

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)



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

JUDGMENT

Reportable

Case No.: 3358/2024

In the matter between:

D[...] R[...]

Applicant

And

N[...] M[...]

First Respondent

R[...] L[...]

Second Respondent

Coram: Francis J

Heard: 6 May 2026

Delivered: 12 May 2026

ORDER

1. The applicant is granted leave to withdraw the application brought in terms of section 18(2) read with section 18(3) of the Superior Courts Act 10 of 2013 for the suspension of paragraph 4.1.1 of the order granted on 2 December 2025.
 2. The applicant is ordered to pay the respondents' costs of the application, such costs to be taxed on Scale C and to include the costs of two counsel where so employed.
-

JUDGMENT ON COSTS

FRANCIS, J:

Introduction

- [1] This is one of three judgments on costs delivered in this matter. The other judgments address the costs of the application and counter-application heard on 2 December 2025, and the costs of the urgent application brought by the applicant on 10 March 2026 about the first respondent's drug use and related interim care and contact arrangements.
- [2] On 19 January 2026, the applicant brought an application in terms of section 18(2) read with section 18(3) of the Superior Courts Act 10 of 2013 for the

suspension, pending appeal, of paragraph 4.1.1 of the order I granted on 2 December 2025, which regulated his term-time contact with a minor, L[...]. The respondents opposed the application and affidavits were exchanged. The matter became entangled with a recusal application brought by the applicant in February 2026 (since determined) and with the application for leave to appeal the December 2025 order.

[3] After leave to appeal was refused, the applicant gave notice on 5 May 2026 of his intention to withdraw the suspension application. The notice tendered no costs. As the matter had by then been set down for hearing on 6 May 2026, withdrawal required either the respondents' consent, which was refused, or the leave of the court, which the applicant now seeks.

[4] Three issues arise: whether to grant leave to withdraw; whether costs should be reserved to the trial court (raised for the first time from the bar); and, if not reserved, where they should fall. The applicant's primary submission is that each party should bear its own costs. The respondents seek costs on a punitive scale.

Leave to withdraw the application.

[5] Rule 41(1)(a) of the Uniform Rules provides that a person who has instituted proceedings may at any time before the matter has been set down withdraw the proceedings by delivery of a notice of withdrawal. After set down, withdrawal requires the consent of the parties or the leave of the court.

[6] The principles regulating the grant of leave to withdraw are settled. In *Pearson & Hutton NNO v Hitzeroth and Others* 1967 (3) SA 591 (E) at 594H, leave was said to be refused where the applicant is not wholly *dominus litis* or where the respondent has by the proceedings obtained an advantage of which it would be unjust to deprive him. Outside those situations a litigant should not ordinarily be compelled to persist in proceedings he or she wishes to abandon, absent abuse of process.

- [7] Neither qualification applies. The applicant remains dominus litis. The respondents have acquired no advantage by their opposition that withdrawal would unjustly deprive them of. The withdrawal is not an abuse. It followed the refusal of leave to appeal, which removed the foundation of the suspension application. Leave to withdraw is granted.
- [8] The contested questions concern reservation and the incidence of costs.

Whether costs should be reserved for the trial court

- [9] In the alternative to a no-costs order, counsel for the applicant argued at the hearing that the costs of the suspension application be reserved for the trial court. He submitted that the trial court will be seized of the underlying merits and that the court's role as upper guardian invites such an approach. The respondents resisted reservation. According to them, the trial is not imminent, the issues in the suspension application stand apart from those for trial, the present record is sufficient to decide costs now, and reservation would merely defer a question ripe for determination.
- [10] The discretion to reserve costs exists, but it is sparingly exercised. Costs ordinarily follow the determination of the proceedings to which they relate. Reservation is the exception, typically resorted to where the court is unable, on the material before it, to dispose justly of the costs question, and where the issues bearing on that question fall to be decided in later proceedings between the same parties before the same court.
- [11] This is not, in my view, an appropriate case for reservation.
- [12] The suspension application is discrete. It was launched, opposed on affidavit, argued, and now abandoned. The questions of withdrawal and costs are capable of determination on the present record. The trial will be concerned with L[...]’s long-term care and contact on different evidence, and the trial court will, by then, be more remote from the conduct that bears on costs in this application than I am at present.

- [13] The cost question is fully ripe. The basis on which the applicant seeks to displace the ordinary rule, namely the unclean-hands argument founded on the non-disclosure in the respondents' January 2026 affidavits, is a matter of which I have a complete picture. The affidavits have been filed, the chronology is established, and the legal principles are settled. There is no respect in which the trial court will be better placed than I am to make a fair allocation.
- [14] Reserving costs would also defer for a long time, and for no purpose, the resolution of a discrete dispute on which both sides have been heard.
- [15] The court's role as upper guardian engages decisions about a child's care, contact, and welfare. It does not require every collateral procedural question to be deferred to the trial court. The determination of costs on an application withdrawn on the eve of the hearing falls to be made according to the ordinary principles, and there is nothing in L[...]s interests (or that of W[...]s) that is served by leaving it open.
- [16] The application for reservation is refused.

The default position on costs

- [17] The general rule is that the party who withdraws is liable for the costs of the opposing party, who has been put to the trouble and expense of meeting a claim or application that is no longer pursued. As Van Reenen J observed in *Reuben Rosenblum Family Investments (Pty) Ltd and Another v Marsubar (Pty) Ltd* 2003 (3) SA 547 (C) at 550C, departures from that rule are not lightly entertained and require some special feature in the conduct of the parties or the circumstances of the case.
- [18] In matters concerning children, the discretion is informed by the court's role as upper guardian, and by a reluctance to discourage litigants from approaching the court in good faith on a question affecting a child's welfare. That approach is reflected in *JJ v RV* (5832/2019) [2020] ZAFSHC 226, on which the applicant relied. It does not, however, establish any rule that costs may not be awarded in

litigation concerning a child. The discretion remains one to be exercised on consideration of both the child's interests and the conduct of the parties.

