REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case No: 20/18381

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

15/09/2020
SIGNATURE DATE

In the matter between:

CENTRAL AUTHORITY FOR THE REPUBLIC OF SOUTH AFRICA	First Applicant
CB	Second Applicant
and	
LC	Respondent

This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be 10h00 on 15 September 2020.

JUDGMENT

INGRID OPPERMAN J

Introduction

[1] This is an application brought in terms of Article 12 of Chapter III of the Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996 (*'the Hague Convention'*). The First Applicant (*'the Central Authority'*) and the Second Applicant (the father of the children forming the subject matter of this application) seek the return of two minor children, aged 4 and 6, to the jurisdiction of the Ontario, Canadian Central Authority.

The Hague Convention at a glance

[2] The Hague Convention only applies if the Central Authority can show that the children have been wrongfully removed or retained. The Central Authority must demonstrate that: (1) the child was habitually resident in the requesting State immediately before the removal or retention;[1] (2) the removal or retention of the children was wrongful in that it constituted a breach of *"custody rights"* of the left-behind parent;[2] and (3) the left-behind parent was actually exercising these rights at the time of the wrongful removal or retention or would have exercised these rights but for the removal or retention.[3]

[3] If these requirements are satisfied, and if the application is brought within 1 year from the date of the removal or retention, the children must be returned.[4] In this regard, article 12 of the Hague Convention provides as follows:

> "Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of

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1 Art. 3(a) of the Hague Convention.

2 Art. 3 of the Hague Convention.

3 Art. 3(b) of the Hague Convention.

4 See, generally, *Sonderup v Tondelli* 2001 (1) SA 1171 (CC); *Pennello v Pennello* 2004 (3) SA 117 (SCA); *Chief Family Advocate v G* 2003 (2) SA 599 (W).

> 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.
>
> The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.
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> Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child."

[4] There are certain narrow exceptions to the peremptory return of the child. These exceptions are: (a) The Article 12(2) exception that provides that where proceedings have been instituted more than a year after the abduction and where it is demonstrated that the child has settled in his or her new environment that a court has a discretion to order the return; (b) The Article 13(a) exception that provides that a court is not bound to return a child if it is demonstrated *inter alia* that the left-behind parent had consented to or subsequently acquiesced in the removal or retention of the child; (c) The Article 13(b) exception that provides that a court is not bound to return a child if it is demonstrated that *"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"*; (d) The Article 20 exception entitles a court to refuse to return the child if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms; (e) A child's right to object to his or her return is explicitly provided for in article 13 of the Hague Convention. The provision reads, in relevant part, as follows:

> "The judicial or 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 an age and degree of maturity at which it is appropriate to take account of its views."

[5] A child, moreover, and in terms of section 278(3) of the Children's Act 38 of 2005, as amended ('*the Children's Act*'), also has a right to object. The provision reads as follows:

> "The court must, in considering an application for the return of a child, afford that child the opportunity to raise an objection to being returned and in doing so must give due weight to the objection, taking into account the age and maturity of the child."

[6] If the court finds that the child has valid reasons for his or her objection to being returned, then it may refuse to order the child's return.[5]

Defences

[7] The respondent disputes that the children were habitual residents of Canada immediately prior to their retention. This defence, which is directed at one of the jurisdictional pre-requisites, dovetails with the defence raised in terms of Article 13(a) being that the second applicant had consented to, or subsequently acquiesced, in the removal or retention of the minor children from Canada.

[8] One of the children G, currently 6 years of age, was bullied and has been diagnosed with Sensory Processing Disorder ('*SPD*'). It is contended that if he is returned there is a grave risk that he would be exposed to physical or psychological harm or otherwise be placed in an intolerable situation as contemplated in Article 13(b).

[9] The respondent further argues that in applying the 'best interests' principle, as provided for in both the Constitution and the Children's Act, the children should not be returned. In this regard, the respondent contends that the best interests principle

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[5] See, generally, *Central Authority v MV (LS Intervening)* 2011 (2) SA 428 (GNP) and *Central Authority of the Republic of South Africa v B* 2012 (2) SA 296 (GJ).

is a self standing consideration and enjoys hierarchal supremacy to the Hague Convention for children present in the jurisdiction of South Africa.

Curator ad litem

[10] Adv Morgan Courtenay was appointed in terms of section 279 of the Children's Act to act as the legal representative of the children. This was formalised on 7 August 2020 by a court order, granted by agreement between the parties. In terms of such court order, Mr Courtenay was empowered to, amongst other things, appoint any expert necessary to assist him in his investigation and to file his report as soon as is practically possible.

[11] Mr Courtenay enlisted the assistance of Ms Filmer, a social worker and provided her with a narrow mandate ie to assist him in drawing out the actual views and wishes of the children; to, where necessary, offer an explanation for these views and to comment on the potential impact, if any, an order returning the children would have on their emotional and psychological well-being.

[12] Ms Filmer was, due to the pressing time constraints imposed on Mr Courtenay by this court to finalise the report, not requested to provide her own formal report but rather to provide her views to Mr Courtenay who included them in his report. Ms Filmer confirmed by way of affidavit, both this arrangement and that he had accurately recorded her observations, views and opinions. Her *curriculum vitae* was also provided to the court.

[13] In a comprehensive report setting out in much detail the facts which underpin their opinions, they found that:

13.1. In the interviews that Mr Courtenay and Ms Filmer had with the children, neither of the children were prepared or willing to share any detailed information regarding Canada and their time there. The

children could thus not assist the court in determining whether or not they were habitually resident in Canada.

