



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case Number: **2025-021499**

In the matter between:

TANYA COX

First Applicant

PURE WHITE SNOW (PTY) LTD

Second Applicant

(Registration No.: 2014/032173/07)

and

GERBER CO PROCESSING (PTY) LTD

First Respondent

GERBER CO SCOURING (PTY) LTD

Second Respondent

(Registration No.: 2021/929254/07)

Coram	:	Da Silva Salie, J
Matter argued	:	26 August 2025
Judgment delivered	:	26 August 2025
Counsel for Applicants	:	Adv. P S MacKenzie
Instructed by	:	Smith & De Jongh Attorneys

Counsel for Respondents : Adv. G.J. Gagiano
Instructed by : William Koch Attorneys Inc.

Interlocutory application – main relief settled on concession of alternative order – costs only in issue. Neither party achieving substantial success – full factual matrix of conduct of the parties and events considered by the Court - no order as to costs

Order:

[17] For the reasons set out above, I make the following order:

“There is no order as to costs.”

EX TEMPORE JUDGMENT HANDED DOWN ON TUESDAY, 26TH AUGUST 2025

DA SILVA SALIE, J:

Introduction

[1] This matter came before me on the semi-urgent roll today, on the issue of costs only. The substantive (interlocutory) relief by the applicants initially sought (on the urgent roll earlier this year, February 2025) was directed at securing possession of certain assets forming the subject of pending litigation under case number 18554/24.

[2] The main action arises from a sale of shares agreement and memorandum of understanding concluded in November 2023, under which the first respondent paid

R375 000 to the first applicant. A dispute ensued about alleged breaches, leading to a mutual cancellation of the agreement.

[3] In August 2024, action was instituted by the respondents' consequent to the cancellation of the agreement. The applicants defended the action and counterclaimed. The assets at issue in this interlocutory application are connected to the pending action: the applicants alleged that the respondents, despite an undertaking not to do so, were using the applicants' equipment/assets which formed part of the dispute. The interlocutory application therefore sought to interdict such use (primary relief) or, in the alternative to have the assets placed in independent storage under the Sheriff's custody pending the outcome of the main action.

[4] By agreement between the parties, the applicants accepted the respondents' concession of the alternative relief: that the assets be placed under the custody of the Sheriff in independent storage pending the determination of the action.

[5] This judgment concerns the costs only of the now settled interlocutory application. The substantive relief has been resolved by agreement, with the applicants accepting the respondents' concession of the alternative order. The sole issue for determination is whether either party should bear the costs of this application.

Applicants' Submissions

[6] The applicants contend that they are entitled to their costs, including the costs of counsel on scale C. Their principal grounds are:

- (a) The respondents breached their written undertaking of 3 July 2024 not to use the applicants' assets, which compelled the applicants to launch these proceedings.

(b) the respondents ultimately conceded the alternative relief in the notice of motion.

(c) But for the breach, the interdict application would not have been necessary, warranting a costs order against the respondent.

(d) In the circumstances, the applicants argue that they were justified in approaching the Court and should not be mulcted in costs.

Respondents' Submissions

[7] The respondents submit that no order as to costs should follow, emphasising that:

[a] Although they breached the undertaking, the breach arose from a bona fide (albeit mistaken) belief that they were entitled to use the assets in light of the unresolved repayment dispute. The breach ceased immediately upon receipt of legal advice after service of the application.

[b] The applicants refused a tender for return of the assets against payment of the R375 000 – a stance which, according to respondents, unnecessarily prolonged the dispute.

Applicable Principles

[8] The principles governing costs are trite. The general rule is that costs follow the event, but the rule is not inflexible. The Court retains a discretion to depart from it, exercised judicially taking into account all relevant facts.

[9] Where neither party achieves outright success and the litigation reflects mutual concessions; the Court may properly order that there be no order as to costs. Stated

differently, where litigation yields a compromise, or where responsibility for the proceedings lies on both sides, it is often appropriate that no order as to costs be made.

Evaluation

[10] The thrust of applicant's argument is that the respondent must be held accountable for the breach: in this case by way of a costs order. I am not persuaded that the matter is entirely that simple and such a stance would be a myopic view of the cost's determination before me today. I am mindful of the broader sequence of events, including the back-and-forth communications between the parties regarding the underlying cancelled agreement, which culminated in the genesis of this interdict application. The respondent's position was that they had already paid R375 000 to the first applicant under the cancelled agreement, which they contended ought to be repaid.

