

REPUBLIC OF SOUTH AFRICA



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

Appeal Case No: A152 / 2025

In the appeal between:

The Lemon Tree (Pty) Ltd

First Appellant

Annaloshini Padayachee

Second Appellant

Lingarethran Padayachee

Third Appellant

Kaleida Café (Pty) Ltd

Fourth Appellant

and

Shift Espresso Bar Holdings (Pty) Ltd

Respondent

Summary: Appeal - Franchisor - Franchisee - Interdict *pendente lite* -
Specific performance - No security tendered – Consumer
Protection Act – Order Amended – Appeal Dismissed.

Coram: WILLE, J et NZIWENI, J et MGENGWANA, AJ

Heard: 21 January 2026

Delivered: 5 February 2026

JUDGMENT

THE COURT: (unanimous)

INTRODUCTION

[1] This appeal is before us with the leave of the court of first instance. The court *a quo* granted an interdict *pendente lite* against the appellants. It is this interdictory relief that is the subject of this appeal. This appeal turns on a narrow issue, but to determine it, it is necessary to set out the litigation history and the full context of the dispute between the appellants and the respondent. For purposes of clarity, we will refer to the first three appellants collectively as the franchisee and to the respondent as the franchisor. The second and third appellants were sureties with the first appellant. The fourth respondent's position was somewhat different.¹

THE CONTEXTUAL BACKGROUND

[2] The franchisee entered into a written franchise agreement with the franchisor. The franchisee was granted the right to conduct business under the '*Shift Espresso Bar*' brand. This business was to be conducted from business premises situated at West Coast Village Shopping Centre, in Sunningdale, Western Cape. The business was known as '*Shift Espresso – Village Place*'.²

¹ The position of the fourth respondent will be dealt with separately.

² This will hereinafter be referred to as the "business".

[3] When the franchise agreement (the 'agreement') was concluded, the franchisee became bound not to conduct any business in competition with the franchisor, its other franchisees, or the business at Village Place.³

[4] It was alleged that the second and third appellants breached the agreement and commenced conducting a similar business near Village Place, with the alleged knowledge and assistance of the first appellant, and that the fourth appellant served as a front for this business.⁴

THE EXCHANGE OF LETTERS

[5] The franchisor's attorneys communicated with the franchisees regarding their alleged misconduct and demanded, *inter alia*, that the fourth appellant cease engaging in unlawful competition with the Village Place business and that the first, second and third appellants otherwise comply with their obligations under the agreement.⁵

[6] In response, the franchisees' attorneys took the position that the agreement failed to comply with specific statutory regulations and that, in law, the franchisees had an entitlement to resile from the agreement because it was either void or voidable for non-compliance with the Consumer Protection Act.⁶

[7] The franchisee indicated that it intended to operate a non-franchise business from the premises at Village Place, with effect from 9 December 2024. It was alleged that the conduct of this business was in breach of the terms of the agreement between the franchisor and the franchisee. This notwithstanding that this business was allegedly operated by the fourth appellant.⁷

³ This in the form of agreed restraint of trade provisions in the agreement.

⁴ This was hotly disputed on the papers.

⁵ A cease-and-desist letter.

⁶ The Consumer Protection Act No. 68 of 2008 ("CPA").

⁷ This was communicated by way of a letter on 20 November 2024.

THE LITIGATION HISTORY

[8] In view of the response received from the franchisee, the franchisor launched an urgent application in which it sought an interim *compelling* order that, pending an action for specific performance by the franchisee in terms of the agreement, the *status quo* be maintained, and that the franchisee be compelled to comply with its obligations in terms of such agreement.⁸

[9] Matters escalated, and following a letter from the attorney representing the franchisee, the franchisee took steps to 'de-brand' the business and commenced trading from the premises under the name and style of 'Gaea Café' with effect from 5 December 2024.⁹

[10] The franchisor then launched another application (the *second* application) on 4 December 2023 to interdict the franchisee's de-branding exercise. This second application was opposed. It was due to be determined urgently on 5 December 2023. By agreement, the second application was then heard together with the first on 12 December 2023. The specific arrangement between the parties in this connection is as clear as mud. It is unclear if the franchisor abandoned the specific relief it sought in the second application.¹⁰

[11] The respondent also sought an interim order in the first application against the fourth appellant, interdicting and restraining the fourth appellant from unlawfully competing with the franchisor on the basis that the fourth appellant was a front for or the 'alter ego' of the second and third appellants in an attempt by the franchisees to evade their obligations in terms of the restraint provisions in the agreement.¹¹

⁸ This application was set down for hearing on 12 December 2023 (the "first" application).

