FAMILY ADVOCATE, CAPE TOWN, AND ANOTHER v EM 2009 (5) SA 420 (C)

Citation	2009 (5) SA 420 (WCC)
Case No	15972/2008
Court	Cape Provincial Division
Judge	Madima AJ
Heard	November 28, 2008
Judgment	November 28, 2008
Annotations	Link to Case Annotations

B

Flynote : Sleutelwoorde

Minor - Abduction - International abduction - Application for return of unlawfully removed or retained child - Defences - Acquiescence - Delay in launching process - Process for return of child launched four months after C removal, after taking legal advice - Delay not inordinate and not amounting to acquiescence - Court obliged to order return of child - Hague Convention on Civil Aspects of International Child Abduction (1980) as incorporated into South African law in terms of Schedule to Hague Convention on Civil Aspects of International Child Abduction Act 72 of 1996, art 13 *(a).*

D **Minor** - Abduction - International abduction - Application for return of unlawfully removed or retained child - Defences - Acquiescence - Consent - Mother removing child from United Kingdom to South Africa - Child subsequently visiting father in UK with grandmother - When grandmother encountering difficulties at passport control points en route to UK, father E writing letter to facilitate safe passage of child and grandmother back to South Africa - Letter not amounting to consent - Hague Convention on Civil Aspects of International Child Abduction (1980) as incorporated into South African law in terms of Schedule to Hague Convention on Civil Aspects of International Child Abduction Act 72 of 1996, art 13 *(a).*

Headnote : Kopnota

F The first applicant (the Family Advocate), in her representative capacity as the designated and delegated Central Authority for the Republic of South Africa in terms of s 3 of the Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996, applied in the High Court, in terms of the Hague Convention on the Civil Aspects of International Child Abduction (1980), as incorporated into South African law, for an G order directing, inter alia, the immediate return of the minor child, M, to the United Kingdom. M was born in the UK in December 2004 to the respondent (her mother) and second applicant (her father). She was habitually resident with her parents in the UK until she and the respondent travelled to South Africa on holiday in September 2007. After remaining in South Africa for a few weeks, the respondent informed the second applicant H that she and M would not be returning to the UK, but would be remaining permanently in South Africa. A month later, M was accompanied by her maternal grandmother to visit the second applicant in the UK. When travelling they experienced difficulties at various passport control points and, at the request of his mother-in-law, the second applicant wrote a letter to facilitate easy travel for them

back to South Africa. The letter was dated I 4 December 2007 and addressed 'to whom it may concern', and read that 'I . . ., father of [M], has given permission for my mother-in-law . . . to accompany my daughter to Cape Town . . . . Please grant them safe passage.' The respondent resisted the application on the grounds that, in terms of art 13 *(a)* of the Convention, the second applicant had consented to and/or, by his subsequent conduct, acquiesced in the removal and/or J retention of M. The respondent relied on the second applicant's letter of

4 December 2007, as well as his alleged inaction between the time when he A was informed by the respondent that she and M would not be returning to the UK, in October 2007, and February 2008. The second applicant submitted that he had consulted a solicitor and barrister between October 2007 and February 2008 and, once he had been given legal advice on the matter, the present proceedings had been launched, on 2 October 2008.

Held , that the onus was on the party resisting the application for the summary B return of a child under the Convention to establish one or other of the defences referred to in arts 13 *(a)* and 13 *(b).* (Paragraph [17] at 425A - B.)

Held , further, that there was nothing in the second applicant's letter of 4 December 2007 that suggested it was intended to grant consent for M to be permanently removed from the UK or for her permanent retention in South Africa by the respondent. It merely facilitated easy passage for an adult C travelling with a minor child who bore a different surname from the adult. (Paragraph [31] at 427D.)

Held , further, that acquiescence was a question of the actual subjective intention of the wronged parent. Before the wronged parent could be found to have acquiesced in the unlawful removal or retention of the child, the evidence of acquiescence had to be 'clear and unqualified'. (Paragraphs [36] and D [39] at 428C and 429D - E.)

