REPORTABLE
IN THE NORTH GAUTENG HIGH COURT

PRETORIA (REPUBLIC OF SOUTH AFRICA)

Case number: 12856/2010

Date: 10/11/2010

In the matter between:
THE CENTRAL AUTHORITY Applicant

(THE REPUBLIC CF SOUTH AFRICA)

and
MARGI REYNDERS (born JONES) Respondent

L S Intervening party

JUDGMENT

FABR ICIUS J:

1. This is **an** application brought by the South African Central Authority, represented by the office of the **Family** Advocate, under the Hague Convention on the Civil Aspects of International Child Abduction, Act 72 of 1996 *(the Act) (the Hague Convention).* An order is sought that the particular minor child, LS *("I")* be returned forthwith to the jurisdiction of Los Angeles, in the United States of America, and into the care of 'her father, Mr GG Speeckaert *("the father).*

2. L is at present in the care of her maternal grandmother in Hoedspruit and at the hearing of this application I ordered that pending my decision and judgment, the child remain there and complete this year's schooling.

3. The Applicant received a request dated 22 October 2009 from the US Department of State, Bureau of Consular Affairs, *Office* of Children's Issues, which is the US Central Authority for the Hague Convention, on behalf of the *father* for the return of his daughter L to the USA pursuant to the provisions of the Convention. The relevant and necessary documents were attached to the founding affidavit, and I will refer to them where necessary. The relevant facts were obtained by the Family Advocate from the father, I will also refer *hereinafter* to an *ex carle* application of 21 August 2009 brought by the child's *maternal* grandmother, and a draft answering affidavit to that application which also contains facts that I will deal with in this judgment.

4. The father and his (then) South African girlfriend, Jacqueline Stein, had a daughter called L who was born in Cape Town on 15 May 2002. Her mother died on 21 September 2007. The father was not married to her, but it is not in dispute that he is in fact the biological father of L. and (he father thereafter decided to *"take responsibility* for his daughter, and took her to Belgium with him during about December 2007. The child was then *"registered"* in Belgium at the father's then *domicile* in Merchtem on 17 January 2008. This is reflected by a so-called *"Composition of the Family"* certificate, which reflects details of the father as having been resident in Belgium since 6 March 2001, his *"girlfriend"* Salas Edurne. resident there since

28 December 2006, and L resident there also since January 2008. It is common cause that the father later married the mentioned Salas. They were married on 3 *January 2009.* The father then *"officially recognised"* his daughter L according to Belgium law on 19 January 2008, and the child then took the surname of her father and was officially *"registered"* as L S. As a parent, the father therefor had parental authority and rights of custody from that day on.

5. The child then attended elementary school in Belgium from January 2008 until June 2008, whereafter she relocated with her father and his current wife, Salas, to Los Angeles USA. She attended an *elementary* school in Los Angeles from September 2008 and completed Grade 1 there. In September 2009 she was due to start at another elementary school, but before that she visited her *maternal* grandmother, the present Respondent, in Hoedspruit during the school holidays, and was supposed to return to Los Angeles on 24 August 2009.

6. The State Attorney has alleged that Los Angeles was the child's habitual place of residence in the USA, and I will deal with that topic hereunder.

7. L has also previously visited her grandmother for a holiday in the RSA and had returned without any problem. This time, however, the Respondent refused to put L on the airplane on 23 August 2003 and, unbeknown to the father, had launched legal proceedings ex parte which resulted in an order granted on 21 August 2003, and therefore two days before the Respondent was to have returned L to her place of residence. The father only received notice of the order by e-mail after it was granted under case number 57277/2009.

8. It is necessary to refer to this *ex parts* order in some *detail:* Applicant sought an order that pending the final outcome of the Family Advocate's investigation and the final determination of Part B of the notice of motion, the full parental rights and responsibilities in respect of L be granted to her which rights would *inter alia* entail that:

8.1. she would be L's primary caregiver;

8.2 L's primary residence would be at her place of residence,

8.3. she would act as L's guardian.

