

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

CASE NO: 23655/2021

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED: YES

DATE: 03/07/2023

In the matter between:

CHRISTINA JOHANNA STEYNBERG

Applicant

And

TAMMY TAYLOR NAILS FRANCHISING NO 45 (PTY) LTD

Respondent

[Registration Number: 20[...]7]

JUDGMENT

DELIVERED:

L. Meintjes AJ:

Introduction

1. The respondent acquired the right to use the trademark “*TAMMY TAYLOR NAILS*” and related trademarks in South Africa. The respondent is further the franchisor for Tammy Taylor Nails franchise in South Africa and has the exclusive

right to grant prospective franchisee's a licence to operate a Tammy Taylor Nails franchise in specific geographic areas¹.

2. The applicant is the purported franchisee in terms of a written Franchise Agreement that she signed on 19 November 2020 at Pretoria. On the same day, the applicant caused payment of the amount of R345,000.00 (the franchise licence fee) to be made to the respondent².

3. The applicant contends that within the first week after signing the Franchise Agreement, it became apparent to her that the respondent was not open and honest with her regarding the actual costs relating to the purchase and establishment of the franchise. As a result, she elected to cancel the Franchise Agreement by way of email to the respondent on 14 December 2020. On 19 January 2021, the respondent's erstwhile attorney replied accepting her cancellation of the Franchise Agreement³.

4. The applicant contends, *inter alia*, that the respondent failed to comply with various provisions of the Consumer Protection Act, No 68 of 2008 [hereinafter "CPA"] and/or the Consumer Protection Act Regulations [hereinafter "CPAR"]⁴. As a result, and on 13 May 2021, the applicant launched the current application that serves before me and in terms whereof she seeks the following relief against the respondent:-

4.1 an order declaring the Franchise Agreement void and unenforceable on the ground that it does not comply with the provisions of the CPA and the CPAR;

4.2 in the alternative to 4.1 *supra*, an order that clause 4.5.1 of the Franchise Agreement be declared void to the extent of its conflict with the CPA and the CPAR, further alternatively, an order that the Franchise

¹ CL002 – 6 [paragraph 5].

² CL002 – 11 [paragraph 20].

³ CL002 – 13 [paragraphs 25 – 28].

⁴ Published under GN R293 in GG34180 of 1 April 2011.

Agreement is rendered invalid and unenforceable as the enforcement thereof contravenes public policy;

4.3 an order that the respondent be directed to refund the franchise licence fee to the applicant in the amount of R345,000.00 and that interest be payable on the said amount at a rate of 7% per annum from 15 December 2019 to date of final payment; and

4.4 costs of suit⁵.

Factual chronology

5. In what follows I set out the facts as it emerged from the papers filed of record on behalf of both the applicant and the respondent. In this regard, the respondent filed its Answering Affidavit on 18 June 2021⁶ while the applicant filed her Replying Affidavit on 7 July 2021⁷. The facts that follow below were gathered from the Founding Affidavit, the Answering Affidavit and the Replying Affidavit. However, and before I set out such facts in chronological order, the following is to be noted:-

5.1 at the hearing, there was no appearance on behalf of the respondent. Nevertheless, I directed that the hearing proceed in the absence of the respondent due to the fact that the Notice of Set Down was properly served on the respondent at its registered address (that also constitutes its business address) on 2 March 2023⁸. In fact, the Notice of Set Down was also emailed by the applicant's attorney to the respondent on 17 March 2023. In addition, I also had regard thereto that Heads of Argument was filed on behalf of the respondent on 29 November 2021 and I duly took into account the submissions and/or arguments contained therein⁹;

⁵ CL002 – 1 to 2 [Notice of Motion – prayers 1, 2, 2.1, 2.2, 3, 4 and 5].

⁶ CL005 – 1.

⁷ CL006 – 1 to CL006 – 2.

⁸ CL018 – 5 to CL018 – 7.

⁹ CL014 – 1 to CL014 – 18.

5.2 one of the points taken in the respondent's Heads of Argument is that the Replying Affidavit contains "*new matter*" that ought to be struck¹⁰. As stated, there was no appearance for the respondent and accordingly no one moved any substantive application to strike in terms of Rule 6(15). It is trite that it not permissible to make out new grounds for an application in a Replying Affidavit. However, it is sometimes permissible to supplement allegations contained in an application by way of facts in a replying affidavit. Courts do not normally countenance a mere skeleton of a case in a Founding Affidavit, which skeleton is then sought to be covered in flesh in the Replying Affidavit. However, each case depends on its own facts. The Court has a discretion to allow new matter in reply and relevant circumstances include (i) the complexity of the case; (ii) whether it was realistic to expect the applicant to be in possession of all facts at the time of launching the application; (iii) whether the particular evidence refuted what was contained in the Answering Affidavit; and (iv) the nature of the application¹¹. Save for matters in the Replying Affidavit that I consider refuted what was alleged in the Answering Affidavit, I had regard to the allegations in the Replying Affidavit only to the extent that it contained relevant and admissible material that impacts on the merits of the case¹²; and

5.3 both the Answering Affidavit¹³ and the Replying Affidavit¹⁴ contains allegations and annexures that constitutes inadmissible hearsay evidence. Although the applicant in paragraph 4 of her Replying Affidavit requested the Court to exercise its discretion to allow hearsay evidence in terms of Section 3 of the Law of Evidence Amendment Act, No 45 of 1988¹⁵, the applicant failed to deal with any of the factors set out in Section 3(1)(c) of that Act in order for the Court to form an opinion as to whether such hearsay evidence should be

¹⁰ CL014 – 10 to CL014 – 12 [paragraph 3. These paragraphs are paragraphs 13, 14, 15, 17, 18, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39 and 40 of the Replying Affidavit].