⁹ This in accordance with the written notification dated 12 November 2023.

¹⁰ This seems to be only reasonable interpretation.

¹¹ The 'piercing of the corporate veil' argument.

[12] It was alleged that the business conducted by the fourth appellant was essentially the same as the business conducted by the franchisee and that the fourth appellant was operating in competition with the '*Village Place - Shift Espresso*' franchisee and in breach of the agreement.¹²

THE ORDER OF THE COURT A QUO

[13] In summary, an order was granted by the court *a quo* in terms of which the court: (a) interdicted and restrained the first appellant from breaching the franchise agreement; (b) granted mandatory relief, ordering the first appellant to comply with the franchise agreement by, among other things, continuing to trade as the respondent's franchisee from the premises and pay amounts due in terms of the franchise agreement; (c) granted relief, enforcing the restraint covenant in the franchise agreement, by restraining the first appellant from giving any assistance, be it financial, advisory, or otherwise, to the fourth appellant or any other business trading in competition with the respondent or its other franchisees; (d) granted mandatory relief, ordering the first appellant to maintain the premises in the condition prescribed by the franchise agreement, alternatively, restoring the premises to such condition.¹³

[14] In addition, an order was granted by the court *a quo* in terms of which the court: (a) granted relief, restraining the second and third appellants from breaching the agreement and/or their suretyships; (b) granted relief, ordering the second and third appellants to comply with the franchise and suretyship agreements in a variety of stated ways.¹⁴

¹² Simply put, the appellants (through the fourth appellant) were competing with the respondent.

¹³ This was essentially the same relief sought in the discrete second application.

¹⁴ This, in accordance with paragraph 2 of the order.

[15] Finally, the court *a quo* granted an order enforcing the restraint covenants in the franchise agreement against the fourth appellant.¹⁵

[16] Aggrieved by the terms of this order, the franchisee requested written reasons and, before such reasons were delivered, filed an application for leave to appeal. The reasons were subsequently delivered by the court *a quo*, and upon receipt thereof, the franchisee delivered a further amended application for leave to appeal. Leave to appeal was granted by the Court *a quo* to a Full Court of this Division, and this is how this appeal then found us a year later. This appeal is opposed on the grounds, *inter alia*, that the order granted is not appealable, to which we now turn.¹⁶

THE ORDER IS NOT SUBJECT TO THE APPEAL PROCESS

[17] In the judgment on the application for leave to appeal, the court *a quo* clearly indicated that the order was appealable. The franchisor contends that this does not dispose of the question of appealability, as it is for this appeal court to determine, not the parties to this litigation.¹⁷

[18] The franchisee asserts that although the order categorises the relief as interim and pending the finalisation of an action to be instituted by the respondent, the order is final in effect because it compels the franchisee to adhere to an already-cancelled franchise agreement, thereby compelling a commitment to a contractual regime. As a general proposition for an order to be appealable, the decision has to be: (a) final in effect and not susceptible to alteration by the court that granted the

¹⁵ The unlawful competition portion of the order.

¹⁶ The respondent says that the order *a quo* does not commend itself to the appeal process.