The *"matter'* was referred to the Family Advocate to investigate as a matter of urgency what would be in L's best interest pertaining, infer *alia,* to the question as to which party was better equipped to be granted primary residency and care in respect of L, and to make recommendations in this respect to the Court. The application together with the order would be e-mailed to the father at his residential address in Belgium, and the father would thereafter be allowed one month within which to enter an appearance to oppose the application. On 23 November 2009 an order was granted by this Court staying the application under the mentioned case number, pending the outcome of the Hague Convention application which is now before me. The Court also ordered that pending my decision, the primary care and residency of the minor child would remain with the present Respondent.

9. Before I proceed with the brief history of this case, it is convenient to refer to certain allegations made in the ex *parte* application. Under the heading *"the parties"* the present Respondent referred to herself as being the biological maternal grandmother of the minor child, and the Applicant as the biological unmarried father of the minor child. She alleged that the father had not required by operation of law parental rights and responsibilities in respect of L in terms of section 21 of the Children's Act. 38 of 2005. *"nor has he obtained custody and guardian by the operation of any laws here in South Africa or elsewhere abroad in respect of the minor child".* She also alleged that L spent a few months in Belgium from approximately January 2008 to September 2008, whereafter she relocated to Los Angeles and resided there to date *"with the person who is not* L's *parent or custodian but who merely* assumes *the care of L in the absence of the Respondent".* She further alleged that the Respondent in that case had not formed a definite intention that L should permanently reside in Los Angeles. Certain allegations were then made about the father's present wife and her unhappiness about residing in Belgium, and allegations pertaining to the unhappy relationship between L"s father and his new wife. She referred to section *1* of the Domicile Ad which, in that context, meant that the child would either be domiciled at the place with which she was most closely connected, or otherwise, if she had her home with one of her parents, it would be presumed, unless the contrary was shown, that the parental home concerned was the child's domicile. She then alleged that the father had never formed a settled intention that L would reside in Los Angeles, and then referred to a Court in Belgium having awarded the father certain parental rights. Ultimately, she alleged that the South African Courts would be in the best position to determine parental rights and responsibilities in respect of L. As far as her reasons for launching the application ex *parte* was concerned, the following reasons were given (in the context of no prior service):
"1 It is exceedingly difficult as *he does not remain in one place for* any *length of time. He further does not inform me of his movements.*

2 It is imperative for the above Honourable Court to intervene as *Upper Guardian of all minor children and to safeguard the interests of L and to protect her.'*

10. The concluding submission in that context then was that "due *to time constraints and the fact that it is exceedingly difficult to get hold of the Respondent to serve this application upon him by means of edictal citation or otherwise." I*t is, however, clear from the objective facts and copies of electronic mails attached to the application, that the Respondent was in contact with the father on 21 August and that she was also not correct (to put it diplomatically) when referring to the lack of parental rights that the father had over his daughter. I expressed my grave misgivings about the vague, and clearly not accurate allegations made in the founding affidavit pertaining to the reasons why the application was brought *ex parte, I* requested the Respondent to file a further affidavit explaining her reasons which were clearly not correct, and was then handed an affidavit which is not inculpatory but exculpatory on the basis that *"one now knows better with 20/20 hindsight* or words to that effect. The supplementary affidavit on this topic persists in a regrettable lack of insight as to what is actually required, and what the problem was that I pointed out in Court. Litigants ought to know, and legal practitioners do know, that because an ex *parte* application by its very nature places only one side of a case before the Court, it requires the utmost good faith on the part of an Applicant. All Known material facts, i.e. facts that might reasonable influence a Court to come to a decision must be disclosed.
See: Harms, Civil Procedure in the Supreme Court, Butterworth, B-41 and the authorities referred to in footnote 1.

In the present case I am of the view that the relevant facts in the context of the reasons for the *ex parte* application are either incorrect, or have been misstated, and/or are only partially correct.

See: Harms, Civil Procedure in the Supreme Court Butterworth, B-41 and footnotes 1 and 2

I will return to this topic later in my judgment when I deal with the questions of costs.

11. The child's father forwarded certain documentation to the present Applicant, and I will deal with them in as much as they are relevant to what the Applicant has to show herein to be able to succeed with the prayers sought. It is at this stage therefore convenient to turn to the relevant Convention.

