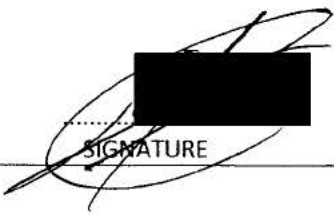




IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT)

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: NO	
(2) OF INTEREST TO OTHER JUDGES: NO	
(3) REVISED	
16 October 2025 DATE	  SIGNATURE

Case number: 075722-2025

In the matter between:

TRANSNET SOC LIMITED

Applicant

and

GIJIMA HOLDINGS (PTY) KIMITED

Respondent

JUDGMENT

MINNAAR AJ:

Relief claimed and Transnet's amendment:

[1] The applicant ('Transnet') approached the urgent court seeking the following relief:

1. *The respondent (Gijima) is directed to:*

- a. *Complete all “Disengagement Services” as that phrase is defined in the Master Services Agreement concluded between Transnet and Gijima, attached to the founding affidavit as “FA1” (“the MSA”);*
 - b. *Take all steps necessary to migrate to Transnet the “Data Centre Services” as that phrase is defined in the MSA, including Gijima’s disengagement from the Active Directory; and*
 - c. *Complete all the items listed in the annexure “NOM1”*
by 30 June 2025, or such other date as may be ordered by this Court.
2. *Gijima is interdicted from engaging in any conduct that disrupts or interrupts the provision of “Services” as that term is defined in the MSA, pending the completion of the Disengagement Services, steps, and items referred to in paragraph 2 above.*
 3. *Costs of the application.*

[2] Listed in “NOM1” are the items that had to be completed by 30 June 2025 (or such other date as the court may order). These items are:

1. *Successfully disengaging and migrating the Active Directory (“AD”) from Gijima’s network to the Transnet-owned and managed network, including undertaking the following key tasks:*
 - 1.1 *Preparing the on-premises AD to decommission unused domains and disable unnecessary services;*
 - 1.2 *Reviewing the disengagement and migration steps prepared by Gijima, Transnet and Microsoft;*
 - 1.3 *Developing a high-level strategy on the*

implementation of the AD migration - ensuring security and integrity of the on-premises AD;

1.4 Granting Transnet and Microsoft administrative access to T0, T1, T2 systems currently under Gijima's management;

1.5 Conducting an evaluation of the current AD infrastructure, including domain controllers, forests and trusts;

1.6 Finalising password reset and control mechanisms.

2. Successfully disengaging and migrating the Data Centre and Hosting Services ("DCHS"), which includes the following tasks and key deliverables:

2.1 Developing a list of Terminated Services that may need to be reinstated, on an as-and-when basis;

2.2 Granting Transnet administrative access to the Azure AD to migrate the DCHS from the on-premises AD;

2.3 Delivering to Transnet and Microsoft the design or architectural documentation in respect of the mainframe for purposes of migrating data to Transnet's new environment.

3. Successfully disengaging and migrating the SAP Workloads, which includes the following tasks and key deliverables:

3.1 Granting Transnet and Microsoft access to the SAP environment firewall;

3.2 Delivering to Transnet and Microsoft the integration

points and special configurations of the SAP environment;

- 3.3 *Conducting an assessment of the SAP environment;*
- 3.4 *Providing Transnet and Microsoft with on-premises AD domain controllers and DNS resolution and forwarding between the on-premises AD and Azure AD;*
- 3.5 *Providing additional capacity during the migration, when required by Transnet.*
- 4. *Successfully disengaging and migrating the Help and Service and Desk.*

[3] The application was opposed, and it was heard on 19 June 2025.

Gijima's approach was that there are disputes of facts and that if the application is not struck for want of urgency, or dismissed outright, disputes of facts exist and the application should be made the subject of a *Mettalurgical*¹ order, referring the application for oral evidence. The following three aspects were identified as disputes of fact:

- a. Whether, as at the date of the launch of Transnet's application (24 May 2025), it was impossible for Gijima to perform its obligations under the MSA;
- b. Whether, on a proper interpretation of the MSA, to keep the services from being interrupted, whatever the incoming service provider had to do when coming into the contract with Transnet in 2020, the next incoming service provider would have to do when taking over from Gijima; alternatively,

¹ *Metallurgical and Commercial Consultants (Pty) Ltd v Metal Sales Co (Pty) Ltd* 1971 (2) SA 388 (W)

- c. Whether there is a tacit term in the MSA that keeps the services from being interrupted, whatever the incoming service provider had to do when coming into the contract with Transnet in 2020, the next incoming service provider would have to do when taking over from Gijima.

[4] Judgment was reserved, and both sides submitted extensive written heads of argument. Having considered the matter, I concluded that it would be appropriate to refer the application to oral evidence, in line with the approach adopted by Gijima.

[5] On 27 June 2025, I had a virtual meeting ('the case management meeting') with the parties to discuss the logistics of the order I intended to issue. Both parties were invited to identify any additional issues they would prefer to be included in the referral order. Transnet elected not to include any further points of reference. Gijima requested that the question be included as to whether the *exceptio non adimpleti contractus* applies in the application.

[6] Having considered the written submissions and the inputs on logistics provided during the meeting, I gave a judgment on 30 June 2025 ('the referral judgment'). In terms of the referral judgment, the application was postponed to 21 July 2025 for the hearing of oral evidence. In terms of the order, the referral points were defined as:

1. *Whether, as at the date of the launch of Transnet's application, it*

was impossible for Gijima to perform its obligations under the MSA.

2. *Whether, on a proper interpretation of the MSA, to keep the services from being interrupted, whatever the incoming service provider had to do when coming into the contract with the applicant in 2020, the next incoming service provider would have to do when taking over from Gijima; alternatively,*
3. *Whether there is a tacit term in the MSA that keeps the services from being interrupted, whatever the incoming service provider had to do when coming into the contract with the applicant in 2020, the next incoming service provider would have to do when taking over from Gijima.*
4. *Whether the exceptio non adimpleti contractus finds application herein (additional point of reference as requested by Gijima during the case management meeting).*
5. *Whether annexure “FA12” to the founding affidavit constitutes an agreement between the parties (identified as a relevant point by me).*
6. *Whether Transnet has the technical ability and infrastructure to take over the IT services from Gijima (identified as a relevant point by me).*

[7] Throughout, and despite the voluminous and intricate nature, the application was treated as urgent. Transnet’s request that Gijima complete all the items listed in “NOM1” by 30 June 2025 (or such other date as the court may order) fuelled the urgency of the application. In amplification, and as stated in the referral judgment, the nature of the

services rendered is critical, not only to Transnet but to the country as a whole. It involves the entire country's rail network, running container and wagon services over thousands of kilometres of rail with hundreds of depots and shunting yards. It further has a profound impact on the public purse.

[8] Mr Pandelani Reuben Munyai, the Group Chief Information Officer of Transnet, and also the deponent to the founding and replying affidavits, gave oral evidence. Transnet also called Mr Ravi Bhat, a representative of Microsoft South Africa (Pty) Ltd ('Microsoft'). Mr Sylvester Samuel, the Chief Operating Officer of Gijima, and the deponent to the answering affidavit, gave oral evidence on behalf of Gijima. Gijima further called Mr Vincent Willie, an ICT consultant employed by Gijima, to testify. All these witnesses gave extensive testimony and were exposed to intense cross-examination. I will deal with their testimony later in this judgment.

[9] Following the conclusion of the oral evidence, time frames were agreed upon to submit supplementary written submissions, and the application was postponed to 15 August 2025 for argument.

