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**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 ordered to pay the respondents' costs of the March 2026 application incurred after 11 March 2026, save for the costs of 10 and 11 March 2026 which are governed by paragraph 4 of the order made on 11 March 2026.
 2. Such costs shall be taxed on Scale C and shall include:
 - 2.1 the costs of two counsel where so employed;
 - 2.2 the qualifying expenses of Mr Bernard Altman, Mr Terence Dowdall and Dr Glyde Thompson; and
 - 2.3 the costs of the appearances on 8 April 2026, 28 April 2026 and 6 May 2026.
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JUDGMENT ON COSTS

FRANCIS, J:

Introduction

- [1] This is one of three cost judgments delivered in this matter. The other judgments address the costs of the application and counter-application heard on 2 December 2025 and resolved on the merits, and the costs of the application brought by the applicant under section 18 of the Superior Courts Act 10 of 2013 for the suspension pending appeal of paragraph 4.1.1 of the order I made on 2

December 2025. Each judgment deals with a separate event and is guided by its own principles.

- [2] This judgment deals with the costs of the applicant's urgent application dated 10 March 2026. The application started as a request to compel the first respondent to undergo drug testing, but over two months, it became a wider enquiry into the interim care and contact arrangements for the children, W[...] and L[...]. The enquiry was scheduled for hearing on 28 April 2026, after significant case management and expert preparation, but the applicant abandoned it on the day of the hearing. Both parties have made submissions on costs.
- [3] The applicant argues that the costs for 11 March 2026 have already been settled by the order made that day, and that the costs of preparing for the abandoned enquiry should remain with each party, or that no costs order should be made. The respondents argue that they should receive their costs for the application, except for those of 11 March 2026, on Scale C with two counsel, including the qualifying expenses of their three experts, Mr Altman, Mr Dowdall, and Dr Thompson, as well as the costs for the appearances on 8 April, 28 April, and 6 May 2026.

Chronology

- [4] On 10 March 2026 at 11h14, the applicant's attorneys wrote to the first respondent's attorneys, calling on him to submit to drug testing by 12 noon, failing which, urgent steps would be taken. At 14h37, the first respondent's attorneys replied that the use of drugs had been a "once-off event" and that no testing was therefore necessary. The applicant launched the urgent application at 15h39 and set it down for hearing the next day. At 16h58, the first respondent's attorneys wrote again, conceding to the testing sought and not opposing the application, but reserving the right to file affidavits in response to the allegations made.

- [5] On 11 March 2026, the application was heard. The applicant did not confine himself to the relief sought in his notice of motion. He pressed for a summary enquiry into the nature and extent of the first respondent's drug use, and for an order that the primary residence of L[...], and possibly W[...], be transferred to him. The court took the view that the appropriate course was to allow the respondents to file affidavits and to deal with the matter at a postponed hearing. An order was made by agreement, except for one paragraph relating to the default contact, which provided for interim arrangements pending a further hearing. Paragraph 4 of that order provided that there be no order as to costs in respect of the application launched on 10 March, up to and including 11 March 2026.
- [6] Between 11 March and 8 April 2026, the first respondent's drug test results were distributed, the first respondent admitted himself to a rehabilitation center, and the parties arranged for the children to reside with the second respondent. On 8 April 2026, the matter came before me again. I declined to hear argument on interim care that day and indicated that I would issue case management directions. Those directions were issued on 8 April 2026, consolidated the applicant's various applications for hearing on 28 April 2026, and directed the parties' experts to meet to address the appropriate interim care arrangements for the children pending the first respondent's discharge from in-patient treatment. The matter was postponed to 28 April 2026 with provision for the filing of affidavits and the giving of oral expert evidence. The directions warned that non-compliance might result in cost orders *de bonis propriis* or in dismissal of any application.
- [7] Both parties were given an opportunity to comment on the case management directions and to seek further directives, and both participated. On 9 April 2026, a Joint Case Management Report was filed. In that report, the applicant made detailed proposals for the apportionment of interim contact between himself and the second respondent, accepted that the children should continue to reside primarily with the second respondent in the interim, and recorded that further

days beyond 6 May 2026 should be allocated for the completion of the hearing. There is no objection on the part of the applicant in that document, in law or on principle, to the second respondent's role in the contemplated arrangements.