Held , further, that there was nothing to suggest any laxity on the second applicant's part between October 2007 and February 2008 that could be interpreted as acquiescence in the removal and retention of M. His delay was not inordinate. On the contrary, it was impressive that he had been able to bring the proceedings within four months of being informed by the E respondent of her intention to remove M from the UK permanently and to retain her in South Africa. The slackness attributed to the second applicant by the respondent lacked merit and, consequently, it was the court's finding that he had not by his conduct consented to or acquiesced in M's removal and/or retention. (Paragraph [41] at 429G - J.)

Held , further, that there was no doubt that the delay envisaged by art 12 was not F applicable in the present case. The respondent removed and retained M on 26 October 2007. The present application was launched on 2 October 2008. The matter therefore fell within the mandatory provisions of art 12 which provided that, where a period of less than one year had elapsed from the date of the wrongful retention to the date of the commencement of the proceedings before the judicial or administrative authority of the G Contracting State, the authority concerned 'shall' order the return of the child forthwith. In the circumstances, M was wrongfully removed and retained by the respondent and the application in terms of the Convention had to succeed. (Paragraphs [45] - [46] at 430F - G/H.)

Cases Considered

Annotations H

Reported cases

Southern Africa

Central Authority v H 2008 (1) SA 49 (SCA) : referred to

Senior Family Advocate, Cape Town, and Another v Houtman 2004 (6) SA 274 (C) : dictum in para [7] applied I

Smith v Smith 2001 (3) SA 845 (SCA) ([2001] 3 All SA 146): dicta at 850J and 851A - B applied.

Foreign

Australia

Police Commissioner of South Australia v Temple (No 1) (1993) FLC 92 - 365: applied. J

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A England

Re H and Others (Minors) (Abduction: Acquiescence) [1997] 2 All ER 225 (HL): applied.

United States of America

B *Friedrich v Friedrich* 78 F 3d 1060 (6th Cir 1996): referred to.

Statutes Considered

Statutes

The Hague Convention on Civil Aspects of International Child Abduction Act 72 of 1996: see *Juta's Statutes of South Africa 2008/9* vol 7 at 4-118.

Case Information

C Application for the summary return of a child to the United Kingdom in terms of art 12 of the Hague Convention on the Civil Aspects of International Child Abduction (1980). The facts appear from the reasons for judgment.

Cur adv vult .

D *Postea* (November 28).

Judgment

Madima AJ:

E Introduction

[1] This sad case concerns a little girl called M who was born on 26 December 2004 in the district of Torbay in the United Kingdom of Great Britain. M was brought to the Republic of South Africa by her mother, the respondent, whose marriage to her father, the second applicant, was in some sort of trouble. Both M and her mother are F currently in the Western Cape, South Africa.

[2] The instant application is brought in terms of the Hague Convention on the Civil Aspects of International Child Abduction (1980) (the Convention), as incorporated into South African law by the Hague Convention on the Civil Aspects of International Child Abduction Act G 72 of 1996 (the Act), for an order directing, inter alia, the immediate return of M to the United Kingdom.

[3] The first applicant is the Family Advocate who brings this application in her representative capacity as the designated and delegated Central Authority for the Republic of South Africa in terms of s 3 of the H Act. The second applicant is a United Kingdom national and the biological father of M, the subject of this application.

[4] The respondent is the biological mother of M, a South African, currently resident in Paarl, Western Cape, Republic of South Africa (South Africa). Second applicant and respondent were married to each I other on 25 November 2000 at Porterville, Western Cape, South Africa.

[5] As already stated above, M was born in the United Kingdom on 26 December 2004. The family lived together in the United Kingdom until September 2007 when respondent and M travelled to South Africa to spend the holidays with respondent's family. Return air tickets were J purchased as respondent and M would be returning to the United

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Kingdom after the holidays in South Africa. All these arrangements were A done with the consent of second applicant.

