

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



CASE NO: 6367/2022

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

25 JANUARY 2023

JUDGE RM KEIGHTLEY

In the matter between:

RAMAHLO, GEORGE DA SILVE N.O.

First Applicant

VILAKAZHI, AMANDA LINDAKUHLE N.O.

Second Applicant

and

PICK n PAY RETAILERS (PTY) LTD

Respondent

JUDGMENT

KEIGHTLEY J:

INTRODUCTION

1. At issue in this matter is a payment of R21,627,758.91 to the respondent, Pick n Pay Retailers (Pty) Ltd (Pick n Pay). The payment was made pursuant to an agreement and pursuant to a debt owed to Pick n Pay by a company called Lashka 167 (Pty) Limited (Lashka). The payment is controversial because of two common cause facts: (1) Lashka was placed in final voluntary liquidation on 19 February 2018; and (2) Payment to Pick n Pay was effected on 02 July 2019, long after Lashka's liquidation.

The applicants are the joint liquidators of Lashka (the liquidators). They say that the payment was made in disregard of the *concursum creditorum* and is invalid. The liquidators seek an order directing Pick n Pay to repay the money with interest.

2. Pick n Pay advances a layered response to the application. First, it contends that the liquidators have failed to establish a cause of action. Second, it contends that the agreement underlying the payment was of an executory nature, giving rise to reciprocal rights and obligations, which obligations were inherited by the liquidators on winding up. The final leg of Pick n Pay's opposition to the application is its contention that the liquidators elected to abide by the terms of the agreement. Consequently, it says that it was entitled to exercise its rights and effect payment to itself of the debt due to it.

FACTS

3. In 2012 Pick n Pay and Lashka entered into a franchisor-franchisee agreement in terms of which Lashka operated a Pick n Pay Family Supermarket. In addition, Lashka registered a general notarial mortgage bond over its movable property in favour of the Pick n Pay as security for Lashka's indebtedness to it. Lashka was unable to meet its payment obligations to Pick n Pay, despite an agreed payment variation regime. Consequently, Pick n Pay sought to perfect its notarial bond. On 25 August 2017 an interim order was granted by agreement between the parties in terms of which Lashka consented to the perfection and agreed to an order that it make payment of all debts due to Pick n Pay. Thereafter, Pick n Pay took possession of the movables. In effect, it became involved in running the business of the stores (which now also included a liquor outlet) with Lashka.
4. Lashka's dire situation was best resolved by the sale of the business. Lashka agreed to this and a suitable buyer, acceptable to Pick n Pay, was found. In November 2017 the purchaser, Enthrall Trading (Pty) Ltd (Enthrall), and Lashka entered into a Sale of Business agreement. The parties to this agreement were expressly identified as Lashka and Enthrall. Pick n Pay was not a party to the agreement. However, the agreement contained certain provisions involving Pick n Pay and, importantly, establishing rights in its favour. In brief, these were as follows:

- 4.1 The agreement noted that Pick n Pay had claims against Lashka for payment of outstanding amounts due to the former.
- 4.2 As a suspensive condition to the Sale of Business Agreement, Pick n Pay was required to consent to the sale to Entrall and to waive its rights of first refusal under the original franchise agreement between it and Lashka.
- 4.3 Clause 4.4 of the agreement recorded that Pick n Pay had given its required consent and waiver.
- 4.4 The payments due under the Sale of Business agreement, including the purchase consideration of twenty-five million Rand, was to be made to attorneys White & Case, to be held for the benefit of Lashka until the release of the funds under clause 6.2 of the agreement.
- 4.5 Under clause 6.1, Lashka was required, as soon as practicable after the effective date, to deliver a duly completed payment instruction (countersigned by Pick n Pay) to White & Case instructing White & Case to apply the held funds in settlement of the amounts owed to First National Bank (the bank) and Pick n Pay in terms of its claims against Lashka. (The bank was another of Lashka's creditors, but Lashka's liability to the bank, and the settlement of that liability, are not of central relevance to these proceedings.)
- 4.6 Further, under clause 6.1, if Lashka failed timeously to deliver that payment instruction, White & Case was obliged (by the use of the word 'shall'), to proceed with the relevant payments, provided that the payment instruction confirmed the amount of the payments to be made thereunder; and was signed by a representative of Pick n Pay. Lashka also irrevocably and unconditionally authorised Pick n Pay to deliver the payment instruction and White & Case to act in accordance with any payment instruction signed and delivered by Pick n Pay.
5. Essentially, then, the agreement envisaged that Lashka's indebtedness to Pick n Pay would be met from the proceeds of the sale of the business. Pick n Pay would have a first claim to payment (as would the bank), and only in the event of there being a

