THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 946/2023

In the matter between:

PICK 'N PAY RETAILERS (PTY) LTD	**APPELLANT**
and	
GEORGE DA SILVA NO RAMALHO NO	**FIRST RESPONDENT**
AMANDA LINDOKUHLE VILAKAZI NO	**SECOND RESPONDENT**

Neutral citation: *Pick 'n Pay Retailers (Pty) Ltd v Ramalho, NO and Another* (946/2023) [2025] ZASCA 97 (2 July 2025)

Coram: ZONDI AP and UNTERHALTER and COPPIN JJA and PHATSHOANE and BLOEM AJJA

Heard: 20 February 2025

Delivered: 2 July 2025

Summary: Liquidation-*Concursus creditorum*-Mandate given by the seller to the attorneys to make payment from the proceeds of sale terminated upon the seller's liquidation-the payment made after liquidation was unlawful-appeal dismissed with costs.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Keightley J, sitting as court of first instance):

The appeal is dismissed with costs including the costs of two counsel, where so employed.

JUDGMENT

Zondi AP (UNTERHALTER and COPPIN JJA and PHATSHOANE and BLOEM AJJA concurring):

Introduction

[1] This appeal concerns the payment made to a creditor by a third party on behalf of the seller after the commencement of the seller's liquidation and pursuant to an agreement of sale between the seller and the purchaser. The question is whether such payment was affected by the *concursus creditorum* established by the seller's liquidation. The Gauteng Division of the High Court, Johannesburg (the high court) held that the payment was affected by the *concursus* and ordered the creditor to repay to the liquidators the amount it received from the seller's agent for payment, White & Case Attorneys. The appeal is with the leave of the high court.

[2] Subsequent to the hearing of the argument on the appeal, the Court directed the parties to file supplementary heads of argument to address the following questions concerning the payment made by the agent for payment:

'a) Does Clause 6.1 of the Sale of Business Agreement contain a mandate to White & Case (WC) to make payment of money held in trust on defined terms failing which, does it contain a mandate to WC to make payment to Pick 'n Pay?;

b) Does Clause 6.1 provide that in the event of Lashka failing to exercise the mandate in 1 above Lashka authorises Pick 'n Pay to do so?;

c) If so, did those mandates end on the winding up of Lashka as per *Klein NO*[1] judgment?*;*

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[1] *Klein NO v South African Transport Services and Others* 1992 (3) SA 509 (W).

d) If they did, was the payment to Pick ‘n Pay an invalid disposition?;

e) And if so, was any such claim made in the founding affidavit based on the mandates and their extinction?;

f) If so, could it have been pursued without joining White & Case?;

g) If not, how is this relevant to the resolution of the appeal before the Court?’

The Court received the supplementary heads of argument from both parties for which it is grateful.

The facts

[3] The appellant is Pick ‘n Pay Retailers (Pty) Limited (Pick ‘n Pay). The respondents are the joint liquidators of Lashka 167 (Pty) Ltd (in liquidation) (Lashka). Lashka was placed into final liquidation on 19 February 2018, by virtue of a special resolution which was submitted to and duly registered with the Companies and Intellectual Property Commission. Before its liquidation Lashka, as a franchisee, and Pick ‘n Pay, as a franchisor, had concluded a franchise agreement, in respect of the operation of a retail store to trade under the name and style of Pick ‘n Pay Family Supermarket, San Ridge Square, Midrand (the business) at a monthly franchise fee.

[4] During 2016 and 2017, Lashka experienced financial distress which resulted in the business operating at a loss and being unable to pay its creditors, including Pick ‘n Pay, timeously. During August 2017, Pick ‘n Pay launched an application, and was granted an order, in terms of which it was entitled to perfect a general notarial bond, which it held in respect of Lashka’s indebtedness. At that stage Lashka was substantially indebted to Pick ‘n Pay in the amount of R13 536 351,90.