[6] Some several weeks into her stay in South Africa, respondent indicated to second applicant that she intended to remain in South Africa permanently with M and would therefore not be returning to the United Kingdom. I need to emphasise that respondent neither sought B nor obtained second applicant's consent in this regard, that is, that M would not be returning to the United Kingdom. Second applicant was merely informed to that effect.

[7] However, a month later, on or about 27 November 2007, M travelled to the United Kingdom together with her grandmother (Mrs H) to pay C second applicant a visit for two weeks. M and her grandmother returned to South Africa on 6 December 2007. Prior to their return to South Africa, Mrs H informed second applicant that she had experienced difficulties at various passport control points when she was travelling into the United Kingdom with M. At her request, second applicant wrote the following letter dated 4 December 2007 (the letter of 4 December 2007) D to facilitate easy travel for both Mrs H and M:

'To whom it may concern

I KM, father of M, has given permission for my mother-in-law, RH to accompany my daughter to Cape Town on 6 December 2007. E

Please grant them safe passage.

Please do not hesitate to contact me for any assistance.

Yours Faithfully'

[8] The letter of 4 December 2007 was duly signed by second applicant. M has been in South Africa since then. F

Applicants and respondent's respective cases

[9] The gist of applicants' case on the one hand is that M's removal from the United Kingdom and her retention in South Africa by respondent is unlawful in terms of the Act. Second applicant in particular seeks that M be returned to the United Kingdom where she was habitually resident G before her unlawful removal and retention. The respondent, on the other, relies on the provisions of art 13 *(a)* of the Act relating, inter alia, to consent and/or acquiescence in the said removal and/or retention of M.

Relevant provisions of the Hague Convention H

[10] The Act aims to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access. (See preamble to the Act.) I

[11] Further, to *(a)* secure the prompt return of the children wrongfully removed to, or retained in, any Contracting State; and *(b)* ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States. (See art 1 of the Act.) J

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A [12] Article 3 of the Act provides instances where the removal or the retention of a child is to be considered wrongful. It is, for example, wrongful where -

'(a) it is in breach of rights of custody attributed to a person, . . . either jointly or alone, under the law of the State in which the child was B habitually resident immediately before the removal or retention; and

(b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.'

C [13] Article 12 provides for the remedy of return where there has been a wrongful removal or retention. It is stated in the provision that:

'Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the D date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.'

[14] Article 13 provides that:

'Notwithstanding the provisions of the preceding Article, the judicial or E administrative authority of the requested State is not bound to order the return of the child if the person . . . [who] opposes its return establishes that -

(a) the person . . . having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had *consented to or subsequently acquiesced* in the removal or retention; or

F *(b)* there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.' [Own emphasis.]

[15] Article 14 provides that:

G 'In ascertaining whether there has been wrongful removal or retention within the meaning of Article 3, the judicial or administrative authorities of the requested State may take notice directly of the law of . . . the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable.'

H Onus of proof

[16] Our courts have laid down the following requirements for an applicant who wishes to secure the return of a child in terms of the Act:

(a) That the child was *habitually residing* in the requesting State I immediately before the removal or retention;

(b) That the *removal or retention was wrongful* in that it constituted a breach of custody rights by operation of law of the requesting State;

(c) That the *applicant was actually exercising those rights at the time of the wrongful removal or retention* and would *have so exercised such rights but for the removal or retention* (art 3 *(b)*). (See *Senior Family Advocate,* J *Cape Town, and Another v Houtman* 2004 (6) SA 274 (C) at para 7.)

