



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

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Status: Immediate

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Pick 'n Pay Retailers (Pty) Ltd v Ramalho, NO and Another (946/2023) [2025] ZASCA 97 (02 July 2025)

Today the Supreme Court of Appeal (SCA) dismissed an appeal with costs including the costs of two counsel, where so employed. This appeal concerned the payment made to a creditor by a third party on behalf of the seller after the commencement of the seller's liquidation pursuant to an agreement of sale between the seller and the purchaser. The question was whether such payment was affected by the *concursum 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 *concursum* 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 was with the leave of the high court.

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.

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.

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).

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.

There were two main issues which arose for consideration in this appeal. The first was whether the respondents' affidavits disclosed a cause of action and the second was whether, on its proper interpretation, the agreement was an uncompleted executory contract and whether the respondents had elected to abide by it.

It is clear from the respondents' affidavits that they averred 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 *concurso 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.

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 Entrhall for the business was R25 million, which Entrhall had to pay into the trust account of White & Case Attorneys. 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.

As regards the first point taken by Pick 'n Pay, it was correct that the affidavits in motion proceedings served 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 contained factual averments that were sufficient to support the cause of action on which the relief sought was based.

It is common cause that Entrhall 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 Entrhall and Entrhall 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.

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 Lashka; 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 submitted that the rights which it derived from clause 6 of the agreement, including the right to receive payment

from the proceeds of sale, were directly enforceable rights. It was correct that clause 6 of the agreement imposed 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 argued 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 *conkursus* since the respondents had abided by it.

This Court held that clause 6.1, which was 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 instructions, 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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