balance remaining after its claims were settled would White & Case be permitted to pay that balance to Lashka.

6. It is also important to note that while the Sale of Business agreement obliged Lashka to issue a payment instruction to White & Case, Pick n Pay was protected by the fall-back provided under clause 6.1 that permitted it to issue the necessary payment instruction on default of Lashka's obligation to do so. Pick n Pay's protection was underscored by the express irrevocable authorisation given by Lashka under the same clause.
7. Subsequent to the conclusion of the Sale of Business agreement Pick n Pay released the security it had perfected under the notarial bond. The business was transferred from Lashka to Entrall on 26 November 2017 and the latter took over the stores. By 02 December 2017 Entrall had satisfied the obligation to pay the purchase consideration in full to White & Case. The latter released funds to settle the bank's claims on payment instructions delivered by Lashka on 05 and 12 December 2017. However, Lashka did not comply with the similar obligation to deliver the requisite payment instructions vis-a-vis Pick n Pay. It is common cause that neither Lashka nor the liquidators has ever complied with that obligation.
8. On 2 July 2019, Pick n Pay proceeded to sign and deliver the payment instruction to White & Case as provided for in clause 6.1 for settlement of Pick n Pay's claims against Lashka. White & Case obliged and released the funds to Pick n Pay. The payment instruction and payment to Pick n Pay was effected approximately 19 months after the conclusion of the Sale of Business agreement and almost 17 months after Lashka's winding up. The affidavits filed by the parties provide no explanation for the delay. In fact, the affidavits are silent on what events took place in the interim period, save for a brief reference to a meeting between Pick n Pay's attorneys and the liquidators shortly before the former delivered the payment instructions to White & Case.

IS A CAUSE OF ACTION ESTABLISHED?

9. Pick n Pay advances a point *in limine* which, it says, renders the application stillborn. It points to paragraph 40 of the founding affidavit as identifying the liquidators' cause of action. The relevant part of that paragraph reads as follows:

'...(T)he transfer of the amount of R21, 627, 758.91, from White & Case Attorneys to the respondent, falls to be set aside on the basis, inter alia:
40.1.1. in terms of the provisions of section 32 of the Insolvency Act no. 24 of 1936 (as amended); and
40.1.2. on the basis of disregarding the *concursum creditorum* that had been constituted long before the transfer.'

10. Pick n Pay says that neither of these two grounds identifies a cause of action. Section 32(1)(a) of the Insolvency Act provides:

'Proceedings to recover the value of property or a right in terms of section 25(4), to set aside any disposition of property under section 26, 29, 30 or 31, or for the recovery of compensation or a penalty under section 31, may be taken by the (liquidator).'

While the section gives a liquidator the power to institute proceedings to recover dispositions, Pick n Pay points out, correctly, that the power extends only to those dispositions that fall within the ambit of ss 26, 29, 30 or 31 of the Insolvency Act. In other words, s 32 is an enabling provision and does not constitute an independent and general cause of action. It points out further that the affected sections all address dispositions made prior to winding up. It follows logically that s 32, read, as it must be, with ss 26, 29, 30 or 31 of the Insolvency Act, have no application in this case, as the disposition in questions was made well after Lashka was wound up.

