# Pennello v Pennello and Another (238/2003) [2003] ZASCA 147; [2004] 1 All SA 32 (SCA) (1 December 2003)

## THE SUPREME COURT OF APPEAL

## OF SOUTH AFRICA

***Reportable***

**CASE NO: 238/2003**

**In the matter between**

**ROBERT SALVATORE PENNELLO APPELLANT**

**and**

**HAYLEY SARAH-DAWN PENNELLO RESPONDENT**

**THE CHIEF FAMILY ADVOCATE AMICUS CURIAE**

**CORAM: Mpati DP, Farlam, Brand, Lewis JJA and Van Heerden AJA**

**HEARD:** ***4 NOVEMBER 2003***

**DELIVERED***: 1 DECEMBER 2003*

***Summary:*** **Minor ─ abduction of ─ Hague Convention on Civil Aspects of International Child Abduction (1980) ─ defences ─ provision in art 13(b) that requested State not bound to order return of child if existence of grave risk of physical or psychological harm, or that child would otherwise be placed in an intolerable situation.**

***JUDGMENT***

**VAN HEERDEN AJA**

**VAN HEERDEN AJA**

## Introduction

**[1]** This appeal concerns a two-and-a-half year old girl, A.M.P. (A.), who was brought to South Africa by her mother, the respondent, from New Jersey, United States of America, in September 2002. Both mother and daughter are still in this country, presently living in Knysna (Western Cape).

**[2]** On 22 November 2002, on the application of the appellant (A.'s father), the Durban and Coast Local Division (Pillay J) ordered the summary return of A. to New Jersey, subject to relatively detailed conditions designed to protect the interests of the child pending the final adjudication and determination, by the New Jersey courts, of the issues of custody, care of and access to her. This order was made pursuant to the provisions of the Hague Convention on the Civil Aspects of International Child Abduction (1980) (the Convention), as incorporated into South African law by the Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996 ('the Act'), which came into operation on 1 October 1997.[1]

**[3]** With the leave of Pillay J, the respondent appealed against this order to the Full Court of the Natal Provincial Division. On 14 February 2003, the Full Court (Hurt, Van der Reyden and Kondile JJ) upheld the appeal.[2] The present appeal is against the judgment and order of the Full Court, leave to appeal having been granted by this Court, which also ordered that the Chief Family Advocate be admitted as an *amicus curiae*.[3]

## Background

**[4]** The appellant (presently 42 years old) is a citizen of and resident in the United States of America. He and the respondent (who is 29 years old) were married on 2 April 1999 in New Jersey, United States of America. The parties' daughter, A., was born in New Jersey on 9 May 2001. The family lived together in New Jersey until 25 September 2002, on which date the respondent clandestinely removed A. from the United States of America without the knowledge or consent of the appellant. It is common cause that, at the time of A.'s removal, she was habitually resident in the United States of America and that both parents were exercising equal custody rights in respect of their child. Thus, in terms of art 3 of the Convention, A.'s removal from the United States of America (also a Contracting State to the Convention) was wrongful.[4]

**[5]** Article 8 of the Convention provides that any person, institution or other body who claims that a child has been removed 'in breach of custody rights' may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child. In terms of art 7(*f*), one of the obligations imposed upon Central Authorities is to 'initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child'.

**[6]** In this case, the appellant applied to the United States Central Authority for its assistance in securing A.'s return and that Central Authority, in turn, transmitted the appellant's application to the Chief Family Advocate of South Africa for further action.[5]

Unfortunately, the Office of the Family Advocate of Kwa-Zulu Natal[6] (the Durban Family Advocate), although apparently the delegate of the Chief

Family Advocate (as the South African Central Authority) in that jurisdiction,[7] badly (albeit in good faith) misconstrued its role in terms of the Act. In a letter dated 31 October 2002, addressed to the appellant's Durban attorneys, the Durban Family Advocate purported

'... to confirm our telephone conversation this morning during which I informed you that the Office of The Family Advocate would not be able to finalise the above-mentioned matter expediently because of the immense bureaucracy that would impede my functioning in this matter.'

The letter stated further that:

'I believe that your office would be able to assist Mr Pennello more expeditiously. I confirm that I requested you to contact Mr Pennello and inform him of my difficulties, as I do not have the time to communicate with him today as I am dealing with an urgent application and will be called upon to give evidence in the High Court.'

