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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 to pay the costs of the application and of the counter-application heard on 2 December 2025, such costs to be taxed on Scale C and to include the costs of two counsel where so employed.
 2. For the avoidance of doubt, this order does not extend to the costs of the postponement application, which were disposed of by paragraph 1 of the order of 2 December 2025.
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JUDGMENT ON COSTS

FRANCIS, J:

Introduction

- [1] This is one of three cost judgments arising from the litigation between the parties. The other two concerns the costs of the applicant's section 18 application for suspension of paragraph 4.1.1 of the order of 2 December 2025, pending appeal, and the costs of the urgent application of 10 March 2026 relating to the first respondent's drug use and interim care and contact. The three judgments deal with discrete events, governed by their own considerations. This judgment, the most substantial of the three, concerns the application and counter-application heard on 2 December 2025 and determined on their merits.

- [2] On 2 December 2025, following argument, I made an order which (i) refused the applicant's application for the postponement of certain of the relief sought in the respondents' counter-application; (ii) regulated holiday contact between the applicant and the children, W[...] and L[...], during the December 2025/January 2026 school holiday; (iii) put in place an interim regime governing the applicant's contact with each child during term time, pending finalisation of the action instituted by the applicant; (iv) granted the social-media interdict and the related restraints sought by the respondents in their counter-application; and (v) directed the applicant to cooperate with the ongoing psychological assessment being conducted by Mr Bernard Altman. My reasons for that order were handed down on 11 February 2026.
- [3] Paragraph 5 of the order of 2 December 2025 reserved all questions of costs in respect of the application and counter-application, including the costs of two counsel. Paragraph 1 of the same order dealt separately with the costs of the postponement application, which were ordered to be paid on Scale C. It is the costs of the application and counter-application, exclusive of the postponement application, that now fall to be determined.
- [4] The applicant contends that there should be no order as to costs. The respondents seek their costs on Scale C, including the costs of two counsel where so employed.

The outcome of the application and counter-application

- [5] Costs ordinarily follow the result. I begin, therefore, with who succeeded and who did not.
- [6] The application sought interim contact arrangements pending finalisation of the action. The applicant sought, in respect of L[...], implementation of the regime recommended in the joint expert minute of July 2024, and, in respect of W[...], contact on a basis that went beyond what his own expert, Ms Pettigrew, had recommended in her report of September 2025. He sought, in addition, a twenty-

day holiday contact with L[...] over the December 2025/January 2026 school holiday and the appointment of a parenting coordinator.

- [7] The order I made did not give the applicant what he sought. In respect of L[...], contact was aligned with that ordered in respect of W[...], rather than reflecting the 6:8 schedule for which the applicant contended. In respect of W[...], the order did not provide for contact every Wednesday and two weekends a month, as the applicant had sought. As to the December 2025/January 2026 school holiday, L[...] had three days alone with the applicant from 4 to 7 December 2025, and both children were with the applicant from 14 to 27 December 2025, being thirteen nights. That was materially different from, and significantly less than, the twenty days alone with L[...] for which the applicant contended.
- [8] The counter-application, by contrast, succeeded in substance. The respondents obtained the social-media interdict, which was a remedy of real importance to them. They obtained an order directing the applicant to cooperate with Mr Altman's ongoing assessment. The contact regime granted accorded in essence with that for which the respondents had contended in their amended counter-application of 26 November 2025. There were differences of detail, in particular as to certain features of holiday contact, but the principal relief which the respondents pressed was granted. That much appears from paragraph 19 of the reasons.
- [9] On the ordinary rule that costs follow the result, the respondents are prima facie entitled to their costs. The applicant must persuade me that some other order is appropriate.

The applicant's submissions

- [10] The applicant's case rests on three propositions. First, that he was seeking no more than the regime agreed in the joint expert minute of July 2024 and ought not to be penalised for relying on his own expert and on what had previously been common cause. Second, the respondents amended their counter-

application on 26 November 2025, thereby abandoning aspects of the relief originally sought. Third, that in matters concerning children costs ought not, as a matter of principle, to follow the result (see, *JJ v RV* (5832/2019) [2020] ZAFSHC 226). I deal with each in turn.

The reliance on the July 2024 joint expert minute

- [11] The first submission overstates the position. The relief sought at the December 2025 hearing was not coterminous with the regime agreed in the July 2024 joint minute. In respect of W[...], the applicant's amended Notice of Motion of September 2025 and Ms Pettigrew's report of the same month proposed contact in line with the joint minute. But in his supplementary affidavit of 7 November 2025, the applicant pressed for more: additional weekend contact and contact every Wednesday rather than every alternate Wednesday. The respondents' counsel drew attention to this in argument. Ms Pettigrew's report did not support the wider contact ultimately sought.
- [12] In respect of L[...], the July 2024 joint minute had been overtaken by events by the time of the December 2025 hearing. Four further expert reports had since been filed. Reports were filed by Mr Dowdall, Mr Altman and Ms Pettigrew of September 2025, and the Family Advocate's of 18 November 2025, which incorporated the Family Counsellor's report of 8 November 2025. The respondents and their experts contended for the alignment of the children's contact regimes. The Family Counsellor's recommendations as to holiday contact bore little resemblance to what the applicant sought. A court is not bound to give effect to a joint minute that is fifteen months old when considerably more recent and broader expert material is before it.
- [13] The applicant's reliance on the July 2024 minute, therefore, does not displace the ordinary rule. He was not inviting the court to give effect to an agreed expert position. Instead, he was inviting the court to depart from a more recent body of expert and Family Advocate material, much of which did not support his case.