12. The Convention **was** enacted in order to provide relief for parents of children who are under the age of 16, and have been wrongfully removed in breach of the parent's rights. The main objective is to secure and ensure the prompt and safe return of minor children wrongfully removed in any of the contracting States to the Convention. Its main purpose therefore is to restore the *status quo* as soon as possible to what it was prior to the unlawful removal. For present purposes, I will only refer to those Articles of the Convention that are relevant to the dispute before me.

12.1. Article 3:
This Article states that the removal or the retention of a child is to be considered wrongful where -
a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was 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.
The rights of custody mentioned in sub-paragraph (a) above, may arise in particular by operation of law or by reason of judicial or administrative, or by reason of an agreement having legal affect under the law of that State.

12.2. Article 4 of the Convention states:
The Convention shall apply to any child who was habitually resident in a contracting State immediately before any breach of custody or access rights.

12.3. Article 12 states:
Where a child has been wrongfully 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 (1) year has elapsed from the date of the wrongful removal of retention, the authority concerned shall order the return of the child forthwith.

12.4. Article 5 of the Convention:
Provides certain definitions for the purpose of it and *"rights of custody'* are defined as including rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence *"Rights of access'* are defined as including the right to take a child for a limited period of time to a place other than the child's habitual residence.

13. The South African Children's Act. Act 38 of 2005. came into effect on 1 April 2010 (it was amended by the Children's Amendment Act, Act 41 of

2007 and the Child Justice Act, Act 75 of 2008). Chapter 17 of the Act gives effect to the Hague Convention, and in Section 275 states that the Hague Convention is in force in the Republic of South Africa, and its provisions are law in the Republic subject to the provisions of the Act. According to Section 278(3), the Court must, in considering an application in terms of this Chapter for the return of a child, afford that child the opportunity to raise an objection to being returned, and in so doing must give due weight to that objection, taking into account the age and maturity of the child. Section 279 of the Act, in turn, makes provision for the legal representation of a child under such circumstances. In accordance with the Act and the South African Constitution, I allowed separate representation of the child, admitted the child's affidavit as evidence in the present context and considered all relevant facts. I will deal with that hereunder, under a separate heading. According to Section 28(2) of the Constitution, *a* child's best interests are of paramount importance in every matter concerning the child. It is necessary to keep that Constitutional imperative in mind in the context of the present proceedings before me. To complete the contextual setting it is necessary to refer to Article 13 of the Convention

"Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that-

a) the person, institution or other body 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 of retention; or

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*
The judicial administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained and age and degree of maturity at which it is appropriate to take account of its views ."

14. Attached to the founding affidavit were translated copies of orders of the relevant Belgium Court, after considering a petition brought after the Respondent's refusal to return the child ruled on 25 August 2009 that on a *prima facie* basis the father exercised sole parental authority at least on the provisional basis pending a judgment from the relevant Juvenile Court, in the relevant application it was stated on behalf of the Applicant (the father) that the place of residence of the minor child was in Belgium, having also been registered in the Belgium Population Registers.

15. In the context of the mentioned ex *parte* application, the father by way of his then authorised attorney, forwarded an unsigned answering affidavit to the present Respondent, Certain allegations are made therein by the father which are particularly relevant to the present Respondents first ground of opposition, namely that the child was not habitually resident in Los Angeles and that the jurisdictions fact of Article 4 of the Convention was therefore not proven. In this particular context certain of the father's allegations in the answering affidavit are particularly noteworthy. Amongst others: the following appear:

15.1. *"My working area can be anywhere in the World but at this time if is mainly the USA and Europe)*

15.2. *'The official domicile of my wife and me and also the official domicile of L S is in Belgium, Dries 1, 1745 Merchtem*
15.3. *'At this moment we stay in ... Studio City. California. USA':*
15.4. *L S came to Belgium with me. She got her official residence since 14 January 2008 ...at Merchtem. Belgium*
15.5. *"She has Belgian nationality".*

16. Under the heading of *"jurisdiction"* and "residence", the child's father then made the following allegations and I quote them seriatim;

