



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

Not reportable

Case no: 2025-222660

In the matter between:

BENON CLAYTON CZORNIJ

FIRST APPLICANT

SERVE UP SOFTWARE (PTY) LTD

SECOND APPLICANT

and

IOANNIS NICOLAKAKIS

FIRST RESPONDENT

DIMITRIOS KAMBAS

SECOND RESPONDENT

ROMAN'S PIZZA (PRETORIA) (PTY) LTD

THIRD RESPONDENT

In re:

IOANNIS NICOLAKAKIS

FIRST APPLICANT

DIMITRIOS KAMBAS

SECOND APPLICANT

ROMAN'S PIZZA (PRETORIA) (PTY) LTD

THIRD APPLICANT

and

BENON CLAYTON CZORNIJ

FIRST RESPONDENT

SERVE UP SOFTWARE (PTY) LTD

SECOND RESPONDENT

Coram: JONKER AJ
Heard: 27 August 2026 with notes delivered on 2 and 4 September 2026
Delivered: 8 September 2026
Summary: Costs – withdrawal of urgent application after set-down – rule 41(1)(a) – withdrawing party ordinarily liable for costs – partial mootness not caused by respondents – punitive costs refused – company not liable where proceedings brought in its name without board authority or leave under section 165(6) of the Companies Act 71 of 2008 – prayer to fund shareholder’s legal costs from company funds refused.

ORDER

- 1 The applicants are granted leave in terms of Uniform rule 41(1)(a) to withdraw the application, such withdrawal to take effect from the date of this order, save in respect of the relief dealt with in paragraph 2 below. The applicants shall deliver a notice of withdrawal in terms of that rule within five days of the date of this order.
 - 2 The first applicant’s claim for an order permitting him to pay 80 per cent of the attorney and own client costs of this application to the applicants’ attorney out of the funds of the second applicant is refused.
 - 3 The first applicant shall pay the respondents’ costs of the application, including the costs of 27 August 2026 and the costs occasioned by the notes on costs delivered pursuant to the directions given on that date, such costs to include the costs of counsel on scale C.
 - 4 No order for costs is made against the second applicant.
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JUDGMENT

Jonker AJ:

Introduction

[1] On 27 August 2026 this urgent application came before me. Before argument on the merits began, counsel for the applicants informed me that the applicants no longer sought the relief in the notice of motion. The reason given was that on the preceding day, 26 August 2026, the respondents' attorneys had written to the two directors of the second applicant on behalf of 276 franchisees of the third respondent, each giving notice of the termination of its licence agreement with the second applicant with effect from 30 September 2026. This, the first applicant argued, rendered the application moot. That stance had been taken the previous afternoon in a supplementary replying affidavit, in which Mr Czornij said that he had been advised that the development rendered the relief moot, and reserved the right to seek costs on a punitive scale against the respondents when the main application and the counter-application are heard. The applicants asked that costs stand over for determination together with the main application and the counter-application, which are pending between the same parties.

[2] I was not prepared to accede to that request, for reasons I give below. I directed instead that the applicants deliver a note on costs and that the respondents deliver a note in reply. The respondents had delivered principal heads of argument before the hearing, and supplementary heads of argument dated 27 August 2026 which answered the supplementary replying affidavit and asked that the application be dismissed with costs.

[3] Three questions remain for decision. The first is whether the applicants should be granted leave to withdraw the application, the respondents contending that it should instead be dismissed. The second is the first applicant's persisting request to be permitted to pay 80 per cent of the attorney and own client costs of this application to the applicants' attorney out of the funds of the second applicant. I shall refer to that relief as the funding claim. The third is the costs of the application. I take the three in that order, because until it is determined on what basis the application comes to an end, the footing upon which its costs fall to be decided is not settled.

