IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, MAKHANDA)

CASE NO: 2026-009074

In the matter between

KYTA INDUSTRIES (PTY) LTD (REG NO:2013/166736/07)	Applicant
and	
ROXANNE HIBBERT (ID: 9[...])	First Respondent
HOLDIT MARKETING AND MANUFACTURING (PTY) LTD (REG NO: 2000/001061/07)	Second Respondent
MUKA ENCHANTED EMPORIUM (PTY) LTD (REG NO: 2023/965818/07)	Third Respondent

---

JUDGMENT

KRüGER AJ:

Introduction

[1] The applicant instituted urgent proceedings in this court against the first respondent, its former employee, with whom it had entered into a restraint-of-trade

agreement which prohibited her from taking up similar employment in the Eastern Cape for a period of six months after the termination of her employment. At the same time, it sought to protect its interests against her new employers, the second and third respondents. It sought to interdict the first and second respondents from utilising and/ or disclosing its confidential information, including its customer lists and contact details, customer point of contact information; pricing models, data and formulae, discount models and formulae, as well as customer product trends and customer supply requirements, for a period of 18 months from the date of the court order. Additionally, it sought to restrain these respondents from contacting its clients and from disclosing confidential information they held relating to the applicant, and to obtain an order directing all three respondents, jointly and severally to pay the costs of the application, with the one paying absolving the others.

[2] The merits of the matter have been settled.

[3] What remains to be determined is the issue of costs, as between the applicant and the second and third respondents ('the respondents'). The applicant sought an order to direct the respondents to pay 50% of its party-and-party costs on scale A, jointly and severally, up to 29 January 2026, and for them to bear the costs fully on the same scale from 29 January 2026, up to the hearing, on 3 February 2026, unless the costs are otherwise excluded. The respondents opposed the proposed costs order.

The order by consent and parties' submissions

[4] The respondents consented to an order prohibiting them from employing the first respondent in the Eastern Cape for a period of six months from the date of termination of her employment with the applicant, and from utilising and/ or disclosing the applicant's confidential information, including its customer lists and contact details; pricing data, models and discount structures, as well as customer trends and supply requirements, obtained directly or indirectly and to the extent that this information is not lawfully known or in the public domain. The respondents further consented to refraining from contacting, soliciting or engaging with any customers of the applicant, unless they have had prior or existing relationships with those customers; or where customers approach the respondents; or where they

acquired the customers after 23 December 2025, and where they have approached the customers without knowledge of the applicant's customer list. The exceptions apply only to the extent that the customer relationships were not established using the applicant's confidential information. Lastly, the respondents also agreed to remove and delete any confidential information of the applicant and provide confirmation thereof.

[5] Mr *Delport*, for the applicant, supported the applicant's requested costs order as, in his view, the applicant was substantively successful in its application. Thus, in accordance with the usual rule, the applicant should be entitled to an award of costs. He submitted that the applicant had no choice but to turn to the court to protect its interests on 19 January 2026. While the respondents could have avoided the litigation by providing suitable undertakings, they failed to do so in the exchanges between the parties preceding the launching of the proceedings. The respondents' internal directive to the first respondent, dated 12 January 2026, instructing her to ply her trade outside the Eastern Cape and without reference to the applicant's confidential information, was not supplied in the answering affidavit and came before the court only because it was included in the replying affidavit. It was submitted that the fact that the proceedings reached the hearing stage was solely attributable to the respondents.[1]

[6] Ms *Sephton*, on behalf of the respondents, opposed the requested costs order. She submitted that the respondents opposed the application to protect their legitimate interests against the severe curtailment of their rights as the applicant sought a restraint lasting 18 months. In her view, the respondents did not capitulate or concede that they intended to use the applicant's confidential information to their benefit. Pertinently, she pointed out that the order by consent was limited to the six-month duration of the first respondent's restraint of trade and in the Eastern Cape, and that there were clear exclusions to the restriction imposed on the respondents, which did not form part of the relief as requested. She added that the evidence relied upon in support of the application did not support a conclusion that the respondents

---

[1] Reliance was placed on *Meljo Pan Africa (Pty) Ltd v Rossouw and Others* (120904-2024) [2024 ZAGPPJHC 2071 (20 December 2024) para 85.

would place reliance on the applicant's confidential information, and that, as such, costs should either be awarded against the applicant, on scale B, or the parties should be ordered to pay their own costs.

[7] In reply, Mr *Delport* submitted that the exceptions noted in the order simply clarified what necessarily could not be restricted in terms of the court order. In his view, the applicant's success entitled it to costs. The threshold for relief of this nature to prevent unlawful competition from an employer who employs an employee under restraint was met, in line with the ratio of *IRR South Africa BV v Hall (aka Bagas).*[2]

Discussion

[8] The point of departure in an award of costs is that it lies within the court's discretion. Subject to that, the second principle is that costs will ordinarily follow suit.[3] A successful party will be deprived of their costs depending on the specific circumstances of the case, such as the conduct of the parties and/or their legal representatives, whether the success of the party is technical in nature, or depending on the nature of the proceedings.[4]

[9] It is indeed true that the applicant had met the threshold for the relief obtained as was set out in *IIR South Africa*. Schwartzmann J, for the full court, held that the ex-employer must prove that (1) it has confidential information or trade secrets; (2) that a third party is making use of such information, knowingly or innocently; (3) that it has a real right not to be faced with unlawful competition; and (4) that it has no other remedy.[5]

[10] It was thus immaterial whether the respondents used or intended to use the confidential information of the applicant to which the first respondent had access. They employed the first respondent, who was under restraint, and did not undertake at the outset, that her employment would align with her restraint. She had access to

---

[2] 2004 (4) SA 174 (W).
[3] *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others (No 2)* 1996 (4) BCLR 441 (CC) para 3.
[4] Ibid.
[5] Para 13.4.2.

confidential information of the applicant which she could have used for the benefit of the respondents, knowingly or innocently.

[11] The applicant obtained the restraining order on terms similar to, yet more limited than, those requested. The interdict, as agreed, is geographically restricted and coincides with the period of restraint imposed on the first respondent. In my view, that amounts to significant success, and the applicant should not be deprived of its costs, but it should also not be awarded its costs without qualification, as the agreed order is clearly narrower than what was requested. The proposed order on party-and-party scale and shared between the respondents based on their responsiveness to the application, is warranted.

[12] Accordingly, I make the following order:

(a) The second and third respondents are jointly and severally liable for 50% of the applicant's party-and-party costs on scale A, up to 29 January 2026, and

(b) The second and third respondents are jointly and severally liable for the remainder of the applicant's costs on party-and-party costs on scale A, unless otherwise excluded

R KRüGER

ACTING JUDGE OF THE HIGH COURT

Date heard: 3 February 2026

Date delivered: 10 February 2026

APPEARANCES:

For the Applicant:	Adv *J Delport*
Instructed by:	Barnard Inc, Pretoria c/o Huxtable Attorneys, Makhanda
For the Second and Third Respondents:	Adv *S Sephton*
Instructed by:	Steyn IP, Kempton Park