[10] Transnet delivered an amended notice of motion on 6 August 2025. The amended notice of motion stated that Transnet intends to apply on 15 August 2025 for the following urgent relief (the amendments are in **bold**):

1. *That Gijima is directed to:*

- a. Complete all “Disengagement Services” as that phrase is defined in the MSA concluded between Transnet and Gijima, attached to the founding affidavit as “FA1” (“the MSA”);
- b. Take all steps necessary to migrate to Transnet the “Data Centre **and Hosting Services**” as that phrase is defined in the MSA, including Gijima’s disengagement from the Active Directory; and
- c. Complete all the items listed in the annexure “NOM1”

within the times stipulated in NOM1, or such other date(s) as may be ordered by this Court.

1.1 Gijima is interdicted from engaging in any conduct that disrupts or interrupts the provision of “Services” as that term is defined in the MSA, pending the completion of the Disengagement Services, steps, and items referred to in paragraph 1 above.

1.2 Costs of the application.

[11] Annexure NOM1 to the amended notice of motion also contained amendments and read (the amendments are in **bold**):

Within 10 (ten days) of the granting of this order (and not by 30 June 2025, or such other date as the Court may determine as initially prayed for):

1. Successfully disengaging and migrating the Active Directory (“AD”) from Gijima’s network to the Transnet-owned and managed **data centre and cloud infrastructure**, including undertaking the following key tasks:

- 1.1 Preparing the on-premises AD to decommission unused domains and disable unnecessary services;

- 1.2 *Reviewing the disengagement and migration steps prepared by Gijima, Transnet and Microsoft;*
- 1.3 *Developing a high-level strategy on the implementation of the AD migration - ensuring security and integrity of the on-premises AD;*
- 1.4 *Granting Transnet and Microsoft administrative access to T0, T1, T2 systems currently under Gijima's management;*
- 1.5 *Conducting an evaluation of the current AD infrastructure, including domain controllers, forests and trusts;*
- 1.6 *Finalising password reset and control mechanisms.*

Within 10 (ten days) of the granting of this order (and not by 30 June 2025, or such other date as the Court may determine as initially prayed for):

2. *Successfully disengaging and migrating the Data Centre and Hosting Services ("DCHS"), which includes the following tasks and key deliverables:*
 - 2.1 *Developing a list of Terminated Services that may need to be reinstated, on an as-and-when basis;*
 - 2.2 *Granting Transnet administrative access to the Azure AD to migrate the DCHS from the on-premises AD;*
 - 2.3 *Delivering to Transnet and Microsoft the design or architectural documentation in respect of the mainframe for purposes of migrating data to Transnet's new environment.*

Within 10 (ten days) of the granting of this order (and not by 30 June 2025, or such other date as the Court may determine as initially prayed for):

3. *Successfully disengaging and migrating the SAP Workloads, which includes the following tasks and key deliverables:*

3.1 *Granting Transnet and Microsoft access to the SAP environment firewall;*

3.2 *Delivering to Transnet and Microsoft the integration points and special configurations of the SAP environment;*

3.3 *Conducting an assessment of the SAP environment;*

3.4 *Providing Transnet and Microsoft with on-premises AD domain controllers and DNS resolution and forwarding between the on-premises AD and Azure AD;*

3.5 *Providing additional capacity during the migration, when required by Transnet.*

4. *Successfully disengaging **Transnet's 7 (seven) mainframe applications from its mainframe to Microsoft's Azure Cloud platform, including undertaking and completing the following key tasks and deliverables:***

4.1 ***Completing a technical questionnaire in order for Microsoft South Africa (Pty) Ltd ("Microsoft") to assess Gijima's infrastructure;***

- 4.2 *Identifying the COBOL (Sapiens) and DB2 as the primary technologies in use, with a relatively small footprint; and*
- 4.3 *Engaging and cooperating with Microsoft and Transnet to conduct a 6 six to 8 eight-week assessment to inventory applications, data and interfaces.*
- 5. *Gijima cooperating with, and providing to Transnet and Microsoft all support necessary as contemplated in the MSA to facilitate the successful completion of the disengagement of the Exchange On-Premises to Azure Virtual Machines, including undertaking and completing the following key tasks and deliverables:*
 - 5.1 *Completing a detailed architecture of the existing Exchange On-Premises deployment, including:*
 - 5.1.1 *server roles (including Mailbox, Edge, Hybrid, etc.)'*
 - 5.1.2 *version and patch levels;*
 - 5.1.3 *network topology and firewall rules;*
 - 5.1.4 *hybrid configuration settings; and*
 - 5.1.5 *inventory of mailboxes, connectors, accepted domains and transport; and*
 - 5.2 *Ensuring that all necessary ports are open between On-Premises Exchange servers, Azure VMs and Microsoft 365 endpoints, required for hybrid mail*

flow, directory synchronization, certificate validation and secure communications.

[12] In a notice dated 9 August 2025, Gijima objected to Transnet's proposed amendment. In this notice, Gijima stated that the proposed amendment is prejudicial to the conduct and presentation of its case in a manner that cannot be cured by a postponement or an order as to costs.

[13] Gijima listed various grounds of objection to substantiate the prejudice that Gijima will suffer should the amendment be permitted. In short, these grounds are:

- a. *In the hearing of oral evidence, Gijima completed the presentation of its case, including the leading of its own witnesses and the cross-examination of the Transnet witnesses. The presentation of evidence by Gijima and the conduct of the cross-examination of the Transnet witnesses were determined by the referral issues.*
- b. *The question of impossibility was the main issue traversed during the hearing of oral evidence.*
- c. *Whether a task is impossible or not depends on the task. The tasks Transnet wanted Gijima to perform were those set out in its original notice of motion. With the amendment, Transnet has added to that list of tasks ex post facto by inserting paragraphs 4 and 5 into its prayers in NOM1.*

- d. *For the first time, the seven critical applications that run on the mainframe are specified.*
- e. *With the amendment, Transnet attempts to build a six-to-eight week analysis into the order to be granted against Gijima. This would be profoundly unfair, both in terms of the timing, the increased scope, and the contradiction of Mr Baht's testimony given on behalf of Transnet.*
- f. *The amendment widens the issues when the evidence has already been led. It is an ambush and cannot be accommodated within a fair process.*
- g. *A pleader cannot canvass one issue in the trial and then, in a post-hearing amendment, attempt to canvass another.*
- h. *What Transnet's amendment does is extend the period for the performance of the MSA from the originally chosen date of performance as set out in Transnet's original founding papers to an unspecified future date, 10 days from the granting of the order. It completely changes the framework of the enquiry into impossibility, which has already been completed during the oral evidence hearing and cannot practically be reopened.*
- i. *Transnet cannot litigate in a piecemeal and sequential fashion, causing disruption to the court and Gijima, to say nothing of delaying and disrupting the actual process of bringing about the transition and disengagement.*

- j. *The proposed amendment to the notice of motion does not cure the vagueness that originally rendered the original notice of motion defective.*

[14] In terms of the provisions of Rule 28(1), any party desiring to amend any pleading or document, other than a sworn statement, filed in connection with any proceedings, shall notify all other parties of his intention to amend and shall furnish particulars of the amendment. Rule 28(2) provides that the notice referred to in subrule (1) shall state that unless written objection to the proposed amendment is delivered within 10 days of delivery of the notice, the amendment will be effected. Rule 28(3) deals with the requirement of an objection to a proposed amendment. Rule 28(4) caters for an application for leave to amend following an objection to the proposed amendment.

[15] Without complying with the prescriptions of Rule 28(1), Transnet delivered the amended notice of motion on 6 August 2025.

[16] An amendment cannot be granted for the mere asking thereof. Some explanation must be offered thereof, and such explanation must be in the founding affidavit filed in support of the amendment application. If an amendment is not sought promptly, a reason must be given for the delay. The party seeking the amendment must show *prima facie* that the

amendment has something deserving of consideration, and the application must not be *mala fide*.²

[17] Insofar as Transnet implies that condonation should be granted in terms of Rule 6(12) (as prayed for in prayer 1 of the amended notice of motion), then Transnet ought to have delivered an affidavit to justify non-compliance with Rule 28 and to apply for the amendment to be granted. Even more so when an objection to the proposed amendment is lodged. Transnet failed to provide any explanation under oath to justify the amendment or to address Gijima's objections.