That was a course open to him, but a course taken at the risk of an adverse costs order.

The amendment of the counter-application

- [14] The second submission overlooks the chronology. The Family Advocate's report became available only on 18 November 2025. The respondents amended their counter-application within eight days. The amendment did not represent the abandonment of any position pursued at the hearing. It brought the relief sought into line with the most recent expert material. That is not capitulation but the proper response of a litigant to the evidence.
- [15] In any event, the relief sought succeeded in substance. The applicant's submission would have force only if he had succeeded on those issues on which the respondents had moved. He did not. The core of the order — the alignment of the children's term-time arrangements — was what the respondents sought and obtained.
- [16] The applicant also submitted that no counter-application was necessary, the respondents being able to advance their proposals regarding contact within the application itself. That is wrong. The social-media interdict and the order requiring cooperation with Mr Altman were substantive remedies which could not have been granted otherwise than on a discrete claim. They were not collateral observations capable of being grafted onto the applicant's contact claim. The counter-application was the proper procedural vehicle, and the relief granted bears this out.

Costs in matters concerning children

- [17] The third submission relies on the principle articulated in *JJ v RV* that the doors of the court must remain open in matters concerning children, and that the ordinary rule as to costs ought not to operate as an obstacle to access to the court in such matters.

- [18] The principle applies in its usual form where parents in good faith hold differing views about what serves a child's interests, each acting in what he or she believes to be the child's welfare. It does not, however, immunise litigants in matters concerning children from costs altogether. The court retains a discretion to be exercised with regard to the welfare of the child, but that discretion does not preclude an order for costs. Where one party has succeeded clearly on the merits, and the other has pursued relief at variance with the recommendations of the experts and the Family Advocate, the welfare consideration must be weighed against those facts.
- [19] There is a further consideration. The respondents are the children's parents and were defending the integrity of their parental authority against a third-party section 23 contact application. The *JJ v RV* principle, typically applied to disputes between parents, applies with less direct force in that setting. The respondents were not advancing a parenting plan against an equal in standing. They were defending their parental authority against an outsider. Having incurred the costs of doing so and succeeded, the welfare consideration does not shield the applicant from those costs.

The wasted costs occasioned by the late narrowing of the care claim

- [20] One further matter requires consideration. The agreed order of 11 June 2025 provided that all questions of care and contact in respect of both children would be determined at the hearing. The applicant filed an amended Notice of Motion on 25 September 2025, but it was only in his practice note of 16 October 2025 that he made plain that he was no longer persisted with his care claim, having instituted the action on 29 August 2025. Between 11 June and 16 October 2025, the respondents and their experts, particularly Mr Altman, prepared on the basis that care was in issue.
- [21] Not all that preparation was wasted. Much of it goes to the contact dispute and remains relevant to the action. But the respondents are entitled to point out, as they did in argument, that the applicant's late narrowing of relief occasioned

some duplication of work. I do not rest my costs order on this consideration, which would in any event call for a more detailed assessment than is necessary here. It is, however, a further reason why the ordinary rule should apply, and not the making of no order as to costs.

Punitive costs

[22] The respondents' heads of argument at the December 2025 hearing sought costs on the attorney-client scale. They relied principally on the applicant's conduct during Mr Altman's assessment, his conduct on social media, and the broader course of the litigation. The applicant's heads at the same hearing also sought punitive costs, grounded in allegations of fraud on the court, said to have been committed by the respondents and Mr Dowdall in the proceedings before Lekhuleni J in late 2024.

[23] Punitive costs are not warranted on either side. The litigation was hard-fought and turned on genuine differences as to the children's interests. The applicant's case, although unsuccessful, was not unarguable, and the respondents' opposition was substantial. Nothing in the conduct of either party before the December 2025 hearing rises to the level required to justify a punitive order. The applicant's grave allegations against the respondents and Mr Dowdall, raised in argument and elsewhere, formed no part of my reasons of 11 February 2026 and form no part of this cost's judgment. They may be ventilated at trial, and I express no view on them here.

Whether the costs should be reserved for the trial court

[24] The applicant's counsel submitted that the costs of the December 2025 application should be reserved for determination by the trial court. I do not accept that submission. The application and counter-application were discrete proceedings, fully argued and determined on their merits. The trial court will be concerned with final care and contact on a fresh body of evidence and will be in a markedly worse position than I am now to assess the costs of an interlocutory

hearing held in late 2025. The costs issue is ripe for decision, and the parties are entitled to one.

Scale and number of counsel

[25] The application raised questions of statutory interpretation under the Children's Act, the application of section 23 to non-parental contact, the relationship between contact and parental authority, the social-media restraints sought by the respondents, and the constitutional best-interests standard. The papers were voluminous, and the expert evidence both extensive and divided. Costs on Scale C, including the costs of two counsel where so employed, are appropriate.

Order

[26] I make the following order:

1. The applicant is to pay the costs of the application and of the counter-application heard on 2 December 2025, such costs to be taxed on Scale C and to include the costs of two counsel where so employed.
2. For the avoidance of doubt, this order does not extend to the costs of the postponement application, which were disposed of by paragraph 1 of the order of 2 December 2025.

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