16.1. *"The official domicile of L S is in ... Maechtem, Belgium;*

16.2. *"She was officially registered as a resident of Belgium with her address in Belgium.. .since 14 January 2008;*
16.3. *"Since September 2008 she stayed with me and my wife in ... Studio City, California, USA:*
16.4. *'Her official domicile, until now is still Dries ... Merchtem. Belgium";*
16.5. *"In any case, this case should De tried in Belgium in the ratione loci competent Court:*
16.6. *"At the end of May . . I launched a petition to the Juvenile Court in Brussels, asking to confirm my parental rights the Belgian law assigned me:*
16.7 *"L S has Belgian nationality:*

16.8. *"She is a Belgian citizen with her official domicile in Belgium.*

17. Under the heading *"nationality* the father and Applicant in those proceedings stated'

"From the moment I recognised my daughter (19/01/2008) I had the parental authority over L S. From the moment LS had her official residence in Belgium, the Belgian Courts had jurisdiction over any case concerning the guardianship of L Just to make sure this parental authority was confirmed in a judgment. I asked the Juvenile Court in Brussels to state that I had the full parental authority over L I already asked this confirmation at the end of May 2009. *The law of Belgium is very clear at this point"*

and the Applicant then referred to Article 375 of the relevant Code.

18. Regarding the present Respondents action in the South African Courts, and her alleged unlawful conduct, he made the following allegations and I deem it appropriate to quote them:
L has her official residence in Belgium and is a *Belgian citizen She was only in South Africa on holiday with her grandmother.*

Prior to that he stated that the present Respondent waited until L was in South Africa just to be able to bring the case before a South African Court, so that he could not defend himself, in as much as she deliberately picked a Court that had no jurisdiction in this case.

In the context of the Hague application he said that he launched the application and directed it to the American Central Authority of the Hague Convention. The reason for applying to the American Central Authority was that he asked the return of L to the United States of America where all her social ties lay at that moment. It was also the place where she went to school and had all her friends. He stated that all of her social and emotional connections for the last two years were in Belgium and the USA. Apart from her grandmother, and the memory of her deceased mother, she had no emotional or social bond with South Africa. The Belgian Court has also suspended its decision as to the final order that ought to be granted, pending the outcome of the present application. Before he took L to Belgium, legal proceedings in South Africa at a prior stage allowed her to come with him to Belgium and at that stage it was clear for all the parties, he said *"that I had the intention to relocate L with me. This could mean at my official domicile in Belgium or in my residence (USA)'.* He again repeated that the child's official domicile was in Belgium. Other allegations concerned facts relevant to the best interests of the child, and I will deal with some of those later on herein.

19. In a *"supporting affidavit to Applicant's replying affidavit* dated 23 July 2010, the father confirmed the allegations in the founding affidavit, and the relevant annexures thereto, including the orders of the Belgian Court that I have mentioned, and the draft answering affidavit to the *ex parte* application. In the context of the present issue, namely what the childs habitual residence was, he said the following:

"*I am a director of photography which means that I am often on film-sets all over the World. I divide my time between film-sets in Europe and the USA. My official domicile is recorded as Belgium. However, my family and I live in LA. USA..'.'.*

Nevertheless he continues to say that the child's habitual residence at the time of her wrongful retention in the Republic, was in Los Angeles, it is clear that he makes a distinction between his and his daughters official domicile, which is in Belgium, and his and her place of habitual residence which is in Los Angeles,

20. What does *"habitual residence"* mean in the present context?
This concept is not defined by the Convention itself. II has been interpreted according to *"the ordinary and natural meaning of the two words it contains, as a question of fact, to be decided by reference to all the circumstances of any particular case"* The intention thereby is to avoid the development of restrictive rules as to the meaning of habitual residence, so that the facts and circumstances of each can be assessed free of presuppositions and presumptions. However, the fact that there is no *"objective temporal baseline"* on which to base a definition of habitual residence, requires that close attention be paid to the subjective intent when evaluating an individual's habitual residence. When a child is removed from its habitual environment, the implication is that it is being removed from the family and social environment in which its life has developed, The word *"habitual'* implies a stable territorial link, which may be achieved through length of stay, or through evidence of a particularly close tie between the person and the place. A number of reported foreign judgments have established that the possible prerequisite for *"habitual residence"* is some *"degree of settled purpose"* or *"intention".* A settled intention or settled purpose is clearly one which will not be temporary. However, it is not something to be searched for under a microscope. If it is there at all it will stand out clearly as a matter of general impression. I do not lose sight of the fact that it is often impossible to make a distinction between the habitual residence of a young child and that of its custodian's.

