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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

CASE NO:2023-077771

(1)	REPORTABLE: NO/YES
(2)	OF INTEREST TO OTHER JUDGES:NO/YES
(3)	REVISED:NO/YES
_____ DATE	_____ SIGNATURE

In the matter between:

I[...] J[...] M[...]

Plaintiff

and

G[...] J[...] M[...]

Defendant

JUDGMENT

MOGOTSI AJ

Introduction

[1] Before addressing the merits of the dispute in this divorce action, it is necessary to address the manner in which this matter proceeded to trial.

- [2] Upon the matter being called, the parties persisted that they were at an impasse and unable to resolve the outstanding issues. Consequently, the Plaintiff was called to testify and subjected to cross-examination. However, it thereafter became abundantly clear that the alleged dispute was, in fact, non-existent. Following my engagement with both counsels, they conceded that there were no material issues in dispute. The Defendant's counsel mentioned that there are specific contentions relating to the findings of the Family Advocate raised by the Defendant, which I shall traverse later in this judgment.
- [3] Once the Defendant testified, the dispute crystallised into the two narrow and, as will be shown later in this judgment, legally unsustainable contentions. It is a grave concern that this matter proceeded to trial, thereby consuming valuable court time.

The factual matrix

- [4] Having said that, I now turn to the merits of this matter. The parties were married to each other but separated in May 2023. Three children were born of the marriage, namely: K[...] J[...] M[...], born 11 October 2003; M[...] J[...] M[...], born 12 December 2012, aged 13; and L[...] J[...] M[...], born 03 October 2020, aged 5. K[...] is a major with special needs.
- [5] The parties were referred to the Office of the Family Advocate for an enquiry and the report as mandated by the *Mediation in Certain Divorce Matters Act*¹, was compiled by The Family Advocate, Mr FJ Vogel, and is dated 31 January 2025.
- [6] In essence, the Defendant seeks an order for shared residence and a week-to-week rotation for the minor children, M[...] and L[...]. Furthermore, he proposes that each party bear the costs of maintaining the children while they are in their respective care. The Plaintiff, while agreeing to the shared-residency arrangement for M[...] as recommended, opposes its immediate implementation for L[...], citing her young age and the stability of the current arrangement.

¹ *Mediation in Certain Divorce Matters Act 24 of 1987*

The issues

- [7] This court is therefore called upon to determine whether the Defendant's proposals serve the best interests of the minor children.

The law and analysis

- [8] It is trite law that the court must consider the Family Advocate's Report and has a judicial duty to come to its own independent conclusion on what is in the child's best interests. As was recently reaffirmed in *K... O... v M... S...*,² expert reports concerning the interests of minor children, to be of assistance to the court, must meet the requirements of expert evidence. This includes being based on a proper factual foundation and logical reasoning. The court must be able to follow the reasoning from the facts found to the conclusions reached.
- [9] The guiding principle is the "best interests of the child" standard, enshrined in section 28(2) of the *Constitution of the Republic of South Africa*,³ and given detailed content in section 7 of the *Children's Act*.⁴ Section 6(2)(a) of the Act further provides that proceedings concerning a child must prioritise a child-centred approach, which respects the child's right to participate appropriately. As Howie JA reminded in *F v F*⁵, this type of litigation is "not of the ordinary civil kind"; it is fundamentally a judicial investigation into the child's welfare rather than an adversarial contest between the parties.
- [10] The Family Advocate, assisted by a registered social worker, Ms Marlene Goris, conducted a thorough enquiry, which included interviews with the parties and all three children, and compiled a report setting out the background, the current arrangements, the children's views, and a recommendation.
- [11] Both parties are in agreement with the Family Advocate's recommendation that M[...]s residence be shared on a week-to-week basis. This arrangement has been in place for some time, and M[...] herself has expressed that it works for

² *K... O... v M... S...* (Case No: 2024-021334) [2025] ZAGPPHC 192 (24 February 2025)

³ *Constitution of the Republic of South Africa, 1996*

⁴ *Children's Act 38 of 2005*

⁵ *F v F* 2006 (3) SA 42 (SCA) para 14, per Howie JA: "[t]his litigation is not of the ordinary civil kind. It is not adversarial."

her, rating her relationship with both parents a perfect ten. The Family Advocate's Report supports this.