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[17] The question of onus was settled in *Smith v Smith* A 2001 (3) SA 845 (SCA) ([2001] 3 All SA 146) at 850J where Scott JA held, inter alia, that:

'(A) party seeking the return of a child under the Convention is obliged to establish that the child was habitually resident in the country from which it was removed immediately before the removal or retention and that the removal or retention was otherwise wrongful in terms of B article 3. Once this has been established the *onus* is upon a party resisting the order to establish one or other of the defences referred to in article 13 *(a)* and *(b)* or that the circumstances are such that a refusal would be justified having regard to the provisions of article 20.'

[18] The learned judge went further and stated that:

'If the requirements of article 13 *(a)* or *(b)* are satisfied, the *judicial or* C *administrative authority [in the country to which or in which the child was removed or is being retained] may still in the exercise of its discretion order the return of the child.* ' (At 851A - B.) [Own emphasis.]

Matters of common cause

[19] It appears from the papers before me that the following issues are D not in dispute, namely that -

(a) immediately prior to her removal, M's habitual place of residence was the United Kingdom;

(b) both second applicant and respondent jointly have parental responsibilities in respect of M in terms of s 2(1) of the Children's Act of E 1989;

(c) second applicant, at the time of the removal and/or retention of M, exercised his parental responsibilities over M.

Issues in dispute F

[20] The following matters are, however, in dispute -

(a) whether M's removal to or retention in South Africa was wrongful;

(b) whether second applicant consented to or acquiesced in M's removal;

(c) whether, due to the delay in the bringing of the instant application, the application falls outside of the requirements of the Act and falls G to be dismissed;

(d) whether there has been compliance with rule 63 of the Uniform rules with regard to the affidavits of second applicant; and

(e) whether respondent is entitled to costs *de bonis propriis* against first applicant. H

[21] I believe that it is important at this stage to revisit the facts of this case in order to deal effectively with the issues in dispute between the parties. I need to state that there were two *in limine* points that were raised by respondent in its papers. I must say that, after submissions by counsel for applicants, both points were wisely abandoned by respondent, and correctly so. I

[22] I now deal with the issues that are in dispute between the parties.

Wrongful removal and/or retention

[23] The question is whether or not the removal from the United Kingdom or retention in South Africa of M by respondent was unlawful. J

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A The answer to this question can be found squarely within the provisions of art 3 of the Act. I repeat here what art 3 provides, for the sake of easy reading. The removal or retention of a child is wrongful where -

'(a) it is in breach of rights of custody attributed to a person . . . , either jointly or alone, under the law of the State in which the child was B habitually resident immediately before the removal or retention; and

(b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.'

C [24] The question that begs to be answered is: was second applicant exercising his custody rights over M either jointly or alone at the time of the removal or the retention or would have been exercising them but for the removal or retention, and, secondly, were those rights breached?

[25] I have no hesitation in finding that second applicant's joint right(s) D of custody were breached under the laws of the country where M was habitually resident before her removal or retention, as well as that second applicant, at the time of the removal or retention, was actually exercising those rights jointly with respondent. What is paramount, in my view, is the intention of the *removing and/or retention* spouse. What is equally of E importance is the state of mind of the second applicant.

[26] The respondent's state of mind in this regard is not disputed. She communicated same to second applicant in October of 2007 when she said she would not be coming back to the United Kingdom. It is second F applicant's state of mind that is examined with relation to the removal and/or retention of M. It is the second applicant's art 3 rights that were breached when respondent communicated to him that she would not be coming back to the United Kingdom, but intended settling permanently in South Africa with M. That was the defining moment. Second G applicant had not given his consent.

[27] There is no doubt that the removal and retention is unlawful. The fact that respondent has allowed M to travel to the United Kingdom to visit second applicant and in turn the fact that second applicant has allowed M to return to respondent during the period November and December 2007, respectively, should not distract us from the fact that H respondent's intention was to permanently remove M from the United Kingdom and/or to permanently retain M in South Africa.