**[7]** As a result of the attitude adopted by the Durban Family Advocate, the appellant 'took up the cudgels himself',[8] instituting an application on 5 November 2002 for A.'s immediate return. Needless to say, this application was vigorously opposed by the respondent and as set out above, the matter eventually came to this Court, the appellant being ordered by the Full Court to pay the costs of the respondent's appeal to it. I shall deal with the effect of the stance taken by the Durban Family Advocate later in this judgment.

**[8]** In opposing the appellant's application in the Durban and Coast Local Division, the respondent relied on art 13(b) of the Convention, contending that there should not be an order for the return of A. to New Jersey because there was a grave risk that, if the child were returned, she would be exposed to

physical or psychological harm or would otherwise be placed in an intolerable situation. In her opposing affidavit the respondent listed a number of instances of behaviour by the appellant towards her which (according to the respondent) constituted physical and mental abuse. She described the appellant as 'an extremely volatile person... incapable of moderating his behaviour'; as 'obsessive' (particularly as regards his 'fanatic' gym schedule); as 'extremely intolerant,' with a 'very low level of frustration', resulting in his resorting to violence against her 'on numerous occasions'. According to the respondent, her marriage relationship with the appellant had long been a troubled one, characterised by 'frequent bitter arguments' between them and by 'continual' physical and verbal abuse directed against her by the appellant. She was allegedly so traumatised by the appellant's conduct that she eventually reached the stage where she 'simply could not continue', and felt that she had 'nowhere to go other than to return to the safety of [her] family in South Africa'.

**[9]** The respondent submitted further that her actions in leaving New Jersey with A. and returning to her parental home in South Africa were motivated by fear for her safety and 'an inability to continue in the intolerable situation' which had developed between herself and the appellant. She went so far as to say that she 'genuinely believe[d] that if I return to America, my life will be at risk if I reside with the [appellant]' and that, even if she were to have separate accommodation, the appellant would 'continually harass me and make my life unbearable'. On the respondent's version, A. had clearly been traumatised by the appellant's behaviour and now displays this in her interaction with other men. Were the court to order A.'s return to New Jersey, there would allegedly be 'a grave risk to her health, both physically and psychologically', should the child have to stay with her father. Moreover, even if the respondent were to return with A. to New Jersey, the relationship between the appellant and the

respondent would still expose A. to serious psychological harm and place the child in intolerable situation.

**[10]** Much of the factual matrix upon which the respondent's reliance on art 13(b) was based was disputed by the appellant. Indeed, Pillay J agreed with the respondent's contention that there were substantial disputes of fact between the parties which could not be resolved on the papers before him. However, in his view, these factual disputes related 'in the main to the issue of custody which ... is not an issue before this Court and which is best resolved in the Court of habitual residence, viz. New Jersey'. Relying on the judgment of the Constitutional Court in *Sonderup v Tondelli and Another*,[9] the judge held that, once the appellant had established that the removal of the child was wrongful within the meaning of art 3 of the Convention – which he had done on the papers before the Court – the onus was then on the respondent to establish the defence on which she was relying in terms of art 13(b).

**[11]** Pillay J stated that he was –

' ... by no means satisfied that ... a sustained and established pattern of domestic violence[10] has been shown to exist. The physical and verbal abuse, even on the Respondent's version, appears to me to arise over apparently trivial disagreements and conduct which one or the other party finds offensive or unacceptable ... there are insufficient facts before this Court to justify a finding that the child would be placed in the intolerable situation or exposed to the grave risk of physical or psychological harm as the Respondent would have the Court find on the probabilities ... The reasons advanced by Respondent that she and the child would be exposed to physical and mental trauma if ordered to return to America, appear to arise out of her own reasons rather than out of fear of harm to the child'.[11]

**[12]** The judge regarded as 'crucial' the undertakings given by the appellant's counsel on his behalf during the course of argument that addressed 'to an appreciable extent' the concerns of the respondent and ameliorating the potential hardships to which A. might be exposed should the court order her return to New Jersey. Accordingly, as already mentioned, the court ordered A.'s return to New Jersey, subject to a number of protective conditions based on the undertakings given by the appellant.

