IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 057110/2024

(1) REPORTABLE:
(2) OF INTEREST TO OTHER JUDGES:
(3) REVISED.

3/11/2025 [redacted]

DATE SIGNATURE

In the matter between:

SPESNET PROPRIETARY LIMITED Plaintiff

and

SOUTH AFRICAN NURSING COUNCIL Defendant

JUDGMENT

MBONGWE J:

INTRODUCTION

[1] The Defendant excepts to the Plaintiff's Particulars of Claim on the basis that they fail to disclose a cause of action and are vague and embarrassing. The

Plaintiff has claimed the amount of R36 million, being the balance of the contractual amount of R39 million less two equal payments of R1.4m each already paid by the Defendant for services allegedly rendered in terms of a service level agreement ("SLA"). The plaintiff contends that the full performance of its obligations in terms of the service level agreement was frustrated by the Defendant's conduct. More specifically, the Plaintiff alleges that the Defendant failed to maintain the stability of its systems as described in the agreement and thereby rendered the plaintiff's further performance impossible. In consequence, the plaintiff has invoked the doctrine of fictitious completion to claim the total contractual amount.

Legal Principles

[2] The test for an exception is whether, on every reasonable interpretation of the pleading, no cause of action is disclosed. The court must accept the factual allegations as true and determine whether they sustain a claim in law.[1]

[3] Rule 18(4) of the Uniform Rules of Court requires that "*every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim.*" A pleading that omits material facts necessary to sustain a cause of action is excipiable.[2]

[1] *McKelvey v Cowan NO* 1980 (4) SA 525 (Z) at 526D-E.
[2] *Trope v South African Reserve Bank* 1992 (3) SA 208 (T) at 211B–C.

[4] A pleading is vague and embarrassing if it lacks sufficient particularity to enable the opposing party to plead meaningfully.[3]

Grounds of Exception

1. THE ESCROW AGREEMENT

[5] The defendant has raised four grounds on which it premises its exceptions to the plaintiff's particulars of claim, being that the plaintiff has failed to plead the details pertaining to the fulfillment of the condition precedent that an escrow agreement be concluded between the parties <u>and an independent</u> third party, Maponya Incorporated, as an escrow agent, before the conclusion and implementation of the Service Level Agreement ('SLA') between the parties. The Defendant contends that the Plaintiff's omission to allege compliance with the condition precedent and fulfilment of its obligation in terms of the escrow arrangement, disentitled the plaintiff from seeking to rely on the SLA and invoking the principle of fictitious completion of its obligations in terms thereof.

[6] The Defendant contends that the SLA was conditional upon the conclusion of an escrow agreement involving a third-party, Maponya Incorporated, the escrow agent. Although the conclusion of the escrow agreement was a condition precedent for the conclusion of the SLA, the Defendant contends that Plaintiff failed to plead:

- who represented the parties in the conclusion of the escrow agreement.

[3] *Jowell v Bramwell-Jones and Others* 1998 (1) SA 836 (W) at 898F–899A.

- whether the escrow agent accepted its appointment.
- whether the Plaintiff complied with its obligations under the escrow Agreement.
- The date and place where the escrow agreement was concluded and details of the parties that were involved in the conclusion of the escrow agreement

The Plaintiff's omissions, the Defendant contends, render the claim incomplete and incapable of sustaining a cause of action.

2. *UNFOUNDED ALLEGATION OF WAIVER*

[7] The Plaintiff incorrectly alleged that the Defendant had waived its right to subject the parties' dispute to a remedial resolution mechanism such as mediation and/or arbitration as per the SLA. On the contrary, it was the parties' decision to subject their dispute to adjudication by a court.

3. *FICTITIOUS COMPLETION PRINCIPLE*

[8] The Defendant further contends that the Plaintiff's reliance on fictitious completion of its obligations is misplaced absent allegations of full compliance with the escrow agreement. The doctrine of fictitious completion, as recognised in *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk*[4], applies where a creditor is prevented from completing performance due to the debtor's conduct. The creditor may claim as if performance had been

[4] 1979 (1) SA 391 (A)

completed, provided it was ready and willing to perform, and the debtor's conduct rendered performance impossible.