13.2. The children raised an objection to returning to Canada. Both categorically indicated that they do not wish to return to Canada. Their explanations were, according to Mr Courtenay and Ms Fismer, woefully inadequate and based on immature reasoning. They concluded that the children are anxious about moving back to Canada which is due to the continued uncertainty. They hold the view that the refusal to return has, likely, been spurred on by the respondent or another adult who has actively tried to influence them.

13.3. The bully that tormented G (the 6 year old boy) at John Knox school, has not been re-enrolled for the upcoming school year and G's SPD is not a reason to find that he cannot be returned especially if protective measures are put in place to ameliorate these difficulties.

[14] I will return to these conclusions and views.

Factual matrix

[15] The second applicant and the respondent met during 2009. During that period he visited his family in Australia and suggested that they move there. They met with an immigration specialist but the respondent indicated that she was not keen on relocating to Australia as she has a close bond with her family and had a good job. She was not prepared to give it all up, made her position clear and considered the topic closed.

[16] They were married on 8 September 2012 and on 5 February 2014, G was born.

[17] The respondent describes their marriage relationship as one in which there was constant fighting and one in which they attended numerous counselling sessions and marriage guidance courses.

[18] The second applicant and the respondent applied for relocation to Canada based on the levels of violent crime, '*an often ineffective Government overwhelmed by fraud and corruption as well as incompetence which in many cases leads to failed services and infrastructure resulting in a rapidly shrinking economy and job market*'.

[19] The respondent commenced the entry application process by certifying her degree with WES in June of 2015 and enrolled herself and the second applicant for the IELTS language test which they wrote on 21 November 2015. During 2016 they created an online CIC express entry profile with the respondent as the main applicant.

[20] On 1 February 2016, X was born.

[21] During May of 2017, the second applicant secured a job offer and on 4 July 2017, signed the job offer. Shortly after securing the job he told the respondent that he did not see her in his future. The respondent said that she was unaware that he had applied for positions in Canada. The couple attended marriage counselling. The respondent contends that she tried to persuade the second applicant not to go to Canada but that on 9 October 2017, he once again informed her that he wanted a separation and ultimately, a divorce. This was confirmed in a letter of even date written by the second applicant's attorney at the time one Aleisha Oliver of Martin Vermaak attorneys in which it is recorded that it is common cause that the marriage relationship had disintegrated and in which the respondent was invited to engage in mediation aimed at implementing a shared residency arrangement between both

parents *'in a manner which also allows each Parent to enjoy equal rights with respect to contact to and care of the Children.'* Interestingly the letter records:

> '10. The mediation would be aimed at consolidating a long-term parenting plan dealing with **interim residency**, contact, and maintenance obligations pertaining to the children, incorporating all unique aspects ranging from developmental milestones to **international travel**.....' (emphasis provided)

[22] The respondent who had been raised by a single mother pleaded with the second applicant to attend church counselling and marriage counselling which he consented to.

[23] On the 1st of November 2017 the second applicant informed the respondent that he still wanted to divorce her. On the 3rd of November 2017 he sent a mail recording that he couldn't keep staying in the spare room and that he would be moving out. He suggested professional help for the children, mediation and urged as little disruption as possible for the boys. He recorded their agreement that he could keep his keys to the house in order to spend as much time as possible with the children. He also listed the items he would be taking during the 'separation phase', that the final divorce settlement would dictate the final outcome and suggested that they could keep the items taken by him in a roster, signed by both of them. He recorded that once this was done, he would arrange for a trailer to fetch the goods when the boys were not home. The second applicant had rented a home approximately 2 kilometres from the respondent's home. The respondent explained that at that stage she believed that "Canada was off the table' as the second applicant was seeking shared primary residency and she did not see how this would be possible if he were in Canada.

[24] In November 2017 the second applicant successfully completed a BSc degree via the Dublin Institute of Technology.

[25] The second applicant announced that he was taking the boys to his parents' home in Ramsgate for the December 2017 holidays. The respondent says that for the sake of the wellbeing of the children and in a further attempt at saving the marriage, she joined him.

[26] Towards the end of December 2017, beginning of January 2018, the second applicant announced that he was forging ahead with his planned move to Canada and that the company wanted him to start in February 2018. The respondent explains that she was faced with an impossible situation one in which she was faced with uprooting their entire lives to save their marriage. In her view it was not the right decision for a host of reasons including that their relationship was still strained, no arrangements had been put in place for their relocation and the children had already been enrolled for the school year. She implored the second applicant to stay in South Africa but he was adamant.

[27] Still not convinced that it was the right decision but not wanting to break up her family, she agree to accompany the second applicant when he travelled on 10 February 2018. She came back a week later on 17 February 2018. The purpose of her visit was to explore the world the second applicant had chosen. The children did not accompany them as they had already started school.

[28] The respondent explains that she agreed, on a trial basis, to uproot the children and to go across to Canada. She says she had to deal with all the arrangements because the second applicant had left with one and a half suitcases and had not even made arrangements relating to his car, which the Bank ultimately repossessed.

[29] The respondent emphasised that the Canadian authorities require, as a pre-condition for the awarding of a work permit and a temporary residency visa, a

commitment to return to your country of origin, failing which it is not granted. She stated that she was accordingly, and throughout this stage, under the impression that they would have to return to South Africa ie that they were not emigrating. On 8 August 2018 she moved over on their temporary residency visas and her work permit.

[30] The respondent explained that since the move was intended to be for only a temporary trial period, she did not sell the matrimonial home (registered in her name) and had left most of the household furniture behind. She also did not lease the house between 2018 and 2020. The only piece of furnishing sent across to Canada was her dining room set but everything else was purchased in Canada. She sold her car as the monthly repayments together with the insurance premiums amounted to about R20 000.

[31] The respondent did not close any of her accounts such as Truworths, Edgars, and Vodacom.