**[13]** After she had been granted leave to appeal to the Full Court and had delivered a notice of appeal on 13 January 2003, the respondent filed an application in which she sought to have the matter remitted to the court *a quo* for the purpose of adducing further evidence, either orally or by way of affidavit. This further evidence concerned the 'efficacy and reliability' of the undertakings given by the appellant (and used by Pillay J as a basis for formulating his order), and the effect on the respondent and A. of any failure by the appellant to comply with these undertakings. The respondent also sought to place before the court certain 'pleadings and documents filed in the proceedings brought by the [then] Respondent [the current appellant] in the Superior Court of New Jersey'. The appellant answered the allegations made by the respondent in the affidavit deposed to by her in support of this application, and the respondent, in turn, replied to the appellant's answering affidavit.

**[14]** In the view of the Full Court:

'Much of the documentary material which the respondent seeks to place before this Court in the form of "further evidence" post-dates the completion of the parties' affidavits in the original application proceedings and reflects a series of moves and counter-moves which both parties have made for the purpose of furthering their respective aims in the litigation between them. Ordinarily, because this is a matter which involves the interests

of a very young child, and because the proceedings have been extremely urgent, we would have been disposed to allow the application to adduce further evidence by way of affidavit on appeal (subject, of course, to stipulations aimed at avoiding any prejudice to the applicant [the present appellant]). However, on the view which we take of the appeal itself, judged in isolation from the further evidence which has been tendered, it is not necessary to make any order in respect of the respondent's application.'[12]

As indicated above, the Full Court upheld the respondent's appeal to it, with costs, setting aside the order made by Pillay J and dismissing the appellant's application for the return of his daughter to New Jersey.

**Further applications before this Court**

**[15]** On 10 October 2003, the respondent delivered another application for leave to adduce further evidence before this Court, both by way of affidavit and documentary material (including all the documents which she had previously sought to place before the Full Court) 'in proof of the fact that the undertakings given by the appellant to the court of first instance did not constitute adequate safeguards in the best interests of the minor child A. and accordingly should not have been accepted as such by the Court of first instance.'

**[16]** The appellant gave notice that he would abide the decision of this Court in respect of the respondent's application but that, in the event of her application being granted, he also sought leave to adduce further evidence, by way of affidavit and documentary material (including his affidavit answering the respondent's previous application to adduce further evidence, and the annexures thereto).

**[17]** While courts in foreign jurisdictions, such as England and Australia, have generally taken the view that applications under the Convention 'are intended to be heard expeditiously by a summary form of procedure to enforce or otherwise the terms of the Convention,'[13] this is not an invariable rule. Thus, for example, in *J (A Minor)*,[14] the English Court of Appeal held that evidence of events subsequent to the initial return hearing could be accepted, provided that this 'fresh' evidence is such 'as substantially to change the basic assumptions on which the court made the [original] order and ... such that in general it would be an affront to one's sense of justice not to admit it'; evidence 'which if given would probably have an important influence on the result of the case and …which is such as presumably can be believed; in other words…evidence which is apparently credible, though of course not necessarily incontrovertible.'[15] This is a common-sense approach which satisfies one's sense of justice and which, in my view, accords with the approach adopted by South African courts in determining applications to adduce further evidence on appeal,[16] particularly in cases where the interests of children are at stake.

[18] The evidence covered by the respondent's application and the appellant's conditional counter-application would seem to satisfy the above-mentioned criteria, in so far as it may have an effect on the question as to whether the respondent has established a defence in terms of art 13(b) of the Convention and, if not, the adequacy of the 'protective mechanisms' contained in the order of the court of first instance. In any event, in the light of the fact that counsel for each party did not really oppose these applications in respect of such further evidence, both respondent's application and appellant's conditional counter-application were granted at the outset of the hearing before this Court. Counsel for the respondent initially sought to amend the respondent's notice of motion in this regard so as to provide for three supplementary affidavits deposed to by

the respondent (dated 9 October 2003, 28 October 2003 and 30 October 2003, respectively) to be placed before us, but ultimately did not persist with this request.

**[19]** In the main, the 'new' evidence which the respondent thus adduced before this Court related to various orders obtained by the appellant in the Superior Court of New Jersey after the original judgment and order by Pillay J on 22 November 2002. It would appear that, on 27 November 2002, the appellant obtained against the respondent, *ex parte*, an 'order to show cause' in terms of which, *inter alia,* the parties would have 'temporary joint legal custody of A.', the respondent would 'be designated as primary residential parent', and the appellant would have extensive 'shared parenting time with A. on an alternating week basis'. The provisions of this order, the 'return date' of which was 20 December 2002, clearly contradicted several of the important conditions for A.'s return, as contained in the order made by Pillay J,[17] notwithstanding the fact that, in terms of Pillay J's order, the appellant was required –

'... within 14 days of the date of delivery of judgment [to] launch proceedings and pursue them with due diligence to obtain an order from the appropriate judicial or administrative authority in the State of New Jersey, United States of America',

which order had to reflect the conditions set by Pillay J (a so-called 'mirror order').

