

**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

**29 MAY 2023**

**JUDGE RM KEIGHTLEY**

In the matter between:

**RAMALHO, GEORGE DA SILVA N.O.**

First Applicant

**VILAKAZI, AMANDA LINDOKUHLE N.O.**

Second Applicant

and

**PICK n PAY RETAILERS (PTY) LTD**

Respondent

**Neutral citation:** *Ramalho, George Da Silva N.O. & Pick n Pay Retailers (Pty) LTD, Gauteng Local Division, Johannesburg & Others (Case No. 2022/6367) [2023] ZAGPJHC 587 (29 May 2023)*

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**JUDGMENT (LEAVE TO APPEAL)**

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**KEIGHTLEY, J:**

1. The respondents in the original application before me, Pick n Pay (Pty) Ltd (Pick n Pay), apply for leave to appeal against my judgment and order handed down on 25 January 2023, in which I directed Pick n Pay 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). I also made a costs order against Pick n Pay.

2. The original application was instituted by the liquidators of Lashka 167 (Pty) Ltd (Lashka). They sought to recover a payment made to Pick n Pay, a creditor of Lashka, long after Lashka was placed in liquidation on the basis that the payment was made in disregard of the *consensus creditorum*.
3. As noted in my judgment in the main application, Pick n Pay raised a point in limine, arguing that the liquidators had failed to establish a cause of action. I dismissed the point in limine for the reasons set out in my original judgment at paragraphs 9 to 18.
4. On the merits of the application, Pick n Pay's defence was that it had acted lawfully under the Sale of Business agreement (between Lashka and a third party, Enthral) in signing and delivering the payment instruction, and causing payment of its claims to be made notwithstanding that this was done after Lashka was placed under winding-up. In brief, Pick n Pay's case was that the Sale of Business agreement gave rise to reciprocal rights and obligations, including rights and obligations between Lashka and Pick n Pay (which was not a party to the agreement). The liquidators had inherited Lashka's payment obligations to Pick n Pay and, by their conduct, had elected to be bound thereby. Accordingly, so the argument proceeded, by enforcing its rights under the agreement to receive payment, Pick n Pay acted lawfully.
5. My reasons for rejecting Pick n Pay's defence are outlined in paragraphs 19 to 27 of my judgment.
6. In their application for leave to appeal Pick n Pay contends that I erred in dismissing the point in limine, and that I ought to have found that there is no recognised cause of action based on a disregard of the *consensus creditorum*. As to the merits, the submission is that I erred in saying that it was disputed that the Sale of Business agreement was of an executory nature that was uncompleted at the time of liquidation of Lashka. Mr Smit for Pick n Pay submitted that whether a contract is executory in nature is a question of fact, and that the liquidators had not disputed Pick n Pay's averment that it was an executory contract. Mr Smit cited

*Gore and Another NNO v Roma Agencies CC* 1998 (2) SA 518 (C) at 521B in support of his submission.

7. As I understand the law, whether an agreement is executory in nature is a matter of interpretation and not of fact. I do not believe *Gore* says anything different. What was stated in *Gore* was that: 'the question whether or not a trustee or liquidator has elected to complete an executory contract is one of fact'(emphasis added). Thus, it is the election to complete the contract, and not the nature of the contract itself which is a question of fact. *Gore* does not assist Pick n Pay.
8. Under s17(1)(a) of the Superior Courts Act, leave to appeal may only be given where the Judge is of the opinion that the appeal (i) would have a reasonable prospect of success or (ii) there is some other compelling reasons why the appeal should be heard, including conflicting judgments on the matter under consideration. The test for granting leave under this section is well settled. The question is not whether the case is arguable, or another court may come to a different conclusion (*R v Nxumalo* 1939 AD 580 at 588). Further, the use of the word 'would' in s 17(1)(a)(i) imposes a more stringent and vigorous threshold test than that under the previous Supreme Courts Act, 1959. It indicates a measure of certainty that another court will differ (*Mont Cheveaux Trust v Goosen* [20014] SALCC 20 (3 November 2014); *Notshokuvo v S* [2016] ZASCA 112 (7 September 2016)). The *Mont Cheveaux* test was endorsed by a Full Court of this Division in the unreported case of *Zuma & Others v the Democratic Alliance & Others* (Case no: 19577/09, dated 24 June 2016).
9. The main thrust of the application for leave to appeal on my finding on the merits rested on *Gore*. As I have indicated, the reliance by Pick n Pay on *Gore* was misplaced. As to the point *in limine*, nothing new was submitted to me that was not dealt with in the main application and in my original judgment.
10. In my view, at best for Pick n Pay, its grounds of appeal raise issues that arguably lead to another court deciding differently. However, this is not the test. It was urged upon me that because of the complexity of the facts and of the Sale of Business agreement, I should be minded to grant leave to appeal. While on the surface the facts and agreement may appear to be complex, at heart the real issues raised were relatively simple once properly understood.

11. I am not satisfied, for these reasons, that the applicant has established a case for leave to appeal being granted.

12. I make the following order:

‘The application for leave to appeal is dismissed with costs.’

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**R M KEIGHTLEY**  
**JUDGE OF THE HIGH COURT**

**APPEARANCES:**

**COUNSEL FOR APPLICANT  
APPLICANTS' ATTORNEYS**

**ADVOCATE AJ DANIELS SC  
RICHTER ATTORNEYS**

**COUNSEL FOR RESPONDENTS  
RESPONDENTS' ATTORNEYS**

**ADVOCATE JE SMIT  
DLA PIPER SOUTH AFRICA (RF) INC**

**DATE OF HEARING:  
DATE OF JUDGMENT:**

**24 MAY 2023  
29 MAY 2023**