¹¹ *Mahem Verhurings CC v Firstrand Bank Limited (A)* 316/217 [2019] ZAGPPHC 272 (27 June 2019) at paragraphs 24 – 28.

¹² *Van Zyl v Government of the Republic of South Africa* 2008 (3) SA 294 (SCA) at paragraph 46.

¹³ Such as the photos attached as Annexure AS2 [CL005 – 21]

¹⁴ Such as annexures RA1, RA6, RA7, RA8 and RA9 [CL006 – 27 and CL006 – 56 to CL006 – 75].

¹⁵ CL006 – 4.

admitted in the interests of justice¹⁶. In the result, I also excluded such hearsay evidence from the factual narrative that follows.

6. During late October, alternatively early November 2020, the applicant entered into discussions and negotiations with the respondent to purchase a franchise. According to the applicant, the respondent forwarded documents to her during the beginning of November 2020. These documents consisted of (i) an “initial” Franchise Agreement; (ii) a non-disclosure agreement; (iii) a disclosure documents; and (iv) an operations manual¹⁷. In conformity with the rule in *Plascon Evans*, I accept that the respondent provided two additional documents to the applicant as well as certain videos of how the franchise should look. The two further documents that were provided constitute business plans¹⁸. It appears that the aforesaid total of six documents was provided by the respondent to the applicant on 9 November 2020¹⁹.

7. On 10 November 2020:-

7.1 the applicant completed an online enquiry as a potential franchisee and when asked whether she was of the opinion if the online guide and information was sufficient, she answered “yes”²⁰; and

7.2 the respondent forwarded an invoice to the applicant for an amount of R345,000.00 (VAT inclusive) and which represented the franchise fee or licence fee. The invoice further indicated that such franchise fee was due on 13 November 2020²¹.

8. On 14 November 2020, and after the applicant perused the initial Franchise Agreement and consulted with her attorney, her attorney forwarded a list of queries and questions to the respondent. In essence, and for the most part the applicant’s

¹⁶ *S v Ndhlovu and others* 2002 (6) SA 305 (SCA) at paragraph 18.

¹⁷ CL002 – 9 [paragraph 15].

¹⁸ CL005 – 8 [paragraphs 9 and 9.1].

¹⁹ CL005 – 13 [paragraph 19.3].

²⁰ CL005 – 82 [paragraph 9.3]

²¹ CL002 – 10 [paragraph 17] read with CL002 – 81.

attorney pointed out that the words “*Tammy Taylor Nails*” appearing in various clauses had to be amended to “*Franchisor*” and as regards clause 4.5.1, the query was noted: “*Please provide the amount of the Licence Fee, as well as the amount or percentage of the funds that will be retained. What is the cancellation fee. Delete “has been sold”. If the franchise is not sold you will not receive you funds. It is also difficult to be bound by the franchiser’s discretion. This should be detailed so that both parties know what will happen*”.²²

9. On 16 November 2020 and at Pretoria, the applicant signed the “*Non-Disclosure Agreement and Confidentiality Agreement*”²³.

10. On 17 November 2020:-

10.1 the respondent sent an email to the applicant and which constitutes a response to the list of queries and questions. In essence, the amendments of “*Tammy Taylor Nails*” to “*Franchisor*” were confirmed and as regards clause 4.5.1, it was expressly noted: “*Franchisor’s instruction that this should remain*”²⁴; and

10.2 in view of the list of questions and queries and responses thereto, the respondent furnished the applicant with an amended Franchise Agreement. It is this agreement that the applicant seeks to be declared void²⁵.

11. On 19 November 2020:-

11.1 the applicant signed the amended Franchise Agreement and forwarded it to the respondent [as stated, it is this amended Franchise Agreement that the applicant seeks to be declared void]²⁶;

²² CL002 – 10 [paragraph 18] read with CL002 – 82 to CL002 – 84.

²³ CL002 – 62 to CL002 – 75.

²⁴ CL005 – 83.

²⁵ CL002 – 10 [paragraph 18] read with Annexure FA4 [CL002 – 85 to CL002 – 121].

²⁶ CL002 – 10 [paragraph 19] read with Annexure FA4.

11.2 the respondent made out and provided an invoice to the applicant in the amount of R248,910.06 (VAT inclusive) for opening stock²⁷; and

11.3 the applicant caused to be paid to the respondent the amounts of R345,000.00 (the franchise licensee fee). The proof of payment attached to the Founding Affidavit indicate that the aforesaid payment was made from the account of XBS Group (Pty) Ltd while the applicant is referenced as the “*beneficiary statement description*”²⁸.

12. On 20 November 2020:-

12.1 the applicant caused to be paid the opening stock in the amount of R248,910.06 to the respondent. The proof of payment attached to the Founding Affidavit indicates that payment was made by XBS Group (Pty) Ltd with the beneficiary statement description reading: “*TTN Parkview*” and which again corresponds with the invoice for the opening stock²⁹; and

12.2 the applicant sent an email [with the email address reading: “[c\[...\]@xbs-group.co.za](mailto:c[...]@xbs-group.co.za)”] to the respondent thanking the respondent for their help with her Tammy Taylor Store; that she is very excited; and confirming that the above payments were made. The respondent replied in two emails. The first confirmed that the order for the opening stock was placed and that it takes approximately a month to arrive at the respondent. The second was a type of welcoming letter whereby the applicant was informed that joining a franchise family can be overwhelming and that the respondent procured the services of shopfitters and architects that support franchisees through the challenges of building a salon³⁰.