[32] She said that she had booked return flights for 28 December 2018 as the stay was intended to be on a trial basis.

[33] The respondent says that upon arriving in Canada, she made every effort to give it a fair chance in order to save her marriage.

[34] G was enrolled in junior kindergarten at the John Knox Christian School (*'John Knox'*) and X was enrolled in a nursery programme at the Summerhill Day School.

[35] The care of the children seems to have been divided along traditional gender lines: the respondent assuming the role of primary caregiver and homemaker whereas the second applicant, although actively involved, assumed a secondary role in the life space of the children.

[36] She started to interact with the local community, attended social functions and enrolled the children in several extra mural activities.

[37] The respondent explained that despite this, her relationship with the second applicant did not improve. She experienced the second applicant's conduct towards her as abusive and controlling. He started recording every aspect of their daily interactions.

[38] G was being subjected to bullying and victimisation at school. He was being treated differently because of his accent and being shamed for being behind in his educational level by a boy, called B.

[39] The school addressed the bullying problem but it was not eliminated.

[40] The respondent returned to South Africa during December 2018 as planned. Prior to the respondent's return to Canada and on 14 February 2019 the following email exchange occurred:

The respondent wrote to the second applicant:

> '**All terms from 2018 agreement still stand**. We agree to extend Canada as a trial to maximum time period of Dec 2019 upon which we can return home as a family or Chantel with the children. Should a sooner return be needed then it is also in order. Brendon will provide Chantel with the necessary documents to travel across border with the boys should she so require.'

Second applicant responded:

> '...You want to give Canada up to another 9 months on a "trial" basis and then we decide if we will stay on longer in Canada or leave Canada. **I agree to that** and would hope we all give it our best effort and Canada a fair chance as our "home" during this time.
>
> You requested a travel letter for you to be able [to] travel with the boys in my absence. I have provided one that is good for another 4,5 months and will provide you another one before this document expires providing you a further 6 months validity which will then sufficiently cover you for the **full duration of this 9 month "trial" term.'** (emphasis provided)
>
> (*'the February 2019 mails'*)

[41] Because there were insufficient children for a second class, G was again placed in the same class as B. The bullying re-commenced. This caused tensions between the couple and during June 2019 the second applicant moved in to a separate bedroom. (The second applicant explains that this was so because the respondent would wake up at 3h00 in the morning to work during South African time.)

[42] The respondent wanted to return to South Africa but the second applicant threatened her saying he would let the Canadian authorities know and she would be sent back to South Africa without the children.

[43] The respondent approached Assaulted Woman Helpline, a non-profit organisation in Canada. They referred her to another entity who referred her to FCJ Refugee Centre where she was advised that she could (a) apply for a humanitarian permit so that she could remain in Canada and still have access to the minor children (b) seek refuge at the Abused Woman Pilot Program, however she would not be ensured of a space or (c) find a job and request her employer to 'sponsor' her. All of this had the accompanying risk of her having to return to South Africa and having to litigate for the return of the children from South Africa.

[44] Towards the end of November 2019, the respondent had consulted with an attorney at MacDonald and Partners in Canada, to assist her. The respondent disclosed this to the second applicant who then and on 2 December 2019, provided her with a letter in terms of which he consented that the children travel with her to South Africa departing on 3 December 2019 ('*the consent letter*'). The consent letter did not make provision for travel back to Canada.

[45] The respondent says that she had made it very clear that she would not be returning to Canada. She had not purchased a return ticket.

[46] On 6 January 2020, the respondent sent the second applicant an information sheet received from Jan Cilliers pre-primary school indicating that the children would commence school on 15 January 2020.

[47] On the 14th of January 2020, the respondent sent the second applicant a copy of the receipt in respect of the school clothes purchased for the minor children. The respondent also informed him that the boys had been placed with the teachers they had discussed telephonically.

[48] On the 15th of January 2020, their first day of school, the respondent sent the second applicant photographs. He said he would phone them later to establish how their day had gone.

[49] The second applicant had daily telephonic contact with the children until about April 2020 when the acrimony started again. The second applicant accused the respondent of policing the calls which led to the respondent setting up a separate phone for the children but because of their age, this posed a problem. The respondent explained that she had created a rule in the house that the children were obliged to speak to the second applicant at least once a day. These calls ranged between 45 minutes and 1 minute in duration.

[50] The second applicant was included in a school parent Whatsapp group for G.

[51] During February and March 2020, the second applicant sent some of their personal belongings back to South Africa. The second applicant ordered a heater on Takealot which was delivered to the home. He also tried to sell the respondent's motor vehicle in Canada at her request.

[52] The respondent and the children did not have any form of residency status to enter Canada between 11 February 2020 and 16 April 2020. The respondent says that the second applicant had renewed her temporary work permit without her

consent but that in any event, he had never provided her with the required authorisation to enter Canada.

[53] The respondent contends that the second applicant had raised no objection to the children settling into their old lives in South Africa, was aware that they had been enrolled into Jan Cilliers and had regular contact with them for 8 months. It was only once the temporary residency had been extended, which he had done without her knowledge or consent, that this application was initiated.

[54] The respondent has secured employment in South Africa and the second applicant has been exercising physical contact with the children since returning to South Africa during July 2020.