**[20]** According to the appellant, he had instructed his attorney in New Jersey to take the necessary steps to obtain a 'mirror order', as required by Pillay J's order. At the same time, he had also instructed the attorney to commence

proceedings against the respondent for divorce and 'the necessary ancillary relief'. His attorney had instituted proceedings in New Jersey 'with a two-fold purpose: (i) to obtain interlocutory relief in the divorce proceedings; (ii) to obtain an Order which would...meet the requirements of the Order of [the Durban High Court]'. However, allegedly because of differences in the legal systems of New Jersey and South Africa and a 'misunderstanding' by the appellant's New Jersey attorney of 'the exact requirements of the South African court order', the 'order to show cause' made by the New Jersey court on 27 November 2002 was not 'strictly in accordance with' Pillay J's order – something of an understatement, to put it mildly. The Durban Family Advocate then prepared a memorandum dated 10 December 2002, pointing out a number of respects in which the 'order to show cause' was not compatible with the conditions imposed by Pillay J. The day before, on 9 December 2002, the appellant had applied for and obtained from the Superior Court of New Jersey a second order, largely 'mirroring' the requirements set in the order made by Pillay J, and this second order was approved by the Durban Family Advocate. The appellant states that this was done because his South African legal representatives had advised him that the 'order to show cause' made on 27 November 2002 did not meet the requirements of the court of first instance. The appellant's New Jersey attorney subsequently confirmed in writing to the appellant's South African attorneys, by way of a letter dated 23 January 2003, that he had 'withdrawn the Order to show Cause, so that the only order in existence in New Jersey is the mirror Order'.

**[21]** The appellant's 'complaint for divorce' against the respondent was filed in the Superior Court of New Jersey on 26 November 2002. One of the orders sought was that he be awarded 'legal custody' of A., 'with reasonable parenting rights' to the respondent. It would appear that, prior to this, the respondent had

(on 18 October 2002)[18] applied to the Durban and Coast Local Division for leave to institute proceedings against the appellant by way of edictal citation for a decree of divorce and an order awarding custody of A. to her. Leave was granted on 28 October 2002 and, on 31 October 2002, the respondent instituted such proceedings which were defended by the appellant. The respondent's plea to the appellant's conditional claim in reconvention was served on 11 June 2003 and the matter thereafter placed on the awaiting trial roll.

**[22]** Notwithstanding these developments, the appellant went ahead with the divorce proceedings in the Superior Court of New Jersey and, on 24 July 2003, succeeded in obtaining (by default) a final order of divorce against the respondent, in terms of which no maintenance is payable by either party to the other, certain specified debts must be paid by each party and, upon the return of A. to New Jersey, the appellant is obliged to pay child support for her in the amount of US $102 per week. According to the divorce order, this figure is based on the appellant and the respondent earning US $40 000 and US $18 000 per year, respectively, and the appellant 'having 40% parenting time with the child'. Furthermore, the New Jersey order provides that the appellant must continue to pay medical insurance for A. (even while she is in South Africa), that the respondent is responsible for the first US $250 per year in unreimbursed medical expenses for A. and that, 'in accordance with the Child Support Guidelines percentages', the appellant must pay 65% and the respondent 35% of all A.'s medical and like expenses. The order does not, however, deal with the issues of custody of and access to A..

**[23]** By means of the further evidence placed by the respondent before this Court, she again sought to cast doubt on the adequacy of the appellant's undertakings, as incorporated in the order made by the court of first instance,

and on the appellant's ability and willingness to comply with such undertakings. In summary, the respondent submitted that, in all probability, she would not be able to obtain employment should she return to New Jersey and would hence be unable to support herself financially. She contended, furthermore, that the appellant's financial position was such that he would not be able to comply with the undertakings made by him, let alone provide her (the respondent) with any direct financial support (no provision for which was made in Pillay J's order, in any event). She would also not be in a financial position to take any legal action in New Jersey to enforce or vary the 'mirror order' made on 9 December, to defend any proceedings instituted by the appellant to vary or amend such order, or to procure legal representation for herself in the envisaged custody and access proceedings in New Jersey. The appellant, on the other hand, gave details of his financial position and submitted that he was indeed able and willing to comply with the undertakings made by him, as slightly amended to take account of certain changes in his circumstances.