13. The applicant alleges that within the first week after signing the amended Franchise Agreement, it became apparent to her that the respondent had not been open and honest regarding the actual costs relating to the purchase and

²⁷ CL002 – 125 to CL002 – 129.

²⁸ CL002 – 11 [paragraph 20] read with CL002 – 124

²⁹ CL002 – 130.

³⁰ CL005 – 88 and CL006 – 53.

establishment of the franchise. She mentions an example to the effect that additional operating expenses and costs for training the staff were not adequately disclosed. As a result, she ultimately elected to cancel the amended Franchise Agreement³¹. However, and before she elected aforesaid and on 2 December 2020, the respondent sent an email to the applicant asking the question as to when the applicant is planning to open the Tammy Taylor Nails Parkview³².

14. On 3 December 2020, the applicant sent an email to the respondent pertaining to the approval of 3D renders and building plans and attaching certain photographs depicting what the applicant had done thus far in respect of the store. The respondent replied on the same day requesting to be provided with the applicant's 3D renders as well as her building plans for approval³³.

15. On 4 December 2020, and after the applicant provided the 3D renders and building plans to the respondent, the respondent replied via email to the applicant indicating that same cannot be approved as: *"these renders do not reach the level of standard according to our IC"*³⁴.

16. On 10 December 2020, the applicant sent an email to the respondent and wherein she asks the representative of the respondent certain questions regarding the interior and layout of the business³⁵.

17. On 14 December 2020, the applicant elected to cancel the amended Franchise Agreement and forwarded written notice thereof to the respondent on the same date. The subject of the email reads: *"Kansellasie vir Parkview Mall Tammy Taylor"* and the content of the email reads *verbatim* as follows:-

Goeiemôre Carla,

Ek vertrou dit gaan goed met jou.

³¹ CL002 – 13 [paragraphs 25 and 26].

³² CL006 – 28.

³³ CL006 – 41.

³⁴ CL006 – 41.

³⁵ CL005 – 22.

Carla ons het 09h00 'n redelike groot meeting gehad aangaande Tammy Taylor, kostes is bespreek, uitgawes wat alreeds aangegaan is asook sekere spesifikasies wat nog moet plaasvind.

Ek en Arrie het besluit met al die kostes wat ons nog moet spandeer soos shopfitting, personeel opleidings kostes, uniforms, produkte aankoop gaan dit nie vir ons die moeite werd wees om aan te gaan nie. Die kostes is meer as wat ons beplan het en sodoende het ons besluit om die Franchise ooreenkoms te kanselleer voordat julle enige gelde ook moet betaal vir Parkview se salon.

As jy asseblief van jou kant af vir my net kan laat weet die proses vorentoe.”

[It is noteworthy that the email contains the footer of the XBS Group as well as its contact details and logo reading “*Exclusive Business Solutions*”]³⁶

18. On 15 December 2020, the applicant followed-up via an email concerning her cancellation letter of the previous day. Such follow-up email also attached a Nedbank Confirmation of Banking Details -letter pertaining to the XBS Group and the email itself referred to such banking details of the XBS Group for purposes of “*terugbetaling*”³⁷.

19. On 19 January 2021, the respondent’s erstwhile attorney sent a letter via email to the applicant and wherein the respondent accepted the applicant’s cancellation of the amended Franchise Agreement. In addition, such letter dealt with a proposal on how to deal with the opening stock, but no mention was made of the applicant’s request for repayment of the franchise licence fee. For ease of reference, I quote the content of this letter *verbatim*:-

“Dear Sir/Madam,

³⁶ CL002 – 13 [paragraph 26] read with CL002 – 131.

³⁷ CL002 – 13 [paragraph 27] read with CL002 – 132 to CL002 – 133.

We refer to the above matter and confirm that we act on behalf of Tammy Taylor Nails South Africa (hereinafter referred to as “our client”), on whose instructions we address this letter to you.

It is our client’s instructions that you purchased the Tammy Taylor Parkview Franchise, and signed the Franchise Agreement on the 19th of November 2020 after the full business plan and costs relating to the Tammy Taylor Nails franchise was disclosed to yourself.

It is our instructions that you cancelled your franchise agreement with Tammy Taylor Nails South Africa on the 14th of December 2020, after building a salon that did not comply with the luxurious look and feel of the brand. It is our client’s instructions that you agreed to use the preferred shopfitters of Tammy Taylor Nails and paid half of the agreed project management fee. After meeting with the architect and shopfitters you decided to do your own build as you indicated that none of the current Tammy Taylor Nail salons match your personal class and style. Our client afforded you the right to do your own build, but insisted on approving your renditions as drawn by your own architect.

Despite numerous requests and cautioning mails from our client, you built a “white box” that does not resemble a salon, let alone a Tammy Taylor Salon. Whereafter, you proceeded to cancel your licence due to financial circumstances. It is our client’s instructions that they hereby accept the cancellation, and that all our client’s rights remain strictly reserved.

Lastly, our client’s instructions are that they received payments for products, and that you are hereby invited to collect the products from our client, or alternatively, our client is willing to buy the products from you at 50% of the value, as certain products are ordered for specific clients. Our client wishes you the best in your future endeavours.”