[18] Transnet argued that, had the application not been referred for oral evidence, and had further time not lapsed, Transnet would have been entitled to an order for performance by the deadline of 30 June 2025. Since the deadline has long passed and the court can no longer grant relief, that is to be complied with by 30 June 2025, Transnet has sought an amendment to more accurately align with a new timeframe within which Gijima is to comply with its Disengagement obligations.

[19] Transnet further argued that Constitutional Rights are at play and as such it would be just and equitable that the amendment be effected. I find it difficult to align myself with this approach.

² *Vinpro NPC v President of the Republic of South Africa* (1741/2021) [2021] XAWCHC 261 (3 December 2021) at par 25

[20] The vital consideration for the court to judicially exercise its discretion is that an amendment will not be allowed in circumstances which will cause the other party such prejudice as cannot be cured by an order for costs, and where appropriate, a postponement.³ The power of the court to allow material amendments is, accordingly, limited only by considerations of prejudice or injustice to the opponent.⁴

[21] The introduction of the proposed amended notice of motion indeed shifted the goalposts regarding both the urgent nature of the application and the tasks Transnet insists Gijima should complete. The inescapable question is whether the application was urgent when it was issued and whether it constituted an abuse of this Court's process.

[22] The amendment is an attempt to escape the proverbial pinch of the shoe. It is tailored to fit in with the oral evidence of Mr Baht, especially on the time needed to do the assessments.

[23] On the amendment, I find that the objections are valid. The amendment will cause prejudice and an injustice to Gijima. Neither of which can be cured by an appropriate costs order.

[24] In the premises, the amendment is set aside, and Transnet is bound by the relief claimed in the original notice of motion.

³ *Moolman v Estate Moolman* 1927 CPD 27 at 29

⁴ *Devonia Shipping Ltd v MV Luis (Yeoman Shipping Company Ltd intervening)* 1994 (2) SA 363 (C) at 396G

The MSA:

[25] In June 2020, the parties entered into the MSA. In this regard, Gijima agreed to provide information technology ("IT") services to Transnet for a period of five years, from 1 December 2019 to 30 November 2024. As an addendum to the MSA, the termination date was extended from 30 November 2024 to 28 February 2025.

[26] Part and parcel of the MSA was a Disengagement Plan ("disengagement") that was to be implemented from the commencement of the MSA. It is a complex procedure to ensure the smooth transfer of IT services on the termination date.

[27] Following the extended termination date of 28 February 2025, the parties continued to engage with each other, and disengagement workshops were held. Transnet successfully obtained approval for payment of Gijima's services up to 30 June 2025.

[28] Clause 54 of the MSA sets the guidelines for disengagement. It imposes a series of obligations on Gijima to cooperate with Transnet to achieve a smooth and orderly migration of IT services.

[29] 'Disengagement' means *"the complete transition of terminated Services from [Gijima] ... as part of the Disengagement Services and in cooperation with Transnet so as to not cause any unnecessary*

interruption of, or cause any unnecessary adverse impact on the Services ... ”. (clause 52 of Attachment A to the MSA).

[30] ‘Disengagement services’ mean the provision by Gijima of all reasonable information and assistance to Transnet to enable Transnet or a Third Party designated by Transnet to take over Gijima’s obligations under the MSA in the event of termination or expiration of the MSA (clause 55 of Attachment A to the MSA).

[31] Clause 54.1.1 of the Master Services Agreement sets a clear deadline for disengagement. It provides that upon termination or expiration of MSA, Gijima shall have completed the Disengagement Services for the Services or the applicable Service Towers, as the case may be, in full cooperation with Transnet, its Affiliates and/or third parties, including, as the case may be, any replacement provider(s) that Transnet may designate.

[32] Clause 54.1.5 of the MSA places the obligation to prepare the Disengagement Plan on Gijima. As submitted by Transnet, the Disengagement Plan is the compass document for disengagement.

[33] In terms of clause 54.2.1 of the MSA, commencement of the Disengagement Services shall be on the date stipulated by Transnet and for a period to be mutually agreed by the Parties and in accordance with Attachment X2 to the MSA.

[34] Attachment K to the MSA prescribes Gijima's most important obligations (or Critical Deliverables). Attachment K confirms that Gijima is obliged to prepare the Disengagement Plan. According to Transnet, there is no obligation on Transnet to prepare any plan anywhere in Attachment K (or anywhere else in the MSA). As would be evident from the paragraphs dealing with the referral points, Transnet's approach in this regard is flawed.

[35] Clauses 54.1.4 and 54.1.5 of the Master Services Agreement elaborate on the Disengagement Plan. Gijima must prepare an overview for disengagement, referred to as Attachment X1, and then the Disengagement Plan itself, referred to as Attachment X2.

[36] In turn, Attachment K to the MSA requires two versions of the Disengagement Plan. The first is an initial high-level Disengagement Plan. Gijima had to prepare this preliminary version of the Disengagement Plan within three months of the start of the Master Services Agreement (meaning a deadline of 29 February 2020). Gijima also had to update the preliminary version on an annual basis (clause 54.1.6).

[37] The second version of the Disengagement Plan is the final detailed version. Gijima had to prepare the final version 24 months *before* the end of the MSA, or (as would happen here) within one month of an earlier termination of the MSA. The fact that the MSA required Gijima to prepare the final version of the Disengagement Plan a full two years before the end of the MSA emphasises the importance of an orderly, well-planned disengagement. Attachment K imposes a severe penalty if Gijima misses the deadline: R100 000.00 per week.

[38] Attachment K, having set the deadline for the *Disengagement Plan*, clause 54.1.1 of the Master Services Agreement then sets the deadline for *Disengagement*: Gijima must complete Disengagement by the time the Master Services Agreement, or any of the Service Towers, terminates or expires.

[39] Throughout this process, Transnet still needs IT services while Gijima moves towards Disengagement. For that reason, Gijima remains obliged to:

- a. Perform the Services (clause 54.1.7: “[Gijima’s] obligation to provide the Services shall not cease until the Disengagement Services have been completed in accordance with Attachment X2, to the satisfaction of Transnet”), and

- b. Perform the Disengagement Services until Disengagement is completed to Transnet's satisfaction (clause 54.2.2: "[Gijima] agrees that the Disengagement Services shall continue for a period of time, which may be for a period of up to 12 (twelve) months, or such longer period as is required by Transnet").

[40] The MSA divided IT services into seven groups, known as Service Towers. These Service Towers are:

- a. Cross-functional services.
- b. Help and service desk services.
- c. End user computing services.
- d. Collaboration services.
- e. Data centre and hosting services.
- f. Project management services.
- g. Relationship management services.

[41] The MSA was intended to expire on 30 November 2024. Despite the agreed-upon expiry date, clause 51 allowed Transnet to terminate the MSA or individual Service Towers earlier, with 90 days' notice (clause 51.4.1.1). One of the grounds for early termination was the depletion of Transnet's budget for the MSA.

[42] On 10 April 2024, Transnet, in accordance with a notice of partial termination, terminated some Service Towers on 90 days' notice due to the depletion of the contract budget and value. The notice distinguished between:

- a. Service Towers that Transnet was terminating on 90 days' notice (called "Terminated Services"); and
- b. Service Towers that Gijima would still provide for the remainder of the MSA and until the completion of the Disengagement Services (called "Remaining Services").

[43] The Terminated Services include help and service desk, end user computing, collaboration services, and relationship management. Transnet no longer needed Gijima to perform the Terminated Services. Transnet already moved them in-house as part of its corporate strategy to in-source its IT services.