¹⁷ The respondent says that the fact that leave to appeal was granted is not dispositive of this issue.

order; (b) definitive of the rights of the parties; and (c) have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.¹⁸

[19] We say that whether an interim order (by name or label) is appealable depends on a range of factors and that the concept of the 'interests of justice' plays an important role in the enquiry into what interests are involved in a finely weighed consideration of the relevant factors in each case.¹⁹

[20] Thus, we need to look at the essential features of the order that was granted and not be blinded by the name or label given to the interdict. The order granted (although labelled interim) features characteristics of an order for specific performance of the agreement, and characteristics of an order including the restraint covenants, against the first to third appellants.²⁰

[21] In addition, the orders granted have the characteristics of interdicts and restraints, prohibiting the fourth appellant, who is not a party to the franchise agreement, from competing with the respondent.²¹

[22] We also say that the order's duration is a factor to be considered in the weighing-up process. Most of the orders operate as interim interdicts pending the finalisation of an action to be instituted by the respondent for specific performance of the franchise agreement.²²

[23] Thus, as a matter of pure logic, the appellants will be left in a state of uncertainty until the action foreshadowed is finally determined. If the action proceeds to trial, it will take several years to conclude, even longer if any final judgment is

¹⁸ Zweni Minister of Law and Order 1993 (1) SA 523 (A) at 531 B – C.

¹⁹ Tshwane City v Vresthena (Pty) Ltd 2024 (6) SA 159 (SCA).

²⁰ Paragraphs 1.1 and 1.2 of the order.

²¹ Paragraph 1.3 of the order.

²² The pleadings do not include an alternative claim for damages.

taken on appeal. This is in circumstances where the respondent has tendered no security to the appellants.²³

[24] Self-evidently, the order does manifestly dispose of a substantial portion of the relief claimed in the action in that it preserves the franchisor's rights to claim specific performance from the franchisee in the absence of any security being tendered by the respondent.²⁴

[25] Thus, in all these circumstances, we are driven to conclude that the interests of justice demand that an appeal against the orders and judgment of the court *a quo* be permitted and that the orders granted by the court *a quo* commend themselves to be subjected to the appeal process.²⁵

THE GROUNDS OF APPEAL

[26] The grounds of appeal that eventually crystalized during the hearing were the following: (a) that the court *a quo* applied the incorrect test for determining factual disputes; (b) that the court *a quo* erred in ordering specific performance of the agreement; (c) that the appellants challenge the exercise of the court *a quo*'s discretion ; (d) that court *a quo* erred in failing to find that the agreement was unenforceable for want of compliance with the Consumer Protection Act 68 of 2008 and thus, was void or voidable ; (e) that the respondent failed to establish that it had a protectable interest and, as such, that any restraint of trade could not be enforced; (f) that the court *a quo* erred and misdirected itself in failing to find that the respondent had a suitable alternative remedy; (g) that the court *a quo* erred and misdirected itself in finding that the franchisee had repudiated the agreement; (h) that the court *a quo* erred in piercing the corporate veil; (i) that the court *a quo* erred

²³ This is an issue to which we later turn.

²⁴ Shoprite Checkers Ltd v Blue Route Property Managers and Others 1994 (2) SA 172.

²⁵ The order was final in its effect regarding the issue of specific performance.

in relying on and applying the so-called 'Cash Crusaders' judgment, and (j) that the court *a quo* erred by failing to award costs to the appellants.²⁶

CONSIDERATION

[27] The test for granting relief in this case, *pendente lite*, remains the same. All that is required is *prima facie* proof of facts that establish the existence of a right in terms of substantive law. The degree of proof required is that the right can be *prima facie* established even if it is open to some doubt.²⁷

[28] Put another way, a weighing up of the probabilities of conflicting versions is not required. Rather, the approach is to consider the facts as set out by the applicant together with any facts set out by the respondent (which the applicant cannot dispute), and to decide whether, with regard to the inherent probabilities and the ultimate *onus*, the applicant should, on those facts, obtain final relief at the trial. The facts set up in contradiction by the respondent should then be considered, and if they throw serious doubt on the applicant's case, the latter cannot succeed.²⁸

[29] Most importantly, if the features of the relief granted by the court *a quo* may be categorised as final and, because of that determination, the order is appealable, *it does not change the test* to be applied for the granting of interim interdictory relief.²⁹

[30] It seems clear from the reasons provided that the court *a quo* did not make a finding (correctly so) that the franchisor was entitled as a matter of fact or law to specific performance under the agreement. The relief granted was merely to restore and preserve the *status quo ante* pending the final determination of the parties' rights. There are several remedies available for a breach or a threatened breach of

²⁶ This issue was identified in the Heads of Argument rather than in the Notice of Appeal.