20. Subsequent to the aforesaid response from the respondent’s attorney accepting the cancellation, the applicant’s attorney sent an email to the respondent’s

erstwhile attorney on 20 January 2021 seeking to be provided with a copy of the fully signed amended Franchise Agreement in order to enable the applicant's attorney to properly respond³⁸.

21. On 29 January 2021, the applicant's attorney follow-up the request for a fully signed copy of the amended Franchise Agreement via email to the respondent's erstwhile attorney³⁹.

22. On 15 February 2021, the applicant's attorney sent a further letter via email to the respondent's erstwhile attorney confirming that their failure/inability to provide a fully signed copy of the amended Franchise Agreement gave rise to a reasonable and only inference that the respondent had never signed the amended Franchise Agreement. In addition, demand was made for the refund of the franchise licence fee in the sum of R345,000.00 and, according to the applicant, no response was forthcoming to this email as with the previous two emails. The applicant's Founding Affidavit was deposed to on 11 May 2021 and in paragraph 31 thereof she testifies further that at date thereof, the respondent failed to take any steps or provide any explanation for its failure to repay the franchise licence fee of R345,000.00. For purposes of completeness, I quote the content of this letter *verbatim*:

"Our letters of 20 and 29 January 2021, to which we have not had the courtesy of a reply, refers.

In terms of the above letters, you were requested to provide our office with a signed copy of the franchise agreement entered into between the above parties. You were unable to provide such a signed agreement and the only inference that can be drawn from your failure to respond, is that your client had not signed the agreement, resulting in that the franchise agreement never came into force and effect.

Our client effected payment of an amount of R345,000.00 to Tammy Taylor Nails SA Franchising (Pty) Ltd, representing the franchise fee, and an amount

³⁸ CL002 – 14 [paragraph 29] read with CL002 – 136.

³⁹ CL002 – 14 [paragraph 30] read with CL002 – 139 to 141.

of R248,910.06 to Tammy Taylor Nails SA Franchising (Pty) Ltd t/a Nectacraft. We accept that you act on behalf of both companies, except if you confirm otherwise.

*In view of the fact that no franchise agreement had come into force and effect, we demand payment of the amount of R593,910.06, representing the above amounts that were made to your client, within 5 (five) days from date of this letter, failing which we hold instructions to proceed with legal action for the recovery of the amount. Payment of the amount of R593,910.06 can be made directly into our firm's trust account, of which the details is as follows*⁴⁰

Amended Franchise Agreement

23. The amended Franchise Agreement is attached as Annexure FA4 to the Founding Affidavit and consists of 38 pages as well as various annexures. The following is, *inter alia*, evident therefrom:-

23.1 on page 29 thereof it is apparent that the applicant signed same on 19 November 2020. However, it was not countersigned by the respondent whatsoever;

23.2 page 1 contains the Tammy Taylor Nails Logo and the heading "*Franchise Agreement*";

23.3 page 2 indicates that the Franchise Agreement is one between the respondent as the franchisor and the applicant as the franchisee. In addition, it is recorded at the top of page 2 that the applicant's attention is specifically drawn to certain provisions which she is required to initial and by her initial thereto, she confirms that she understands the importance of such provisions. She initialled just underneath such recording;

⁴⁰ CL002 – 14 [paragraph 31] read with CL002 – 142 to CL002 – 145.

23.4 page 3 contains an index. The first paragraph on page 4 is vitally important and for this purpose I quote same *verbatim*:

“BINDING CONTRACT:

Your signature on behalf of your entity and the acceptance and signature on behalf of the franchisor of this agreement will constitute a binding agreement”;

23.5 the remainder of page 4 consists of the preamble and I quote its most salient terms/provisions:-

“(A) Preamble

(1) The franchisor has entered into an agreement with the USA based Tammy Taylor Nails, Inc. to use the trademark described in this agreement.

(2) The franchisor has special skills, know-how and technical information in the planning, setting up, equipping, financing, training of staff and operating of a nail beauty salon.

(3) The franchisor has developed a business concept in the nail beauty industry (“the business system”), which business system is operated under the franchisor’s trade name “TAMMY TAYLOR NAILS”.

(4) The franchisor has the right to use and to grant to others the use and to grant the use of the trademark “TAMMY TAYLOR NAILS”, in general and in name in particular in connection with the business of proprietor and operator of TAMMY TAYLOR NAILS and to goods marketed and sold as such TAMMY TAYLOR NAILS OUTLET and elsewhere (“the products”).

(5) *The franchisor has in consequence of its knowledge and experience, acquired and developed systems, procedures and know-how which are utilized by TAMMY TAYLOR NAILS and its franchisees in conducting business as a proprietor and operator of a TAMMY TAYLOR NAILS FRANCHISE.*

(8) *The franchisor is prepared to allow the franchisee, the right to carry on business within a specific part of the Republic of South Africa ("the territory"), utilising, the franchisor's business system. In entering into an agreement with the franchisor, the franchisee will be substantially or materially associated with advertising schemes or programmes or one or more trademarks, commercial symbols or logos or similar marketing, branding, labelling or devices or any combination of such schemes, programmes or devices that are conducted, owned, used or licensed by the franchisor.*

(9) *The franchisor is therefore willing to enter into this franchise agreement with the franchisee, subject to the terms and conditions as are contained in this franchise agreement that will govern the business relationship between the franchisor and the franchisee, including the relationship between the parties with respect to the goods or services to be supplied to the franchisee by or at the discretion of the franchisor.*

