86. However, in *Stanhope*, as pointed out by the plaintiff in its written argument, to the extent that this was the *ratio* of the case, it does not apply here where the defendant has deliberately not sought a referral to arbitration in a special plea but is instead seeking by application to enforce only part of an arbitration clause without stating that it intends to pursue arbitration.
87. Further, the court in *Stanhope* accepted that: *“If the party resisting a stay in the proceedings is able to show that the party seeking such a stay through a special plea is not ready to do all things necessary for the proper conduct of the arbitration, the court might exercise its discretion against the latter and refuse a stay.”*⁷¹
88. I agree with the plaintiff’s submission that on this basis this court would similarly be entitled to say that it is not prepared to enforce an arbitration process when

⁷⁰ Stanhope at 57D

⁷¹ Stanhope at 57E

the party seeking to enforce its obligations is, itself, unprepared to submit itself to the arbitration procedure.

89. The defendant seeks specific performance of a portion of an arbitration clause in circumstances where it is not prepared to and does not tender to submit itself to arbitration in due course. If the defendant is committed to enforcing the arbitration clause, it was required to raise its claim for the enforcement of the whole clause in a special plea, including a prayer for a stay of the court proceedings and a referral to arbitration. What it cannot do is seek to enforce part of the arbitration clause in circumstances where it may never submit to arbitration.
90. The application for specific performance should on this ground be dismissed.

The non-performance or breach of the contract by the other party

91. The defendant submits that all that is in dispute is:
 - 91.1 whether Clause 12.1 of the Design Agreement creates a mandatory dispute resolution procedure or whether it is, as the plaintiff claims, merely voluntary such that either party may approach a court at any time; and
 - 91.2 the plaintiff's breach of Clause 12.1(c) of the Design Agreement.

Are the plaintiff's obligations under Clause 12.1 of the Design Agreement voluntary?

92. As to the first point, the plaintiff states⁷²:

"Clause 12.1 (j) (sic) of the General Terms to the Design Agreement provides that the private dispute settlement procedure under the Design Agreement 'shall not prejudice the Parties right to approach any court for legal relief'".

93. On this basis, the plaintiff alleges that:

⁷² Answering Affidavit para 62, Caselines 06-301

- 93.1 Clauses 12.1 (a) to (i) put in place a voluntary procedure for the parties to resolve any dispute between them by first following a process of negotiation followed by an arbitration;⁷³and
- 93.2 either party may follow the dispute settlement procedure, or it may instead choose to approach a court, which it can do at any stage of the dispute settlement process.⁷⁴
94. It is apparent that the plaintiff has omitted the words “*should the circumstances warrant such action*” from Clause 12.1 (i) of the Design Agreement. On this basis, the defendant submits that the plaintiff’s views as set out above are flawed.
95. I am satisfied that on a proper interpretation of Clause 12.1 beginning with the text and structure of the words used that there is no reasonable construction of Clauses 12.1 (a) – (g) which could or would result in that process being viewed as “*voluntary*”.
96. Nevertheless, the matter does not end there. The defendant submits that Clause 12.1(i) of the Design Agreement only entitles a party to approach a court should the circumstances warrant such action. It is thus necessary, so the argument goes, for the party invoking Clause 121(i) to set out circumstances why the institution of proceedings in court are warranted, and concomitantly, why the process contemplated by the parties in Clause 12.1(a) – (g) ought to be averted.
97. The defendant submits further that the clear example of circumstances wherein Clause 12.1.(i) may appropriately be invoked is in urgent proceedings where the process contemplated cannot be complied with before referring the matter to an arbitrator to provide relief.
98. The defendant then argues that an intention by a party to evade the condition precedent to arbitration can never be considered to be circumstances which warrant the invocation of Clause 12.1(i).

⁷³ Answering Affidavit para 61, Caselines 06-300

⁷⁴ Answering Affidavit para 63, Caselines 06-301

99. On the facts, the attitude displayed by the defendant in the face of the Notice was, from the outset, unjustified and apparently motivated by cynicism. In this regard, the defendant does not only rely on the allegation that it was the intention of the plaintiff to “*evade*” the “*condition precedent*” to arbitration but it goes further: it avers that the plaintiff had the “*hope of exerting maximum financial pressure and possibly, damage on the defendant by capitalising on the plaintiff’s greater financial resources in order to engage in an expansive and costly dispute resolution process*”⁷⁵.
100. Further in this regard, the defendant asserts that in delivering the notice, the plaintiff reduced the pre-arbitral steps to a “*farcical tick-box exercise*” and insisted that the plaintiff “*remedy*” the notice by a specified date⁷⁶. At the same time, it asserted that it had no intention of delaying the process but refused to meet as contemplated in the dispute resolution clauses, but rather on an “*informal*” basis where, notwithstanding its dismissal of the notice, it stated that it was “*confident that meaningful negotiations between the parties are best placed to resolve the disputes in an amicable, expedient and cost-effective manner.*”
101. It begs the question as to how, faced with the alleged “*farce*” put up by the plaintiff, the defendant could have possessed such confidence that the informal negotiations would be meaningful, expedient and cost-effective unless it was actually of the view that the information that it had already been given by the plaintiff was, indeed, sufficient to give effect to the purpose of the dispute resolution clauses.
102. Put differently, the purpose of the Notice requirements in Clause 12 of the Design Agreement had been achieved. The defendant believed itself to be in a position to meet with the plaintiff and possibly resolve the parties’ disputes.⁷⁷