[5] Following its perfection of the general notarial bond, Pick ‘n Pay effectively took control of the business. Lashka and Pick ‘n Pay continued with settlement discussions in respect of Lashka’s indebtedness to Pick ‘n Pay. Pursuant to the discussions, it was agreed that Lashka would sell the business to a suitable third party and Pick ‘n Pay agreed to assist with procuring potential buyers. In due course, Pick ‘n Pay procured Enthrall Trading (Pty) Ltd (Enthrall), and on 3 November 2017 Lashka and Enthrall concluded a Sale of Business Agreement (the agreement).

[6] The express material terms of the agreement were, among others, that Pick ‘n Pay was required in terms of a suspensive condition to the agreement to consent to the sale and waive its rights of first refusal contemplated in the franchise agreement. For the agreement to be given effect to, Pick ‘n Pay was required to consent to the transaction on the terms of the agreement and to release the security that it had perfected over the movable assets pursuant to the perfection order, both of which it duly did. The suspensive condition was met. The purchase consideration payable by Enthrall for the business was R25 million, which Enthrall had to pay into the trust account of White & Case Attorneys.

[7] Clause 6 of the agreement provided a mechanism by which the purchase price was to be disbursed. Since clause 6 is central to the dispute, I shall quote it in full. It provides the following:

‘**Amount Held in Trust**

6.1 White & Case will hold the funds referred to in clause 5.2.1 above ("Held Funds") in trust for the benefit of the Seller until such time as it releases or pays out same pursuant to the provisions of clause 6.2 below.

The Seller shall, as soon as may be practicable after the Effective Date, deliver a duly completed payment instruction (countersigned by the Franchisor) to White & Case instructing White & Case to apply the Held Funds in settlement of the amounts owed to First National Bank and Pick ‘n Pay in terms of the Pick ‘n Pay claims (including any and all amounts owing by the Seller to the franchisor in respect of stock purchased by the Seller from the Franchisor), as specified in the payment instruction and in the amounts so specified in such payment instruction, provided that in the event that the Seller fails to timeously deliver the completed payment instruction/s as contemplated herein, White & Case shall, provided that the payment instruction/s (i) confirms the amount of the payments to be made thereunder and (ii) is signed by a representative of the Franchisor, be obliged to proceed with such payments in accordance with such payment instructions. The Seller hereby irrevocably and unconditionally authorises (a) the franchisor to deliver such payment instruction and (b) White & Case to act in accordance with any-such payments instruction.

Notwithstanding the above, the parties agree that in the event of a dispute in respect of the amounts owing by the Seller, the franchisor will not sign off the payment instructions until such time that the dispute is resolved.

6.2 The balance of the Held Funds (if any) remaining after payment of the amounts contemplated in clause 6.1 above shall, upon receipt of written instructions from the Franchisor

to that effect, be released and paid by White & Case into the Seller's Bank Account. The Franchisor shall deliver such written instructions to White & Case as soon as the franchisor is satisfied that all business creditors have been settled in full.

6.3 Simultaneously with the release of the Held Funds as contemplated above, White & Case shall release to:

6.3.1 the purchaser all interest, if any, which accrued to such amount/s from the date of deposit thereof up until the effective date; and

6.3.2 the Seller all interest, if any, which accrued to such amount/s from the effective date up until the date of release of such funds.

6.4 The parties hereby authorise White & Case to rely, without enquiry, on any instruction/notice contemplated in clause 6.1 (including a facsimile message) which appears, on the face of it, to be signed by and on behalf of the Seller and/or the Franchisor, as the case may be.

6.5 The benefits accruing to White & Case in terms of this clause 6 are deemed to have been imposed as a *stipulatio alteri* for the benefit of White & Case and may be accepted by White & Case at any time.'

[8] Lashka unconditionally gave Enthrall, among others, the following warranties:

'19 .2.1 Save in respect of those assets forming the subject matter of the Instalment Sale Agreements only, the Seller is, as at the Effective Date, the sole and beneficial owner of the Fixed/Movable Assets and has the right and, save as otherwise contemplated in this Agreement, is able to sell and give free and unencumbered title to the Fixed/Movable Assets to the Purchaser.

19.2.3 Save for the general notarial bond registered over the movable assets of the Business in favour of the Franchisor and the encumbrances listed in Annexure "F" hereto, none of the Fixed/Movable Assets or Stock are or will be subject to any reservation of ownership, lease, lien, hypothec, mortgage, notarial bond, pledge or other encumbrance whatsoever.