- [19] The applicant pitches his case on a single ground against the ordinary rule. He contends that the respondents, in their answering affidavits of 27 January 2026, failed to disclose facts within their knowledge concerning the first respondent's recreational drug use, and that this non-disclosure constitutes an abuse of process which disqualifies them from the costs they would otherwise receive. The argument is based on the principle, recently affirmed by the Constitutional Court in *Villa Crop Protection (Pty) Ltd v Bayer Intellectual Property GmbH* 2024 (1) SA 331 (CC), that a court will not lend its process to a litigant who comes before it with unclean hands.

The unclean hands argument

- [20] The factual premise of the argument requires careful consideration. The first respondent's answering affidavit, deposed to on 27 January 2026, was confirmed by the second respondent on the same date. In that affidavit, the first respondent denied that L[...] would suffer harm from the December 2025 order, relied on the report of his expert, Mr Dowdall, and contended that the application disclosed no exceptional circumstances. The replying affidavit was deposed to on 2 February 2026.
- [21] It is now common cause that on 27 January 2026, the first respondent had used cannabis in Israel in October 2025, had used recreational drugs immediately after the hearing on 2 December 2025, had used methamphetamine and cocaine during a ten-day period in Australia, and had used recreational drugs at a festival in Citrusdal in mid-January 2026. The use was both recent and ongoing, and close in time to the period under consideration in the suspension application. The second respondent was aware of at least some of these matters when he deposed to his confirmatory affidavit. None of this was disclosed in the answering or confirmatory affidavits in the suspension application. None of it was disclosed

to Mr Dowdall, whose report contained the statement that the first respondent's depression "has been adequately treated and managed".

[22] The applicant submits that this non-disclosure rendered the opposition to the suspension application an abuse of process and that the respondents, having come to court with unclean hands, are not entitled to their costs. He cites paragraph [72] of *Villa Crop* in support.

[23] The submission is not without force. Deponents to affidavits in proceedings concerning the welfare of a young child owe a duty of candour to the court. They are not entitled to confine themselves to answering the questions framed by the other side. They must place before the court all material facts within their knowledge that bear on the relief sought. Where a parent deposes that no harm will accrue to the child from a particular contact regime, and where his fitness for contact stands to be assessed in part by reference to his own conduct, the line between selective answering and material non-disclosure is a narrow one. The argument cannot, however, bear the weight that the applicant places upon it, for the reasons that follow.

[24] *Villa Crop*, as Unterhalter AJ emphasised, is a power exercised sparingly. Its consequence, the foreclosure of access to the court's process, is a serious one in light of section 34 of the Constitution (the right of access to courts). The doctrine is reserved for cases in which the abuse is grave and so connected to the substance of the matter that the court should not hear it at all. The doctrine was not invoked at the time to bar the respondents' opposition, and I am not persuaded that it can now be used as the basis to deny them costs.

[25] The scope of the suspension application was narrower than the applicant's submission allows. The s 18 enquiry was directed to whether L[...] would suffer irreparable harm under the contact regime fixed by the December 2025 order, and whether reciprocal harm would be visited on the respondents and W[...] if that regime were suspended pending appeal. It would have turned principally on evidence of L[...]s adjustment, the reports of his school principal, and the expert

opinion on his development. The first respondent's drug use, although of obvious importance in the main matter, did not occupy the center of the s 18 enquiry, and its non-disclosure is unlikely to have altered the outcome of the suspension application.

- [26] The sequence of events weighs against the unclean-hands argument as the operative cause of the withdrawal. The applicant did not abandon the suspension application when the drug use emerged after 7 March 2026. He persisted with it, together with the application for leave to appeal and the related proceedings, for a further two months. The withdrawal came after leave to appeal had been refused, not at the time of the disclosure. That is, as the applicant's own argument accepts, the position. The unclean-hands point is therefore deployed not as the cause of the withdrawal but as a basis for departing from the ordinary rule on costs. That is permissible, but it requires that the asserted abuse have a real bearing on the application now being withdrawn.
- [27] The non-disclosure was a serious matter. It has had consequences in the drug application, where it bore on the interim care arrangements, and it is liable to be revisited on any future affidavit by the first respondent in this litigation. In the present context, however, given the limited reach of the s 18 enquiry and the timing of the withdrawal, the non-disclosure does not, in my view, supply a sufficient reason to displace the ordinary rule that the costs of a withdrawn application are for the party who has withdrawn it.

Scale and number of counsel

- [28] The application engaged questions of statutory interpretation under section 18 of the Superior Courts Act, the scope of the unclean hand's doctrine post-*Villa Crop*, and the application of constitutional principles concerning the best interests of children to interlocutory relief pending appeal. The papers ran to several hundred pages, and the matter was vigorously contested by both sides. In those circumstances, costs on Scale C and two counsels are appropriate.

Order

[29] In the result, I make the following order:

1. The applicant is granted leave to withdraw the application brought in terms of section 18(2) read with section 18(3) of the Superior Courts Act 10 of 2013 for the suspension of paragraph 4.1.1 of the order granted on 2 December 2025.
2. The applicant is ordered to pay the respondents' costs of the application, such costs to be taxed on Scale C and to include the costs of two counsel where so employed.

M FRANCIS

Judge of the High Court

Appearances:

For Applicant: Adv B K Pincus SC & Adv R D E Gordon

Instructed by: Maurice Phillips Wisenberg

For First & Second Respondent: Adv S B Van Embden & Adv J L McCurdie SC

Instructed by: Norman, Wink & Stephens Attorneys