[44] The Remaining Services are data centre and hosting services. Gijima is obliged to continue performing them during the Disengagement Period and until the Disengagement Services have been completed to Transnet's satisfaction.

[45] Data centre and hosting services involve providing the necessary services and activities to support Transnet's centralised production, quality assurance, and development computing environments. This includes the design, implementation, support, management, and maintenance of the data centre and hosting facilities on behalf of Transnet.

[46] Transnet's termination notice also triggered (and accelerated) the deadlines for disengagement. The termination notice triggered the deadline for the final version of the Disengagement Plan. This is because Attachment K required Gijima to send the final version of the Disengagement Plan 24 (twenty-four) months before the end of the Term [so by the end of November 2022] or within 1 (one) month of Gijima receiving a Termination Notice. The termination notice triggered this second deadline. This meant that Gijima was obliged to prepare and send the final version of the Disengagement Plan by mid-May 2024.

[47] The termination notice further triggered the start of the Disengagement Period because, as stipulated in clause 54.2.1, the notice specified termination dates for both the Terminated Services and the Remaining Services.

[48] According to Transnet, Gijima missed both deadlines. Transnet extended the Disengagement Period for the Remaining Services from 1 December 2024 to 28 February 2025.

[49] Between November 2024 and April 2025, Transnet hosted several workshops with Gijima about disengagement. According to Transnet, Gijima was generally uncooperative.

[50] On 1 December 2024, Transnet reminded Gijima that it had to complete the Disengagement Services for the Remaining Services by the extended deadline of 28 February 2025. Gijima replied that it would “*proceed to provide the Services until agreement is reached on terms that are not unilateral but are practically and commercially viable in the circumstances.*” Transnet contends that Gijima’s reply made no sense, as, according to Transnet, the parties had already reached an agreement on the terms in the Master Services Agreement.

[51] On 12 December 2024, Transnet sent a letter of demand. In this letter, Transnet demanded, among other things, that Gijima cease performing the Terminated Services and that it submit the final version of the Disengagement Plan for the Remaining Services. In response, Gijima asked for “a detailed Transition Plan”.

[52] According to Transnet, the excuse of “a detailed Transition Plan” became the standard excuse for not meeting the Disengagement deadline. Transnet’s stance is that this excuse falls flat because the MSA requires Gijima to prepare the Disengagement Plan, and Transnet has no related obligation.

[53] The stance adopted by Transnet is flawed, as there were reciprocal obligations on both parties. I deal with this in the discussion of the referral points.

[54] Transnet remains insistent that the Transition Plan has nothing to do with Disengagement and is unrelated to this phase of the Master Services Agreement's life cycle. Despite this insistence, Transnet stated that it still did what it could to assist Gijima with disengagement, including providing no fewer than three transition plans.

[55] Transnet sent another letter on 20 December 2024, providing more details about the actions Gijima must take to complete the Disengagement of the Remaining Services by the extended deadline of 28 February 2025. Gijima again asked for a transition plan, requiring Transnet to provide its plan regarding the migration of its Terminated Services. Gijima also demanded an explicit agreement regarding all details inherent in a disengagement of this magnitude and complexity.

[56] According to Transnet, the MSA mentions a Transition Plan, but only for the 2019 transition from the previous, pre-MSA provider ("T-Systems") to Gijima.

[57] Gijima took over from T-Systems in 2019/2020. According to Gijima, what Gijima took over from T-Systems to service Transnet in 2019/2020 is substantially the same as what Transnet now wants to take over from Gijima. Gijima argues that the T-Systems process was a successful disengagement and transition. The T-system process is clearly documented in Annexure "O1" of the answering affidavit. There is no reason why the T-System process cannot readily be adapted to facilitate the current transition and disengagement.

[58] Gijima pleads a tacit term to this effect, stating that the parties would handle the disengagement and transition of the information and communication technology services in accordance with the T-System process.

[59] During the T-Systems process, there were three parties: T-Systems (the outgoing party), Transnet (the client), and Gijima (the incoming party). The 'heavy lifting' was done by Gijima. It designed the transition plan (annexure "O1"). It hired and then acquired from T-

Systems the entire infrastructure, including the data centre building, mainframe computer, legacy programs, software, coding, and coded-in IP addresses, which Transnet had been using for its main operations for years before T-Systems took over. It has 16 years of system configurations built into it, and it contains a large volume of application data.

[60] Gijima submits that the significance of this history cannot be overstated because it means, if one has any insight into the technical complexity of something as vast as the entire country's rail network running container and wagon services over thousands of kilometres of rail with hundreds of depots and shunting yards and the many years that this has been running, that there is absolutely no possible other way of providing Transnet with the same information communication technology services without replicating, or acquiring, that which T-Systems owned and that which Gijima now owns.

[61] Transnet is, however, adamant that the T-Systems process differs vastly from the current disengagement and transition. For instance, the current process does not include the human resources element.

The Disengagement Plan:

[62] In compliance with clause 54.1.5 of the MSA, Gijima compiled the Disengagement Plan and submitted it to Transnet in or about September 2020. Transnet, through Mr Munyai, only accepted the Disengagement Plan on 28 August 2023.

[63] No plausible explanation was provided for why Transnet took almost three years to accept the Disengagement Plan. Due to the timeframes imposed by the Disengagement Plan, its acceptance played a crucial role. It is ironic that Transnet, having waited for almost 3 years to accept the Disengagement Plan, now complains that Gijima did not comply with the strict timeframes imposed thereof and labels Gijima as being obstructive.

[64] On a reading of paragraph 9 of the Disengagement Plan, there was no obligation on Gijima to perform the following duties:

- a. Any upgrades to systems and procurement of new licences or upgrades of licences.*
- b. Ceding of any shared licences to Transnet or the new duly appointed service provider.*
- c. Any modification or update to existing designs or architectural artefacts relating to changes required to fit the Transnet or newly appointed service provider delivery models.*
- d. Any changes required to existing infrastructure, including additional actions required to connect to existing infrastructure to*

facilitate data replication or migration as part of Transnet or the newly appointed service provider's transition of the towers.

- e. Any implementation of new infrastructure required for transition purposes of the disengagement or the onboarding of s197's (this is a reference to staff being transferred in terms of section 197 of the Labour Relations Act).*
- f. Consulting services required outside of transfer and disengagement activities.*
- g. Any transition services or migrations to new platforms.*
- h. Transfer of any other multi-tenant shared services of Gijima.*

[65] Further included in the Disengagement Plan, under the heading

"Constraints and dependencies" is:

"The key dependency for full Gijima disengagement, in particular with respect to all phases which will be Transnet's or the newly appointed service provider, include readiness to take on the infrastructure and services, without creating the risk of outages for Transnet."

[66] It is Gijima's submission that Transnet has not demonstrated readiness. The most glaring "missing part" in Transnet's set-up to receive and operate the data to be transferred from Gijima is a mainframe computer of adequate scale and design. Transnet, at least for the time being, has no mainframe to migrate its data onto.

First point of referral: Whether, as at the date of the launch of Transnet's application, it was impossible for Gijima to perform its obligations under the MSA.

[67] The application was launched on 24 May 2025, and Transnet sought Gijima to comply by 30 June 2025, or such other date as may be ordered by the court.

[68] To determine whether it was impossible for Gijima to perform its obligations under the MSA on any of these specified dates, a proper analysis of the evidence presented is required.

[69] The three tiers of infrastructure for which Gijima is responsible are primarily the mainframe infrastructure, the midrange infrastructure and the Wintel infrastructure. There is also the building where the machines are hosted (stored), known as a data centre. It has suitable equipment, a data recovery service, storage, backup services, and networking, all of which comprise the infrastructure that Gijima provides to Transnet to operate its information communication technology services. Gijima employs approximately 140 information and communication technology-skilled personnel to support this infrastructure and provide data centre and hosting services. The salary run for these technicians is approximately R14 million per month. Gijima is currently billing Transnet approximately R17 million per month to provide data centre and hosting services, which include Active Directory (a security layer in the Wintel environment), SharePoint services, and other cross-functional services.