Habitual Residence, Consent and Acquiescence

[55] The factual analysis underpinning the investigation into the children's habitual residence and the Article 13(a) defence, overlap and are accordingly dealt with together. I am conscious of the fact that the applicants must establish the jurisdictional facts required by Article 3 that will trigger the provisions of Article 12. The existence or not of those however, depend on the question whether the second applicant agreed to the children's removal and retention in this country alternatively acquiesced therein. In doing so, I am to apply the well-known *Plascon-Evans*[6] rule with regard to disputes of fact in proceedings on affidavit[7]. I am also conscious of the fact that the *onus* in resisting the return of the children relying on the provisions of Articles 13(a) and (b), rests on the respondent to prove on a balance of probabilities.[8]

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6 *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*, 1984 (3) SA 623 (A) at 634E - 635C

7 *Pennello v Pennello*, (supra) at paras [40] and [41]

8 *Senior Family Advocate, Cape Town and Another v Houtman*, 2004 (6) SA 274 (C) at para [15]; *Pennello* (supra) at para [38]

[56] The Hague Convention does not define "habitual residence". Brigitte Clark summarises the approach accurately as follows:

> '.....habitual residence should not be given a special technical definition, but should remain a question of fact to be decided by reference to the facts of each individual case. Habitual residence may be acquired by voluntarily assuming residence in a country for a settled purpose. It may be lost when a person leaves that country with a settled intention not to return.....There is a significant difference between ceasing to be habitually resident in a country and acquiring habitual residence in a new country. A person can lose habitual residence in "a single day" when he or she leaves with the settled intention not to return. However, habitual residence cannot be acquired in a day. An appreciable period of time and a settled intention will be necessary to enable him or her to become habitually resident'.[9] (footnotes omitted)

[57] The facts of this case are very similar to the facts in the *Houtman*[10] case where the court had found that the child's habitual residence was not in the Netherlands and declined to find that Article 12 had been triggered. A limited purpose is served by comparing facts in different cases as there are invariably nuanced differences, which change the outcome of the application of the legal principles. Of notable significance though, in concluding that the child's habitual residence was not in the Netherlands, was the factual finding that an agreement was in place that the stay in the Netherlands would be on a temporary basis ie for a trial period.

[58] The February 2019 mails[11] confirm that the parents' shared intentions regarding the childrens' residence was that the period 8 August 2018 to 28 December 2019 was considered a trial period and March 2019 to 3 December 2019 was to be a further 9 month trial period. More importantly, the agreement that was

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9 Family Law Service, Division P6 – Child Abduction

10 *Houtman* (supra)

11 Quoted in paragraph [40] hereof

recorded in the mails accepted that if the trial period proved unsuccessful, the only issue would be whether the family would return to South Africa **together** or whether the respondent would return **alone** with the children.

[59] The second applicant does not dispute the email exchange but contends that all that had been agreed upon is that after the expiry of the trial period *'...WE would decide together what next for OUR family, there were many scenarios on this spectrum for us to consider...'*[12] This construction is not born out by the content of the mails as the second applicant expressly offered to provide consent letters which would enable the respondent to travel with the children during the 9 month trial period.

[60] The second applicant's entire application is premised on the fact that the respondent is alleged to have undertaken to return to Canada on 15 January 2020. In his replying affidavit however, he changed this version and said that the respondent might have told him that she was returning permanently days before her departure. This startling change of version from the founding affidavit to the replying affidavit is worth quoting in full:

> 'The respondent may have told me mere days before their planned departure that she wanted to return to South Africa long term but 1) she only spoke about herself, now she may feel that her and the children are one entity.....they are however not and I have always dealt with them as separate entities as is correct to do. I cannot stop the respondent from returning to South Africa if she chooses to as she has free will and full rights to do so. 2) Just because the respondent informed me of her view does not constitute agreement on my part and her views mentioned nothing around G's dissatisfaction....'[13]

[61] The consent letter which the second applicant produced on 2 December 2019, the night before the respondent's and the children's departure from Canada, is

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[12] Caselines 010-137 – Ad Paragraph 51

[13] Caselines 010-140 – 010-141 – Ad Paragraph 72

significant as, with full knowledge that the respondent was not returning to Canada, the second applicant provided the respondent with consent to travel with the children one way only, did not record that they are returning on 15 January 2020 and that permission is granted for her to travel back with them. The most probable reason why this was not done is because there was no agreement in place that they would return. It would have been very easy for the second applicant to have done so and to have embodied consent for both trips (to South Africa and back to Canada again) in one document, as the travel consent letters have a 'shelf life', the term coined by the second applicant, of 3 months.

[62] Not only did the second applicant enable a one way return to South Africa but he also accompanied the family to the airport and told G that he did not know when he would see him again as he bid them farewell.

[63] Three basic models of determining habitual residence of a child have developed from judicial interpretation of habitual residence, namely: the dependency model, the parental rights model and the child centred model. In terms of the dependency model, a child acquires the habitual residence of his or her custodians whether or not the child independently satisfies the criteria for acquisition of habitual residence in that country. The parental rights model proposes that habitual residence should be determined by the parent who has the right to determine where the child lives, irrespective of where the child actually lives. Where both parents have the right to determine where the child should live, neither may change the child's habitual residence without the consent of the other. In terms of the child-centred model, the habitual residence of a child depends on the child's connections or intentions and the child's habitual residence is defined as the place where the child has been physically present for an amount of time sufficient to form social, cultural,

linguistic and other connections. South African Courts have adopted a hybrid of the models in determining habitual residence of children. It appears to be based upon the life experiences of the child and the intentions of the parents of the dependant child. The life experiences of the child include enquiries into whether the child has established a stable territorial link or whether the child has a factual connection to the state and knows something culturally, socially and linguistically. With very young children the habitual residence of the child is usually that of the custodian parent.[14]

[64] The children spent an initial 4 month period in Canada, returned to South Africa for 2 months and then spent another 9 months in Canada, returning to South Africa on 3 December 2019, where they have been ever since.

[65] Mr Courtenay reported that because the children were unwilling to share any detailed information regarding Canada with either him or Ms Filmer, one could not look to them to assist this court in determining whether they were habitually resident in Canada on 3 December 2019. No-one disputed this conclusion nor do I.

