

**THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO.: 47409/21

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED

Date: 8 August 2025

Signature

In the matter between:

THABO GIFT LEBEA

Applicant

(Identity No.: 8[...])

and

TAMMY TAYLOR NAILS SA FRANCHISING (PTY) LTD

Respondent

(Registration No.: 2014/269894/07)

JUDGMENT

ELS AJ

[1] During April 2020 the applicant enquired from the respondent (by completing an online enquiry on the website of the respondent) regarding a possible franchise. Pursuant to a subsequent meeting with a representative of the respondent, Michelle Johnston ("Ms Johnston"), the applicant made a payment of R230,000.00 to the respondent. The reason for the aforesaid payment is explained in paragraph 7.4 of the founding affidavit as follows:

“7.4 I orally agreed with Ms Johnston, who acted on behalf of the respondent, to purchase a Tammy Taylor Nails franchise in South Africa and paid R230,000.00 (Two Hundred and Thirty Thousand Rand), which she indicated was payable upfront and immediately as a so-called “franchising fee”, subject of course to a formal and written agreement that the parties had to agree upon and sign.”

[2] The deponent to the answering affidavit, Carla Van Der Wath (“Ms Van Der Wath”) describes herself as the general manager employed by the respondent.

[3] It is not explained in the answering affidavit on what basis it is contended that Ms Van Der Wath had personal knowledge of the allegations in the answering affidavit. More importantly, Ms Johnston did not depose to any confirmatory affidavit. As a consequence I have to accept the version of the applicant in paragraph 7.4 of the founding affidavit.

[4] Subsequent to the aforesaid payment, Ms Johnston provided the applicant with a draft franchise agreement. In the covering e-mail, dated 30 May 2020, the following was said:

“Dearest Thabo

My sincerest apologies for the delay in sending you your franchise contract.

It has been updated, and I was awaiting the final version.

Please can we setup some time for us to sign together.

In the meantime, if you have any questions, please feel free to contact me any time.

Warm regards”

[5] There is no dispute about the fact that the written franchise agreement was never concluded.

[6] On 14 December 2020 a letter was addressed to the respondent by Lebea Inc. Attorneys (where the applicant is employed as an attorney).

[7] In paragraphs 5 to 8 of the letter the following was stated:

- “5. Following payment of the aforementioned amount, our client waited for your team to assist with location identification to which your team has either failed and/or neglected and/or refused to assist our client with.*
- 6. Consequent to the above and coupled with the undisputed fact that the nail industry has not been doing well due to the Covid-19 pandemic and the instability of the economy in the country, we regret to advise you of our client’s withdrawal of the intention to purchase your franchise. In any event our client has not been able to secure funding to continue with the purchase of the franchise.*
- 7. In view of the above it is not foreseeable that our client’s financial situation will improve in the near future.*
- 8. As a direct result of the aforementioned and in the absence of a signed agreement, we hereby terminate and withdraw our client’s intentions to purchase the licences and hereby request that you effect the refund of the amount of R230 000.00 paid pursuant to the above within 7 days of receipt of this letter.”*

[8] According to the applicant, the main issue that had not yet been agreed upon, was the area of the franchise.

[9] In the replying affidavit the following was added in respect of the basis for the claim for payment against the respondent:

“23.1 I made payment of the franchise fee or “licensing fee” in anticipation and condition of the conclusion of a written franchise agreement. It would be inconceivable and totally illogical for me to make such a large payment if it were not done on the basis and condition that the parties conclude a written franchise agreement. A “licence” without rights attached thereto for R230 000.00 would be of no use and constitutes an inherently improbable scenario.

23.2 In this instance, the amount of money paid constitutes undue enrichment of the respondent at the expense of myself and is even more reason as to why the amount is repayable.

23.3 We did not come to a final franchise agreement as we could not agree on a suitable location and thus, I could not sign same.”

[10] In **Kudu Granite Operations (Pty) Ltd v Caterna Ltd** 2003 (5) SA 193 (SCA) the following was said at paragraphs 12 and 15:

“[12] The learned Judge accepted the general principle that, where an agreement fails without fault on either side after partial performance, each party is entitled to the return of whatever was performed so as to restore the status quo. In his view, however, there is uncertainty about the true cause of action, some authorities favouring a basis of enrichment and others treating it as a distinct contractual remedy. As Smit J understood the divergent opinions, they gave rise to no material difference in approach. From this perspective it was therefore unnecessary to consider whether the elements of an enrichment action had been proved.

...

[15] *Kudu's first contention is well-founded. There is a material difference between suing on a contract for damages following upon cancellation for breach by the other party (as in Baker v Probert 1985 (3) SA 429 (A), a judgment relied on by the court a quo) and having to concede that a contract in which the claim had its foundation, which has not been breached by either party, is of no force and effect. The first-mentioned scenario gives rise to a distinct contractual remedy: Baker at 439A, and restitution may provide a proper measure or substitute for the innocent party's damages. The second situation has been recognised since Roman times as one in which the contract gives rise to no rights of action and such remedy as exists is to be sought in unjust enrichment, an equitable remedy in which the contractual provisions are largely irrelevant. As Van Den Heever J said in Pucjlowksi v Johnstons Executors 1946 WLD 1 at 6:*

'The object of condiction is the recovery of property in which ownership has been transferred pursuant to a juristic act which was ab initio unenforceable or has subsequently become inoperative (causa non secuta; causa finita).'

The same principle applies if the contract is void due to a statutory prohibition (Wilken v Kohler 1913 AD 135 at 149 to 150), in which case the condictio indebiti applies. There is no reason why contractual and enrichment remedies should be conflated. Caterna's case was one of a lawful agreement which afterwards failed without fault because its terms could not be implemented. ..."

[11] According to the applicant, the initial agreement was subject to a condition that the parties conclude a formal franchise agreement. Although it was not expressly stated in the founding affidavit, I accept that the aforesaid condition was in effect a suspensive condition.

[12] Section 7 of the Consumer Protection Act, 68 of 2008 provides as follows:

“7(1) A franchise agreement must–

(a) be in writing and signed by or on behalf of the franchisee;

(b) include any prescribed information, or address any prescribed categories of information; and

(c) comply with the requirements of section 22.”

[13] I do not have to decide in this matter whether a franchise agreement is invalid if there is non-compliance with section 7(1). What is provided for in section 7(1) is in line with what is alleged in the founding affidavit namely that the initial agreement was subject to the conclusion of a *“formal and written agreement”*.

[14] When it became clear that the parties would not conclude any written franchise agreement, the respondent was obliged to repay to the applicant the amount of R230,000.00.

[15] The applicant delivered to the respondent, through the sheriff, a notice in terms of section 345 of the Companies Act, 61 of 1973. Although the respondent disputed the indebtedness, it did so on the ground that the applicant had allegedly repudiated the agreement between the parties. As I have already indicated, even if it is accepted that there was an initial oral agreement, it was clearly subject to the suspensive condition of concluding a written franchise agreement.

[16] The respondent's failure to effect payment to the applicant, where the debt

is clearly due, results in a finding that the applicant has demonstrated that the respondent is unable to pay its debts.

[17] In the premises I grant the following order:

1. The respondent is hereby placed under final winding-up in the hands of the Master of the High Court.

APJ ELS

ACTING JUDGE OF THE HIGH COURT

DELIVERED: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines.

For the applicant: SL Mohapi

Instructed by: Lebea Inc. Attorneys

For the respondent: No appearance

Date of hearing: 4 August 2025

Date of judgment: 8 August 2025