²⁷ Webster v Mitchell 1948 (1) SA 1186(W) at 1189.

²⁸ Webster v Mitchell 1948 (1) SA 1186(W) at 1189.

²⁹ Noah v Union National South British Insurance Co Ltd 1979 (1) SA 330(T) at 332 H - 333A

a contract. Specific performance is one of them. The choice among these remedies rests primarily with the non-defaulting party.³⁰

[31] It is the non-defaulting party who may choose one or more of the legal remedies either in the alternative or together as long as these remedies are not inconsistent with each other. Thus, when considering an application for an interdict to compel performance with reference to general requirements, the remedy of performance of the contract is a matter for the franchisor to choose to invoke, subject to the court's discretion.³¹

[32] Put another way, it must be so that it is against conscience that a party should have a right of election whether to perform in terms of a contract or only pay damages for a breach.³²

[33] One of the core issues for determination is whether the appellants made out a case that the exercise of the court *a quo's* discretion (or any discretion) was wrong. Inextricably linked to this determination is the argument that the agreement was unenforceable for non-compliance with the CPA and thus void or voidable.³³

[34] Although initially the subject of some dispute, it was wisely thereafter conceded that the CPA applies to franchise agreements.³⁴

³⁰ It is the non-defaulting party who makes the election

³¹ GB Bradfield: Christie's The Law of Contract in South Africa (8th Edition) at 14.1.

³² Farmers' Co-op Society (Reg) v Berry 1912 AD 343 at 350.

³³ This was not an issue for final determination at the interdict stage of the proceedings.

³⁴ The CPA defines franchise agreements as an agreement between two parties, being the franchisor and franchisee, respectively—

- (a) in which, for consideration paid, or to be paid, by the franchisee to the franchisor, the franchisor grants the franchisee the right to carry on business within all or a specific part of the Republic under a system or marketing plan substantially determined or controlled by the franchisor or an associate of the franchisor.
- (b) under which the operation of the business of the franchisee will be substantially or materially associated with advertising schemes or programmes or one or more trademarks, commercial symbols or logos or any similar marketing, branding, labelling or devices, or any combination of such schemes, programmes or devices, that are conducted, owned, used or licensed by the franchisor or an associate of the franchisor; and

[35] The appellants rely on non-compliance with the CPA regulations governing the non-disclosure of certain prescribed supporting documentation.³⁵

[36] Regulation 2 (2) (e) of the regulations promulgated under the CPA provides that any provision in a franchise agreement to which such regulations apply, which conflicts with the regulations, is only void to the extent of such a conflict.³⁶

[37] The respondent contends that there is nothing contained in the CPA or the regulations that could serve as a basis for arguing that any failure to comply with the regulation relied on by the first to third appellants would render a franchise agreement void or voidable at the election or instance of a franchisee.³⁷

[38] In general, public policy requires that contracting parties honour obligations freely and voluntarily undertaken. The appellants contend that the respondent made a misrepresentation, and the appellants seek to rely on the respondent's misrepresentation. The general effect of misrepresentation is that a party who has been induced to enter into a contract by the other party's misrepresentation of an existing fact is entitled to rescind (or resile from) the contract provided the misrepresentation was material, was intended to induce the person to whom it was made to enter into the contract, and did so induce that person to conclude the contract. Unless a misrepresentation is material, or in respect of a material fact, it will not justify the rescission of the contract. Put another way, it would be surprising if the law were to permit a party to rescind a contract merely because the party had been the victim of a misrepresentation on a matter of minor importance. Put another

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- (c) that governs the business relationship between the franchisor and the franchisee, including the relationship between them with respect to the goods or services to be supplied to the franchisee by or at the direction of the franchisor or an associate of the franchisor.