- [8] On 10 April 2026, supplemental case management directions were issued. On 16 April 2026, a joint experts' meeting took place, chaired by counsel proposed by the applicant and accepted by the respondents. The applicant's experts participated. The minute of that meeting was produced on 20 April 2026, and, on 21 April 2026, I issued further directions concerning the oral testimony of the parties' experts and the issues to which that testimony would be directed.
- [9] In preparation for 28 April 2026, the respondents undertook extensive consultations with their three experts, Mr Bernard Altman, Mr Terence Dowdall and Dr Glyde Thompson. Mr Altman and Mr Dowdall attended court on 28 April 2026 in readiness to testify. The applicant's experts had also been engaged. Heads of argument had been delivered by both sides. The applicant's heads of argument, dated 30 March 2026, sought, in paragraph 197, an order that the respondents pay the costs of the March 2026 application, including the costs of two counsel on Scale C, the one paying the other to be absolved. The respondents' heads, in similar terms but on the converse footing, sought costs on Scale C in the event the applicant was unsuccessful.
- [10] On 28 April 2026, for the first time and without prior notice, the applicant submitted that the enquiry should not proceed and that the court should hear instead only the leave to appeal and section 18 applications. He raised a legal objection, namely that the second respondent had not been declared an interested person in terms of section 23 of the Children's Act, and that an order as to L[...]s residence with the second respondent could not therefore be made. He raised an alternative submission to the effect that the first respondent's continued presence at the rehabilitation clinic, together with the safeguards the court would impose on his discharge, rendered the enquiry into co-dependency and enabling unnecessary. The applicant thereafter served a notice of withdrawal

of the section 18 application on 5 May 2026, and at the hearing on 6 May 2026, indicated that he would not pursue the wider enquiry he had himself initiated.

The costs of 10 and 11 March 2026

[11] The costs of 10 and 11 March 2026 are not properly before me. Paragraph 4 of the order of 11 March 2026 provided that there be no order as to costs in respect of the application launched on 10 March 2026 up to and including 11 March 2026. The applicant correctly conceded the position in his short heads. The respondents' broader prayer, insofar as it includes those days, must therefore be refined.

[12] The costs that fall to be determined now are accordingly the costs of the application after 11 March 2026, in particular the costs of 8 April 2026, 28 April 2026 and the costs occasioned by the preparation of the parties for the hearing on 28 April 2026, together with the costs of today.

The general principle

[13] A litigant who initiates proceedings and then withdraws or abandons them is, as a general rule, liable for the costs caused to the other side by that initiation and abandonment. The principle is set out by Van Reenen J in *Reuben Rosenblum Family Investments (Pty) Ltd and Another v Marsubar (Pty) Ltd* 2003 (3) SA 547 (C) at 550A–D. It is only in exceptional circumstances that a party put to the expense of opposing withdrawn proceedings will be denied the costs caused by the opposition. A respondent who is dragged into proceedings is entitled to expect that, if those proceedings are abandoned by the party who initiated them, the costs of the abandonment will not lie at the respondent's door.

[14] The applicant's position is that this principle should not produce its ordinary consequence here for three reasons. The first is that the enquiry which generated the bulk of the preparation costs was directed by the court, and not by him. The second is that only the court could, in the end, decide whether oral evidence was necessary, and that he was therefore obliged to prepare for the

hearing while reserving his right to argue, on the day, that the hearing should not proceed. The third is that the legal objection he eventually raised, namely the second respondent's lack of recognition under section 23 of the Children's Act, is a sound point, and that the court is bound to take notice of it whenever it is raised.