Background and facts

[4] The first applicant, Mr Czornij, and the first respondent, Mr Nicolakakis, each hold 50 per cent of the shares in the second applicant, Serve Up Software (Pty) Ltd, to which I refer as SUS. Mr Czornij and the second respondent, Mr Kambas, are the two directors of SUS. Mr Kambas is Mr Nicolakakis' nephew and is the chief technology officer of the third respondent, Roman's Pizza (Pretoria) (Pty) Ltd, to which I refer as Roman's with Mr Nicolakakis as its chief executive officer.

[5] SUS developed and owns a point-of-sale system known as ServeUp, which it licensed to Roman's corporate stores and to franchisees in the Roman's network. It is common cause that those franchisees provided approximately 90 per cent of SUS's income.

[6] Litigation between these parties began in November 2025, when Mr Nicolakakis, Mr Kambas and Roman's launched the main application. In it they seek an order declaring Mr Czornij a delinquent director, an order under section 163 of the Companies Act 71 of 2008 compelling him to sell his shares in SUS to Mr Nicolakakis, delivery of the ServeUp source code and related material, and, in the alternative, the winding up of SUS together with a declarator that the

intellectual property in the software vests in Roman's. Mr Czornij answered in January 2026 and brought a counter-application in which he accepts a sale of his shares but disputes the mechanism by which they are to be valued. Neither the main application nor the counter-application has been heard.

[7] This urgent application was served on 31 July 2026 and issued on 3 August 2026. In it Mr Czornij sought, in his personal capacity and in the name of SUS, interim interdicts pending the outcome of the main application and the counter-application. He also sought leave under section 165(6) of the Companies Act to bring the proceedings in the name and on behalf of SUS, no such leave having previously been obtained.

[8] The relief was, in summary, this: leave to bring these proceedings under section 165(6); interdicts restraining infringement of SUS's copyright in the ServeUp system, restraining adaptation of that work, and directing delivery up of infringing copies; an interdict restraining the respondents from installing a rival point-of-sale system in any Roman's store; an interdict restraining interference in SUS's contractual relationships with its customers; an order compelling Mr Nicolakakis to comply with an alleged oral agreement concluded in 2018 by ensuring that the ServeUp system remained licensed to the Roman's network; an order restraining Mr Kambas and Roman's from assisting him to breach that agreement; an order directing compliance with fiduciary duties; and the funding claim.

[9] The application was set down for 27 August 2026. The affidavits filed of record run to some 250 pages, exclusive of annexures.

[10] On 26 August 2026 the respondents attorneys, addressed a letter to the two directors of SUS on behalf of 276 named Roman's franchisees, each giving notice of termination of its licence agreement with SUS with effect from 30 September 2026. It is that letter which the applicants say brought the application to an end.

Leave to withdraw

[11] The applicants did not deliver a notice of withdrawal. What happened is that counsel announced from the bar that the relief would not be moved for as the matter has now become moot. The respondents made the point that, although the relief was no longer pursued, the application had not been withdrawn and no costs had been tendered.

[12] Uniform rule 41(1)(a) provides that a person instituting any proceedings may at any time before the matter has been set down, and thereafter by consent of the parties or with leave of the court, withdraw such proceedings, in any of which events that person shall deliver a notice of withdrawal.

[13] This matter had been set down for hearing on 27 August 2026. The respondents did not consent to a withdrawal. On the contrary, they contended that live issues remained, that nothing had been rendered moot, and that the proper disposal was not a withdrawal but the dismissal of the application with costs and that if the applicants would not prosecute them, they should pay the costs. The applicants accordingly required the leave of this court to withdraw, and they did not ask for it.

[14] Nothing turns on the informality. I treat the announcement made by counsel from the bar as an application for leave to withdraw, made orally in the presence of the respondents, and I deal with it as such.

[15] Leave ought to be granted, and not merely as a formality. The merits of the application were never argued before me. A court cannot compel a litigant to prosecute a claim which it no longer wishes to pursue¹, and a dismissal in these

¹ *Levy v Levy* 1991 (3) SA 614 (A) at 620B-C. A court may intervene where the withdrawal is itself an abuse of its process, but that is a power to be exercised with great caution and only in a clear case: *Hudson v Hudson and Another* 1927 AD 259 at 268.

circumstances would dispose of claims upon which the court has heard no argument at all. If leave were refused, the applicants would have to move the relief or face the dismissal of the application. A dismissal, even one following upon a refusal to move, would at least arguably found a plea of *res judicata* in later proceedings between the same parties on the same cause. Withdrawal carries no such consequence.