³⁵ This is a regulation dealing only with administrative and disclosure issues.

³⁶ It does not automatically have application and bear down on the entire contract.

³⁷ *Pratsch t/a Caltex Mooi River v Rasmussen* 2008 (2) SA 243 (N) at [8] to [11].

way, the misrepresentation (non-disclosure) must have factually induced the contract.³⁸

[39] The representation must be such as would have persuaded a reasonable person to enter the contract. To allow a party to rescind because that party subjectively regards the fact misrepresented as more important than it would be regarded by a reasonable person would be unfair to the party that made the misrepresentation.³⁹

[40] On a proper reading of the papers, the appellants did not make out a case for a material misrepresentation. The respondent avers that the appellants complied with the agreement until they sought to escape it for commercial reasons. This may or may not be correct, but this is an issue for final determination by the trial court.⁴⁰

[41] The respondent sought to enforce the agreement's terms by way of an interim interdict. The appellants contended that the respondent had no protectable interest and thus no restraint of trade was capable of enforcement. This position by the appellants falls to be considered in the context of the requirements for interim relief, and a *prima facie* right, albeit open to some doubt, is sufficient. Further, whether the restraint is enforceable will undoubtedly be an issue for the trial court to decide.⁴¹

[42] The relief sought against the fourth appellant was founded in unlawful competition. Also, considerations concerning the enforcement of a restraint of trade will only become relevant once the contractual relationship between the parties has been terminated.⁴²

³⁸ Cockroft v Baxter 1955 (4) SA 93 (C).

³⁹ Novick and Another v Comair Holdings Ltd and Others 1979 (2) SA 116 (W) at 149 C.

⁴⁰ It is so that this shield was belatedly raised.

⁴¹ After hearing all the evidence.

⁴² This will be an issue for the trial court to decide.

[43] All that the respondent had to demonstrate for the interim relief on this score was *prima facie* proof of facts that establish the existence of a right in terms of substantive law, even if it is open to some doubt, whilst a weighing up of the probabilities of conflicting versions was not required.⁴³

[44] The franchisor approached the court to enforce the agreement it concluded with the first to third appellants, seeking to recover the fees and payments to which it is contractually entitled by virtue of its know-how, trade connections, skills, training, and operational knowledge given to the franchisee.⁴⁴

[45] One of the requisites for the granting of an interim interdict is the absence of another adequate remedy. This goes to the exercise of the court's general discretion (judicially exercised) to grant or refuse an interim interdict.⁴⁵

[46] The existence of a right to claim damages does not warrant the refusal of an interdict. This must be so because enforcement is one of the party's default rights under a contract, and a court will not lightly deprive a party of this right.⁴⁶

[47] We say this because, in considering an alternative remedy, the very purpose of the franchisor's seeking interdictory relief was to put an end to the alleged breaches of the franchisor's rights. The principle of legality imposes a duty on courts to give effect to legally recognised rights.⁴⁷

[48] The franchisee averred that the court erred in finding that they had repudiated the agreement. The franchisee says that it lawfully resiled from the agreement. The test whether conduct amounts to a repudiation, to justify

⁴³ Paragraphs 103 to 110 of the Reasons provided by the court *a quo*.

⁴⁴ This as is set out in the franchise agreement.

⁴⁵ *Candid Electronics (Pty) Ltd v Merchandise Buying Syndicate (Pty) Ltd* at 464 G – 466 D

⁴⁶ The franchisor had no other suitable alternative remedy.