⁷⁵ Founding Affidavit para 39.2, Caselines 06-16

⁷⁶ Answering Affidavit Annex AA4, Caselines 06-375-376

⁷⁷ It is trite that where a statute imposes statutory peremptory notice requirements, not every deviation from the requirements from such notice will be fatal. If there was substantial compliance such that the purpose of the provision was served, that will be sufficient. See *Merry Hill (Pty) Ltd v Engelbrecht* 2008 (2) SA 544 (SCA) at para 23 and the cases cited therein, and *Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA 199 (SCA) at para 22 to 23

103. Nevertheless, the back and forth continued between the parties until the plaintiff, without prejudice to its rights, and in a stated attempt to obtain the co-operation of the defendant, provided further detail of the quantification of the amount claimed and attached annexures “A” and “B” in that regard.⁷⁸ The plaintiff called upon the defendant to indicate within two days whether it was agreeable to a meeting as required by Clauses 12.1(d) and 11.1(c) of the Design Agreement and Operation Agreements. That did not happen. The defendant apparently did not respond, and the plaintiff instituted the action on 8 August 2023.

104. In my view, the circumstances described above are such as to warrant the plaintiff’s institution of the action.

Is the plaintiff in breach of Clause 12.1.(c) of the Design Agreement or was the defendant given a detailed quantification of its claim?

105. The plaintiff provided the defendant with the Notice, which was supplemented with plaintiff’s letter of 4 August 2023, and thereafter the notice of intention to amend which contained more than sufficiently detailed quantification of the plaintiff’s damages.

106. I think that it is permissible not to ignore how the defendant has itself approached matters of costing and quantification, as appears from the papers. In this regard, schedule 5 – “*Price and Payment Terms*” of the Design Agreement, deals with the (original) contract price for that part of the project. It states in Clause 1 that the Contract Price is a fixed and firm price for the supply and is summarised in a table (a table of hardly more than a single page).⁷⁹ I observe, for example, that the description of the supply is described under various headings including, “*Design, Preliminary and General*”, which is broken down into four globular amounts. So too, there is a heading in respect of “*Filter Presses*” (without specifying how many) with a globular amount. There is also a heading for “*Pumps and Motors*” (including Filter Press Feed Pumps and Motors). Again, there are

⁷⁸ Answering Affidavit Annex AA7, Caselines 06-384-389

⁷⁹ Caselines 02-78-79

several globular amounts which make up the sub-total for this part of the supply. All of these sub-totals go to a total contract price of more than R167 million.

107. If one compares how, and the manner in which, the plaintiff has approached the quantification of its damages in POC-5, with the approach taken by the defendant towards costing and quantification in its table, it is readily apparent that the plaintiff has adopted the same approach as the defendant but, in POC-5, the plaintiff has provided greater detail.

108. Seen in this context, the defendant's complaint set out below appears to ring hollow:

"(I)n spite of the highly technical subject matter of the agreements and the claims on which the plaintiff relies, the plaintiff merely annexed to its particulars of claim vague and inchoate spreadsheets in support of the above voluminous damages, often of no more than a single page, reflecting a globular quantification of the plaintiff's claim".⁸⁰

109. When regard is had to the content of all these documents, the defendant's insistence that it had not been provided with a detailed quantification is unsustainable.

110. The plaintiff in its answering affidavit has described the defendant as an expert in the design and supply of slurry dewatering plants, the supplier of the plant, and the person responsible for its maintenance and that, in consequence, it would have no difficulty in evaluating the plaintiff's quantum and permitting a meaningful engagement with the parties' respective representatives as envisaged by Clause 12. The defendant does not deny these allegations as a matter of fact but says that as a matter of law, it is still entitled to pleadings in compliance with Rule 18.

111. Even accepting that to be the correct position in law for the purposes of Rule 18, I do not consider it to be inappropriate to have regard to the fact of the defendant's expertise when considering what was expected of the parties in

⁸⁰ Defendant's Heads of Argument para 5, Caselines 07-40

terms of the Notice requirements in terms of Clause 12.1 (c) of the Design Agreement.

112. In my view, the defendant has no claim for more than it has already received from the plaintiff.

113. For all of the reasons set out above, the application for specific performance falls to be dismissed.

114. There is no reason why the costs should not follow the result.

115. I accordingly make the following orders:

115.1 The exception is dismissed.

115.2 The defendant's application in terms of Rule 30(2)(b) is dismissed.

115.3 The costs of the exception and the application in terms of Rule 30(2)(b) are to be paid by the defendant, including the costs of two counsel on scale C.



S McCafferty AJ
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION
JOHANNESBURG

APPEARANCES

For the Applicant	C Woodrow SC
Instructed by	Meise Nkaiseng Inc.
For the Respondents	S Stein SC
Instructed by	Werksmans Attorneys
Date of Hearing	6 June 2024
Date of Judgment	27 September 2024