19.2.4 Save for the Franchisor, no person has any right (whether pursuant to any option, right of first refusal or otherwise) to purchase or acquire (whether as security or otherwise) any of the Fixed/Movable Assets or Stock other than the right to purchase trading stock in the normal course of business for value.

19.2.20 As at the Effective Date, the Seller will not, in respect of the Business, be engaged in any litigation, arbitration or criminal proceedings other than the proceedings for the collection of debts from trade debtors in the ordinary course of business and the legal proceedings stipulated in Annexure G hereto. Having made all reasonable enquiries, the Seller is not aware

of any facts, matters or circumstances which may give rise to any such litigation, arbitration or criminal proceedings.'

[9] It is common cause that Enthrall paid the purchase consideration of R25 million into the trust account of White & Case. On 26 November 2017, the business of Lashka was transferred to Enthrall and Enthrall took possession of the business. First National Bank (FNB) was paid in full. On 5 December 2017, a first payment instruction was completed, signed and delivered by Lashka to White & Case for the settling of the FNB term loan. On 12 December 2017, Lashka completed, signed and delivered to White & Case a second payment instruction for the settlement of the FNB overdraft facility. However, Lashka failed to deliver to White & Case a payment instruction regarding a payment to Pick 'n Pay, and by the time of its liquidation on 19 February 2018 it had not done so. In consequence, on 25 June 2019 Pick 'n Pay proceeded to sign and deliver the payment instruction to White & Case in terms of clause 6 of the agreement and was paid R21 627 758.91 on 2 July 2019. This was a year after the appointment of the respondents as liquidators.

[10] The dispute arose between the respondents and Pick 'n Pay regarding the latter's entitlement to retain the amount paid to it by White & Case after Lashka's liquidation. As a result, on 17 February 2022 the respondents brought an application against Pick 'n Pay in the high court seeking payment of R21 627 758, 91 plus interest and costs.

[11] Pick 'n Pay opposed the application. It denied that it was liable to repay the amount claimed by the respondents. In addition to disputing the claim on the merits, Pick 'n Pay also raised points in limine. It contended that the respondents had failed to make out a case for the relief they sought. This contention was based on the grounds, first, that s 32 of the Insolvency Act 24 of 1936 (the Insolvency Act) on which the respondents relied, is not the correct section to invoke in seeking to impeach dispositions under ss 26, 29, 30 and 31 of the Insolvency Act. Second, in light of serious disputes of fact on the papers, the respondents should have proceeded by way of action instead of motion proceedings.

[12] As regards the merits, Pick ‘n Pay contended that it was entitled to retain the payment it received from White & Case as such payment was made and received pursuant to an uncompleted executory contract which the respondents had elected to abide by. The payment, according to Pick ‘n Pay, was thus unaffected by the *concursus creditorum* established by Lashka’s liquidation. The respondents, concluded Pick ‘n Pay, are bound by the payment terms under clause 6 and are precluded from claiming repayment of the amount.

The high court’s findings

[13] The high court rejected Pick ‘n Pay’s defences and granted the order sought by the respondents. According to the high court, clause 6 does not preclude the respondents from claiming repayment of the amounts paid to Pick ‘n Pay. Despite its terms, the essential nature of the agreement was that of an ordinary sale and purchase of a business. To the extent that the agreement was executory in nature this applied only to the legal relationship vis-a-vis the purchaser and the seller under the agreement. The reciprocal rights and obligations, reasoned the high court, established under the agreement were solely between Enthrall and Lashka. The high court held that once liquidation intervened, Pick ‘n Pay’s legal position under clause 6 was no different to that of any other creditor to whom payment of a debt remained outstanding. The high court concluded that Pick ‘n Pay was not entitled to exercise its rights under clause 6.1 by signing and delivering a payment instruction to White & Case. Its rights were limited by the *concursu*s to participation in the insolvent estate as a creditor.