[16] That consideration is of some weight here. The respondents themselves say that the copyright claim, the claim concerning Mr Kambas' fiduciary duties and the question of leave under section 165(6) all remain live. Those claims have never been argued. They should not be extinguished by the manner in which this application came to an end rather than upon their merits. For that reason I do not accede to the respondents' contention that the application should be dismissed. A withdrawal leaves those claims where they were, which is where they ought to be left.

[17] Leave to withdraw will therefore be granted, save in respect of the funding claim, which I shall deal with hereinbelow.

The course adopted at the hearing

[18] I should explain why I declined to allow the costs to stand over.

[19] The reason is practical. This application generated a substantial record, which I have read, and the matter was allocated to me for hearing. A court seized of the main application in due course would have to read that record afresh for the sole purpose of deciding who should pay the costs of an application it never heard. That is not an efficient use of judicial resources and it would burden a colleague with a task this court is far better placed to perform. Where the court that has read the papers is able to decide the costs, it should ordinarily do so.

[20] Fairness nevertheless required that both sides be heard. The respondents had notice of the applicants' stance from the supplementary replying affidavit delivered on the afternoon of 26 August 2026, and they answered it in supplementary heads of argument prepared overnight. The applicants, by contrast, had placed no argument on costs before me. Had the applicants advanced their submissions orally, the respondents would have had the opportunity of answering them. That is why I directed a note and a note in reply. Both have been delivered and I am grateful to counsel for the assistance the notes have given.

The issue

[21] The applicants submit that the respondents should pay the costs of the application. Their case rests on a single proposition: the relief became moot; the mootness was caused by the respondents; and the respondents should therefore bear the costs of an application which their own conduct rendered pointless.

[22] The respondents submit that Mr Czornij should pay their costs on the attorney and client scale, including the costs of counsel on scale C, and that the funding claim should be refused. They say that the letter of 26 August 2026 rendered nothing moot, that the application was in any event bad from the outset, and that they did not bring the terminations about.

The legal framework

[23] An award of costs is a matter for the discretion of the court, to be exercised judicially upon a consideration of all the facts.²

² *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* [1996] ZACC 27; 1996 (2) SA 621 (CC) para 3.

[24] The starting point in this matter is not mootness but withdrawal. Whatever prompted it, what occurred on 27 August 2026 is that the applicants abandoned the relief they had claimed. A litigant who withdraws proceedings is ordinarily in the position of an unsuccessful litigant. In *Germishuys*³ it was held that where a litigant withdraws, or in effect withdraws, very sound reasons must exist why the other party should not have its costs, because the claim or application has proved futile and the other party is entitled to the costs occasioned by its institution.

[25] The onus accordingly rests on the applicants to show sound reason why the ordinary consequence should not follow. The reason advanced is mootness. It has two elements: that the relief became moot, and that the respondents caused it to become moot. Both must be shown. Mootness brought about by events for which the respondents are not answerable would not, without more, justify visiting the costs of an abandoned application upon them.

[26] A matter is moot when it no longer presents an existing or live controversy, so that an order will have no practical effect.⁴ The enquiry is directed at the controversy between these parties on the issues raised in these proceedings. It is not directed at the commercial background against which the dispute arose.

[27] Where proceedings have become moot the costs remain justiciable, and in deciding them a court may have regard to the merits, but only so far as is necessary to arrive at a just order on costs.⁵ Where proceedings were already

³ *Germishuys v Douglas Besproeiingsraad* 1973 (3) SA 299 (NC) at 300D-E. See also *Wildlife and Environment Society of South Africa v MEC for Economic Affairs, Environment and Tourism, Eastern Cape* 2005 (6) SA 123 (E) at 130G-131C.