Consent and/or acquiescence

I [28] Respondent bases her opposition to this application broadly on two grounds, namely that second applicant *consented* to both the removal and retention; alternatively, that by his subsequent conduct, he acquiesced therein and thereby caused respondent to reasonably believe that second applicant consented to M's retention. Respondent relies, inter alia, on the letter of 4 December 2007 in this regard. In her heads of argument J filed before this court, her legal representative submitted that:

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'The second applicant's letter dated 4 December 2007, the contents of A which he personally formulated and signed, not only states his express consent to M's return, but puts his blessing on her safe return to the RSA. This express consent was given before commencing with this application.'

[29] Respondent's legal representative went further and submitted that B there could be no better proof of second applicant's consent to M's retention in the RSA than from said letter of 4 December 2007. It was further argued that, had second applicant intended otherwise, he could have inserted wording in the letter that qualified his consent or otherwise noted certain conditions to giving his consent.

[30] Counsel for applicants, for her part, contended that the letter of C 4 December 2007 says no more than it states, namely the facilitation of easy passage for M and her grandmother.

[31] I have gone over the letter of 4 December 2007 several times. I can find nothing which suggests that the letter was intended to grant consent for M to be permanently removed from the United Kingdom or for her D permanent retention in South Africa by respondent. What I have found is a letter that facilitates easy passage for an adult travelling with a minor child who bears a different surname to the adult. I am surprised at neither the difficulties that M's grandmother allegedly encountered when going through customs nor the request by M's grandmother that second applicant provide them with such letter of comfort or of easy passage. E This is because such problems are common, what with child-trafficking and indeed abductions specifically catered for by the Act. It is also telling that the letter is addressed to no one in particular, but to anyone who cared to know the circumstances of the two travellers.

[32] Respondent further submitted through her legal representative that F second applicant's actions or lack thereof, and more especially second applicant's general behaviour regarding this matter, also clearly indicates his consent to or acquiescence in M's retention.

[33] Second applicant, according to the submissions, instituted no action immediately after being informed by respondent that she would G not be coming back to the United Kingdom, to secure the return of M. He did not object unequivocally or protest to respondent. He made arrangements with respondent for M's visit to the UK. He took no action during M's

visit to secure her continued presence in UK between November and December 2007. He did not object or protest to his H mother-in-law when she visited with M. Heavy reliance was placed on what was allegedly not done by second applicant between the periods October 2007 and February 2008.

[34] Second applicant submitted through his counsel that he had indeed consented to M travelling to South Africa with respondent in September I of 2007 for a visit. Both M and respondent would be coming back to the United Kingdom at the end of their holiday. Both M and respondent had purchased return tickets. Second applicant was shocked when a month later, in October 2007, respondent informed him that she would not be returning to the United Kingdom but would be remaining permanently in South Africa with M. J

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A [35] Counsel for applicants submitted that the marriage between second applicant and respondent was undergoing challenges and that they had been to a marriage counsellor. Second applicant always was hopeful that their marriage could be salvaged somehow. That is the reason second applicant allowed M to go to South Africa in September 2007, and again B in December 2007 accompanied by her grandmother. It was also submitted that respondent had also made an undertaking that she would never take M away from him.

[36] It is this conduct between the parties that respondent now relies on as acquiescence that led her to believe that second applicant had now C consented to the removal and/or retention of M. The courts have held that, for a parent to acquiesce in the unlawful removal or retention of a child, within art 13, the evidence of the acquiescence 'must be clear and unqualified'. (See *Police Commissioner of South Australia v Temple (No 1)* (1993) FLC 92 - 365, quoted from Jeremy D Morley *Acquiescence or Consent, Hague Convention on International Child Abduction, Acquiescence* D *and Consent.*)

[37] Referring further to the concept of acquiescence, other courts in foreign jurisdictions have held that:

'Acquiescence under the Convention requires either an act or statement with the requisite formalities such as testimony in a judicial proceeding, E a convincing written renunciation of rights or a consistent attitude of acquiescence over a significant period of time.'