Contentions of the parties

[14] Pick ‘n Pay attacks the findings and conclusions reached by the high court and persists before this Court with the defences it raised in the high court. Pick ‘n Pay submits that the high court ought to have upheld the point in limine that the respondents’ affidavits failed to disclose a cause of action. And further that it erred in finding, first, that the respondents disputed that the contract was an uncompleted executory contract when in their replying affidavit the respondents admitted this fact; and second, that the reciprocal rights and obligations established under the agreement were solely between Enthrall and Lashka and that upon payment of the purchase price and the delivery of the business to Enthral, the contract was completed.

[15] In response to the questions posed by the Court, which are referred to in para 2 above, Pick ‘n Pay submits that clause 6.1 of the agreement contains a mandate by Lashka and Enthrall to White & Case and authority by Lashka to Pick ‘n Pay to exercise the mandate in the event of Lashka failing to exercise the same. It argues that if the agreement is found to be an executory agreement, which the respondents abided, the mandate given to White & Case, and the authority of Pick ‘n Pay did not end on the winding-up of Lashka. The agreement, in all respects, remained extant. But if the agreement is found not to be an executory agreement, which the respondents abided by, the mandate to White & Case ended upon the winding-up of Lashka, and so did the authority given to Pick ‘n Pay. Pick ‘n Pay contends, however, that the termination of mandate and authority was not pleaded by the respondents.

[16] In response, the respondents submit that the agreement was completed. The purchase price was paid and the business was transferred to Enthrall prior to the winding-up of Lashka. The payment made to Pick ‘n Pay after the liquidation of Lashka was irregular and disregarded the *concursus.* The respondents argue that the mandate provided for in clause 6.1 of the agreement came to an end on the winding-up of Lashka. They contend further that given that the mandate pertained to the payment of Lashka’s funds, on liquidation such funds could not have been dispersed contrary to the rights of the general body of creditors. The mandate automatically terminated on Lashka being wound-up.

Issues

[17] Two main issues arise for consideration in this appeal. The first is whether the respondents’ affidavits disclosed a cause of action and the second is whether, on its proper interpretation, the agreement was an uncompleted executory contract and whether the respondents had elected to abide by it.

[18] As regards the first point taken by Pick ‘n Pay, it is correct that the affidavits in motion proceedings serve to define not only the pleaded issues between the parties, but also to place the essential evidence before the court for the benefit of not only the

court, but also the parties. They must contain factual averments that are sufficient to support the cause of action on which the relief that is being sought is based.[2]

[19] It is clear from the respondents' affidavits that they aver that the payment that was made by White & Case to Pick 'n Pay, on the latter's instruction, fell to be set aside on the basis that it was made in disregard of the *concursus creditorum* established by the liquidation of Lashka. Such payment constituted a disposition and that Pick 'n Pay was 'not entitled to help itself to the funds of Lashka after it became aware of its liquidation.'

[20] In *Walker v Syfret* [3] the effect of winding up was considered and it was held:
'The effect of a winding-up order is to establish a *concursus creditorum*, and nothing can thereafter be allowed to be done by any of the creditors to alter the rights of the other creditors. If a debt owing by the insolvent company to one creditor has been extinguished by compensation, he cannot, merely because the debt arises out of a negotiable instrument, be allowed to deprive the other creditors of the benefit of such extinguishment by reviving it by means of a cession to a third party.'

[21] The court went on to hold[4]:
'The object of the Insolvent Ordinance is to ensure a due distribution of assets among creditors in the order of their preference. And with this object all the debtor's rights are vested in the Master or the trustee from the moment insolvency commences. The sequestration order crystallises the insolvent's position; the hand of the law is laid upon the estate, and at once the rights of the general body of creditors have to be taken into consideration. No transaction can thereafter be entered into with regard to estate matters by a single creditor to the prejudice of the general body. The claim of each creditor must be dealt with as it existed at the issue of the order. Now, to deprive the estate of a valid defence to a claim against it is as prejudicial to the creditors as to take from it the most tangible asset of corresponding amount.'

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[2] *Die Dros (Pty) Ltd and Another v Telefon Beverages CC and Others* [2002] ZAWCHC 53; [2003] 1 All SA 164 (C); 2003 (4) SA 207 (C) at para 28.
[3] *Walker v Syfret* 1911 AD 141 at 160.
[4] Ibid at 166.