(11) *The franchisor will therefore, upon signature of this agreement, license you, the franchisee, to become the owner of and operate a licensed business in accordance with the business system developed by the franchisor and to make use of the franchisor's trade name and intellectual property to the extent allowed in terms of this agreement".;*

23.6 page 5 contains terms under the heading "General" and also refers to the CPA and the CPAR. I quote the most relevant provisions thereof verbatim:-

"(B) General

(4) The franchise (business venture) undertaken by him/her in terms of this agreement, depends to a large extent, upon his/her own business ability and skills. The franchisee acknowledges that he/she has read the franchisor's disclosure document and that the franchisor has made no warranty, whether verbally or by implication, as to the potential success of the franchised business. The franchisee confirms that it has relied solely on its own independent investigations in entering into this agreement.

(10) This agreement is governed in accordance with the Consumer Protection Act (the CPA) and any other relevant laws of the Republic of South Africa.

(11) All provisions of this agreement shall stand on its own and no provision shall be affected or void by the invalidity of any other provision of this agreement.

(14) The general principles of honesty, fairness, reasonability and equity will guide the interpretation of this franchise agreement and the relationship between the franchisor and the franchisee [Regulation 2(2)(e)(ii)] of the CPA.

(16) It is the intention of the parties that this franchise agreement shall at all relevant times comply with the provisions of the CPA and any of its regulations. To the extent that any of the provisions of the regulations are not complied with, such provisions shall be deemed to be included in this franchise agreement on terms and conditions which are reasonable in the nail beauty industry, to which this franchise agreement pertains”;

23.7 pages 6 to 8 contain definitions of terms. The most salient of which I quote verbatim:-

1.1.2 *“this agreement” shall mean this franchise agreement between the franchisor and the franchisee, together with its annexures;*

1.1.8 *“commencement date” shall mean the commencement date as set out in Annexure A1 hereto;*

1.1.9 *“cooling-off period” shall mean a period of 10 (ten) business days from signature date of this agreement within which period the franchisee may cancel this agreement by written notice to the franchisor to that effect;*

1.1.11 *“the effective date” shall mean the date upon which the cooling-off period lapses, unless any suspensive conditions are to be fulfilled, in which case the effective date shall be the date on which such suspensive conditions have been fulfilled;*

1.1.21 *“the premises” shall be the business premises from which the franchisee will operate the licensed business as a TAMMY TAYLOR NAILS franchise and as described in Annexure A4 attached hereto. In case the franchisee does not operate the licensed business from a retail or commercial facility, the terms of this agreement relating to “the premises”, would not be applicable;*

1.1.29 *“the signature date” shall mean the date on which this agreement is signed by the last party to do so;*

1.1.31 *“termination date” shall mean the termination date as set out in Annexure A7”;*

23.8 pages 8 and 9 concern the *“Grant of Franchise”* and I take the liberty to quote its provisions *verbatim*:-

2.1 *The franchisor hereby grants to the franchisee a license and a right to operate the franchise in the territory as described and attached*

hereto as Annexure A which right is an exclusive license for the duration of this agreement, subject to the terms and conditions of this agreement and the requirements of the operational manual, to operate the licensed business within the allocated territory, if applicable, and render licensed services and sell the licensed product, as the case may be, in the territory strictly in accordance with the business system and subject to the terms and conditions of this agreement, including any additions to or variations in the business system as may from time to time be specified or approved by the franchisor.

2.2 The franchisor hereby grants the franchisee subject to the terms and conditions of this agreement and the requirements of the operational manual, right to use the business system, the trademarks and the intellectual property solely and only for the purpose of operating the franchise from the premises.

2.3 The franchisor shall to ensure that no other franchisee(s) render the licensed services or otherwise infringes on the rights of the franchisee to operate the licensed business in the territory exclusively. However, it is expressly recorded and agreed that the franchisor has the right to sell a licence in the area once the existing franchisee's agreement has been cancelled or once the demand in the area justifies a second franchise. The franchisee will have first right of refusal to buy the second license in the specified area provided the franchisee is in good standing with the franchisor.

2.4 The franchisor gives no warranty and makes no representation in relation to any attack or infringement on the part of any other franchisee(s) or third party and the franchisee shall not be entitled to cancel this agreement nor have any claim against the franchisor in the event of any such attach, conduct or infringement, howsoever and whensoever arising, whether such conduct of infringement is tenable in terms of legislation or not however the franchisor shall be required to take action against such franchisee as a franchise holder.

2.5 Notwithstanding anything to the contrary contained within this agreement the rights hereby granted are specific and limited to the conduct and operation of the franchise by the franchisee at the premises. The franchisee shall not, save with the prior written approval of the franchisor, be entitled to establish or maintain any offices or premises from which to administer, operate or carry on the franchise other than the premises.

2.6 The franchisee agrees that he/she has studied and understands the contents of this agreement together with the contents of the franchisor prospectus, disclosure document, operational manual, application form and, for as far as it may be relevant, considers himself bound by the terms and conditions of such documents which are not specifically incorporated in this agreement.

