

**REPUBLIC OF SOUTH AFRICA****IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, JOHANNESBURG****CASE NO: 2025-130849**

|                                                                                     |                                 |
|-------------------------------------------------------------------------------------|---------------------------------|
| (1)                                                                                 | REPORTABLE: NO                  |
| (2)                                                                                 | OF INTEREST TO OTHER JUDGES: NO |
| (3)                                                                                 | REVISED.                        |
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| .....                                                                               |                                 |
| F. MARCANDONATOS                                                                    | 21 April 2026                   |

**In the matter between:****H: M. B.****Applicant****and****H: A. G.****Respondent**

***This judgment was handed down electronically by circulation to the parties' and/or the parties' representatives by email and by being uploaded to Case Lines. The date and time for hand-down is deemed to be 10h00 on 21 APRIL 2026***

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## JUDGMENT

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### MARCANDONATOS AJ:

#### INTRODUCTION

- [1] The parties herein have been cited by their full names. The parties have two minor children, each of whom have also been cited with their full names. In the interests of the children and to protect their best interests, I deem it appropriate to follow standard practice and I shall refer to their children, as the minor children, and in respect of the parties themselves, I shall refer to Applicant as “*Dad*” and to Respondent as “*Mom*”.
- [2] *Dad* sought that he be permitted to exercise overseas contact to his two minor children in the United States of America (“*USA*”), born from the previous marriage between *Dad* and *Mom*.
- [3] The extent of the contact sought by *Dad* is set out in his Notice of Motion, on an interim basis and pending the outcome of *Mom’s* appeal to the full bench of the Honourable Court of the Relocation Order and Judgement of the Honourable Justice Liebenberg AJ, dated *6 June 2025*, wherein the Court, *inter alia*, determined the relocation of the minor children to the *USA* to be in their best interests.
- [4] *Mom* opposed the Application, which was enrolled for hearing before me in Open Court on *4 February 2026*.
- [5] After Counsel for *Dad* had addressed this Court, Counsel for *Mom* commenced addressing me.

- [6] As a consequence of indications I gave and questions posed to *Mom's* Counsel, the matter stood down and was settled in accordance with an Agreement, which was made an Order dated *4 February 2026*<sup>1</sup>, resulting in only the question of costs remaining, as the parties could not agree on the costs. The matter concerning costs was argued before me virtually on *10 February 2026*, on the basis that irrespective of the Costs Order to be made, there shall be no costs payable by either party in respect of the virtual hearing on *10 February 2026*<sup>2</sup>.
- [7] In *Dad's* Notice of Motion<sup>3</sup> he seeks, in the event of opposition, *Mom's* Attorney is to pay the costs of the Application *de bonis propriis* alternatively, *Mom* to pay the costs of the Application on the scale as between Attorney and own client.
- [8] *Mom*, who opposed the Application, in her Answering Affidavit<sup>4</sup> sought that *Dad's* Application be dismissed with costs, on the Attorney and client scale, including the costs of Counsel, on Scale C.
- [9] *Dad's* Counsel in argument as well as in his Supplementary Heads of Argument dated *9 February 2026*<sup>5</sup>, did not persist in the cost *de bonis propriis*, only the costs as claimed in the Notice of Motion, alternatively on Scale C, including the costs of Counsel.
- [10] Counsel for *Mom* in his Practice Note dated *17 January 2026*<sup>6</sup>, sought a dismissal of the Application with punitive costs and in his Heads of Arguments dated *17 January 2026*<sup>7</sup>, he seeks that Applicant pay the costs of the Application on a punitive scale, including the costs of Counsel on Scale C and in the draft Order uploaded on *29 January 2026*<sup>8</sup>, seeks an Order that the Application is

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<sup>1</sup> CL017-7 to 017-6

<sup>2</sup> Supra FN 1 – CL017-6 parag 2

<sup>3</sup> CL001-6 Prayer 2

<sup>4</sup> CL004-44

<sup>5</sup> CL013-1-00-parag 14.24

<sup>6</sup> CL007-2-20 – 007-2-24 parag 10

<sup>7</sup> CL015-1 to CL015-15 parag 31

<sup>8</sup> CL020-1 to CL0020-2 Prayer 1

dismissed with costs, on the Attorney and client scale, including the costs of Counsel, on Scale C.