See: Senior Family Advocate, Cape Town, & Another v **Houtman, 2004 (6) SA 274 (C), paragraphs 8 to 11**

21. I noted with interest that the child herself stated that her home was in South Africa. She is apparently well adjusted at school in Hoedspruit, and obviously has been in South Africa for longer than **a** year, which fact is due largely to the actions of the Respondent herein. Having regard to **the** father's own allegations in the mentioned legal proceedings in Belgium, the allegations made in his draft answering affidavit to the *ex parte* application, and his supporting affidavit to the present replying affidavit, it is abundantly clear that his and his daughter's domicile is in Belgium. My overwhelming impression in the context of *"habitual residence"* in Los Angeles, is that this is at the best of a temporary nature having regard to the father's profession and its uncertainties. There is no, or insufficient evidence, which convinces me that either the father or his daughter have a particularly close tie with either Los Angeles or the United States, They seem to have moved there merely as a matter of convenience, and there is no indication on the evidence before me that their residence there will be of some permanence, or even that the father had any intention at all of changing his domicile from Belgium to the United States. At his own instance, legal proceedings in Belgium are pending, and all the allegations he made in those proceedings, as in the present proceedings, point to the fact that his own closest ties are with Belgium, that he regards himself and his daughter as being domiciled there, and there is no allegation pointing to the fact of his intention to abandon that.

22. I am therefore not persuaded that the Applicant his discharged the onus of proving that the child was habitually resident in the United States immediately before any breach of custody or access rights. I do, however, accept, contrary to the Respondent's argument, that the father had rights of custody on the present facts, and this is abundantly clear having regard to the proceedings before the Belgium Court. It is also clear the removal or retention of the child was wrongful, in that it constituted a breach of the valid custody rights, and that the father actually exercised those rights. There is no merit in any argument to the contrary, and I do not therefore intend dealing with it in any detail at all. The application therefore ought to fail on the basis of Applicant failing to prove one of the necessary jurisdictional facts, namely that of Article 4 of the Convention applying.

23. There are, however, two further reasons why the application ought to be refused. One reason pertains to the provisions of Article 12 of the Convention which reads as follows:

-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 (1} year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith'.*

The present proceedings have beer, launched within a period of one year from the date of the wrongful retention of the child, but at date of judgment hereof (November 2010), the child has been in the care of the Respondent since August 2009. That is a separate fact which I will deal with hereunder. I accept, of course, that according to the provisions of Article 19 of the Convention, a decision thereunder concerning the return of the child shall not be taken to be a determination on the merits of any custody issue. One must not lose sight of the purpose of the Convention, which is to ensure, save in exceptional cases provided for in Article 13 (and possibly also in Article 20) that the best interests of a child whose custody is in dispute should be considered by the appropriate Court, It would be quite contrary to the intention and terms of the Convention, were a Court hearing an application under the Convention, to allow the proceedings to be converted into a custody application.

See: Sonderup v Tondell S Another. 2001 (1) SA 1171 (CC)at paragraph 30

24. Article 13:

This Article provides that I need not order the return of the child if the person which opposes its return establishes, amongst others, that there is a grave risk that his/her return would expose the child to physical or psychological harm, or otherwise place the child in an intolerable situation. The Respondent sought to make out a case on that basis, and there were some comments by psychologists who were of the view that a return to the father in the USA would destabilise the child, take her away from a present safe and pleasant environment, and place her in an environment that would be relatively new to her, and would further involve living with her father and his wife, whose relationship was allegedly in the process of breaking down. Some of these allegations were very general and others were exaggerated In any event, in the mentioned Sonderup decision, the Constitutional Court held that Article 13 contemplated risk of harm of a grave nature, in the present case I cannot find the return of the child would result in her suffering physical harm, and the psychological harm that was relied on herein would, in my view, not be the serious harm contemplated by Article 13, but rather the type of harm that all children who were subjected to abduction and Court-ordered return, were likely to suffer, and which the Convention contemplated and took into account in the remedy it provided (see paragraph 44 of the judgment),

25. Article 13 of the Convention also empowers the judicial authority to refuse to order the return of the child if it fines that the child objects to being returned, and has attained an age and degree of maturity at which it is appropriate to take account of its views.