[22] The principles in *Walker v Syfret* have been consistently applied by our courts. In *Pride Milling Company (Pty) Ltd v Bekker NO and Another*[5] this Court was concerned with the dispositions made by a company after the grant of a provisional winding-up order. This Court held that such payments cannot be validated in terms of s 341(2) of the Companies Act 61 of 1973. Petse DP, writing for the Court, explained that to validate such payments would render nugatory the operative part of s 341(2), in terms of which dispositions made by a company being wound up are void and would also have the effect of undermining the essence of the *concursus creditorum,* and indeed the substratum of insolvency law.[6] He stated that this would mean that the recipient 'would be left to enjoy the benefits of its claim being settled in full, while other creditors would have to be content with whatever residue might still be available'.[7]

[23] In *Administrator, Natal v Magill, Grant & Nell (Pty) Ltd (In Liquidation)*[8] it was held:

'Plaintiff company was at all material dates unable to pay its debts in full, and upon its liquidation during August 1966 a *concursus creditorum* was established (*Walker v. Syfret*, *N.O.*, 1911 A.D. 141 at p. 160, and secs. 181 and 182 of the Companies Act, 46 of 1926). In a *concursus* "the claim of each creditor must be dealt with as it existed at the issue of the order" (per INNES, J.A., in *Walker v. Syfret,* N.O., supra at p. 166). Included among plaintiff company's concurrent creditors were the two aforementioned nominated sub-contractors. Defendant's action in paying them direct, and in thereafter deducting the amount so paid from his indebtedness to the plaintiff, not only converted the two nominated sub-contractors into preferent creditors receiving payment in full, but, as is obvious, it also reduced the amount available for distribution by the liquidator amongst the general body of concurrent creditors (including the two aforementioned nominated sub-creditors) by the R3,060.42 so paid. Once the liquidation supervened, the two nominated sub-contractors were only entitled to receive from their debtor (plaintiff company) whatever dividend was ultimately awarded to its concurrent creditors. By paying them in full after liquidation had already supervened, defendant thus enabled the nominated sub-contractors to receive more than they were legally entitled to claim.'[9]

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[5] *Pride Milling Company (Pty) Ltd v Bekker NO and Another* [2021] ZASCA 127; [2021] 4 All SA 696 (SCA); 2022 (2) SA 410 (SCA).
[6] Ibid para 19.
[7] Ibid para 20.
[8] *Administrator, Natal v Magill, Grant & Nell (Pty) Ltd (In Liquidation)* 1969 (1) SA 660 (A).
[9] Ibid at 671F– 672A.

[24] I accept that the cause of action is inelegantly pleaded in the respondents' affidavit, but if the averments in the founding affidavit are carefully analysed, it becomes clear that the respondents' case is that the payment to Pick 'n Pay was made in a manner and at a time that disregards the *concursus.* The complaint is that the payment made in these circumstances had the effect of preferring Pick 'n Pay and causing prejudice to the general body of Lashka's creditors. The claim was thus based upon the principles applicable to a *concursus creditorum.* Pick 'n Pay's first point must therefore fail.

[25] The second defence raised by Pick 'n Pay is that the agreement is an uncompleted executory contract and that as the respondents had elected to abide by it, the contract remained unaffected by the creation of the *concursus.* This Court in *Du Plessis and Another NNO v Rolfes Ltd*[10] had this to say regarding the effect of insolvency on uncompleted contracts:

'At common law a liquidator or trustee is not bound to perform unexecuted contracts entered into by an insolvent before insolvency unless he, in conjunction with the general body of creditors, considers that such performance will be in their interests (see, for example, *Uys and Another v Sam Friedman Ltd* 1934 OPD 80 at 85; *Ex parte Liquidators of Parity Insurance Co Ltd* 1966 (1) SA 463 (W) at 470F--H and *Montelindo Compania Naviera SA v* Bank *of Lisbon and SA Ltd* 1969 (2) SA 127 (W) at 141C--142A). If a trustee elects to abide by an executory contract he must of course perform all the obligations of the insolvent. He must also give reasonable notice of his intention to continue with the contract, otherwise the other party to the contract may treat the contract as being at an end (*Tangney and Others v Zive's Trustee* 1961 (1) SA 449 (W) at 452--3) and hold the insolvent estate liable for any damages that it might have suffered as a consequence thereof. The claim for such damages is a concurrent one and does not form part of the costs of administration. As pointed out by Friedman J in *Smith and Another v Parton NO* 1980 (3) SA 724 (D) at 728 *in fine*--729B,