## **SUBMISSIONS BY APPLICANT<sup>9</sup> INCLUDING ORAL SUBMISSIONS IN BRIEF PERTAINING TO COSTS**

- [11] *Dad* contends that the conduct of *Mom*, is such that it warrants a Costs Order against *Mom* on the Attorney and own client scale, having regard to the authorities.
- [12] *Dad* submits that *Mom* deliberately frustrated him from having the minor children holiday in the *USA* so as to prejudice their LPR status in the *USA* and to attempt to alienate them from *Dad*.
- [13] In doing so, *Mom* sought to abuse the process of this Honourable Court and its powers.
- [14] *Mom's* malicious conduct prevented the minor children from holidaying with *Dad* in the *USA* since *Dad* departed South Africa at the end of *October 2024*. Further since that time, *Dad* has only been able to exercise limited in person contact with the minor children in terms of his annual paid leave.
- [15] *Dad* submits that this Court ought to have regard to *Mom's* explicit refusal herself to engage with *Dad* for travel arrangement, as a factor justifying intervention to prevent unreasonable obstruction of *Dad's* rights. This factor is particularly relevant when *Mom* advised *Dad* of the terms upon, which she would permit the minor children to travel to the *USA* (and *Dad* agreed thereto) and then *Mom* reneged thereon.
- [16] *In casu*, there is no basis whereupon *Dad* ought to be deprived of costs. The opposition by *Mom* was completely unreasonable and unfounded and *Mom's* persistence therein has caused *Dad* to have incurred unnecessary costs.

- [17] It is respectfully submitted by *Dad* that he did everything within his power to avoid having to become involved in an Application and that the opposition thereto by *Mom* and the attitude displayed by her generally towards *Dad's* conduct, was completely unreasonable.

#### **SUBMISSIONS BY RESPONDENT<sup>10</sup> INCLUDING ORAL SUBMISSIONS IN BRIEF PERTAINING TO COSTS**

- [18] *Mom* sets out the extensive and prolonged litigation that she had been subjected to by *Dad* and sets out a stratagem of *Dad* to financially out-litigate her, which strategy has led to a substantially indebtedness to her Attorney of Record and submits that she demonstrated the untruths and contradictions in *Dad's* various Affidavits.

- [19] Despite seeking that the minor children holiday in the *USA* from *23 December 2025* until *14 January 2026*, a period of approximately 22 days, *Dad* provides no explanation as to:

- 19.1. how it would be in the minor children's best interests for them to be cared for by a stranger in the approximately 5 days that *Dad* would be compelled to be present at his place of employment; and
- 19.2. the identity of the person who would be caring for the minor children, whilst he is at his place of employment.

- [20] In any event *Dad* had contact in South Africa with the minor children during the *December 2025* and *January 2026* period and will exercise contact with the minor children during *February 2026*, in South Africa.

- [21] In argument, *Mom's* Counsel highlighted that this is a matter involving children and there is no "*winner*" in the matter. He further submitted argument, by relying

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<sup>10</sup>

upon the exchange of correspondence and in particular a letter addressed by Respondent's Attorney dated **30 June 2025**<sup>11</sup> in which he referred to paragraphs 2 and 3 thereof in which it is stated as follows:

- "2. *In respect of Paragraph 4.7 (including the sub-paragraphs thereto) our client has the following suggestion to be made in respect of the proposed written agreement (to be made an Order of Court) between the parties.*
3. *The written Agreement (to be made an Order of Court) should contain the provision that our client be named as Interim Primary Resident Parent pending the outcome of the Relocation Application."*

[22] **Mom's** Counsel referenced this to the Notice of Motion, arguing that in spite of the Tender made by **Mom** and as contained in the aforesaid letter, **Dad** failed (*i.e. neglected*) to seek relief akin to terms of the Tender, Counsel further relying on paragraph 4 of the aforesaid letter wherein it states:

- "4. *In the event that your client is agreeable to the above, same can be included in a written agreement (to be made an Order of Court). Further discussions can be had in order for the agreement to be made an Order of Court in respect of the June-July 2025 school holidays provided that your client is agreeable to the contents of paragraph 3 Supra."*

[23] Counsel referred to **Dad's** Attorney's response to the aforesaid letter dated **1 July 2025**<sup>12</sup>, submitting that in the Heads of Argument filed on **22 October 2025**, it was submitted by **Dad's** Counsel that Applicant was prepared to agree to this additional provision being included in the written agreement to be concluded between the parties<sup>13</sup>, however, this is factually not correct because in the said letter **Dad** wanted additional inclusions in the agreement as referenced in paragraph 4.2 of the aforesaid letter in which it is stated:

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<sup>11</sup> CL022-1 under the folder "Correspondence"

<sup>12</sup> CL022-4 to CL022-5 under the folder "Correspondence"

<sup>13</sup> Applicant's HOA – CL013-24 to CL013-57 parag 5.6

“4.2. *The written agreement is to also provide for our client to exercise holiday contact with the minor children in the USA for the balance of their July 2025 long school holiday, their mid-term break from 3 to 12 October 2025 and their December 2025 long school holiday. In respect of the December 2025 school holiday, our client envisages the minor children spending Christmas with your client. Our client intends to return to South Africa for a short period over Christmas and would like the minor children to return with him to the USA after Christmas for the balance of the holiday. Provision will also need to be made in the agreement for our client to have holiday contact in the USA beyond December 2025, as your client’s Appeal may not have been adjudicated upon by that time.*”

[24] Counsel further referred to paragraph 3 of the same letter arguing that it introduced a new condition not previously included in which it states:

“3. *We are instructed to place on record that our client’s new condition, as set out in paragraph 3(three) of your emails under reply was not previously part of your client’s tender for holiday contact made by your client’s Counsel in Open Court on 22 May 2025. We still await receipt of the transcript of these Court proceedings from yourselves, which transcript your client has to date, refused (unreasonably so) to provide to us.*”

[25] The thrust of **Mom’s** Counsel’s argument therefore being that, in spite of the Tender made by **Mom’s** Attorney as aforesaid, there was no acceptance thereof, nor was this dealt with in the Notice of Motion. Accordingly, there was no improper opposition by **Mom** of this Application and therefore no costs ought to be granted against her, but instead against **Dad** as claimed.

## COURT'S CONSIDERATIONS

- [26] I have difficulty in reconciling the submissions advanced by *Mom's* Counsel from the Bar, with the contents of *Mom's* Answering Affidavit<sup>14</sup>, particularly her responses to the correspondence highlighted above, which were directly addressed in *Dad's* Founding Affidavit<sup>15</sup>. The Answering Affidavit does not sustain the argument now contended for. Had this been a material component of *Mom's* defence to the Application, one would reasonably have expected it to be clearly and unequivocally advanced on Oath. Its emergence only in oral argument and then in the context of costs, strongly suggests that it constitutes no more than an *ex post facto* attempt to mitigate the consequences of an otherwise unsuccessful opposition.
- [27] *Mom's* Counsel's argument as advanced in oral submissions finds no support in the Answering Affidavit. This deficiency is not a matter of emphasis, nuance or elaboration. It concerns a substantive defence which, if genuinely relied upon, ought to have been pleaded in the Affidavit. The belated reliance on this contention, raised for the first time during argument, renders it unpersuasive.
- [28] It is trite that Motion proceedings stand or fall by the Affidavits. Submissions from the Bar cannot be introduced to supplement or replace evidence that was required to be placed before the Court on Oath. Where the Answering Affidavit is silent on a contention later sought to be advanced, *Mom's* Counsel cannot be permitted to advance it from the Bar.
- [29] What is particularly telling is that this contention surfaced not as a genuine defence to the merits of the Application, but only as an afterthought in relation to the question of costs. This further diminishes the weight that can properly be attributed to it.