[70] What then was the position as at the date of the launch of the application or 30 June 2025? Was it impossible for Gijima to render the services under the MSA both to disengage and to keep the services running until the moment of disengagement responsibly and safely, and did Transnet have the equipment capacity, both as to infrastructure and skilled staff, necessary to take over the rendering of the services itself responsibly and safely?

[71] The first to testify was Mr Munyai, who was spearheading a project to modernise Transnet's information communication technology services. Mr Munyai worked with several technology service providers towards this goal.

[72] Mr Munyai was adamant that Transnet was in a state of readiness to take delivery and take over the rendering of services from Gijima safely and responsibly as at the date of the launch of the application because it had a large contingent of information communication staff (some 500 plus staff members in this department) and its transition partner Microsoft South Africa Limited, had supplied it with Cloud services sufficient to receive Transnet's data stored by Gijima and to perform the processing functions previously undertaken by Gijima in its production environment (comprising the mainframe, midrange and Wintel environments) by hosting this data in the Azure Cloud platform, which, according to Mr Munyai, was ready to take over from Gijima.

[73] The evidence of Mr Munyai was that Microsoft was Transnet's new service provider in this regard and that its skill set and Azure Cloud service for which Transnet contracted was sufficient to give Transnet the necessary infrastructure and receptive and functional information communication technology environment into which Transnet's data could be migrated to ensure a seamless handover.

[74] The evidence revealed that the mainframe hosts seven critical applications essential to the maintenance and operation of Transnet Freight Rail's business. Mr Munyai described these as mainframe-native applications. These applications were written for and run on a mainframe, developed in the 1980s. Since then, they have undergone continuous development on mainframe architecture, becoming what are known as legacy applications.

[75] These legacy applications play a crucial role in controlling the movement of wagons and locomotives across the rail infrastructure of the country, moving ore, coal, gas, petroleum, foodstuffs and innumerable other freight goods, which generate the turnover and facilitate the economic functioning of the country's rail logistics system, which interfaces with its ports and mining and other rail-related infrastructure. These applications on the mainframe, which are central to Transnet Freight Rail's business, are essential. Being native to mainframes, they can only run on a mainframe. If they are to run in the Cloud, i.e., on other computers that are not mainframes, they need to be

rewritten to retain their logic and functionality while modernising their architecture for Cloud operation.

[76] Mr Bhat confirmed this. He confirmed that the document Mr Munyai called Transnet's "transition plan" was a document comprising eight pages of slides with small diagrams reflecting the migration proposal. It dealt only with the midrange (SAP) and Wintel environments of Transnet's ICT services and did not address the mainframe at all. This "transition plan" was provided to Gijima for the first time on 22 November 2024, some 8 days before the end of the MSA.

[77] In response to a question by Transnet's counsel regarding Gijima's case, which inquired about the inability to migrate mainframe applications from the current mainframe to Azure, Mr Bhat stated that mainframe applications are very specific and would require different migration plans. He testified that it has been done before, but it depends on the structure of the applications and their interaction with the environment. An assessment would need to be conducted to understand the applications' purposes, their functionality, and the environment in which they operate. Such a process would take six to eight weeks.

[78] Mr Bhat testified that a six-to-eight-week analysis process would be required of the mainframe before Microsoft could begin to devise a Cloud solution for the mainframe services and applications provided by Gijima to Transnet. During that period, Microsoft would also assess and

advise Transnet on whether it was possible at all to migrate the mainframe to the Cloud.

[79] Those six to eight weeks were revealed to Gijima for the first time as part of Mr Bhat's witness statement, dated 11 July 2025. This revelation was only made after the application launch date.

[80] On a question by the court as to whether all of this would have been ready on 30 June 2025, Mr Bhat responded that unless the assessment is done in depth, there cannot be a definite answer as to whether it is possible to migrate to Azure.

[81] This concession is of great importance herein. From this concession, it is clear that until the required assessment is completed, migration cannot proceed. The evidence is clear that no such assessment was done.

[82] It follows that the foundational step of the mainframe migration process had not occurred when the application was launched, as Microsoft had not yet commenced the analysis of the mainframe. This was confirmed by Mr Bhat, who thus undermined Mr Munyai's testimony that Microsoft had been ready to migrate Gijima's services to the Azure Cloud services.

[83] Absent a transition plan, which Transnet was contractually required to provide, Gijima couldn't render the Disengagement Services by 30 June 2025 (or on a date to be determined by the court).

[84] That impossibility was not of Gijima's making. Transnet introduced its "transition partner", Microsoft South Africa, for the first time on 22 November 2024, a mere eight days before the contract was due to expire. On the same day, it provided a high-level "flight plan", which was not a transition plan in any sense contemplated by Attachment X1, nor did this plan include the mainframe.

[85] To date, neither Transnet nor Microsoft has produced a transition plan capable of facilitating the disengagement of the mainframe.

[86] In these circumstances, it is unnecessary to determine any further aspect of Transnet's claimed readiness to receive or migrate services by the date of the application.

[87] On the evidence of its own witnesses, Transnet had not achieved, and indeed had not even initiated, the foundational step required to transition the mainframe environment, which is the cornerstone of its ICT infrastructure.

[88] The analysis required by Microsoft had not commenced as at the date the application was launched in May 2025, nor by 30 June 2025,

and remained incomplete even at the commencement of oral evidence on 21 July 2025.

[89] It is difficult to reconcile this evidence with Mr Munyai's assertion that Transnet was ready to take over the services at the time of launching the application. The gap between the accounts of Mr Munyai and Mr Baht is striking.

[90] Mr Munyai's understanding of both the technical environment and the obligations under the Master Services Agreement diverged not only from Gijima's position, but also from that of Transnet's own appointed transition partner, Microsoft. While Mr Munyai relied on the Microsoft transition plan (annexure FA9) to assert readiness, Mr Bhat confirmed during cross-examination that this document did not address the mainframe at all. The portion referencing VMware AVS dealt exclusively with the Wintel environment, meaning that only two of the three core infrastructure components covered by Gijima under the MSA were addressed in that plan.

[91] Mr Munyai also relied on annexure PRM3 attached to his witness statement as evidence of Transnet's transition plan. However, PRM3 suffers the same fate as FA9: it too expressly excludes the mainframe. Comprised of five slides containing high-level diagrams, PRM3 states explicitly that its focus is on Transnet's application inventory and "not the multiple number of server (infrastructure) instances per application" —

an exclusion that, by definition, omits the mainframe infrastructure hosted by Gijima.

[92] Moreover, PRM3 was prepared on 1 July 2025. This was done after the 30 June 2025 deadline stipulated in Transnet's original notice of motion. It postdates the period in which Transnet bore the burden of demonstrating that it was ready to assume the services and, as such, serves no evidentiary purpose.

[93] Mr Munyai was the sole witness from within Transnet's ranks. His colleagues who wrote the memos recommending that Gijima be retained beyond the termination of the MSA were not called. These colleagues of Mr Munyai were senior employees in the business and operating division with well-motivated reasons for retaining Gijima as a transition partner and as the entity to continue rendering the data centre and hosting (of the applications belonging to Transnet) services. It would have assisted Transnet if these people had been called to explain that they had been persuaded by internal processes in engagement with Mr Munyai to accept the modernisation plan and that they had been satisfied that Mr Munyai's refusal of their proposals had been rational and did not put Transnet's operations at risk. Instead, Transnet elected to rely on the sole and subjective evidence of Mr Munyai to present Transnet's case.