26. The child's rights:

The above mentioned part of Article 13 found resonance in Section 278 of the Children's Act of 2005, as amended, which I referred to above. There are other Sections of the Act which are relevant in my view

26.1. The objects of the Act (Section 2) are amongst others, that the best interests of a child are of paramount importance in every matter concerning the child. This is of course also a Constitutional imperative according to the provisions of Section 28(2) of the Constitution, As I have said, the Act also has as one of its objects to give effect to the Republic's obligations concerning the well-being of children in terms of international instrument binding on the Republic, such as the Convention.

26.2. Section 6 of the Children's Act deals with its general principles which, according to Section 6(2)(a), all proceedings, actions or decisions in a matter concerning a child must respect, protect, promote and fulfil the child's rights set out in the Bill of Rights, the best interests of the child standard set out in Section 7, and the rights and principles set out in the Act, subject to any lawful limitation. According to Section 6(5), a child, having regard to his or her age, maturity and stage of development must be informed of any action or decision taken in a matter concerning it, which significantly affects it.

26.3. Section 7 sets out the "Pest *interests of a child standard".*

In that context I need to take into account the nature of the personal relationship between the child and the father and the caregiver, their capacity to provide for the needs of the child, including emotional and intellectual needs, the likely affect on the child of any change in its circumstances, the need of the child to maintain a connection with his or her family, culture or tradition, obviously the child's age maturity and stage of development and background, its physical and emotional security, and its intellectual, emotional, social and cultural development and the need for a child to be brought up within a stable family environment. There are other standards, but I have mentioned the ones that are particularly apposite herein, although I appreciate that I am not sitting in custody proceedings properly so called.

It ts, however, abundantly clear both from Article 13 of the Convention, Section 278 of the Children's Act. and obviously Section 28(2) of the Constitution, that I am by-law required to take those considerations into account, over and above the relevant articles of the Convention, the Convention itself being subservient to those provisions. This is abundantly clear from the provisions of Section 275 of the Children's Act. which specifically makes the Hague Convention subject to the provisions of that Act, and obviously subject to the provisions of the Constitution.

26.4. Not only does Article 13 of the Convention require it but Section 10 of the Children's Act requires that I must give due consideration to the views expressed by the child, and allow it to participate in the matter before me, obviously with due regard to the child's age, maturity and stage of development,

27. I have therefore mentioned the relevant statutory framework which I must have regard to in the context of the proceedings before me. It is therefore clear that it is, since the advent of the Constitution and the Children's Act, not merely a question of applying the Hague Convention, and making an order in terms of its relevant provisions, but rather applying the Convention subservient to the relevant provisions of the Children's Act and the Constitution.

28. The best interests of the child:

I am not sitting as a Court in custody proceedings, and therefore have decided to mention only the relevant considerations which seen collectively, have persuaded me after long and anxious deliberations, that the best interests of the child are paramount, and that those considerations would mean that I ought to refuse the application, which, in turn, would mean that the order of 21 August 2009 remains in force, and that this Court in due course would finally determine whether or not the present Respondent ought to be granted the full parental rights and responsibilities sought for in the motion proceedings under case number 57277/09. I therefore mention the following most important considerations:

28.1. the child has had very little relevant contact with the life in Belgium:

28.2. it has had more *"experience"* of life in the United States, but certainly substantially more in the extended family and scholastic environment in South Africa, with its relevant culture and tradition that goes along with it;

28.3. the child has settled into its life in Hoedspruit, and for present purposes seems to be well adjusted and stable;

28.4. she obviously has an ambivalent attitude towards her father and his way of life, which view is no doubt less objective than if ought to have been, taking into account the nature of the present proceedings and her participation therein;

28.5. she has had less contact with her father than is generally desirable and, again, she is not to blame;