Whether the enquiry was court-driven

- [15] The first contention does not survive a careful reading of the record. The enquiry into the appropriate interim care and contact arrangements did not arise of the court's own motion. It was the substance of what the applicant pressed for at the hearing on 11 March 2026, when he sought a summary enquiry going well beyond the relief in his notice of motion and asked for an order moving L[...]s primary residence to him. The court declined to deal with the matter on the basis of hearsay and untested allegations and gave the respondents an opportunity to file affidavits. In doing so, the court was managing, in a procedurally orthodox way, an enquiry the applicant had himself opened up and that could not fairly be resolved on the affidavit material as it then stood.
- [16] Thereafter, the applicant did not simply acquiesce in the case management process. He participated in it fully. He made submissions on the case management directions. He was party to the Joint Case Management Report of 9 April 2026, in which detailed proposals were made for the apportionment of contact between himself and the second respondent and in which it was recorded that further hearing days might be needed beyond 6 May 2026. His experts attended the joint experts' meeting of 16 April 2026. His counsel addressed me regarding the directions issued on 21 April 2026 regarding the experts' oral testimony. By the time of the hearing on 28 April 2026, the applicant had been engaged in the enquiry process for some seven weeks.

- [17] It does not lie in the applicant's mouth, in those circumstances, to say that the enquiry was the court's project. It was a process he initiated and continued to advance. The respondents' preparation costs were incurred in response to that process and were caused by the applicant.

The discretion to dispense with oral evidence

- [18] The applicant's second contention rests on the well-known passage in *Wallach v Lew Geffen Estates CC* 1993 (3) SA 258 (A) at 263G–H, where it was held that a court directed to hear oral evidence may, when the matter comes before it, conclude that oral evidence is unnecessary and decide the matter on the papers. Reliance was also placed on *Sandell and Others v Jacobs and Another* 1970 (4) SA 630 (SWA) for the proposition that interlocutory orders directing oral evidence are open to variation by any judge before final judgment.
- [19] Those authorities are not in dispute. They establish that a court is not bound by its earlier interlocutory order directing oral evidence. The court may, when the matter comes before it, conclude that oral evidence is unnecessary. They say nothing, however, about who pays the wasted preparation costs when oral evidence is dispensed with.
- [20] The authorities do not support the proposition that a litigant who has obtained an order for oral evidence, participated in the case management for that evidence, and brought matters to the door of the hearing can then, on the day of the hearing, abandon the exercise without consequence. As *Wallach* itself acknowledges, the discretion to decide the matter on the papers is to be exercised to avoid "wholly unnecessary costs and ... wholly unnecessary delay". The avoidance of costs is not the same as their reallocation, and the discretion to truncate proceedings says nothing about who must bear the costs already incurred.
- [21] If the applicant's view, on 28 April 2026, was that oral evidence was unnecessary, that view ought, on his own logic, to have been formed earlier. The

materials on which he relied support that view. The first respondent's continued presence at the rehabilitation center, the safeguards likely to attend his discharge, and the legal objection concerning the second respondent's status, were available well before 28 April 2026. Some of them were available from 11 March 2026 itself. None required any new factual development. The applicant offers no explanation for why these contentions were withheld until the day the experts assembled at court.

The legal objection concerning the second respondent

- [22] The applicant's third contention is that the second respondent has not been declared an interested person under section 23 of the Children's Act and that the order placing L[...] in his primary care could not lawfully have been made. He submits that this is an answer to the question of liability for the preparation costs, because once the legal objection is taken, the enquiry collapses and the costs incurred in preparing for it ought not to be visited on the party that took the objection.
- [23] The application has been withdrawn, and I am not asked to decide the legal question. I express no view upon it. Even assuming, without deciding, that the legal objection has merit, it does not alter the causation analysis for cost purposes.
- [24] First, if the legal objection were the answer the applicant now contends it is, it would have been an answer available from the moment the second respondent's role was first discussed in March 2026. What is clear is that it is not a point that came into existence late or that depended on developments after 11 March 2026. It could have been taken at the outset. It was not. The applicant participated in case management on the footing that interim arrangements involving the second respondent were appropriate. He proposed, in the Joint Case Management

Report of 9 April 2026, ways in which contact should be apportioned between himself and the second respondent. He raised no objection to the children's continuing to reside primarily with the second respondent. The objection emerged only at the hearing of the matter, after the respondents' preparation costs had been incurred.