[94] On behalf of Gijima, Mr Samuel and Mr Willie testified. They were both employed by Transnet and subsequently by Gijima. They testified

that the MSA had been negotiated after the award of the tender to Gijima in 2020, that they had prepared the disengagement plan, which had been signed by Mr Munyai in 2023 on behalf of Transnet. They further testified that when they began working with Transnet to disengage, they repeatedly emphasised that the disengagement plan was only half of the process and that the transition plan was essential from Transnet.

[95] Mr Samuel and Mr Willie also testified that Transnet had never produced the required detailed transition plan, citing the transition plan drawn in the T-Systems process as an example.

[96] They also testified that Gijima had tried to assist in meeting Transnet's demand for a costed disengagement plan (which is not an obligation contained in the MSA; all the MSA requires the parties to do is to agree on a final disengagement plan). In this regard, it suffices to state that courts cannot compel parties to agree, particularly regarding the preparation of disengagement plans throughout the period of the MSA.

[97] It is essential to note that the first disengagement plan, submitted to Transnet in August 2020, was only signed by Transnet in August 2023. At this time, the agreement only had two years to run, and there were subsequent disengagement plans prepared, as testified to by Mr Willie.

[98] The evidence clearly reveals that there was a failure of minds to meet on what was required. Gijima insisted that a transition plan was needed before it could turn off the services. On the other hand, Transnet treated Gijima as a service provider that had to do everything. But as Gijima was not providing the new infrastructure to host Transnet's applications and data, it needed that infrastructure to be identified and prepared to receive those applications and data (combined, referred to as workloads) before it could turn off the services and complete its disengagement obligations.

[99] The evidence revealed that insofar as a new mainframe was concerned, that had not yet been procured, so the like-for-like transition was impossible as at the date of the launch of the application. The Microsoft Azure option had not been even traversed in Microsoft's "transition plan" and the Integrated Train Plan (ITP) upgrade (which Transnet is expecting to replace some legacy applications) was only entering phase 1 and it was in the process of being processed.

[100] In sum, Transnet had three irons in the fire, the replacement mainframe (like for like – lift and shift from IBM, which is still in procurement); the Microsoft Azure option (which has not yet begun the analysis of the mainframe applications which will take at least six to eight weeks, according to Mr Bhat of Microsoft and thus no indication if it was possible to do so for all the applications and in what timeframe it can be done); or the ITP modernisation programme which is only in respect of phase 1.

[101] In relying on the lone voice of Mr Munyai, Transnet failed to call the technicians who had the receptive environment ready for Transnet's applications and data. These technicians could have enlightened the court on the ripeness of the environment to which the information ought to be migrated to.

[102] In these circumstances, Gijima's obligation to render the Disengagement Services could not arise in the absence of reciprocal performance by Transnet. The MSA expressly contemplates that disengagement would be guided by a transition plan (to be provided by Transnet) and aligned to the technical requirements of a successor service provider. FA9 and PRM3 are not transition plans, and Transnet has failed to deliver such a plan. That failure prevented disengagement from proceeding and rendered Gijima's performance impossible.

[103] The principle is no stranger in law: where one party has not performed what is required of it, it cannot demand performance from the other.⁵ Transnet's non-performance, therefore, entitles Gijima to invoke the *exceptio non adimpleti contractus*, and to resist any claim for specific performance until Transnet has fulfilled its own obligations under the MSA.

⁵ See *Nulliah v Harper* 1930 AD 141 152–153; *Koenig v Johnson & Co Ltd* 1935 AD 262 276; *Millman v Goosen* 1975 3 SA 141 (O) 142; *RM Van de Ghinste & Co (Pty) Ltd v Van de Ghinste* 1980 1 SA 250 (C) 252.

Active Directory:

[104] At the time of the termination of the Partial Terminated Services in April 2024 to August 2024, the Active Directory and SharePoint services (which were part of the Collaboration Services tower and which reside in the Wintel environment) were transferred to the Retained Services.

[105] Mr Munyai explained that the Active Directory is a security service that controls user access to Transnet's information communication technology services and is part of the Wintel environment.

[106] The evidence of Mr Munyai and of Mr Bhat traversed an event that happened in July 2021, when there was a ransomware attack on Transnet's IT systems servicing the ports, bringing both Transnet and port operations to a near standstill. Gijima, together with Transnet and Microsoft, was able to isolate the Active Directory where the breach had occurred through the ports system, which is not part of Gijima's responsibility. They managed to keep the mainframe and SAP (midrange) portions isolated from the breach. Gijima then re-built the Active Directory as instructed by Transnet and Microsoft.

[107] One of the lessons learned was that sharing high-level access to the security system with others was dangerous. Gijima resolved from that time onwards, under the guidance of Microsoft, not to share the highest levels of security control through Active Directory (known as

Domain Administrator, which is the T0 access) with anyone else so that it alone could control that level of access, which permits changes to be made to the system. If that access is shared, it could become complicated to prevent others with such access from compromising the system for which Gijima is responsible. Since 2021, Gijima alone has controlled T0 access (the highest level of access to the Active Directory).

[108] Mr Samuel explained that he would not permit sharing of T0 access without getting an indemnity from Transnet for these reasons and that although Gijima's attorneys had prepared a second addendum to the MSA to record such an indemnity following a workshop in April 2025 (in which a discussion over T0 access and the active directory had been discussed), Transnet never furnished the indemnity and as such, T0 access was not given to Transnet.

[109] In his testimony, Mr Munyai indicated that he was happy on behalf of Transnet to give the indemnity to Gijima, but once again, there seems to have been a breakdown in the execution of this agreement, which would have eliminated this obstacle, at least, had the addendum with the indemnity in it been executed by Transnet. Gijima's attorneys had prepared that addendum and sent it to Transnet's attorneys following the meeting at which it had been agreed upon between the parties. This letter is dated 7 April 2025. For some reason, Transnet never provided the signed agreement recording this indemnity, known as the second addendum.

[110] The breakdown seems to have resulted from the parties' inability to achieve a limited transfer of the Wintel environment from Gijima to Transnet, as per a sale agreement they had negotiated. Still, those negotiations had also broken down because Transnet seemed to think that it was purchasing both the Wintel and SAP environments for some R26 million (Gijima's opening price was R30 million). Still, Gijima had never actually offered the SAP environment as part of that sale; it had only offered the Wintel environment and made it explicit in its proposal to Transnet that the items being offered for sale were the non-SAP items. This is evident from Annexure "AA7" to the founding affidavit.

[111] This detail seems to have escaped Mr Munyai, who proposed to his Chief Executive Officer, recommending that Transnet spend R26 million to acquire the infrastructure that Gijima had offered. Mr Munyai, on behalf of Transnet, believed that the R26 million offer covered both the Wintel and the midrange. On the other hand, Gijima, through its Group Chief Executive, Mr Nxumalo, made clear that it was only selling the non-SAP environment. This misunderstanding resulted in a failure to reach an agreement between the parties.

[112] There was no suggestion of the mainframe ever being included in this sale. Transnet conceded this through its own actions. Transnet has gone out late in the day (the tender was issued 2 days before the end of the initial term of the MSA) to buy itself its own mainframe, and as at the date of the oral evidence being heard, the confinement tender to procure a mainframe from either BCX or IT Agility had not been approved.

According to Mr Munyai's evidence, the procurement of the mainframe is still in process.

[113] Transnet also issued a data centre co-location tender to house its new mainframe in another data centre. In the introduction to that data centre co-location tender, it is recorded that Transnet has performed an audit and revealed that once it terminates the services with Gijima, it would not have the capacity to render mainframe services itself. This, along with the evidence of Mr Bhat, confirms that Transnet was not ready with the mainframe infrastructure or its equivalent in the Cloud as of the application's launch date in May 2025.