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<sup>14</sup> Supra FN4

<sup>15</sup> CL006-23 to CL006-27

- [30] Simply put, the Answering Affidavit does not support the argument advanced in oral submissions. Had this been a *bona fide* defence, it would have been raised on Affidavit. It was not.

## THE LAW

- [31] The purpose of an award of costs, is to indemnify a successful party who has incurred expenses in instituting or defending an action<sup>16</sup>.
- [32] In awarding costs, the Court has a discretion to be exercised judicially upon a consideration of the facts in each case and that, in essence, means the decision is a matter of fairness to both sides<sup>17</sup>.
- [33] In leaving the Court with a discretion, the Law contemplates that it should take into consideration the circumstances of each case, carefully weighing the issues in the case, the conduct of the parties and any other circumstances, which may have a bearing on the issues of costs and then make such order as to costs as would be fair and just between the parties.<sup>18</sup>
- [34] The Appellate Division has further stated, that since costs are in the discretion of the Court, it is undesirable to lay down hard and fast rules for the guidance of Courts to which they will be expected to conform in the absence of special circumstances.
- [35] Certain rules exist for the guidance of the Honourable Court.<sup>19</sup>
- [36] The general rule in matters of costs, is that the successful party should be given his costs and this rule should not be departed from, except where there are

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<sup>16</sup> Texas Company (SA) Limited vs Cape Town Municipality, 1926 AD 467 at 488; Van Loggerenberg: Erasmus Superior Court Practice, Vol.2, p.D5-1

<sup>17</sup> Fripp vs Gibbon & Co, 1913 AD 354; Van Loggerenberg Supra, p.D5-6

<sup>18</sup> Fripp vs Gibbon & Co Supra at 363

<sup>19</sup> Van Loggerenberg Supra pp. D5-8 to D5-14

good grounds for doing so, such as misconduct on the part of the successful party or other exceptional circumstances.<sup>20</sup>

[37] Regarding attorney and client costs, it has been said that the Court makes and Order of attorney and client costs, in order to mark its disapproval of the conduct of the losing party.

[38] In **Public Protector vs South African Reserve Bank 2019 (6) SA 253 (CC)** the majority of the Constitutional Court stated<sup>21</sup>:

*“More than 100 years ago, Innes CJ stated the principle that costs on an attorney and client scale are awarded when a Court wishes to mark its disapproval of the conduct of a litigant. Since then, this principle has been endorsed and amplified in a long line of cases and remains applicable. Over the years, Courts have awarded costs on an attorney and client scale to mark their disapproval of fraudulent, dishonest or mala fides (bad faith) conduct vexatious, and conduct that amounts to an abuse of the process of Court.”*

[39] In **Bethell vs Bland & Others 1996 (4) SA (472) (WLD)**, it dealt with a variation of a custody order. On being requested by Counsel for the Applicant to consider the Costs Order it had made in its Judgment in the custody dispute, the Court held as follows:

*“(1) There was no rule that in cases where a variation of a custody order was claimed no order was made to costs. The position was rather that in custody – and access disputes it was frequently, by reason of the circumstances of the case, appropriate not to make an order for costs.<sup>22</sup> Instances where Courts had not made orders as to costs should not be elevated to “rules”. At most, they could be guidelines to the exercise of a judicial discretion. In each case, the facts were crucial.<sup>23</sup>”*

<sup>20</sup> Fripp vs Gibbon & Co Supra at 354; National Home Builders Registration Council vs Xantha Properties 18 (Pty) Ltd, 2019 (5) SA 424 (SCA) at 431E - 432A

<sup>21</sup> Public Protector vs South African Reserve Bank, 2019 (6) SA 253 (CC) at 316C – 319A

<sup>22</sup> 473E, read with 474A-B

<sup>23</sup> At p. 474H

[40] The Honourable Court stated as follows<sup>24</sup>:

*"I consider the correct approach to be:*

1. *Generally speaking, a successful litigant is entitled to his or her costs.*
2. *While it is quite true that a custody dispute should not be seen as an adversarial contest in the ordinary sense but rather as an enquiry into the best interests of the child, it cannot be denied that in most cases the litigants are advancing their own preferences and seeking satisfaction of their love of the child. Often, too the papers contain many attacks on the character and conduct of the opponents.*
3. *On the other hand, it is also a consideration that a party should not be discouraged from putting up a case which he or she, on broadly reasonable grounds, thinks to be in the interest of the child for fear of having costs awarded against him or her if unsuccessful. By the same token, a party who is, on what turned out to be good grounds, confident that his or her case will prevail, should not be discouraged from taken or resisting action because of the costs which he or she will incur.*
4. *However, bona fide and concerned a party may be, if his or her opponent's judgement of the issue prevails, it is not, in the absence of circumstances justifying it, fair that the opponent should be mulcted in his or her own costs."*

## **COURT'S DETERMINATION**

[41] I have had regard to **Mom's** explicit and unequivocal refusal as set out in her Answering Affidavit, to agree to **Dad** exercising contact to the minor children, anywhere other than in the Republic of South Africa.

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<sup>24</sup> At p.475

- [42] In my view, it was justified for *Dad* to have launched the Application. This is particularly so when *Mom* had advised *Dad* of the terms upon which she would permit the minor children to travel to the *USA*, terms which *Dad* accepted, yet which *Mom* thereafter, without justification, failed to honour. Instead of giving effect to her own stated position, *Mom* elected to oppose the Application and persisted in maintaining an inflexible stance that *Dad* could not exercise overseas contact, a stance, which is irreconcilable with the content of her Attorney's letter dated *30 June 2025*.
- [43] Significantly, this purported reliance on that correspondence, was not advanced in her defence on Affidavit, but emerged only belated during oral argument, then in relation to the issue of costs. This conduct underscores the absence of a *bona fide* defence and strongly suggests an attempt, *ex post facto*, to mitigate the consequences of an otherwise unreasonable and unsuccessful opposition.
- [44] In my view, *Mom's* conduct, when before viewed holistically, constitutes conduct, deserving of this Court's marked disapproval. Her opposition to this Application, was not only unfounded and unreasonable, but amounted to an abuse of the process of this Court, with the foreseeable result that *Dad* was put to unnecessary and unavoidable expenses. In weighing the conduct of the parties, as I am enjoined to do, I am satisfied that this matter falls squarely within the category of exceptional circumstances justifying a departure from the ordinary approach to costs in children matters. It is precisely this conduct, which warrants the exercise of my discretion in favour of a punitive costs order.
- [45] In the premise, I find it appropriate that *Mom* ought to pay *Dad's* costs, on a punitive scale.

#### **THE ORDER:**

- [46] Respondent to pay the costs of this Application on the scale as between Attorney and own client, including the costs of Senior Counsel, excluding the costs of argument in respect of this Application and the attendance at Court on *4 February 2026* heard virtually.

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**F. MARCANDONATOS**

Acting Judge of the High Court  
Gauteng Division, Johannesburg

**Heard:** *10 February 2026*

**Judgment:** *21 April 2026*

Appearances

**For Applicant:** Advocate N Haskin SC  
Tel: 083 610 1060  
Email: [haskins@lawcircle.co.za](mailto:haskins@lawcircle.co.za)

**Instructed by:** Kamal Natha  
Attorney at Law  
Tel: 087 813 4718  
Cell: 083 313 3372  
Email: [kamal.natha@klz.co.za](mailto:kamal.natha@klz.co.za) / [support1@klz.co.za](mailto:support1@klz.co.za) /  
[support2@klz.co.za](mailto:support2@klz.co.za)

**For Respondent** Advocate N Riley  
Tel: 082 338 4870  
Email: [fayflood@rsabar.co.za](mailto:fayflood@rsabar.co.za)

**Instructed by:** Bolus Attorneys  
Tel: (010) 020 1893  
Email: [john@bolusattorney.co.za](mailto:john@bolusattorney.co.za)