2.7 The franchisee acknowledges that he/she is under no obligation to sign this agreement until he has satisfied him/her/itself with its contents and fully understands each of its provisions”;

23.10 clause 4 on page 9 concerns the monthly fees payable (royalty fees) by the applicant to the respondent on a monthly basis as well as when the first instalment is due;

23.11 clause 4.5.1 appears to stipulate a suspensive condition and was initialled by the applicant at the right-hand side of the page. I quote this provision *verbatim*:-

“4.5.1 SUSPENSIVE CONDITION – ONLY APPLICABLE TO NEW FRANCHISEES, NOT EXISTING FRANCHISEES RESIGNING A NEW AGREEMENT & SALON BUY OVERS (SPECIFIC SALE AMOUNT WILL APPLY)

This agreement is subject to the payment of the described LICENSE FEE by the franchisee to the franchisor on date of signature in the amount R300,000.00 (excluding VAT) whereof in the event of a cancellation, an amount determined & calculated by head office based on where the franchisee is in the process, will be retained for contract, consultations & expenses incurred (wasted costs). In the event of cancellation, the franchise fee less the cancellation fee, will be refunded once your area/license has been resold and/or at the discretion of the franchisor.

Furthermore, and also on page 10 appear provisions concerning when and how payments by the applicant to the respondent become due and payable as well as provisions concerning interest;

23.12 on page 11 [clause 6 thereof] appears provisions concerning the commencement of business and the duration of the amended Franchise Agreement. I also take the liberty to quote its provisions *verbatim*:-

“6.1 The franchisee will commence with business from the commencement date unless otherwise agreed upon in writing by the franchisor.

6.2 This agreement shall begin to be of force and effect on the date as specified in Annexure A (the commencement date) and shall continue to remain binding on the parties until termination date as set out in Annexure A, unless terminated prematurely in accordance with the provisions of clause 6.2 or 6.3 below, unless otherwise agreed upon in writing by the franchisor or termination in terms of Regulation 7(2) of the Consumer Protection Act: “A Franchisee may cancel a Franchise Agreement without cost or penalty within 10 (ten) business days after signing such agreement, by giving written notice to the Franchisor”.

6.3 Section 14 of the CPA deals with the expiry and renewal of fixed-term agreements. A fixed-term agreement is an agreement like this agreement, which is concluded for a maximum period (presently 24 month) or longer period as may be prescribed from time to time by the Minister by notice in the gazette.

6.4 The provisions of Section 14 of the CPA do not apply to this agreement as the franchisee is a juristic person (company)."

23.13 The remainder of the amended Franchise Agreement deals with issues such as, but not limited to, (i) trademarks; (ii) business system/intellectual property; (iii) what the franchisor may do or not do; (iv) what the franchisee may do or not do and what the franchisee understands; (v) how the franchisee must furnish or equip the premises and look after the premises and equipment; (vi) limitation on the franchisee's right of choice to nominate suppliers; (vii) how advertising, marketing and brand building is to take place; (viii) the franchisee's risk and liability and what the franchisee must insure; (ix) the standard instructions; (x) the franchisee's obligations in respect of the premises; (xi) death or incapacity of the franchisee; (xii) payment due by the franchisee upon the sale of the licensed business; (xiii) when the franchisor may cancel the franchise agreement before the termination date; (xiv) what will happen if the franchisor cancels the agreement or upon expiry thereof; (xv) the franchisor's right to purchase the franchisee's business upon termination or cancellation; (xvi) territory; (xvii) restraint; (xviii) the franchisor gives no warranties/guarantees; (xix) the franchisor's right to cede; (xx) the franchisee may not cede, assign or lease; (xxi) no partnership or agency; (xxii) addresses where the franchisor and franchisee will receive letters, notices and legal documents; (xxiii) boiler-plate provisions concerning whole agreement, non-waiver and no amendment except in writing; (xxiv) Value Added Tax; (xxv) costs; (xxvi) jurisdiction and legal action; and (xxvii) special conditions;

23.14 annexure A to the amended Franchise Agreement stipulated in clause A1 thereof and under the heading: “*Commencement Date*” *verbatim* as follows:-

“The commencement date shall be ____ or the date on which the franchisee commences trading in the licensed business, whichever event is the first to occur”.

Deliberation

24. Section 1 of the CPA defines “*agreement*” as meaning an arrangement or an understanding between or among two or more parties that purports to establish a relationship in law between or among them. The concept of a “*franchise agreement*” is defined (in relevant part) as meaning an agreement between two parties, being the franchisor and franchisee. Section 7 of the CPA sets out the requirements for franchise agreements and provides *verbatim* as follows:-

(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 requirements of section 22.*

(2) *A franchisee may cancel a franchise agreement without cost or penalty within 10 (ten) business days after signing such agreement, by giving written notice to the franchisor.*

(3) *The Minister may prescribe information to be set out in franchise agreements, generally, or within specific categories or industries”.*

25. The type of contract under consideration is one that is required by the CPA to be reduced to writing and signed by the franchisee. However, it is open to the parties to agree that the contract will only come into being if certain formalities are complied with, such as, that same be reduced to writing and signed by both the franchisee and franchisor. In practice, it often happens that during negotiations leading to the formation of a contract, or in the terms of an informal contract itself, mention is made of a written document, or of the reduction of the terms of the contract to writing. This raises the question as to whether the informal contract is binding, and the written document intended for purposes of proof only, or whether there is to be no contract until the written document has been drawn up and executed.