[11] As I see the papers before me, the applicants reflect an oblique denial that such amount is due to the respondents. Albeit that this issue is for determination by the Court which will ultimately hear the main action, I am nonetheless required to be mindful of the vagueness thereof as it appears on the papers before me in determining the issue of costs today. This oblique denial of the R375 000 claim does not fully displace the respondent's claim and this equivocation or indistinctiveness contributed to an *impasse*. It is this disagreement over repayment which underlies the present interlocutory dispute. The stalemate position resulting between the parties *apropos* the R375 000 and the assets culminated in a macabre dance between parties who have fallen into dispute on the consequences of a cancelled agreement. To decide the matter simply on who breached the undertaking would, in my view, be an unduly narrow approach and a miscarriage of justice. I am bound to have regard to the broader context of the parties' conduct and communications which gave rise to this application. As the proverbial saying goes, "*one hand cannot clap alone*", for this dispute did not arise from the moment of the breach of the undertaking by the respondent. What I see is a series of tit-for-tat exchanges escalating to the interlocutory application and yet again, incurring further costs to cover the appearance and argument of costs today.

The record reveals a sequence of exchanges, counter proposals and unresolved disputes which together created the conditions which gave rise to the interdict.

[12] As I see it, both parties herein contributed to the initiation and continuation of these proceedings. The respondents' breach of their undertaking was a material factor that triggered the application. However, it was not shown to have been malicious. The respondents explained that he acted under a bona fide belief that there would be no issue to make use of the assets, since the applicants were withholding repayment of the R375 000. I note that the whilst the undertaking not to use the assets was issued (as per the correspondence of the attorneys of record for the respondents), it did so maintaining at the introduction of the correspondence, ad paragraph 2: *"It is our submission that your client has no legal basis to withhold payment of the R375 000 on condition that our client returns your client's assets/property."*

[13] On the other hand, the applicants' refusal of the respondents' tender (which aligned with their own earlier proposal) and their persistence with the primary relief prolonged these interlocutory proceedings unnecessarily. The respondents' answering affidavit gives a broader perspective of the ongoing disputes in the matter. At paragraph 12 of record page 95, Mr. Gerber, (deponent for the respondents) state in the answering affidavit:

"To resolve all aspects of this application, and prior to the hearing thereof on the urgent date, respondents tendered release of applicants' assets against repayment of the amount of R375 000 which liability cannot be in dispute and which tender was directly in line with a previous tender made by applicants themselves on 15 May 2024."

[14] In response to this tender, the applicants maintain a position (as I see it) that the horse had already bolted. It was the applicant's immovable position that the attempts to settle was an overall settlement attempt of the dispute and places the failure of settlement at the feet of the respondent for having an *"unreasonable attitude"*.

[15] During argument, counsel for the applicant argued that at this stage (re: the repeated tender) the interdict had already been launched and that the tender was not supported by an offer as to costs. I find this argument problematic. This tender was a rehash of previous settlement talks and would have been capable of resolving at least this issue. The argument that it was not accepted because it was not supported by a tender to pay costs is not persuasive. In my view, the launch of the main action and the counterclaim had resulted in an attitude by the applicant that it would not be limited by its own previous tender and instead wanted the overall claims to run its course. At the very least, when the applicants took this approach, it litigated in this interlocutory application at its own expense. Seen overall, considering the full factual matrix of events, both parties contributed to the escalation of costs on an issue which formed but a piece of a bigger puzzle, that being: a claim and counterclaim pending in an action consequent to the cancelled agreement.

[16] Having regard to the totality of circumstances, I am not persuaded that it would be just to saddle either party with an adverse costs order. The balance of fairness on these facts and circumstances lies in neutrality by this Court on the issue of costs. For the reasons set out above, I am of the view it that would be just that each party bear its own costs.

Order:

[17] For the reasons set out above, I make the following order:

“There is no order as to costs.”

G. DA SILVA SALIE
JUDGE OF THE HIGH COURT

WESTERN CAPE DIVISION