11. At the hearing of the matter counsel for the liquidators conceded that despite what was stated in the founding affidavit, they placed no reliance on s 32 and its companion sections to found a cause of action. Pick n Pay recognised that this concession was not enough to uphold its point *in limine*, as the liquidators had not confined their application to those sections. In developing its case that no cause of action had been established, Pick n Pay suggested that a liquidator's power to seek to recover a disposition are circumscribed. Its case is that that power must be founded either:

- (a) in statute, more specifically, s 32 and its companion sections of the Insolvency Act, or s 341(2) of the Companies Act 61 of 1963; or
- (b) on a recognised cause of action under the common law, such as *the actio pauliana*.

Pick n Pay's argument was that a disposition 'in disregard of the *concursum creditorum*' (as posited by the liquidators in paragraph 40 of the founding affidavit) was not a cause of action recognised under these statutes or under the common law. Accordingly, Pick n Pay submitted that the liquidators were bereft of a cause of action.

12. I have difficulty in accepting the correctness of Pick n Pay's starting point, namely that a liquidator may only proceed to recover a disposition under the identified statutory provisions or based on a recognised remedy available to anyone (whether a liquidator or not) under the common law. The fact that the legislator has seen fit to enact specific provisions giving liquidators the power of recovery under the Insolvency Act and the Companies Act is not, in my view, an indication that the intention was to circumscribe a liquidator's powers to effect recovery of dispositions as suggested by Pick n Pay.
13. Each of these statutory provisions serves a particular purpose. As to s 32 (and its companion sections) of the Insolvency Act, they are aimed at extending a liquidator's powers to recover dispositions made *before* the winding-up process commenced, and hence before the *concursum creditorum* was constituted. Absent these statutory provisions a liquidator would have no power to interfere with dispositions of that nature with the object of securing recovery for the general benefit of creditors.
14. Section 341(2) of the Companies Act provides that: 'Every disposition of its property ... by any company being wound-up and unable to pay its debts made after the commencement of winding-up, shall be void unless the Court orders otherwise.' The section must be read with s 348, which provides that a winding-up is deemed to have commenced on the date when the application was presented to court. In the recent decision in *Pride Milling Company (Pty) Ltd v Bekker NO and Another*¹ the Supreme Court of Appeal held that the predominant purpose of s 341(2) is to decree that all dispositions made by a company being wound-up are void. The mischief the section seeks to address is:
- '... a possible attempt by a dishonest company, or directors, or creditors or others, to snatch some unfair advantage during the period between the presentation of the petition for a winding-up order and the granting of that order by a Court by, for example, dissipating the assets of the company or, ... preferring one creditor above another to the prejudice of the *concursum creditorum*.'² (my emphasis)
15. As explained in *Pride Milling*,³ all dispositions made within the period underlined above, namely, between the presentation of the application and the grant of a winding-up order, are potentially invalid because the grant of an order triggers s 341(2), rendering such dispositions void. A court has a discretion under this section to validate dispositions made during this period, with due regard to the mischief at which the section is aimed. However, a court has no power to validate any dispositions made

1 2022 (2) SA 410 (SCA) para 13.

2 *Lief NO v Western Credit (Africa) (Pty) Ltd* 1966 (3) SA 344 (W) at 803, cited in *Pride Milling* above, para 14.