(See *Friedrich v Friedrich* 78 F 3d 1060 (6th Cir 1996), quoted from Jeremy D Morley *Acquiescence or Consent, Hague Convention on International* F *Child Abduction, Acquiescence and Consent* .)

[38] In the United Kingdom the House of Lords held that the burden is strongly on the parent who has removed a child to establish consent by the other parent. The Law Lords held that:

'Where the words or actions of the wronged parent clearly and G unequivocally show and have led the other parent to believe that the wronged parent is not asserting or going to assert his right to the summary return of the child and are inconsistent with such return, justice requires that the wronged parent be held to have acquiesced.'

(Quoted from Jeremy D Morley *Acquiescence or Consent, Hague Convention* H *on International Child Abduction, Acquiescence and Consent.*)

In *Re H and Others (Minors) (Abduction: Acquiescence)* [1997] 2 All ER 225 (HL) Lord Browne-Wilkinson considered that art 13 looked to the *subjective state of mind of the wronged parent* , and that accordingly the true inquiry was simply whether he had in fact

consented to the continued I presence of the child in the jurisdiction to which the child had been removed or had been retained. The Law Lord went on and said:
'In my judgment, therefore, in the ordinary case the court has to determine whether in all the circumstances of the case the wronged parent has, in fact, gone along with the wrongful abduction. Acquiescence is a question of the actual subjective intention of the wronged J parent, not of the outside world's perception of his intentions.

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In the process of this fact-finding operation, the Judge, as a matter of A ordinary judicial common sense, is likely to attach more weight to the express words or conduct of the wronged parent than to his subsequent evidence as to his state of mind. In reaching conclusions of fact, Judges always, and rightly, pay more attention to outward conduct than to possibly self-serving evidence of undisclosed intentions. But in so doing the Judge is finding the actual facts. He can infer the actual subjective B intention from the outward and visible acts of the wronged parent. That is quite a different matter from imputing to the wronged parent an intention which he did not, in fact, possess.
Although each case will depend on its own circumstances, I would suggest judges should be slow to infer an intention to acquiesce from C attempts by the wronged party to effect reconciliation or to reach an agreed voluntary return of the abducted child. Attempts to produce a resolution of problems by negotiation or through religious or other advisers do not, to my mind normally connote an intention to accept the *status quo* if those attempts fail.'

[39] The Law Lord concluded that - D
'the issue of consent is a very important matter [that] . . . needs to be proved on the balance of probabilities, but the evidence in support of it needs to be clear and cogent [because] . . . (i)f the court is left uncertain, then the defence under art 13 *(a)* fails [and] it is furthermore obvious that consent must be real[,] . . . positive and . . . E unequivocal'.

Delay in instituting proceedings and acquiescence

[40] I now examine second applicant's conduct between the period October 2007 and February 2008. Respondent seems to suggest that F second applicant did not do much or anything after she had told him that she was not coming back to the United Kingdom and intended to settle permanently in South Africa with M. Submissions were made that second applicant was shocked at the realisation that his wife was indeed leaving him and that his daughter was also to resettle in South Africa.

[41] Second applicant submitted through his counsel that he consulted G a solicitor and barrister between October 2007 and February 2008 and, once he had been given legal advice on the matter, the instant process and proceedings were launched. I must say that I find nothing that suggests any slackness on second applicant's part in this regard that can be interpreted as acquiescence in the removal and retention of M. I do H not find the delay inordinate. On the contrary, I am impressed that second applicant was able to bring these proceedings inside a period of four months, since he was informed by respondent of her intention to permanently remove M from the United Kingdom and to retain her in South Africa. I have also come to appreciate the time that it takes to get I urgent matters such as the instant proceedings on the roll of our court system. I find it is reasonable in the circumstance for a person in second applicant's place to seek and obtain legal advice in the manner he did. I therefore find that the slackness attributed to second applicant by respondent lacks merit, and consequently second applicant did not consent or acquiescence in M's removal and/or retention by his conduct. J

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A [42] I now deal with the disputed issue of delay in launching the proceedings. Article 12 of the Act makes provision that:

'Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State B where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, *the authority concerned shall order the return of the child forthwith* .' [Own emphasis.]