⁴ *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* [1999] ZACC 17; 2000 (2) SA 1 (CC) para 21 and fn 18, adopted in *Normandien Farms (Pty) Ltd v South African Agency for Promotion of Petroleum Exportation and Exploitation SOC Ltd and Others* [2020] ZACC 5; 2020 (4) SA 409 (CC) para 47.

⁵ *JT Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others* [1996] ZACC 23; 1997 (3) SA 514 (CC) paras 15-17; *John Walker Pools v Consolidated Aone Trade & Invest 6 (Pty) Ltd (in liquidation) and Another* [2018] ZASCA 12; 2018 (4) SA 433 (SCA) para 8.

moot when they were launched, the party who launched them will generally pay, the proceedings having been stillborn from the outset.⁶

[28] Both parties referred me to *Voltex*⁷, and both accepted the same formulation drawn from it: that where an application becomes moot before final determination, the court considers the conduct of the parties, the reasonableness of the litigation, and whether the applicant acted oppressively or the respondent unreasonably withheld its consent. I approach the matter on that basis, which in any event does no more than particularise the discretion described in *Ferreira v Levin*.

Was the application moot?

[29] The applicants' case on mootness is overstated. The letter of 26 August 2026 did not dispose of the issues raised for decision in this application.

[30] Part of the relief claimed concerned copyright. The applicants alleged that the respondents, through contractors, had modified, repackaged, reproduced and redistributed SUS's software without authority and had presented it as a Roman's product. Whether that occurred, and whether it infringed SUS's copyright, is a question wholly unaffected by a customer's decision to give notice of termination. An infringement of copyright, if it occurred, is not undone by the ending of a licence.

[31] Further relief was directed at Mr Kambas' fiduciary duties as a director of SUS. Whether he breached them is likewise untouched by the letter.

[32] The applicants also sought leave under section 165(6). Whether Mr Czornij was entitled to litigate in the name of SUS remained a live question.

⁶ *John Walker Pools* para 8.

⁷ *Voltex (Pty) Ltd v Venkatas and Others* [2025] ZAKZDHC 41.

Indeed, the applicants' note submits that leave 'would have been granted' had the matter not become moot, and the funding claim is still pursued.

[33] The applicants' own note confirms the position. It alleges, in the present tense, that the respondents are doing this by unlawfully and intentionally interfering in the contractual relationships SUS has with its customers, and it maintains a claim to substantive relief. A party who tells the court that unlawful conduct is continuing, and who asks for an order in his favour, is not describing a dead controversy.

[34] I accept that the letter deprived part of the relief of practical utility. It is difficult to see what purpose an interdict restraining interference in SUS's contractual relationships with the franchisees would serve once the franchisees themselves have given notice terminating those relationships. To that limited extent the interdicts directed at the installation of a rival system and at interference with SUS's customers, and the relief compelling compliance with the agreement of 2018, lost their point.

[35] But the application was not wholly moot, and the applicants' explanation for abandoning the copyright and fiduciary relief is revealing. Their note says that once the terminations were given, no purpose would be served by persisting with that relief on an urgent basis. That is not mootness. It is a recognition that the urgency which had brought the parties to court on nine court days' notice had fallen away. Those claims themselves remained available to be pursued in the ordinary course, or in the main application, or by SUS itself if it were properly authorised to do so.

[36] What the letter removed, in substance, was the urgency. What ended the application was the decision to abandon it.

Did the respondents bring about the terminations?

[37] Even on the narrower footing that part of the relief lost its utility, the applicants must show that the respondents brought that about before the costs can be visited upon them. They have not done so.

[38] The assertion that the franchisees cancelled 'at the instance of the respondents' appears in the applicants' note. It appears nowhere on affidavit. No franchisee says that any respondent procured its decision. No evidence connects any respondent to any franchisee's decision. Submissions in heads of argument are not evidence, and a finding of fact of this kind cannot be made on the strength of an assertion by counsel.