[9] However, the application of fictitious completion requires a factual foundation. The Plaintiff must allege that the Defendant's conduct frustrated performance, and that, for its part, the Plaintiff complied with all the conditions precedent, including any linked agreements, such as the escrow arrangement. In the absence of such allegations, the claim is legally deficient.

4. Quantification

[10] In *Minister of Safety and Security v Tyulu*[5], the court emphasised the need for precise and substantiated quantification of the damages claimed. This is pertinent in this case as the damages claimed do not fall in the category of general damages, where the court has discretionary powers. The Plaintiff's failure to deduct anticipated costs it would have incurred to discharge its obligations renders the claim speculative and incapable of judicial assessment.

OPPOSITION

[11] It is not in dispute that the combined summons was served on the Defendant on 24 May 2024. The Defendant only filed its first notice of exception on 7 July 2024 – well outside the period of ten days indicated in Rule 23 (1) of the Uniform Rules of the Court and again on 15 July 2024. No condonation in terms of Rule 27 was sought for the lateness of the filing of these notices.

[5] 2009 (5) SA 85 (SCA).

[12] The defendant had withdrawn the notices of exception after the plaintiff had filed notices of objection that the Defendant's notices constituted irregular steps in terms of Rule 23 (1), followed by the Rule 30 notices.

[13] The Defendant, however, proceeded on 7 August 2024 to file a similar notice of exception on the same grounds and constituting the subject in the present hearing, again without seeking condonation. The Plaintiff seeks the dismissal of the latest exception with punitive costs as a result.

ANALYSIS

[14] As will appear later in this judgment, it is my view that there is, to a great extent, merit in the Defendant's grounds for excepting to the Plaintiff's Particulars of Claim. For that, the Defendant seeks the dismissal of the Plaintiff's claim with costs. On the other hand, the Plaintiff seeks the dismissal of the Defendant's exception with punitive costs on the grounds of the lateness of the filing of the exceptions, including the extant, which is similar in grounding to the earlier withdrawn exceptions for which the Defendant tendered costs.

[15] On the grounds of both the Defendant's lateness in the filing of the exception(s) and the Plaintiff's failure to satisfy the provisions of Rule 18 in pleading its case sufficiently, despite the service of the relevant notice(s) calling upon it to do so, this matter can be summarily disposed of in dismissals. The inevitable consideration is whether both parties had intended for the matter to be ended without full ventilation and determination by a court. Justice will be served, in my view, in allowing the parties the opportunity to fulfill their agreed and common desire, despite the SLA stating otherwise, to directly

engage in litigation for a court determination of the issues between the parties to be made.

Conclusion

[16] The Particulars of Claim as they stand, therefore, fail to disclose a cause of action and are vague and embarrassing. The Defendant cannot plead meaningfully to the Plaintiff's allegations in the absence of essential allegations pertaining to the escrow agreement and a proper quantification of the Plaintiff's claim.

ORDER

[17] Consequent to the findings in this judgment, I make the following order:

1. The exception is upheld.
2. The Plaintiff's Particulars of Claim are set aside.
3. The Plaintiff is granted leave to amend its Particulars of Claim within 20 days from the date of this order.
4. Failing compliance with order 3, the Defendant may apply for the dismissal of the plaintiff's action.
5. The Plaintiff is ordered to pay the costs of the exception, including the costs consequent upon the employment of two counsel, on Scale C.

[redacted]

MPN MBONGWE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION PRETORIA

APPEARANCES

For the Applicant /Defendant:	Adv D B du Preez SC; Adv N P Mashabela
Instructed by:	Diale Mogashoa Attorneys
For the Plaintiff / Respondent:	Adv A Bishop
Instructed by:	Richards Attorneys Inc.
Date of hearing:	24 April 2025
Date of judgment:	03 November 2025