3 Above, para 13.

after the grant of a provisional or final winding-up order.⁴ The reason for this is not difficult to fathom; as *Pride Milling* explains:

'...once a court grants a provisional order a *conkursus creditorum* is established. The effect of this is that the claim of each creditor falls to be dealt with as it existed at the time when the provisional order was granted. ... Accordingly, to order otherwise would not only render nugatory the operative part of s 341(2), in terms of which dispositions made by a company being wound-up are void, but would also have the effect of undermining the essence of the *conkursus creditorum* and indeed the substratum of insolvency law.'⁵

16. Pick n Pay submit that the liquidators have failed to establish a cause of action because their claim does not fall within the ambit of either s 341(2) or s 32. This submission is flawed. Neither of these sections has any application to dispositions made after a winding-up order is granted. It follows that these sections do not cover the field of causes of action available to a liquidator to recover dispositions for the benefit of the general body of creditors. Indeed, it is precisely at the post-*conkursus creditorum* stage that the power to recover dispositions prejudicial to the general body of creditors is most critical. As the much-quoted dicta from *Walker v Syfret* NO⁶ lay down:

'nothing can thereafter be allowed to be done by any of the creditors to alter the rights of the other creditors'.⁷

17. This is so because:

'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.'⁸ (my emphasis)

18. The power of a liquidator to recover dispositions made after the constitution of the *conkursus* of necessity stems from the essence of the *conkursus* itself and what the SCA described in *Pride Milling* as the 'substratum of insolvency law'. A liquidator's cause of action is inherent in these foundational principles. I conclude that there is no merit in Pick n Pay's point *in limine*. The liquidators permissibly pinned their cause of action on the conduct of Pick n Pay in disregarding the *conkursus creditorum*.

4 *Pride Milling*, above, paras 17-18

5 Above, para 19

6 1911 AD 141 at 160, cited in *Pride Milling*, above, para 15

7 *Walker v Syfret*, above p160.

8 *Walker v Syfret*, above p166.

WAS THE PAYMENT JUSTIFIED UNDER THE SALE OF BUSINESS AGREEMENT?

19. Pick n Pay contends that it acted lawfully under the Sale of Business agreement in signing and delivering the payment instruction to White & Case and thus causing payment of its claims to be made notwithstanding that this was done after Lashka was placed under winding-up. This is because that agreement was executory in nature. It gave rise to reciprocal rights and obligations between the parties. Further, Pick n Pay's case is that at the time that Lashka was liquidated the agreement was uncompleted. Despite Pick n Pay being part and parcel of clause 6 and the mechanism for payment built into that clause, Lashka had failed to provide the written instructions which it was obliged to do in terms of clause 6.1 with the effect that Pick n Pay had not been paid.

20. The legal position governing uncompleted executory contracts on insolvency was explained in *Ellerine Bros (Pty) Ltd v McCarthy Ltd*:⁹

'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 *concursum creditorum* therefore does not terminate the continuous operation of a lease agreement to which the insolvent is a party. The *concursum* 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.'¹⁰

And:

'The intended aim of the *concursum*, 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 *concursum*, 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 *concursum* 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 *concursum* "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 obligations".

9 2014 (4) SA 22 (SCA).

10 At para 10, footnotes excluded.

The claims of the other contractant are therefore reduced by the *concurus* 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.¹¹

Further:

'The existence of the *concurus* does not on this principle in any way affect the continued existence of the rights and obligations of the respective parties to an uncompleted contract. There is accordingly nothing, as Galgut AJ correctly found in *Porteous v Strydom NO*, that "excuses the trustee from performing the insolvent's obligations which fall due to be performed between the date of sequestration and the date upon which the trustee makes his election" to abide the contract.¹²

Also:

'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 *concurus*, cannot compel performance. Absent such an election, the terms of the lease remain in place and the liquidator must comply with it.'¹³