[39] The letter records the instructions of 276 separate juristic persons, given in their own names. None of them is a party to this application. On the applicants' own case Roman's is not a party to the licence agreements between SUS and the franchisees.

[40] The founding affidavit puts the matter beyond argument. In it Mr Czornij said that the franchisees should be free to decide whether to contract with SUS without influence or interference by the franchisor. A litigant who asserts that freedom cannot complain when it is exercised, absent evidence that its exercise was procured.

[41] The context points the same way. On the applicants' own version, Roman's announced in May 2025, and confirmed in writing in July 2025, that it intended to take its technology in-house. On the applicants' own version the migration had been under way for months and had reached 167 of 280 stores by 20 August 2026. Against that background, terminations on proper notice by a network that had been migrating for a year are unremarkable, and the fact that they were given the day before the hearing does not by itself establish that the respondents engineered them.

[42] That the franchisees instructed the firm which acts for the respondents is a circumstance that might have called for explanation had it stood alone. It does not stand alone. It is consistent with coordination, but it is equally consistent with a network of franchisees taking convenient collective advice about a supplier from whom, on any version, they were departing. It cannot carry the inference the applicants ask me to draw.

[43] I find that the applicants have not established that the respondents caused such mootness as there was.

[44] The respondents urge me to go further. They ask me to find that the application was stillborn: that no joint venture agreement existed or was enforceable, that no exclusivity was ever agreed, that no copyright infringement was made out, that the requirements of section 165(6) were not met, and that the relief would have failed on every ground. They say that the brief examination of the merits permitted by *John Walker Pools* leads to that conclusion.

[45] I decline the invitation, for two reasons.

[46] The first is that it is unnecessary. The applicants withdrew. They bear the onus of showing sound reason why the ordinary consequence should not follow. They have advanced one reason, and it fails. That disposes of the question, and a court should not decide more than the case before it requires.

[47] The second reason is the more important. The existence and terms of the agreement of 2018, the ownership of and any infringement of copyright in the ServeUp system, and the conduct of Mr Kambas as a director of SUS are all matters in issue in the main application and the counter-application. Those proceedings are pending in this division and will be decided on a fuller record, after a replying affidavit and possibly after oral evidence. Findings made by me on those questions, in an application that was abandoned and on evidence directed at interim relief, would embarrass the court that has to decide them. The

latitude allowed by *John Walker Pools* is to look at the merits solely for the purpose of arriving at a just order on costs. It is not a licence to determine, in a costs judgment, the very issues another court must try.

[48] I therefore say no more about the merits than this. Having read the papers, I am not persuaded that the applicants' case was so clearly good that it displaces the ordinary consequence of a withdrawal.

Who must pay?

[49] The application was brought by two applicants. The second, SUS, was cited as an applicant although leave to litigate in its name had not been granted. That leave was sought in the notice of motion. It was never granted, because the application was abandoned before it could be considered.

[50] SUS was accordingly before this court at the instance of one of its two directors, without a resolution of its board and without the leave which section 165(6) requires. It would not be right to burden the company with the costs of proceedings it never authorised, the more so where the ownership of the company is itself the subject of the pending main application and where its other shareholder is the party against whom the proceedings were brought.

[51] The costs must therefore be borne by Mr Czornij personally. He nevertheless asks to be permitted to pay 80 per cent of the attorney and own client costs of this application to the applicants' attorney out of SUS's funds. It is pressed notwithstanding that everything else has been abandoned.

[52] This request cannot be granted for the following reasons: First, it is substantive relief in an application that has been withdrawn. A litigant who abandons his application cannot select a single prayer of relief from it and ask that it be granted on the strength of a record the court has not been asked to adjudicate.

[53] Second, it presupposes the leave under section 165(6) which was never granted. The premise of the funding claim is that this was litigation properly brought in SUS's name and for SUS's benefit. That premise has not been established.