26. The leading judgment on this point is that of Innes CJ in *Goldblatt v Freemantle*⁴¹ where the learned Chief Justice said that the question in each case is one of construction⁴². He stated in a passage that is often referred to with approval:-

“Subject to certain exceptions, mostly statutory, any contract may be verbally entered into; writing is not essential to contractual validity. And, if during negotiations mention is made of a written document, the Court will assume that the object was merely to afford facility of proof of the verbal agreement, unless it is clear that the parties intended that the writing should embody the contract (Grotius 3.14.26 etc). At the same time it always open to the parties to agree that the contract shall be a written one (see Voet 5.1.7.3, Van Leeuwen 4.2, sec.2, Deckers Note); and in that case there will be no binding obligation until the terms have been reduced to writing and signed. The question in each case is one of construction”⁴³. [my underlining]

27. For the following reasons I find that the amended Franchise Agreement [Annexure FA4] is invalid and void, namely:-

⁴¹ 1920 AD 123.

⁴² At 129.

⁴³ At 128 – 129, *Wienerlen v Goch Buildings Ltd* 1925 AD 282, *Sapro v Schlinkman* 1948 (2) SA 637 (A), *Morgan and another v Brittan Boustredt* 1992 (2) SA 775 (A); *Lambons (Edms) Bpk v BMW SA (Edms) Bpk* 1997 (4) SA 141 (SCA), *Pillay v Schaik* 2009 (4) SA 74 (SCA) and *Breyten Caldwald (Pty) Ltd v Brews* 2017 (5) SA 498 (SCA) at paragraph 16.

27.1 as revealed, and on page 4 of the amended Franchise Agreement it is expressly provided that the signature of the applicant as well as the *“acceptance and signature on behalf of the franchisor of this agreement”* will constitute a binding agreement. Such language cannot be more clear that it was required for a binding contract/agreement that not merely the applicant should sign same, but that the amended Franchise Agreement also had to be countersigned by the franchisor. Further confirmation of this is evident from clause A(9) providing that mere signature of the amended Franchise Agreement by the applicant is not sufficient as it provides for a willingness on the part of the respondent to enter into the franchise agreement and which *“entering”* only occurs upon its signature. This is evident from the words *“the franchisor is therefore willing to enter into this franchise agreement with the franchisee, subject to the terms and conditions as are contained in this franchise agreement that will govern the business relationship....”* This specific clause also indicates that the respondent is willing to enter into the Franchise Agreement subject to the terms and conditions as are contained therein and, as revealed, the *“binding contract”* clause is one of such terms. Furthermore, clause A(11) makes it clear that the respondent will only *“upon signature of this agreement”* license the franchisee to become the owner of and to operate a licensed business in accordance with the business system developed by the franchisor and to make use of the franchisor’s tradename and intellectual property to the extent allowed *“in terms of this agreement”*. These words/phrases confirms my construction that it was required of both the applicant and the respondent to sign the amended Franchise Agreement and that mere signature by the applicant will not suffice; and

27.2 the respondent failed to make out a *bona fide* and material dispute of fact in relation to its signature to the amended Franchise Agreement. In this regard:-

27.2.1 at paragraph 19 of the applicant’s Founding Affidavit she alleges that she signed the amended Franchise Agreement and forwarded it to the respondent. She goes on to allege that according to

her knowledge, the respondent did not countersign the agreement and that she accepts such to be factually correct as her requests for a signed copy of the amended Franchise Agreement have been ignored to date.⁴⁴ In connection with this particular paragraph, the respondent alleged as follows in paragraph 13 of its Answering Affidavit:-

“The content hereof is admitted, however I specifically state that the formal requirements for the conclusion of an agreement were met and the franchise agreement was entered into by the parties”.

On the one hand, it is clear that the respondent admits that it did not countersign the agreement and that it accepts same to be factually correct. On the other hand, the respondent states that the formal requirements [namely that the amended Franchise Agreement had to be countersigned by the respondent] were met. Clearly, this is contradictory. Applying a common sense robust approach as set out in *Wightman*⁴⁵, I cannot think of a more lucid example of how easy it would have been for the respondent to simply attach a copy of the countersigned amended Franchise Agreement to its Answering Affidavit. Afterall, the information (and evidence to that effect) would not merely have fallen within its exclusive knowledge, but also within its exclusive possession. Its failure to have done so is telling and simply does not go far enough to create a *bona fide* and material dispute of fact; and

27.2.2 hereinabove I referred to the three requests via email made by the applicant’s attorney to the respondent’s erstwhile attorney to provide a copy of the fully signed/countersigned amended Franchise Agreement and which requests remained unanswered. In fact, in the last email of 15 February 2021, the applicant’s attorney even went so far as to indicate that the only reasonable inference to be drawn is that

⁴⁴ CL002 – 10 [paragraph 19].

⁴⁵ *Wightman t/a JW Construction v Headfour (Pty) Ltd* 2008(3) SA 371 (SCA) at par 10-13

the respondent had not signed the amended Franchise Agreement resulting therein that the amended Franchise Agreement never came into force and effect. These allegations were made by the applicant at paragraphs 29 to 31 of her Founding Affidavit. The response of the respondent in its Answering Affidavit [at paragraph 23 thereof] is illuminating. The respondent expressly alleged in answer to paragraphs 29 to 31 of the Founding Affidavit as follows:-

“Save to admit the demand by the Applicant, any liability towards the applicant by the respondent in any amount whatsoever is denied”.