- [25] Second, even if the legal objection were sound, it would not retrospectively render improper the preparation undertaken by the respondents in reliance on the case management process to which the applicant had committed himself. Costs in our law are not allocated solely by reference to the ultimate legal merits of a withdrawn proceeding, but by reference to who caused the work to be done. Here, the applicant caused that work to be done. The fact that he might, had the matter proceeded, have ultimately persuaded me to dispose of it on a legal point does not absolve him of liability for the costs incurred in preparation for the abandoned hearing.

The applicant's own prayer for costs

- [26] In paragraph 197 of his heads of argument dated 30 March 2026, the applicant sought an order that the respondents pay the costs of the March 2026 application, including the costs of two counsel on Scale C. He cannot, having sought costs on the most generous basis if successful, fairly be heard to argue that costs should lie where they fall when the prayer is reversed by his withdrawal.
- [27] That is not, of itself, a basis for awarding costs against the applicant. It is, however, a useful check on the proportionality of what the respondents now seek. They seek the same order, on the converse footing, that the applicant himself sought. There is nothing exceptional or punitive in that prayer.

Whether costs should be reserved for the trial court

- [28] Counsel for the applicant submitted at the hearing that the costs of this application should be reserved for determination by the trial court. I decline to

reserve. The application is discrete and can fairly be determined now. The trial court will be no better placed, and probably worse, to allocate the costs of an interlocutory enquiry that took place over a six-to-eight-week period in early 2026 and concerned a moment in time that will, by the date of trial, be substantially behind the parties. There is no reason to defer.

Scale, counsel, and qualifying expenses

[29] Counsel appeared to accept, consistent with earlier orders in this matter, that costs should be granted on Scale C and for two counsel where so employed. The matter, while occupying a relatively short period in the calendar, was complex and voluminous, and was tightly argued on both sides. Scale C and two counsel are thus appropriate.

[30] The respondents seek qualifying expenses for three experts: Mr Altman, Mr Dowdall and Dr Thompson. Mr Altman and Mr Dowdall attended court on 28 April 2026, prepared to testify, and both had consulted extensively with the respondents in preparation. Dr Thompson, although not in attendance at court, was consulted in connection with the matters to be canvassed at the hearing. The qualifying expenses of these three experts are properly included in the respondents' costs in the application. They were incurred in response to the case management directions and would not have been incurred but for the applicant's continued participation in the process.

Concluding observations

[31] I accept that the application of 10 March 2026 was launched in response to a genuine welfare concern. The disclosure of the first respondent's drug use was a serious matter, and the applicant's initial impulse to bring it before the court was understandable. Nothing in this judgment should be read as denying the seriousness of that concern or the legitimacy of bringing it to the court's attention. Nor does the order I make pass judgment on the substance of the legal point raised by the applicant on 28 April 2026. He may yet be vindicated on that point

at the trial of the action, or in some other proceeding properly framed for its determination. The question presently before me is a different one: who bears the cost of the work done in preparation for an enquiry initiated by the applicant and then abandoned? For the reasons set out above, that cost must, in my view, be borne by the applicant.

Order

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

1. The applicant is ordered to pay the respondents' costs of the March 2026 application incurred after 11 March 2026, save for the costs of 10 and 11 March 2026 which are governed by paragraph 4 of the order made on 11 March 2026.
2. Such costs shall be taxed on Scale C and shall include:
 - 2.1 the costs of two counsel where so employed;
 - 2.2 the qualifying expenses of Mr Bernard Altman, Mr Terence Dowdall and Dr Glyde Thompson; and
 - 2.3 the costs of the appearances on 8 April 2026, 28 April 2026 and 6 May 2026.

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