[66] What do the facts show: As at 8 August 2018, the second applicant and the respondent were co-holders of parental rights of the children in terms of sections 19 and 20 of the Children's Act. Prior to the respondent and the children's departure to Canada in August of 2018, the second applicant and the respondent had agreed that they would relocate to Canada for a trial period. The marriage relationship had been in trouble. A formal letter to terminate the marriage relationship had been sent in October 2017, the second applicant had moved out of the matrimonial home in November 2017 and the couple had spent the December 2017 holidays at the second applicants' parents in Ramsgate. Thereafter the second applicant had departed with 1 and a half suitcases to Canada in February 2018.

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[14] *Houtman* (supra) para [8] to [12]

[67] The February 2019 mails confirm the agreement which had governed the position between 8 August 2018 and 28 December 2018 and confirm that that agreement had been extended for a further 9 months. In terms of such agreement, March 2019 to December 2019 would be a trial period. That 8 August 2018 to 28 December 2018 was in fact a trial period, is born out by the return tickets which were purchased in advance. That the return to South Africa on 3 December 2019 was permanent, is born out by the content of the consent letter and the absence of return tickets.

[68] The children did not learn another language, such as French. Linguistically no inference can be drawn from the stay in Canada. They went to school but G does not appear to have integrated well. Neither child appears to have developed social relationships with peers or even day-care institutions as part of their lifestyles.

[69] In my view there is not a strong and readily perceptible link between the children and Canada. I therefore find and based on all the considerations referred to herein, that the children were not habitually resident in Canada on 3 December 2019.

[70] If I am in error in that finding ie that it can be argued that the children were in habitual residence in Canada on 3 December 2019, then I would nonetheless decline the application on the basis that the respondent has discharged the *onus* of establishing that the second applicant '*had consented to or subsequently acquiesced in the removal or retention*' of the children as contemplated in Article 13(a).

[71] The second applicant has known from at least 6 January 2020 that the children would be attending Jan Cilliers school and has even paid the school fees in respect thereof. He knew the children would be enrolled. In addition, he had daily contact with the children. He was even included in a class Whatsapp group.

[72] Rather curiously he did nothing during a period of approximately 6 months (December 2019 to June 2020). No letters demanding the return of the children were written, there were no voiced objections until he filed the application with the Central Authority in Ontario on 29 June 2020 and authorised the first Applicant to act in terms of Article 28.

[73] The second applicant's failure to act expeditiously created the impression that the children could remain in South Africa, in accordance with the agreement re-confirmed in the February 2019 mails. The second applicant was clearly 'holding out' for the respondent to change her mind. He wanted his family back and, quite tragically, also paid for school fees in Canada during the months of January and February 2020 waiting for this eventuality to occur. That this is what the second applicant wanted to achieve is born out by what he says in a long list of undertakings he gives *'to ensure the resettling back into Canada is as smooth as possible for both our children and the respondent'*, he says: *'I will happily attend Christian marriage counselling with the respondent if she is inclined to do so with me to try and save our marriage* ***as this is what I want most for us to achieve*** *for our family.'* (emphasis provided)

[74] The Hague Convention and the remedies created by it cannot be used as a 'bargaining chip'[15] or potential threat in divorce proceedings. One would have expected the second respondent to approach Aleisha Oliver of Vermaak Attorneys[16] to write a letter demanding the return of the children to Canada.

[75] He explained that he did not act earlier because of the Covid-19 restrictions in place in South Africa. Those restrictions only became operative on 26 March 2020.

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15 *Houtman* (supra) at para [18]

16 The attorney he had approached to represent him during October 2017 and who had in fact written a letter on his behalf.

No explanation for the delay between 15 January 2020 (the date he said in his founding affidavit he expected the return of the respondent and the children) and 26 March 2020 (the commencement of level 5 Covid-19 restrictions in South Africa) is proffered. That is a period of 2 and a half months.

[76] Acquiescence was described as follows by Erasmus J:[17]

> "[17] Counsel for the father argues that acquiescence can only be found 'where the words or actions of the wronged parent clearly and unequivocally show and have led the other parent to believe that the wronged parent is not asserting or is not going to assert his right to the summary return of the child and are inconsistent with such a return'. In *Friedrich v Friedrich* 78 F 3d 1060 (6th Cir, 1996), the 6th Circuit Court of Appeals held that acquiescence under art 13 is a question of subjective intent. The Court adopted a stringent approach and stated at p 1070:
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> > '(W)e believe that acquiescence under the Convention requires either: an act or statement with the requisite formality, such as testimony in a judicial proceeding; a convincing written renunciation of rights; or a consistent attitude of acquiescence over a significant period of time.'
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> However, the Supreme Court of Appeal in *Smith v Smith* 2001 (3) SA 845 (SCA) ([2001] 3 All SA 146) at 852 supported the approach taken by the House of Lords in the case of Re H and Others (Minors) (Abduction: Aquiescence) [1997] 2 All ER 225 (HL) at 235e. In this case, Lord Brown Wilkinson, when considering art 13 said:
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> > 'Acquiescence is the question of the actual subjective intention of the wronged parent, not of the outside world's perception of his intentions.'
>
> Therefore, it becomes necessary for the Court to examine the 'outward conduct' of the wronged parent. Consequently, the 'subjective intention of the wronged parent is a question of fact for the trial Judge to determine in all the circumstances of the case, the burden of proof being on the abducting parent'."

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17 *Houtman* (supra) at para [17]

[77] In my view, the evidence in support of a finding that the second applicant acquiesced in the children's retention in South Africa, is overwhelming. All his outwardly manifestations of his professed subjective intents, are at odds with a contrary finding. I therefore conclude that, even if I am wrong in respect of my finding that the second respondent had on 3 December 2019 consented to the removal of the children to South Africa on a permanent basis, the second applicant acquiesced to the children's retention by the respondent in South Africa.