". . . there is nothing in the law of insolvency which affects uncompleted contracts in general; the contract is neither terminated nor modified nor in any other way altered by the insolvency of one of the parties (cf *Uys and Another v Sam Friedman Ltd* 1935 AD 165) except in one respect, and that is that, because of the supervening *concursus*, the trustee cannot be compelled by the other party to perform the contract. Put somewhat differently, this means

[10] *Du Plessis and Another NNO v Rolfes Ltd* [1996] ZASCA 45; 1997 (2) SA 354 (SCA); [1996] 2 All SA 390 (A) at 363E-J.

that the contract survives the insolvency and, save in the respect mentioned, the trustee steps into the insolvent's shoes. The rule that a trustee has a right of election whether or not to abide by the contract is no more than one aspect of the application of this legal principle that I have enunciated.'"

[26] Recently, in *Ellerine Brothers (Pty) Ltd v McCarthy Ltd* [11] this Court considered the effect of insolvency on uncompleted executory contracts and explained it in these terms:

'Following on the insolvency of the lessee the position is governed by the ordinary principles of the common law which apply when a party to an executory contract goes insolvent. As in the case of any other uncompleted contract, the liquidator inherits the lease in its entirety. The creation of the *concursus creditorum* therefore does not terminate the continuous operation of a lease agreement to which the insolvent is a party. The *concursus* neither alters nor suspends the rights and obligations of the parties thereunder and the liquidator, as the universal successor, steps into the shoes of the insolvent and does not acquire any rights greater than those of the insolvent. This means that the liquidator must perform whatever is required of the insolvent in terms of the lease, including unfulfilled past obligations of the lessee.'[12]

[27] This Court went on further to state:

'The intended aim of the *concursus*, or as it has also been described, the 'community of creditors', created immediately upon the liquidation of the insolvent, is to give equal protection to all the creditors without undue preference and to preserve and distribute the estate to the benefit of all of them. To give effect to the *concursus*, the liquidator must decide whether it would be to the benefit of the community of creditors to continue to perform the inherited obligations of the insolvent under an uncompleted contract. He may elect not to do so. In that event a consequence of the *concursus* is that the other party to the contract cannot demand performance by the liquidator of the insolvent's contractual obligations. The statement, 'frequently encountered, that a trustee or a liquidator in insolvency has a "right of election" whether or not to abide by a contract' means no more than that by reason of the existence of the *concursus* 'the other party cannot exact specific performance against the trustee or liquidator if the latter should decide to abandon the contract'. The act of the liquidator in deciding not to continue the lease constitutes '. . . a repudiation of the contract, which would have afforded the lessor . . . the right, concurrently with other creditors, to claim from the liquidator the payment of damages for the non-performance by the company of its contractual

[11] *Ellerine Brothers (Pty) Ltd v McCarthy Ltd* 2014] ZASCA 46; 2014 (4) SA 22 (SCA).
[12] Ibid para 10.

obligations'. The claims of the other contractant are therefore reduced by the *concursus* to a monetary claim and participation in the insolvent estate as a concurrent creditor, where it is treated on the same basis as all the other creditors in the insolvent estate.'[13]

. . . .