[43] The Article goes on and condones such compliance and states that judicial or administrative authorities shall still order the return of the child, unless it is determined that the child is now settled in its new C environment.

[44] In the recent case of *Central Authority v H* 2008 (1) SA 49 (SCA) , the SCA ordered the return of a 5-year-old boy who had been wrongfully retained by his mother in the RSA since he was 2 years old. Some three D and a half years had elapsed since the wrongful retention of the child in the RSA. The child was now 5 years old, and had spent most of his young life in the RSA. The court found that, in the circumstances, the retention of the child in the RSA was wrongful: there was no evidence that the delay had been such that the return of the child to the Netherlands would place him in an intolerable position. The court stated further that E it was also significant that the present circumstances were caused by the mother's unlawful conduct in retaining the child in the RSA and systemic delays which could not be attributed to the father.

[45] There is no doubt that the delay envisaged by art 12 is not applicable in the case before me. Respondent removed and retained F M on 26 October 2007. This application was launched on 2 October 2008. The matter therefore falls within the mandatory provisions of art 12, which provides that, where a period of less than one year has elapsed from the date of the wrongful retention to the date of the commencement of the proceedings before the judicial or administrative authority of G the contracting State, the authority concerned shall order the return of the child forthwith.

[46] In the circumstances I find that M was wrongfully removed and retained by respondent and the application in terms of the Act succeeds.

H Costs

[47] I am faced with a situation where the marriage between second applicant and respondent still subsists and I am loath to make a costs order, as its effect would be akin to a costs order against oneself. The fact that divorce proceedings are pending between the parties is important I and I have taken cognisance of the fact that they are still husband and wife. In these circumstances, I think it is fair that I make no order as to costs.

[48] In the result I make the following order:

[49] That M be returned forthwith, subject to the terms of this order, to J the jurisdiction of the United Kingdom (the UK) in accordance with the

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provisions of art 12 of the Schedule to the Hague Convention on the A Civil Aspects of International Child Abduction Act 72 of 1996 ('the Hague Convention Act').

[50] That second applicant, or his appointee, be granted leave and authorisation insofar as same may be necessary, to remove the child from the Republic of South Africa ('the RSA')

and to accompany her back to B the UK, being the minor child's country of habitual residence, together with the respondent in the event of her electing to return to the UK.

[51] That second applicant shall, within 14 days of the date of this order, launch proceedings and pursue them with diligence to obtain, from the appropriate judicial authority in the UK, an order that, until otherwise C ordered by the appropriate court in the UK:

(a) The second applicant is ordered to arrange and to pay for suitable accommodation for the minor child and the respondent, should she elect to return to the UK with the minor child. The second applicant shall provide proof to the satisfaction of the first D applicant prior to the departure of the minor child and the respondent, should she elect to return to the UK with the minor child, of the nature and location of such accommodation and that such accommodation is available to the minor child and the respondent immediately upon their arrival in the UK.

(b) The second applicant is ordered to pay, for the minor child and E the respondent should she elect to return to the UK with the child, maintenance in such amount as may reasonably be required for their maintenance and upkeep, and failing agreement between them in this regard, such amount as may be ordered by the appropriate authority responsible for such matters in the UK. F

(c) The second applicant is ordered to pay any medical expenses reasonably incurred by the respondent in respect of the minor child.

(d) The second applicant is granted reasonable access to the minor child.

[52] First applicant is directed to seek the assistance of the UK Central G Authority in order to ensure that the terms of this order are complied with as soon as possible.

[53] A copy of this order shall forthwith be transmitted by the first applicant to the UK Central Authority.

[54] There shall be no order as to costs. H

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