[78] Given that I have already found that the Hague Convention does not have application (absence of habitual residence in Canada) and if it does, that the Article 13(a) defences avail the respondent, there is no need for me to deal extensively with the Article 13(b) defences.

Grave risk

[79] The respondent, understandably, makes an impassioned plea that the children, and particularly G, stand to suffer grave psychological harm if returned to Canada. In this regard, the objection is three-fold: the respondent contends that G will be subjected to further bullying should he be returned to Canada; she says that G's mental well-being will suffer if he is ordered to return as –

> "he will not be able to cope with such a drastic change with his current condition. This is confirmed by the report of Adrinet ... wherein she states that removing G from his current stable circumstances, will be detrimental for him and specifically his mental health and he will deteriorate into a state of survival".

And she fears that:

> "... G's whole world will turn upside down if he were to return to Canada as I will not be there, he will be removed from his school, he will be removed from his dogs with whom he has an inseparable connection, he will have too adjust to the weather, he will have to adjust to the new family currently residing with the [s]econd [a]pplicant

> and he will be removed from his friends, family and predictable and routine lifestyle which he has become accustomed to".

[80] These statements do not amount to the type of harm envisaged by the Hague Convention.

The bullying:

[81] It is common cause that G had been bullied. In Mr Courtenay's discussions with G it oddly did not feature dominantly at all as a reason not to be returned. In fact, the cold weather was more concerning for him. The bullying is an issue that can (and should) be addressed through counselling. According to George Petrusma, the principle of John Knox Christian School where G was previously enrolled, the bully that tormented G has not been re-enrolled for the upcoming school year at John Knox.

[82] It bears mentioning that G had also been bullied whilst in South Africa and was moved to a different school. This is clearly also an option in Canada.

G's Sensory Processing Disorder:

[83] G's SPD did not seem to be an issue that prevented the parties, and particularly the respondent, from moving to Canada, on the respondent's version temporarily, in the first place. There is nothing to suggest that G's SPD cannot be properly managed by a suitably qualified expert before (and after) their return. In that way, G can be prepared for his return. De Bod, the occupational therapist, did not conclude that the return would be detrimental to him and that he would deteriorate into a state of survival. De Bod, stated:

> "G's level of sensory sensitivity is of such a degree that it influences his participation in daily activities and often leads to him being in survival mode."

[84] It follows that G's SPD is, and of itself, not a reason to find that he cannot be returned especially if protective measures are put in place to ameliorate these difficulties.

A drastic change:

[85] I cannot accept that any change would, now, be detrimental for G; it was the respondent who uprooted the children from Canada and re-settled in South Africa.

[86] The respondent's stance that she will not return with the children to Canada should this court so order is one which doesn't lie in the mouth of one who contends she is the primary caregiver of the children.

[87] I do not accept that a change of schooling (and the associated loss of those friends) will have a grave impact on G. In this regard it will be remembered that the schools were closed for a substantial period during the COVID-19 pandemic; G, consequently, would have had limited interaction with his peers. It is therefore incorrect to suggest that he had 'settled' into his new environment and firmed up friendships over a 'long period of time'. De Bod, in her report and despite the assertions of settlement at Jan Cilliers and the need for routine, in fact recommends the opposite. De, Bod, in this regard says:

> "Although G's Afrikaans language is improved a lot over the past year he continues to prefer talking in English. It was evident that he 'thinks' and 'plays' also in English. His teacher has confirmed this. It is therefore recommended that he goes to Gr 1 in an English school that has small classes (between 8 -12 children) and that will make special accommodation for his sensory and emotional needs. ..."

[88] The other facts also do not rise to the level of *"grave psychological harm"*. G does not appear to have an inseparable connection to his dog, Rockefeller. He obviously loves him, as all pet owners do, but it does not rise to the level contended for by the respondent. In any event, arrangements can be made for Rockefeller to go

to Canada. G, although not liking the cold, will acclimatise, he will find routine, and he will find friends.

[89] All of these concerns could be ameliorated through the fashioning of a proper protective order. Had I been persuaded to order the return of the children I would have been inclined to incorporate all the protective measures suggested by Mr Courtenay in his report and would have been mindful of the criticisms levelled against the order granted in the court *a quo* in *Huet v The Central Authority & De Hauwere.* [18]

[90] Rigid enforcement of the Hague Convention provisions could lead to injustice in individual cases. As the upper guardian of minor children in its jurisdiction, the high court of South Africa should not excuse itself from the obligation to protect the best interests of each individual child on the basis that international undertakings allow it to defer this responsibility. The *Sonderup*[19] decision emphasises the importance of shaping an order by means of incorporating substantial conditions designed to mitigate the interim prejudice to a child caused by a court ordered return.

Discretion

[91] When an Article 13 defence is successfully raised, the requested State is not bound to order the return of the child.

[92] In casu, there are no ties of culture, heritage, language or other connections which specially qualify the Ontario Courts to decide this case. The formal purpose of the Hague Convention is to discourage the abduction of children but as Tuchten J

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[18] Case No:A296/19 (12 December 2019) – GPD – a full court - Tuchten J, Davis J and Mokose J. Leave to appeal to the Supreme Court of Appeal has been granted.

[19] At para [35]

identified, '*there is a deeper purpose: to make life better for children, particularly those whose parents use them in their proxy wars with each other.*'[20]

[93] If I were to have considered ordering the return of these children, any order would have had to have been mirrored in Canada and would most certainly not have been couched in the terms suggested by the second applicant. The order proposed by him was subject to his will in considerable measure indeed he states: '*The above will be subject to the respondent behaving in a civil and decent manner during this period*'[21], failing which she would have to vacate the home and find her own accommodation.