21. The parties are agreed on these principles. Where they disagree is on the question of whether the Sale of Business agreement was an uncompleted executory contract and thus whether these principles are applicable, and, if so, whether the liquidators elected to abide by the agreement.
22. Pick n Pay accepts that it was not a party to the Sale of Business agreement. However, it says that it played a pivotal role in the lead-up to the conclusion of the agreement and it agreed to give up certain of its rights under the agreement which it otherwise would have been entitled to exercise to protect its position vis-a-viz Lashka. As I have already recorded, under the agreement Pick n Pay waived its right of first refusal, and it consented to Entrhall as purchaser. In addition, in order to give effect to the agreement, Pick n Pay released the security it had effected under the notarial bond. Clause 6 of the agreement also provided expressly for a payment mechanism for the settlement of Pick n Pay's claims and its right to ensure that payment was effected from the purchase consideration.
23. The gist of Pick n Pay's case in this regard is that it does not matter that it was not a party to the Sale of Business agreement. Despite it being a non-party, the agreement, read as a whole, gave rise to rights directly enforceable by Pick n Pay under clause 6. It was thus an executory contract which had not been completed on liquidation. Pick n

11 At para 11, footnotes excluded.

12 At para 12, footnotes excluded.

13 At para 13.

Pay contends that being an executory contract, it was open to the liquidators to elect not to abide by it. However, this would have required them to:

- (a) repudiate the Sale of Business Agreement in its entirety;
- (b) procure the return of the Business to Lashka;
- (c) tender return of the purchase price to Enthral or state that the liquidators are excused from doing so and that Enthral could lodge a concurrent claim against Lashka in liquidation;
- (d) require return of the funds paid to FNB;
- (e) procure the return of the portion of the purchase price paid by Enthral directly to Lashka in respect of stock; and
- (f) procure the return of the funds held by White & Case.

According to Pick n Pay the liquidators' failure to do so demonstrates an election to abide by the Sale of Business agreement. Consequently, they are bound by the payment terms under clause 6 and are precluded from claiming repayment of the amounts paid to Pick n Pay.

24. The liquidators dispute this interpretation. Their case, which in my view has merit, is that despite the inclusion of clause 6, in terms of which Pick n Pay acquired rights, the essential nature of the agreement was that of an ordinary sale and purchase of a business. To the extent that it was executionary in nature, this applied only to the legal relationship viz-a-viz the purchaser and seller under the agreement. The reciprocal rights and obligations established under the agreement were solely between Enthral and Lashka: Enthral was obliged to pay the purchase consideration and Lashka was obliged to transfer the business to Enthral. Once this was done, the contract was complete.

25. The remaining obligations under clause 6, and the legal nexus established thereby, were between Lashka and Pick n Pay. What is more, the rights and obligations under clause 6 pertained to what was to be done with the purchase consideration paid by Enthral to White & Case. The purpose of the clause was to provide a scheme for the settlement of Lashka's pre-existing debt to Pick n Pay under the franchise agreement. Consequently, the liquidators were correct in comparing the nature and effect of clause 6 to a form of acknowledgement of debt.

26. It is plain that the only parties with any substantive legal interest under clause 6 were Lashka, as the debtor, and Pick n Pay, as the creditor. Clause 6 established no reciprocal legal nexus between Pick n Pay and Enthral, or between Lashka and Enthral. By the time clause 6 was triggered, Lashka and Enthral's performance under the agreement was already complete. This was prior to Lashka's liquidation. In these circumstances, there was no legal scope for the liquidators to repudiate the sale of the business and to seek a restoration of the *status quo ante*, as Pick n Pay suggests.

27. 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. It 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 *concursum* to participation in the insolvent estate as a creditor. It follows that the liquidators have a valid claim against Pick n Pay for recovery of the disposition effected by its conduct.

ORDER

28. I make the following order:

1. The respondent is directed to pay the amount of R21, 627, 758.91, together with interest thereon *a tempore morae*, to the account of Lashka 167 (Pty) Ltd (in liquidation), held with the Standard Bank of South Africa Limited, under account number [...].
2. The respondent is directed to pay the costs of the application.

R M KEIGHTLEY
JUDGE OF THE HIGH COURT

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DLA PIPER SOUTH AFRICA (RF) INC

DATE OF HEARING:

02 NOVEMBER 2022

DATE OF JUDGMENT:

25 JANUARY 2023