⁴⁷ *Hotz v University of Cape Town* 2017 (2) SA 485 (SCA) at [36] – [39].

cancellation, is whether the conduct exhibits a deliberate and unequivocal intention no longer to be bound by the agreement.⁴⁸

[49] We cannot discern from the reasons by the court *a quo* that any definitive finding was made that the franchisee repudiated the agreement.⁴⁹

THE CASH CRUSADERS JUDGMENT

[50] The franchisee takes the position that the court *a quo* erred in relying on and applying the jurisprudence as set out in the 'Cash Crusaders' judgment.⁵⁰

[51] In summary, in the CC matter, the franchisees concluded several franchise agreements, and the franchisees cancelled their franchise agreements despite knowledge of an application for certain interdictory relief brought by the franchisor. An interim interdict was granted restraining the franchisees from cancelling their franchise agreements.⁵¹

[52] The interim interdict amounted, in essence, to an order for specific performance. On the day the interim interdict was granted, the franchisees rebranded and began trading under the name and style of Cash Xchange. The franchisees then sought an order suspending the interim interdict pending the outcome of the arbitration proceedings, as they contended that implementing the interim order would be inequitable, as they have been operating their stores under the new name and brand and that it would cause hardship if they were now compelled to revert to operating under the CC name and brand.⁵²

[53] Thus, it seems apparent from a reading of the judgment that the court *a quo* was justified in relying in part on the jurisprudence that developed in the CC

⁴⁸ Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd 2001 (2) SA 284 (SCA) at [16] to [18].

⁴⁹ There was no need to make such a finding for the purpose of considering the interdictory relief..

⁵⁰ Former Cash Crusaders Franchisees v Cash Crusaders Franchising [2025] 1 All SA 190 (WCC).

⁵¹ This on an interim basis pending arbitral proceedings.

⁵² These facts are very similar to the facts in this case.

judgment. This, in turn, informs the balance-of-convenience argument, as the franchisee contended that the balance of convenience did not favour the franchisor. On a proper consideration of the papers, the balance of convenience, on a factual basis alone, favoured the franchisor.⁵³

THE FOURTH RESPONDENT

[54] Every person and business is subject to fair and honest competition from others. Such competition, as with all activities, must not be unlawful. Put another way, nobody has the right to take an undue advantage, the effect of which is to benefit that person at the expense of another person or business. Any competitive conduct that amounts to unlawful interference with a competitor's trade, profession, or calling constitutes a delict in law.⁵⁴

[55] Provided that the requirements for an interdict have been met, a wronged party is entitled to an order restraining unlawful conduct on the part of an unlawful competitor. As a matter of pure logic, there must be conduct in the form of some type of business competition. To determine if the conduct is wrongful, reference is made to the general criterion for wrongfulness, namely, the reasonableness criterion. This determination is sometimes described as public policy.⁵⁵

[56] In certain circumstances, a court may be justified in disregarding an entity's separate juristic personality and apportioning liability elsewhere for what are ostensibly acts of that juristic entity.⁵⁶

[57] The focus then shifts from the company to the natural person behind it (or in control of its activities) as if there were no separation between such person and the company. In that way, personal liability may be imposed on an individual for

⁵³ The franchisor was the non-defaulting party.

⁵⁴ A person is entitled to exercise his or her trade without unlawful interference from others.

⁵⁵ Described also as the general sense of justice of the community as well as fairness and honesty.

⁵⁶ This is generally referred to as lifting or piercing the corporate veil.

misusing or abusing the principle of corporate personality. This is what the respondent advanced in connection with the fourth appellant, namely that it was merely a front for the second and third appellants and also in breach of the agreement.⁵⁷

[58] Thus, if a juristic entity is misused in a particular instance for an improper purpose, there is no reason why its separate personality cannot be disregarded in relation to the transaction in question while giving full effect to it in other respects.⁵⁸

[59] The relief sought by the franchisor against the fourth appellant was on the ground of unlawful competition. The fourth appellant did not seek leave to appeal.⁵⁹

SECURITY FOR ORDERS OF THIS NATURE.