[94] As indicated, the second applicant does not want the marriage relationship terminated but holds out hope for reconciliation. However, he clearly intends controlling the process and offers assistance for a period of 'up to' 6 months. It is unclear what the children will do if their mother, the primary caregiver, is on the streets after the period of 6 months and how that will be to their best interests.

[95] The Hague Convention seeks to ensure that primary residency issues are determined by the court in the best position to do so by reason of the relationship between its jurisdiction and the child. That Court will have access to the facts relevant to the determination of primary residence.[22] The children have now been in South Africa for 9 months – the same period of time they had been in Canada before their return on 3 December 2019. It is hard to conceive of any benefit to the children to return them to Canada in order to have questions of primary residence and contact determined by a Canadian Court.

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[20] *Huet* (supra) at para [67]

[21] Caselines – 010 - 158

[22] *Sonderup* (supra) at 1185B - C

The Best Interests consideration

[96] Mr Haskins representing the respondent argued that the best interests standard as provided for in section 7 of the Children's Act, should be applied when considering returning the children. In other words, he argues that it is a self standing defence and not one which comes into play only as part of the Article 13(b) exclusion. Put differently, he argues that once the jurisdictional requirements are met the best interests standard should trump the provisions of the Hague Convention.

[97] This is how this feature was argued: The Hague Convention on the Civil Aspects of International Child Abduction was adopted at the 17th session of the Hague Convention on Private International Law on 24 October 1980. South Africa acceded to the Convention with the promulgation of the Hague Convention on Civil Aspects of International Child Abduction Act 72 of 1996, which was repealed by the present Children's Act and the provisions are now included in Chapter 17 of the Children's Act.

[98] It was argued that this court should adjust the former rigorous and mechanical approach to the implementation of the Hague Convention, to bring same in line with what is specifically provided for in the Children's Act guarding, specifically, against trivializing the best interests of children consideration.

[99] In this regard, much reliance was placed on section 275 of the Children's Act which, in relevant parts, reads as follows:

> "The Hague Convention on International Child Abduction is in force in the Republic and its provisions are law in the Republic, **subject to the provisions of this Act**." (emphasis provided)

[100] With reference to the dicta of Nicholas AJA in *Sentra-Oes Koöperatief Bpk,*[23]

> "In the majority judgment in *S v Marwane* 1982(3) SA 717(A) at 747H748B, Miller JA explained that the purpose of the phrase "subject to" when used in a legislative provision, is –
>
> > ' . . to establish what is dominant and what subordinate or subservient; that to which a provision is 'subject', is dominant - in case of conflict it prevails over that which is subject to it. Certainly, in the field of legislation, the phrase has this clear and accepted connotation. When the legislator wishes to convey that that which is now being enacted is not to prevail in circumstances where it conflicts, or is inconsistent or incompatible, with a specified other enactment, it very frequently, if not almost invariably, qualifies such enactment by the method of declaring it to be 'subject to' the other specified one. As MEGARRY J observed in *C and J Clark v Inland Revenue Commissioners* (1973) 2 All ER 513 at 520:
> >
> > > 'In my judgment, the phrase 'subject to' is a simple provision which merely subjects the provisions of the subject subsections to the provisions of the master subsections. When there is no clash, the phrase does nothing: if there is collision, the phrase shows what is to prevail.'"

Mr Haskins argued that the Children's Act enjoyed hierarchal supremacy to the Hague Convention within the jurisdiction of South Africa. That being so, the argument continued, the case law which preceded the implementation of the Children's Act may now have to be qualified.[24] He argued that the list of factors which must be taken into consideration where relevant, are those listed in section 7 of the Children's Act. The import of this argument is that the best interests of the children demand that they, despite the peremptory language of Article 12 of the Hague Convention and in the absence of any other exception being demonstrated, not be returned to Canada.

[101] The general assumption of the Hague Convention is that, and as a general rule, a unilateral decision by a parent to wrongfully remove or retain a child in a

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[23] *Sentra-Oes Koöperatief Bpk v Commissioner for Inland Revenue,*1995 (3) SA 197 (AD) at 207 C - F. Reference was also made to *Rennie NO v Gordon and Another NNO*, 1988 (1) SA 1 (AD) at 21 D – G where Justice Corbett had relied on the same *dicta*.

[24] Reliance was placed on the dicta of Spilg J in support hereof in *Central Authority v TK*, 2015 (5) SA 408 (GJ)

country other than the child's country of habitual residence is harmful to the child.[25] In this regard:

> "The removal or retention is accompanied by a sudden severance of the child's relationships and ties with the country of habitual residence, including a severe limitation of the child's contact with the left-behind parent. Abduction will generally be prejudicial to children due to the disruption and trauma it causes, and in the vast majority of cases, it will be in the best interests of the child to be returned."

[102] That is not to say that there can never be a debate about the best interests of the child. On the contrary, the exceptions create an opportunity to investigate the best interests of the individual child as follows:

> "first, once the abducting parent successfully raises an exception to return, the words 'is not bound to order the return' and 'may also refuse to order the return' ... make it clear that the court retains a residual discretion to grant or refuse an order for the return of the child.[26] Secondly, once a defence is raised and the court is exercising its discretion to refuse or order the return of the child, the court may conduct an investigation into the best interests of the individual child concerned.[27"28]

[103] It is within these parameters that a court must have regard to the best interests of the child.[29]

[104] In *Huet,*[30] Tuchten J, writing for a full court, held that the Article 13(b) enquiry is in essence about the child's best interests and:

> 'The Constitutional Court[31] appreciated that there might be cases in which the child's short term interests might not be met by immediate return and that if this was

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[25] C du Toit 'The Hague Convention on the Civil Aspects of International Child Abduction' in T Boezart (ed) *Child Law in South Africa* (2017) at 474.