Not merely has the respondent therefore failed to respond to the emails requesting a copy of the fully signed amended Franchise Agreement and/or to deny the inference in the email of 15 February 2021, but the respondent has also simply failed to meaningfully deal with the content of paragraphs 29 to 31 of the Founding Affidavit – save to admit the demand of 15 February 2021 and, as revealed, same set out the inference to be drawn. I concur with the applicant that the inference was reasonable and properly drawn and that the respondent’s answer quoted *supra* in relation to paragraphs 29 to 31 of the Founding Affidavit is simply insufficient to raise a *bona fide* and material factual dispute. Afterall, and this cannot be overemphasized, it would have been the most easiest thing in the world to simply attach a copy of the fully/countersigned amended Franchise Agreement to the respondent’s Answering Affidavit if it was indeed countersigned by the respondent. The fact that the respondent failed and/or neglected to do so in view of the allegations in the Founding Affidavit (dealt with *supra*) and the emails by the applicant’s attorney of 20 January 2021, 29 January 2021 and 15 February 2021 leads to no other conclusion but for the fact that the respondent (and/or its representatives) failed and/or

neglected to sign and/or countersign the amended Franchise Agreement resulting in same being invalid and void.⁴⁶

28. Further to the above, it will be recalled that clause 6.1 of the amended Franchise Agreement provides that the franchisee will commence with business from the commencement date unless otherwise agreed in writing and that clause 6.2 provides that *"This agreement shall begin to be of full force and effect on the date as specified in Annexure A ("the commencement date") and shall continue to remain binding on the parties until termination date as set out in Annexure A..."*. The concept of *"commencement date"* was defined in clause C1.1.8 as meaning the commencement date as set out in Annexure A1 thereto. As revealed *supra*, Annexure A [in particular clause A1 thereof] provides for the commencement date as follows: *"The commencement date shall be _____ or the date on which the franchisee commences trading in the licensed business, whichever event is to first occur"*. The parties left blank the actual commencement date as the result of which the commencement date is the date on which the applicant *"commences trading"* in the licensed business. Did the applicant therefore *"commence trading"*? If not, then it follows on principles *mutatis mutandis* to those set out in *Goldblatt v Freemantle supra* that the amended Franchise Agreement is also invalid and void as same will only: *"begin to be of force and effect"* once the applicant *"commences trading"*. For the following reasons, I find that the applicant did not commence trading with concomitant result that the amended Franchise Agreement is invalid and void; namely:-

28.1 the Collins English Dictionary defines *"commence"* as *"to start or begin; come or cause to come into being, operation, etc"*. The concept of *"trade"* is again defined therein as: *"the act or an instance of buying and selling goods and services either on the domestic (wholesale and retail) markets or on the international (import, export, and entrepot) markets"*. In light of these definitions and keeping in mind the principles of interpretation enunciated in *Natal Joint*, I am of the view that what is meant is that the applicant had to actually start and/or begin the process of not merely buying product and/or stock for sale, but that such stock and/or product

⁴⁶ *McWilliams v First Consolidated Holdings (Pty) Ltd* 1982 (2) SA 1 (A) and *Skilya Property Investments (Pty) Ltd v Lloyds of London Underwriting* 2002 (3) SA 765 (T).

actually had to be sold (even as a one-time occurrence) to patrons of the new franchise. Accordingly, mere preparatory steps such as, but not limited to, refurbishing the leased premises, placing an order for opening stock and paying therefore, drawing up plans and the like in order to do business with patrons and/or potential patrons is not sufficient. What was required, is that such opening stock actually had to be delivered to the applicant [the acceptance of cancellation letter makes it vividly clear that the opening stock was never even delivered to the applicant] and that such opening stock and/or product and/or contemplated beauty service had to be delivered and/or provided (even on an isolated once-off occasion] to patrons and/or clientele. The problem is that this never occurred as the amended Franchise Agreement was cancelled before then.

29. The applicant accordingly made payment of the franchise license fee of R345,000.00 to the respondent in terms of a void and invalid agreement. She claims repayment thereof. To disallow such claim would have the effect that the respondent is enriched by such payment at her expense. Furthermore, although XBS Group (Pty) Ltd made the actual payment to the respondent, she caused such payment to be made and is considered in law to be the party who made the payment or the transfer – after all, the respondent credited such payments in her favour⁴⁷. As the applicant is considered in law to have made the payment or the transfer, it follows further that the point *in limine* of non-joinder raised in the respondent's Heads of Argument has no merit.

30. In view of my findings and conclusions aforesaid, it becomes unnecessary to deal with the applicant's allegations and submissions concerning the CPA, CPAR, public policy and the like.

ORDER

In the result, I make the following order:

⁴⁷ *Kudu Granite Operations (Pty) Ltd v Caterna Ltd* 2003 (5) SA 193 (SCA) and *Bowman NO v Fidelity Bank Ltd* 1997 (2) SA 35 (SCA) as well as Sharrock *The Law of Banking and Payment in South Africa* – p211 to 214

1. The Franchise Agreement attached as Annexure FA4 to the Founding Affidavit is declared invalid and void;
2. The respondent is directed to refund the applicant the franchise licence fee in the amount of R345,000.00 together with interest thereon at a rate of 7% per annum from 15 December 2019 to date of final payment;
3. The respondent shall pay the applicant's costs of the application.

L MEINTJES
ACTING JUDGE OF THE HIGH COURT
DATE OF HEARING:
20 APRIL 2023

DATE OF JUDGMENT:
3 JULY 2023

COUNSEL ON BEHALF OF APPLICANT:
ADVOCATE E VAN AS

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COUNSEL FOR RESPONDENT:
NO APPEARANCE
[HEADS OF ARGUMENT FOR RESPONDENT
PREPARED BY ADV M BRONKHORST]