



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

(1) REPORTABLE: **NO**  
(2) OF INTEREST TO OTHER JUDGES: **NO**  
(3) REVISED: **YES**

Date: **7<sup>th</sup> June 2019** Signature: \_\_\_\_\_

**CASE NO:** 2018/24037

**DATE:** 7<sup>TH</sup> JUNE 2019

In the matter between:

**LANCET LABORATORIES (PTY) LIMITED**

Plaintiff

- and -

**LIFE BRENTHURST CLINIC**

Defendant

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**JUDGMENT**

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**Adams J:**

[1]. The defendant raises an exception to the plaintiff's particulars of claim on the ground that it lacks averments necessary to sustain a cause of action. The particulars upon which the exception was based were set out in 'clear and

concise terms' as required by Uniform Rule of Court 23 (3). In a nutshell, the defendant takes exception to the fact that the plaintiff, whose cause of action, according to the defendant, is clearly based in contract, gives no details and particulars of the agreement concluded between the parties. Importantly, so the defendant contends, the plaintiff failed to furnish particulars of the natural persons who represented the plaintiff and the defendant when the contract for the rendering of services was entered into.

[2]. The defendant also takes issue with the fact that the plaintiff has failed to furnish details of the pathological services allegedly rendered by the plaintiff at the special instance and request of the defendant. At a very fundamental level there is no merit in this contention by the defendant. Annexed to the particulars of plaintiff's claim are seven tax invoices dated between 21 July 2016 and 25 January 2017, each indicating that the plaintiff had performed 'standard priced tests' and gives the amount charged for the tests performed. The total of these invoices amounts to the sum claimed by the plaintiff in its particulars of claim. For this reason therefore the exception taken on that basis stands to be rejected. In any event, a distinction must be drawn between the *facta probanda*, or primary factual allegations which every plaintiff must make, and the *facta probantia*, which are secondary allegations upon which the plaintiff will rely in support of primary factual allegations. Generally speaking, the latter are matters for particulars for trial and even then are limited. For the rest they are matters for evidence. In applying these principles, I am of the view that the exception based on the lack of particulars stands to be dismissed.

[3]. The plaintiff's cause of action in its particulars of claim is formulated as follows:

'During the period July 2016 to January 2017 the plaintiff rendered pathological services to the defendant at the latter's special instance and request.'

[4]. As I indicated above, the defendant raised an exception mainly on the grounds that the particulars of claim lack averments relating to the underlying agreement between the parties in terms of which the services were rendered. In that regard, Mr Moretlwe, who appeared on behalf of the defendant, referred me to *De Kock v Middelhoven*, 2018 (3) SA 180 (GP), where Mabuse J has this to say at par [24]:

'[24] Now, in casu, in order to constitute a cause of action in respect of her claim based on a contract, the plaintiff would have to allege, as she has done in the particulars of claim, and prove that:

[24.1] there was an agreement or consensus between her and the defendant;

[24.2] she and the defendant had the capacity to contract;

[24.3] the performance on which they had agreed was possible and lawful;

[24.4] the prescribed formalities, where applicable, had been complied with.

Generally, these are the essentials that 'constitute a 'cause of action' called a contract. The cause of action that lacks those essentials is not a contract. Accordingly, whether or not something is a cause of action is determined by the essential ingredients of such a cause of action or, to put it simply, by the material characteristics.'

[5]. Applying these principles, so Mr Moretlwe submitted, the plaintiff should have pleaded these essential ingredients in support of its cause of action founded on a contract. Plaintiff has failed to plead when, where and by whom the agreement was concluded, whether the agreement was orally or in writing and who represented the parties when the agreement was entered into. This means, so the defendant contended, that the particulars of plaintiff's are excipiable on the basis that it lacks averments which are necessary to sustain the specific cause of action.

[6]. On the other hand, Mr Fouché, Counsel for the plaintiff, submitted that the plaintiff's cause of action is not based on an agreement. 'Services rendered at the special instance and request of the defendant' is in itself a sustainable cause of action, so Mr Fouché contended, and that is the basis of the plaintiff's claim in this action.

[7]. I am not persuaded that the argument on behalf of the plaintiff holds water. However one view the plaintiff's cause of action, there can be no doubt that it is founded on contract, namely a contract or contracts to render services to the defendant for a fee. This means that, in my judgment, the plaintiff is required to comply with the requirements relating to pleadings in the context of a contractual claim. The very crisp question is therefore whether the plaintiff has done so.

[8]. In order to succeed an excipient has the duty to persuade the court that upon every interpretation which the pleading in question can reasonably bear, no cause of action is disclosed. Failing this, the exception ought not to be upheld. An exception should be dealt with sensibly and not in an over – technical manner. See: *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA*, 2006 (1) SA 461 (SCA) at 465H.

[9]. In suitable cases legitimate inferences can be drawn as to the meaning of the particulars and by implication the necessary averments can be supplied. However, while the court should endeavour to look benevolently instead of over – critically at a pleading, it should not push that benevolence to the length of upholding a declaration or particulars of claim which as it stands discloses no cause of action, by altering its language, by reading into it what is not there, and ignoring what is, and by thus making for the plaintiff a cause of action he has not himself put up.

[10]. I am of the view that implicit in the allegation by the plaintiff that services were rendered at the defendant's special instance and request is an averment that the services were rendered pursuant to an agreement concluded between the parties. This then means that, in my judgment, it cannot be said that the particulars of plaintiff's claim do not disclose a cause of action. It may very well be that the plaintiff has not complied with the provisions of rule 18 (4), which require every pleading to contain 'a clear and concise statement of the material facts upon which the pleader relies for his claim'. Also, rule 20(2) requires a declaration to 'set forth the nature of the claim' and 'the conclusions of law which the plaintiff shall be entitled to deduce from the facts stated therein', and it is arguable that the provisions of this rule has also not been complied and the particulars of claim may very well be vague and embarrassing. However, that is not the defendant's complaint in this exception.

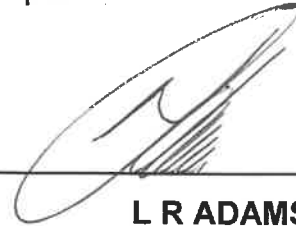
[11]. Applying the above principles *in casu*, I am of the view that the particulars of plaintiff's claim do contain averments necessary to sustain a cause of action. As I indicated above, the plaintiff avers, by implication, that the pathological services were rendered pursuant to an agreement concluded between the parties for the rendering of such services. Those services were in fact rendered, so it is further averred by the plaintiff, and the defendant failed to pay the fee charged for the services rendered, hence the plaintiff's claim for payment. This, in my view, is a full and concise cause of action, which is sustainable.

[12]. Accordingly, the exception should fail.

## **Order**

Accordingly, I make the following order:

1. The defendant's exception is dismissed with cost.
2. The defendant shall pay the plaintiff's cost of the exception.



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**L R ADAMS**  
*Judge of the High Court*  
*Gauteng Local Division, Johannesburg*

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HEARD ON:	4 <sup>th</sup> June 2019
JUDGMENT DATE:	7 <sup>th</sup> June 2019
FOR THE PLAINTIFF:	Adv G V R Fouché
INSTRUCTED BY:	Savage Hurter Louw & Uys Incorporated
FOR THE DEFENDANT:	Adv T Moretlwe
INSTRUCTED BY:	Webber Wentzel