[26] *Smith v Smith* 2001 (3) SA 845 (SCA) at para 11 and *Chief Family Advocate v G* 2003 (2) SA 599 (W) at 618D-E.

[27] *Family Advocate v B* [2007] 1 All SA 602 (SE) and *Chief Family Advocate v G* (ibid) at 611J-612C.

[28] C du Toit 'The Hague Convention on the Civil Aspects of International Child Abduction' in T Boezart (ed) *Child Law in South Africa* (2017) at 476.

[29] See, *Central Authority v B, 2012 (2) SA 296 (GJ)*; *Central Authority v TK* 2015 (5) SA 408 (GJ).

[30] Para [38]

> the case, a limitation on the generality of the right conferred by s 28(1) on the proportionality analysis required under s 36 of the Constitution would in principle be justified.

[105] *Sonderup* was decided in 2001, 9 years before the coming into operation of the Children's Act. It found that Article 12 was consistent with section 28(2) of our Constitution. The argument that the Children's Act alters this position is in my view, unfounded and has been found to be wrong.[32] There is no inconsistency or need for one to trump the other – they supplement one another.

[106] As mentioned previously, rigid enforcement of the Hague Convention provisions could lead to injustice in individual cases. The *Sonderup*[33] decision emphasises the importance of shaping an order by means of incorporating substantial conditions designed to mitigate the interim prejudice to a child caused by a court ordered return. In doing so, clearly regard is had to the best interests principle in doing so.

Presentation of the case

[107] Regulation 23 of the Children's Act provides that proceedings for the return of a child under the Hague Convention must be completed within 6 weeks from the date on which judicial proceedings were instituted in the High Court except where exceptional circumstances make this impossible. The application was served on the respondent on 28 July 2020 and the initial date for the hearing of the matter was set to be 19 August 2020. Mr Courtenay requested additional time to, amongst other things, engage the services of Ms Filmer. The matter was ultimately enrolled for hearing on 8 September 2020. Mr Courtenay explained in his report that he

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[31] Referring to *Sonderup v Tondelli and Another*, 2001 (1) SA 1171 (CC) at paras [29] to [36]

[32] See, C du Toit 'The Hague Convention on the Civil Aspects of International Child Abduction' in T Boezart (ed) *Child Law in South Africa* (2017) at 478-9; *Central Authority of the Republic of South Africa v JW* 2013 JDR 1117 (GNP) at para 19; and *KG v CB* 2012 (4) SA 136 (SCA).

[33] At para [35]

purposefully avoided a best interest enquiry as formulated by the respondent as that is the enquiry to be conducted by the court hearing the ultimate primary residence dispute. In addition, Mr Courtenay said that he was unable to secure experts who were available and willing to provide reports and assistance within the time frames required by this Court, which were informed by regulation 23 of the Children's Act. The very nature of Hague applications means that time does not permit of extensive and in depth investigations into the best interests of the children.

[108] Every application requires a Court to undertake a fine balancing act and for this reason, the state attorney, assuming the responsibility of representing the second applicant can not, as was done in this case, permit affidavits to be drafted without any guidance or assistance resulting in pages and pages of repetitive, inadmissible and irrelevant matter being introduced into the litigation. As it is, a court is obliged to adjudicate the matter under time constraints and providing no limitation and structure to the manner in which the evidence is presented to the court, does not assist the process. This is to be avoided as it is time consuming to sift through this material, obfuscates the true issues in dispute and does not assist the court in dispensing justice promptly.

[109] New matter was introduced into the second applicant's replying affidavit, this in turn gave rise to a further affidavit by the respondent and another by the second applicant. Ultimately, this court granted an order in terms of which the supplementary affidavit deposed to by the respondent on 4 September 2020 was received as well as the affidavit deposed to by the second applicant dated 7 September 2020 but only insofar as it dealt with the allegations relating to the whatsapp message annexed to the respondent's 4 September 2020 affidavit as 'CLR4'.

[110] Mr Courtenay was criticized in both the supplementary affidavit deposed to by the respondent on 4 September 2020 and her supplementary heads of argument. In my view, without foundation. Mr Courtenay gave an account of the facts he based his recommendations on in a manner he was compelled to do by virtue of his office and court appointment.[34] In my view, he executed his duties beyond reproach. In the end, nothing turned on these criticisms and I consider it unnecessary to analyse and discuss them in this judgment.

[111] The family advocate Mr Kathawaroo Renay, should be commended for the speed in which he dealt with this matter. The proceedings were commenced in Ontario on 29 June 2020 and by mid July 2020, the mediation process in South Africa had been concluded. The application was served on the respondent on 28 July 2020 and on the very same day, I was assigned the matter by the Acting Deputy Judge President to both case manage and adjudicate.

Costs

[112] No reasons were advanced why the costs should not follow the result.

Order

[113] I accordingly grant the following order:

113.1. The application is dismissed.

113.2. The second applicant is ordered to pay the costs of this application including the costs of two counsel where so employed.

I OPPERMAN
Judge of the High Court
Gauteng Local Division, Johannesburg

[34] *B v G*, 2012 (2) SA 296 (GSJ) at para [12]

Counsel for the first and second applicants: Adv A Mofokeng
Instructed by: The State Attorney
Counsel for the respondent: Adv ML Haskins SC and Adv V Olivier
Curator ad litem: Adv M Courtenay
Instructed by: BDK Attorneys
Date of hearing: 8 September 2020
Date of Judgment: 15 September 2020