28.6. there is a general consensus among the school teacher, the social worker, the educational psychologist and the counselling psychologist that the child is at present well adjusted, stable and settled;

28.7. that subject to further counselling, she would in the context of the present proceedings generally be better off in Hoedspruit with the present Respondent until the
Court in the mentioned custody proceedings decides otherwise, and once her father has had the full opportunity to put all the relevant facts before the Court (which he has not done at present). I have, for instance, very little, if any, facts pertaining as to exactly how often he is absent from his home In Los Angeles, be that as at present, or as envisaged in the future, who exactly and under which circumstances, looks after the child during such absences, and exactly what the relationship between him and his wife is. I mention this only as an example, and there are other questions that need to be answered in full in a proper answering affidavit to the *ex aerie* proceedings.

29. I have, however, also not lost sight of the fact that some of the observations by the educational psychologist in these proceedings are a gross exaggeration, and if not properly placed into a meaningful context, may be prone to guide a Court into the wrong direction For instance, his comment that *"LS was exposed to some of the most traumatising events known to man"* are simply a gross exaggeration of the actual facts, and led me to suggest it, Court that perhaps Respondent's counsel would like to present him with one or two history books, I do not at present accept that the child would be sadly neglected In the United Stales but I do find that there are sufficient objective facts at present before me to hold that it is in the best interests of the child that the application be refused, and that she remain in the custody and care of the Respondent, subject to the finalisation of the proceedings in terms of the mentioned ex *parte* application. In that context I deem it practical and expedient that I order the father (the Respondent in those proceedings) to file an answering affidavit within 30 (thirty) days of this order if he wishes to oppose those proceedings. A consideration of all the relevant affidavits of the teachers and counsellors have persuaded me that the child's own view, although they largely refer to short-term views and interests, are worth taking into account It is clear to me that she is intelligent, well motivated and has a strong personality. Like all other children she deserves respect, and she has mine. She does, however, need and deserve a close relationship with her father as well.

30. In the light of all of the above, the application for the return of the child to the United States is refused.

31. Costs:
Although costs normally follow the result, the Court obviously has a

discretion in the context of any given case to make an order as to costs that is appropriate and fair, having regard to the relevant facts and circumstances, and the conduct of the parties, I have already mentioned that it is abundantly clear that;

31.1. the Respondent herein retained the child in South Africa without informing her father, as she could have done, as to her intentions and reasons timeously;

31.2. she launched the *ex parte* application, making allegations that were not only vague, unsubstantiated and inaccurate, but as so without the necessary utmost good faith that was expected of her, and of which she and her legal advisors ought to have been aware of;
31.3. she clearly planned the abovementioned:
31.4. she had to that extent manipulated the proceedings in the South African Courts, as well as through her intervention in the proceedings before the Belgium Court. I do not believe that a Court ought to tolerate such conduct, be it in proceedings involving a child, or in any other proceedings launched on an *ex parte* basis, where the utmost good faith and candour is required. As a sign of my strong disapproval for such conduct therefore, I am of the view that she should pay the costs of these proceedings.

32. In the result, the following order is made:

1) The application by the Central Authority for the return of the child is refused:

2) The proceedings under case number 57277/09 are to continue, and the Respondent therein is ordered to file his answering affidavit (if any) within 30 (thirty) days of the date of this order. This judgment is to be communicated to him by electronic mail forthwith (by Respondent's attorney).
3) The Respondent in the present proceedings is ordered to pay the costs of this application.

DATED at PRETORIA on this the 10th day of NOVEMBER 2010.

SIGNED: HJ FABRICIUS

JUDGE OF THE HIGH COURT.
NORTH AND SOUTH GAUTENG DIVISION
PRETORIA

Counsel for Applicant: Adv. C Woodrow
Instructed by The State Attorney, Pretoria

Counsel for Respondent: Adv, M Van Nieuwenhuizen

Instructed by Leigh De Sauza Attorneys. Johannesburg

Counsel for Intervening

Party: Adv. MK Steenekamp
Instructed by Pretoria Justice Centre, Pretoria

Date of Hearing: 18 to 22 October 2010

Date of Judgment: 10 November 2010