- [12] L[...] is only five years old and has been residing primarily with the Plaintiff since May 2023, with contact with the Defendant every second weekend. The Family Advocate's report emphasises that at her tender age, her primary need is for stability, predictability, and a strong sense of security with a primary caregiver. The Family Advocate opined that disrupting her established routine carries a significant risk of causing emotional instability and anxiety, and further recommended a gradual increase of contact to four nights every second week.
- [13] L[...] stated that she wants more days with the Defendant; however, the Family Advocate noted what she assessed as suggestibility on L[...]’s part. There is no evidence before me that the current arrangement is causing harm to her. The court must be careful not to elevate her statement to the level of a considered view. As was stated in *McCall v McCall*,⁶ where a court found a child to be intelligent and articulate but still made due allowance for the possibility of influence, the weight to be accorded to a young child's expressed preference must be carefully assessed. Consequently, I am loath to alter the current arrangement.
- [14] The Defendant proposed that each party bear the costs of maintaining the children while they are in that party's care. In my view, the child's standard of living should not vary depending on which parent's home they are in. I am of the concerted view that this would create unfair and unnecessary competition.
- [15] Therefore, I am satisfied that the Family Advocate's Report is well-founded and serves the best interests of both minor children.

Costs

- [16] The Defendant in the main claim asserted that he was compelled to usurp the Plaintiff's duties by taking the necessary steps to set the matter down for trial to ensure its finality, and that the Plaintiff should be mulcted in punitive costs. The Plaintiff, on the other hand, alleged that the delays in finalising the matter were

⁶ *McCall v McCall* 1994 (3) SA 201 (C) at 205B–G

occasioned by monetary constraints on her part, which hampered her ability to proceed timeously.

- [17] The general rule in divorce matters is that each party pays their own costs, as such proceedings are often viewed as a natural incident of the dissolution of the marriage. However, the court retains a wide discretion in awarding costs, which must be exercised judicially, having regard to the facts of the case.
- [18] The Defendant's persistence in litigating over what were essentially non-issues, and his insistence on proceeding with a trial that was, in my view, unnecessary, weigh heavily against him. The Defendant struck me as a manipulative litigant. His assertion that the party in whose home the children are should bear their maintenance costs at that time appears to be a calculated move designed to place the children in a position where they are drawn to prefer a well-off parent.
- [19] The Constitutional Court affirmed in *Beinash and Another v Ernst & Young and Others*⁷ that access to courts does not entitle a litigant to abuse the judicial process. The Defendant failed to establish a dispute during cross-examination. Despite the court's intervention, he proceeded on new issues that were not raised with the Plaintiff, thereby denying her an opportunity to respond thereto. His actions, in my view, constitute an abuse of the court's processes.
- [20] The Defendant's claim that he had to usurp the duties of the Plaintiff to set the matter down does not assist him. Even if monetary constraints delayed the Plaintiff, the proper course was to engage constructively to narrow the issues, or to seek appropriate case management directions.
- [21] A costs order is an appropriate mechanism by which a court marks its displeasure at litigation conduct that is frivolous, vexatious, or undertaken for an improper purpose. In the circumstances, I am of the view that the Defendant should be burdened with a party and party cost order as a mark of this court's disapproval of his conduct.
- [22] Consequently, I am satisfied that the recommendations contained in the Family Advocate's Report are well-founded and serve the best interests of the minor

⁷ *Beinash and Another v Ernst & Young and Others* 1999 (2) SA 116 (CC)

children, M[...] and L[...], and the Defendant's alternative proposals are therefore rejected.

Order

[23] In the premises, I make the following order:

1. The draft order marked "X" is made the order of the court.

P J M MOGOTSI

ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Appearances

Counsel for Plaintiff:	Tim Dunn
Attorneys for Plaintiff:	TJC Dunn Attorneys
Counsel for Defendant:	Adv Waseem Bava
Attorneys for Defendant:	Naasir Kader Attorneys
Date heard:	16 March 2026
Date of judgment:	26 March 2026