'. . . As stated in *Porteous* 'after the *concursus* occurs, the trustee steps into the shoes of the insolvent, and the trustee is then obliged to perform whatever is required of the insolvent in terms of the contract, including unfulfilled past obligations of the insolvent'. It is only in the event of the liquidator making an election not to abide by the uncompleted contract that the lessor, because of the *concursus*, cannot compel performance. Absent such an election, the terms of the lease remain in place and the liquidator must comply with it.'[14]

[28] Pick 'n Pay accepted that it was not a party to the contract, notwithstanding the role it played in its conclusion, which included the right to decide whether to approve of or reject a purchaser proposed to it by Laksha; a right to receive payment of its claims against Lashka from the proceeds of sale held by White & Case and the authority to instruct White & Case to pay it in the event of Lashka's failure to give similar instructions to White & Case. But despite this acceptance, Pick 'n Pay nevertheless submits that the rights which it derived from clause 6 of the agreement, including the right to receive payment from the proceeds of sale, are directly enforceable rights. It is correct that clause 6 of the agreement imposes an obligation on White & Case to pay Pick 'n Pay on Lashka's written payment instructions, failing which, on Pick 'n Pay's written payment instructions and that by the time of its liquidation Lashka had not discharged its obligation. Proceeding from this premise, Pick 'n Pay argues that to the extent that its payment remained outstanding as at the time of Lashka's liquidation, the agreement was uncompleted and remained unaffected by the creation of *concursus* since the respondents had abided by it.

[29] I am prepared to assume in favour of Pick 'n Pay that although it was not a party to the agreement it nevertheless derived directly enforceable rights from the agreement, including the right to be paid its claims against Lashka. This was facilitated by Lashka and Enthrall agreeing for the payment instructions to be given to White & Case by Lashka, and in the event of Lashka failing to timeously deliver such payment

[13] Ibid para 11.
[14] Ibid para 13.

instructions, by Lashka irrevocably and unconditionally authorising Pick ‘n Pay to deliver payment instructions to White & Case, and for the latter to act in accordance with such instructions.

[30] The funds held by White & Case belonged to Lashka and were to be dealt with in accordance with Lashka’s instructions, failing such, on Pick ’n Pay’s instructions. Pick ‘n Pay’s authority to give payment instructions to White & Case was conferred on it by Lashka in the event of the latter’s failure to timeously give such instructions. The mandate that was given by Lashka to White & Case to make payment from the proceeds of the sale and given to Pick ‘n Pay to issue payment instructions to White & Case terminated with the liquidation of Lashka. White & Case’s mandate to keep funds on behalf of Lashka and to make payment to FNB and Pick ‘n Pay terminated upon the insolvency of Lashka, its principal (*Klein NO*;[15] *Goodricke & Son v Auto Protection Insurance Co Ltd*[16]). Being Lashka’s agent, White & Case was not permitted to execute the instructions given to it by Pick ‘n Pay and the latter, as Lashka’s agent, was not permitted to issue payment instructions to White & Case after Lashka’s insolvency. Whatever mandate White & Case might have obtained from Lashka to keep funds and to pay FNB and Pick ‘n Pay from such funds, such mandate could not still have been in force after the liquidation of Lashka. Therefore clause 6.1, which is the source of Pick ‘n Pay’s authority to give payment instructions to White & Case and to receive payment from them and the concomitant obligation by White & Case to honour such instruction, did not survive Lashka’s liquidation. This must be so since the effect of authority for White & Case to make payment without regard to the rights of other creditors, would be to prejudice such creditors. The contract was not executory because the sale of business had been performed, and the mandate simply gave authority to White & Case to make payment from the proceeds of the sale. That mandate confers authority; it does not require performance and hence is not executory in nature. The payment made to Pick ‘n Pay, on its instructions, after the liquidation of Lashka, was unlawful. It follows, therefore, that the money received by Pick ‘n Pay must be repaid to the respondents.

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[15] *Klein NO* 513B-C.
[16] *Goodricke & Son v Auto Protection Insurance Co Ltd* (in liquidation)1968(1) SA 717 (A) at 722H-723A.

Order

[31] In the result, I make the following order:

The appeal is dismissed with costs including the costs of two counsel, where so employed.

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D H ZONDI

ACTING PRESIDENT

Appearances

For the appellant:	JE Smit SC
Instructed by:	DLA Piper South Africa (RF) Inc
	Symington De Kok, Bloemfontein
For the respondents:	AJ Daniels SC and C de Villiers-Golding
Instructed by:	Richter Attorneys, Rosebank
	Pieter Skein Attorneys, Bloemfontein.