[60] Seligson, AJ (as he then was), in *Shoprite*, developed our jurisprudence in cases where specific performance relief is granted *pendente lite*. The eloquent reasoning by Seligson AJ has stood the test of time and continues to play a crucial role in the judicial control of the conditions which should be ordinarily attached to interim orders of this nature in order to offer some measure of protection to the defendant, should the plaintiff's action proceedings for specific performance fail after or during the trial proceedings.⁶⁰

[61] Seligson AJ, in *Shoprite*, produced a masterpiece in judicial reasoning when he said the following:

'...I am disposed to grant the interdict conditionally so as to make provision for the potential financial prejudice to the respondents should they eventually prove successful in resisting the applicant's claims in the action to be brought. This object can be achieved in the present case by requiring the applicant to provide the

⁵⁷ Henochsberg on the Companies Act 71 of 2008 ("*Henochsberg*") at 86 to 92(2)

⁵⁸ Ex parte Gore and Others NNO 2013 (3) SA 382 (WCC) at [19] – [29]

⁵⁹ The fourth appellant did not pursue any appeal at the appeal hearing.

⁶⁰ Shoprite Checkers Ltd v Blue Route Property Managers and Others 1994 (2) SA 172.

*respondents with an undertaking to pay them any damages which the respondents are able to prove resulting from the grant of the interdict... should the applicant fail in the action to be instituted against them...*⁶¹

[62] This conditional security aspect was canvassed with the franchisor's counsel during the hearing of the matter, both as to the form of the security and the posting thereof by way of an undertaking, and there was no objection. Thus, there is no reason to add this condition, albeit that this is an appeal hearing.⁶²

COSTS

[63] As we see it, there are three cost aspects that need to be addressed. The costs order in terms of which the costs of and incidental to the application were to become costs in the action proceedings is in order, subject to a minor refinement and adjustment.⁶³

[64] In our view, the second application was completely unnecessary and was, in essence, abandoned by the respondent (the applicant *a quo*). Even if we are wrong in this connection, the relief sought in the second application was never pursued separately from the relief sought in the first application. Thus, the costs and incidental to the second application should be borne by the respondent (the applicant *a quo*).⁶⁴

[65] Finally, the court dealing with the action may, after hearing all the evidence, find that specific performance should not be granted against the defendants (the appellants). The trial court will be in a much better position to finally determine who should be liable for the costs of all this unfortunate litigation between the parties. We say this because the respondent limited its claim (as set out in the pleadings) in the

⁶¹ Shoprite Checkers Ltd v Blue Route Property Managers and Others 1994 (2) SA 184 G.

⁶² We intend to follow the same reasoning adopted in Shoprite.

⁶³ No distinction was drawn between the costs of the first and second application.

⁶⁴ The appellants should be awarded these costs.

action proceedings in the hope of obtaining an order of specific performance. There is no specific claim for damages in the alternative. This claim for specific performance may fail, which may materially influence the award of costs.⁶⁵

CONCLUSION

[66] In all the circumstances, the appeal falls to be dismissed save for an amendment to the order in connection with the issue of security to which there is no objection.⁶⁶

[67] Further, a discrete costs order will be made in connection with the second application, which was unnecessary.⁶⁷

ORDER

[68] The following order is granted:

1. The appeal is dismissed save for the following additional orders granted in the following terms:
 - 1.1 The orders granted *a quo* are subject to the condition that the respondent (the applicant *a quo*) agrees and undertakes to be liable to the appellants (the respondents *a quo*) for any damages proved to have been suffered by them as a result of the granting of the interdict, should the respondent's (the applicant *a quo*) action for specific performance fail.
 - 1.2 The respondent (the applicant *a quo*) shall be liable for the costs of an incidental to the second application on the scale as between party

⁶⁵ The trial court will be in a better position to make this determination on costs.

⁶⁶ Counsel for the respondent readily conceded the issue regarding security as an interdict condition.

⁶⁷ These costs will include the costs of two counsel on scale C.

and party (as taxed or agreed) together with the costs of two counsel
(where so employed) on scale C.

WILLE, J

We agree:

NZIWENI, J

MGENGWANA, AJ

APPEARANCES

FOR THE APPLICANTS

ADVOCATE A JANSE VAN VUUREN

ADVOCATE S KHOZA

INSTRUCTED BY THOMSON WILKS INC

FOR THE RESPONDENT

ADVOCATE I C BREMRIDGE SC

ADVOCATE D VAN DER MERWE

INSTRUCTED BY GILES BUSWELL AND ASSOCIATES