[54] Third, and independently of the first two, the funding claim asks the court to authorise payment of a shareholder's legal costs out of the funds of the company whose ownership is in dispute between him and the party he is suing, without a resolution of that company's board and against the express opposition of its other director. Whatever the reach of section 165(10) of the Companies Act, it does not extend to that. This relief must be refused.

[55] The respondents ask for costs on the attorney and client scale. They rely on *In re Alluvial Creek Ltd*⁸, where it was said that proceedings may be vexatious in their effect although brought in good faith, where they put the other side to trouble and expense which it ought not to bear. They point to the urgency, the size of the record, the serious allegations which were made and then abandoned, and the use of the company's name without authority.

[56] Those are not trivial considerations. Allegations of unlawful appropriation of another's intellectual property, made on affidavit and on short notice, should not be made unless the deponent is prepared to see them through. The scale as between attorney and client is an extraordinary one. It is reserved for conduct that is fraudulent, dishonest or vexatious, or that amounts to an abuse of the process of the court, and for cases in which a litigant has behaved in a clearly and indubitably vexatious and reprehensible manner.⁹

⁸ *In re Alluvial Creek Ltd* 1929 CPD 532 at 535.

⁹ *Nel v Waterberg Landbouwers Ko-operatiewe Vereeniging* 1946 AD 597 at 607; *Public Protector v South African Reserve Bank* [2019] ZACC 29; 2019 (6) SA 253 (CC) para 8; *Plastic Converters Association of South Africa v National Union of Metalworkers of SA* [2016] ZALAC 39; (2016) 37 ILJ 2815 (LAC) para 46, both endorsed in *Normandien* paras 69-72.

[57] I am nevertheless not persuaded that a punitive order is warranted. The allegations, whatever their ultimate merit may prove to be, were not made recklessly. They were supported by annexures, by transcripts of telephone calls and by a technical analysis. Mr Czornij did not persist once the terminations were notified. He abandoned the application at the first opportunity, and his counsel told me candidly that he had put down his pen, which saved a day of argument on the merits. It did not save the respondents the cost of preparing supplementary heads overnight to meet a stance taken on the eve of the hearing, and I have weighed that against him. This is not a case of a litigant who leaves proceedings pending, or prosecutes them further, with knowledge that they have ceased to serve any practical purpose. Conduct of that kind is reprehensible and may well warrant a punitive order. Mr Czornij abandoned this application within a day of the event upon which he relies, and I have made no finding that he knew, before then, that the relief he sought was unattainable.¹⁰ A punitive order is reserved for conduct deserving of the court's censure, and I do not regard this applicant's conduct in that light. In *John Walker Pools* the Supreme Court of Appeal declined to mark its displeasure by a special order for costs in circumstances no less unsatisfactory than these.

[58] Costs will accordingly be on the party and party scale. Both parties asked for the costs of counsel on scale C. Having regard to the volume of the record, the commercial value of what was at stake and the complexity of the questions raised under the Companies Act and the Copyright Act 98 of 1978, that scale is appropriate.

[59] The costs will include the costs of 27 August 2026 and the costs occasioned by the notes on costs which I directed on that date.

Order

[60] I make the following order:

¹⁰ *Normandien* paras 69-72.

1. The applicants are granted leave in terms of Uniform rule 41(1)(a) to withdraw the application, such withdrawal to take effect from the date of this order, save in respect of the relief dealt with in paragraph 2 below. The applicants shall deliver a notice of withdrawal in terms of that rule within five days of the date of this order.
2. The first applicant's claim for an order permitting him to pay 80 per cent of the attorney and own client costs of this application to the applicants' attorney out of the funds of the second applicant is refused.
3. The first applicant shall pay the respondents' costs of the application, including the costs of 27 August 2026 and the costs occasioned by the notes on costs delivered pursuant to the directions given on that date, such costs to include the costs of counsel on scale C.
4. No order for costs is made against the second applicant.

EM JONKER
ACTING JUDGE OF THE HIGH COURT

APPEARANCES

For the applicants:	G Elliott SC
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For the respondents:	PL Uys
Instructed by:	Savage Jooste & Adams Inc, Pretoria