[114] The conclusion of unreadiness on the part of Transnet is underlined by its proposed purchases of space in a co-location data centre to house its new mainframe and its confinement to procure a new mainframe (for R71 million) only in May-June 2025. Mr Munyai tried to explain this away by saying that although Microsoft was ready to take over the services for Transnet immediately, the purchase of the mainframe was a "backup" just in case the mainframe services by Microsoft were compromised at any point, but this explanation does not bear scrutiny.

[115] This explanation —that the mainframe was being procured merely as a backup despite Microsoft allegedly being ready to assume the services —was clearly an afterthought. Mr Munyai offered it in an

attempt to avoid the inescapable conclusion that Transnet was not, in fact, ready.

[116] But the explanation does not withstand scrutiny: it is internally inconsistent, commercially irrational, and belied by the timing of the confinement tender, which was only initiated in the final weeks of the contract. The mainframe co-location document issued by Transnet clarifies that the mainframe is intended for providing services in an active production environment, not for disaster recovery functions, which would be outsourced as Gijima has done to other disaster recovery locations and infrastructure.

[117] I find it difficult to comprehend why Transnet would proceed to purchase a new mainframe when Mr Munyai insists that no mainframe is needed for disengagement and transition. It is peculiar that the new mainframe is purchased for millions of rands, only to be utilised as a backup.

[118] Had there been a proper transition plan, which should have commenced early in January 2023, and careful thinking through by Transnet of what was required to transition the data centre and hosting services well in advance of the termination of the Master Services Agreement, this infrastructure would and should have been in place.

[119] It was not, and the conclusion of Transnet's not having the capacity to take transfer of the services is inescapable on the probabilities.

Second point of referral: Whether, on a proper interpretation of the Master Services Agreement, to keep the services from being interrupted, whatever the incoming service provider had to do when coming into the contract with the applicant in 2020, the next incoming service provider would have to do when taking over from Gijima.

[120] There appears to have been a significant difference in understanding and interpretation of the MSA, resulting in this divergence. It was pointed out to Mr Munyai in his cross-examination that, in fact, the MSA does, expressly, place an obligation on Transnet to provide a transition plan. The MSA is expressed to be inclusive of its attachments (clause 2.3.1 of the MSA). One of the attachments is the initial high level disengagement plan that was drawn by Gijima and submitted to Transnet in August 2020 as Attachment "X1" (Annexure FA2.4 to the founding affidavit) to that agreement which disengagement plan is signed by Mr Munyai on 28 August 2023, some five days after Transnet sent the initial notice of termination to Gijima on 23 August 2023.

[121] Attachment "X1" provides in express terms that: *"The main purpose of the Disengagement Plan is to govern the Disengagement*

between Gijima and Transnet based on the Transition plan provided by Transnet or the newly appointed Service Provider.”

[122] Attachment “X1” then goes on to state the “*goals and objectives of the Project*” which are “*delivery of the Disengagement plan which will be aligned to Transnet’s or the new Service Provider Transition Plan.*”

[123] In the “*Disengagement Approach*” section of Item 14 in Attachment X1, the “main stages” of the disengagement framework are identified. Therein, it provides that the actual Disengagement Project Plan with actual dates will be “*dependent on the Transnet or the newly appointed incumbent Transition Plan and actual parties involved.*”

[124] These provisions, all drawn from Attachment “X1”, which is incorporated into the MSA and signed by Mr Munyai himself, make it clear that the disengagement process was always to be governed by a transition plan to be provided by Transnet or its successor. The timeline for disengagement was expressly made dependent on the existence and content of that transition plan. Transnet’s failure to produce such a plan, or to demonstrate that its successor had one in place, frustrates the very mechanism by which disengagement was to be implemented. It cannot now rely on Gijima’s alleged non-compliance when the precondition to disengagement, its own transition plan, was not fulfilled.

[125] Where Transnet elects, as it has done in this case, to upgrade or, in Mr Munyai's words, "modernise" its infrastructure, Attachment "X1" expressly identifies specific activities that fall outside the scope of the disengagement project. Item 9 of Attachment "X1" goes on to list items that are "*specifically out of scope of the disengagement project*". It lists the following:

- a. "*Any modification or update to existing designs or architectural artefacts relating to changes required to fit the Transnet or newly appointed Service Provider delivery models*";
- b. "*Any changes required to existing infrastructure, including additional actions required to connect to existing infrastructure to facilitate data replication or migration as part of Transnet or the newly appointed Service Provider transition of the towers*"; and
- c. "*Any transition services or migrations to new platforms*".

[126] These exclusions make plain that if Transnet elected to modernise or upgrade its IT infrastructure, whether through new delivery models, connection to alternative infrastructure, or migration to new platforms, such activities would fall outside the scope of the disengagement project as defined in Attachment "X1".

[127] Gijima was never contractually obliged to support a transition of this nature, and any delay or failure associated with Transnet's modernisation efforts cannot be attributed to Gijima.

[128] Transnet's attempt to retroactively impose obligations on Gijima in respect of matters that were expressly excluded from scope is both untenable and contrary to the agreed terms of the MSA and the provisions of the signed 2020 / 2023 disengagement plan, as testified to by Mr Munyai at the commencement of his cross-examination.

[129] Mr Munyai's signature and that of another Transnet official appear on this disengagement plan under wording that confirms that the parties were bound thereto.

[130] In sum, the MSA makes it clear that the disengagement plan depends on the transition plan provided by Transnet. Transnet's insistence that Gijima disengage from Transnet without a necessary transition plan was mistaken. Gijima's demand for Transnet to first provide a transition plan was both contractually well-founded and necessary. Transnet failed to appreciate what is required for such a transition.

[131] Gijima, by contrast, having transitioned from T-Systems to itself and with employees who have experienced various transitions throughout their employment histories, has a much better understanding of how such transitions and data migrations are achieved in organisations of this scale. This was evident, especially from Mr Willie's testimony.

[132] Foremost amongst these appreciations was the need to produce a transition plan through a process of in-depth discussion and negotiation. Deep-dive workshops would enable each technical step to be planned and executed through an ongoing process of dialogue and cooperation, achieving the multi-faceted task of disengagement responsibly and safely.

[133] Even the MSA's definition of "*term*" (clause 139 in the definitions) recognises the organic nature of disengagement by recording that the term of the agreement is inclusive of the period of disengagement (which in itself is left to agreement between the parties as is the disengagement fee, recognising that agreement would need to be reached at the end of the MSA and could not be prescribed at the outset by the drafters of the agreement) and the fact that the definition of "*term*" goes even beyond the disengagement period to specify that the agreement only ends when the services have been successfully transferred. Transnet did not appreciate this open-ended nature of the disengagement process in its dealings with Gijima.

[134] Attachment "X1" demonstrates beyond dispute that the transition was Transnet's responsibility to initiate and govern, and that disengagement was contingent upon it.

[135] In these circumstances, Transnet's attempt to reframe its obligation (as it has done throughout the course of this litigation) as

Gijima's sole responsibility is inconsistent with the express wording of the contract it seeks to enforce, contrary to the evidence. In essence, Transnet tacitly conceded through its actions that it had to prepare a Transition Plan, contrary to common sense.

[136] One cannot ignore the fact that considerable effort was made to advance the transition by both parties. The fundamental failure of understanding by Transnet regarding what was required of the incoming service provider, which Transnet has now become, placed a spoke in the wheel of the efforts of both parties. Unfortunately, Transnet's failure to fully comprehend this resulted in the launch of premature and precipitous litigation, which only further frustrated the objective of disengagement, adding an additional layer of legal costs and delays.

[137] To correctly interpret the MSA and prevent service interruptions, Transnet, as the incoming service provider, was obliged to follow the T-Systems process (excluding redundant aspects such as human resources) if it wanted to take over from Gijima.

Third point of referral: in the alternative to the section point of referral: whether there is a tacit term in the Master Services Agreement that keeps the services from being interrupted, whatever the incoming service provider had to do when coming into the contract with the applicant in 2020, the next incoming service provider would have to do when taking over from Gijima.

[138] Gijima's original position was that there existed a tacit term to the effect that, to avoid interruption of services, whatever the incoming service provider had to do when taking over from Transnet's previous service provider in 2020, a subsequent incoming service provider would likewise be required to do when taking over from Gijima.

[139] On behalf of Gijima, it is submitted that this was based on the understanding that the MSA did not expressly regulate certain aspects of the disengagement process, and that such a term was necessary to give the contract business efficacy.

[140] However, the position has changed considering the analysis of Attachment "X1" to the MSA. Attachment "X1" forms part of the contractual documentation. It expressly regulates the disengagement process, clarifying that disengagement must align with and depend on a transition plan provided by Transnet or a newly appointed service provider. This leaves no "gap" in the agreement that could justify the importation of a tacit term.

[141] Given that Attachment "X1" expressly deals with the sequencing, dependencies, and objectives of disengagement, including its alignment to the incoming provider's transition plan, the circumstances contemplated by the initially pleaded tacit term are in fact already covered by the express provisions of the contract.

[142] I agree with Gijima's submissions that, on a proper interpretation, there is no need and no legal basis for the Court to imply such a term.

[143] Put differently, the express wording therefore occupies the very field that the tacit term would otherwise have had to cover. In law and in logic, there is no room for a tacit term where the express terms already address the point. In consequence, the resolution of Issue 3 is not that such a tacit term should be implied, but that the express provisions of the MSA and Attachment "X1" are decisive and conclusive on this point.

[144] The effect of this conclusion is that the matter must be approached based on the express contractual framework, which places the onus on Transnet to provide a transition plan and coordinate disengagement accordingly. The absence of such a plan, particularly in relation to the mainframe, is thus fatal to Transnet's case.

[145] That conclusion has direct implications for the fourth referral point. If disengagement was expressly made dependent on Transnet first producing a transition plan, and if Transnet failed to do so, then it was not in a position to demand performance from Gijima.

[146] This is the very situation in which the *exceptio non adimpleti contractus* finds application: a party who has not performed its own reciprocal obligation cannot compel performance from the other.⁶

Fourth point of referral: Whether the exceptio non adimpleti contractus finds application herein.

[147] Having discussed the first, second and third referral points in the paragraphs above, it follows that Transnet, having failed to discharge its own contractual obligation, was not entitled to demand disengagement from Gijima.

[148] The *exceptio* applies squarely. Transnet's claim for specific performance of the disengagement obligation must therefore fail on this ground alone.

[149] The application of the *exceptio* and the defence of impossibility are mutually reinforcing in this matter. Transnet's failure to provide the contractually required transition plan was both a breach of a reciprocal obligation (engaging the *exceptio*) and the operative cause of the impossibility of performance by Gijima.

⁶ *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 391 (A) at paragraph 418B; *Man Truck and Bus (SA) (Pty) Ltd v Dorbyl Limited t/a Dorbyl Transport Products and Busaf* 2004 (5) SA 226 (SCA) at paragraph 12.

[150] The very condition precedent to disengagement was absent, and that absence was entirely of Transnet's making. Whether viewed through the lens of reciprocal obligations or through the impossibility doctrine, the conclusion is the same: Transnet could not compel performance from Gijima within the timelines it demanded.

Fifth point of referral: Whether annexure "FA12" to the founding affidavit constitutes an agreement between the parties.

[151] FA12 cannot, on any sensible interpretation, be regarded as a contract. Its own form and content make this clear:

- a. It is expressly marked "Draft" – signalling that it is a working document still under discussion and subject to revision.
- b. It is unsigned by either Gijima or Transnet. While signature is not a strict legal requirement for the formation of a contract, the absence of signature here is significant when coupled with the "draft" designation and the lack of any other evidence that the parties agreed to be bound by its terms.
- c. It does not record any executable obligations: – FA12 contains no operative clauses, binding promises, or mutual undertakings. Instead, it sets out what it expressly calls "Action Items", preparatory and indicative steps contemplated in the early stages of disengagement discussions.

- d. Its nature is preparatory, not contractual: FA12 is plainly a planning or working document, capturing preliminary proposals for how the parties might approach disengagement. Such a document may guide operational cooperation, but it does not, without more, give rise to enforceable rights and obligations.
- e. Subsequent updates confirm its non-binding nature: To demonstrate further that FA12 was a working document rather than a concluded agreement, Gijima subsequently updated it. That updated version appears as annexure “AA10” to the answering affidavit, reinforcing the fact that FA12 was never intended to be final or binding.

[152] To elevate FA12 to the status of a binding agreement would require reading into it terms that are simply not there. This would not only contravene basic principles of contract formation but would be wholly inconsistent with the way the document is framed, labelled, and treated by the parties themselves.

[153] In these circumstances, FA12 is self-evidently not a contract and cannot form the basis of any enforceable claim or defence.

Sixth point of referral: Whether Transnet has the technical ability and infrastructure to take over the IT services from Gijima:

[154] The finding, as stated above under the discussion of the first referral issue, that Transnet lacked the necessary infrastructure by 30 June 2025, is directly relevant here.

[155] The answer to the sixth issue is thus clear. Transnet did not, as at the date of launch, by 30 June 2025, or even at the hearing of the oral evidence, possess the technical capability, infrastructure, or skilled personnel to assume the services. The absence of a transition plan, the lack of additional ICT resources, and the admitted dependence on third-party procurement all point to the same conclusion.

Conclusion:

[156] Upon considering all the evidence, it is clear that, at the time of launching this application, Transnet was not ready to receive the disengagement services it now seeks to compel.

[157] It had no transition plan, no technical readiness, and no clarity on how the most critical component (the mainframe) was to be migrated. Indeed, Mr Baht explicitly conceded that even the initial assessment necessary to determine whether the mainframe could be moved had not begun by the time of launch, nor was it complete by the time oral evidence commenced.

[158] The attempt to compel performance in the face of Transnet's own material non-performance is not only without merit, but also impermissible.

[159] The *exceptio non adimpleti contractus* entitles Gijima to withhold performance until Transnet has fulfilled its reciprocal obligations under the MSA. Chief among those is the provision of a viable transition plan. That obligation has not been met. In its absence, it was and remains impossible for Gijima to perform.

[160] Transnet's decision to approach this court prematurely and urgently resulted in extensive litigation. Mr Baht's witness statement was deposed to on 11 July 2025. In his statement, Mr Baht made it clear that Microsoft, as Transnet's transition partner, still had to conduct an essential assessment and predicted it would take six to eight weeks. Despite being aware of this crucial shortcoming, Transnet elected to proceed with its case. As an afterthought, Transnet attempted to introduce an amended notice of motion after five days of oral evidence. The way Transnet elected to proceed constitutes recklessness in prosecuting the application. This resulted in significant costs for Gijima. There is no basis why Gijima should be left out of pocket.

[161] In the circumstances, the application stands to be dismissed with costs, including the costs of two counsel on the attorney and client scale on scale C.

Order:

Consequently, I make the following order:

1. The application dismissed.
2. The applicant is to pay the costs of the application on the scale as between attorney and client, including the costs of two counsel on the scale as between attorney and client.



Minnaar AJ
Acting Judge of the High Court
Gauteng Division, Pretoria

Heard on	:19 June 2025
	21, 22, 23, 24 and 25 July 2025
	15 August 2025
For the Applicant	: Adv. I V Maleka SC with Adv Z Cornelissen
Instructed by	: Mkhabela Huntly Attorneys Incorporated
For the Respondent	: Adv L J Morison SC with Adv M Phukubje
Instructed by:	: Nicqui Galaktiou Incorporated
Date of Judgment	: 16 October 2025