**[24]** With particular emphasis on the New Jersey divorce order obtained by the appellant, counsel for the respondent argued that the appellant had by his own actions rendered the appeal to this Court nugatory and robbed it of all practical import. In his submission, we should dismiss the appellant's appeal on this ground alone. There is, in my view, no merit in this argument. Despite the granting of the divorce order, the courts of A.'s habitual residence under the Convention (New Jersey) have not finally adjudicated upon and determined the key issues of custody of and access to A.. The main issue to be addressed in this appeal is whether, as was found by the Full Court, this is indeed a case in which art 13(b) applies and should bar the return of A. under the Convention to the state of habitual residence. If these questions are answered in the negative

by the court of the requested State, then any conditions imposed by such court to govern the return of the child, which conditions are often (but not invariably) based on undertakings given by the applicant, are designed 'to smooth the return of [the child] to the country of …habitual residence[19], and to give the child 'the maximum possible protection until the courts of the other country…can resume their normal role in relation to the child.'[20]

**The purpose of the Convention and the proper approach to the article 13(b) 'defence'**

**[25]** The primary purpose of the Convention is to secure the prompt return (usually to the country of their habitual residence) of children wrongfully removed to or retained in any Contracting State, viz to restore the *status quo ante* the wrongful removal or retention as expeditiously as possible so that custody and similar issues in respect of the child can be adjudicated upon by the courts of the state of the child's habitual residence.[21] The Convention is predicated on the assumption that the abduction of a child will generally be prejudicial to his or her welfare and that, in the vast majority of cases, it will be in the best interests of the child to return him or her to the state of habitual residence. The underlying premise is thus that the authorities best placed to resolve the merits of a custody dispute are the courts of the state of the child's habitual residence and not the courts of the state to which the child has been removed or in which the child is being retained.[22]

**[26]** Where the removal or retention of the child in question is indeed wrongful within the meaning of art 3,[23] and a period of less than a year after the wrongful removal or retention has elapsed – as is the case with A. – then the appropriate

judicial or administrative authority of the requested State is *obliged* to order the immediate return of the child.[24] There are, however, certain limited exceptions to the mandatory return of the child, one of which is contained in art 13(b), which provides as follows:

'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 [in other words, it has a discretion in this regard] if the person, institution or other body which opposes its return establishes that –

(a)…

(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.'

**[27]** An attack on the constitutionality of the Act incorporating the provisions of the Convention into South African law, based on the argument that this Act obliges South African courts to act in a manner which does not recognise the paramountcy of the best interests of the child,[25] was rejected by the Constitutional Court in *Sonderup v Tondelli and Another*.[26] Writing for the Court, Goldstone J emphasised the purposes of the Convention and stated [27] that:

"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. Indeed, art 19 provides that:

" A decision under this Convention concerning the return of a child shall not be taken to be a determination on the merits of any custody issue."

Rather, the Convention seeks to ensure that custody 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 custody.'[28]

**[28]** In concluding that the Act incorporating the Convention is consistent with the Constitution, the Constitutional Court pointed out[29] that:

'…the court ordering the return of a child under the Convention would be able to impose substantial conditions designed to mitigate the interim prejudice to such child caused by a court ordered return. The ameliorative effect of art 13, an appropriate application of the Convention by the court, and the ability to shape a protective order, ensure a limitation that is narrowly tailored to achieve the important purposes of the Convention. It goes no further than is necessary to achieve this objective, and the means employed by the Convention are proportional to the ends it seeks to attain.'

**[29]** Addressing the question whether the 'abducting' mother of the child concerned (a four year old girl) had established, under art 13(b) of the Convention, that there was a grave risk that the child's return to the state of her former habitual residence (British Columbia, Canada) would expose her to psychological harm or otherwise place her in an intolerable situation, the Constitutional Court made the following statements:[30]

'A matrimonial dispute almost always has an adverse effect on children of the marriage. Where a dispute includes a contest over custody, that harm is likely to be aggravated. The law seeks to provide a means of resolving such disputes through decisions premised on the best interests of the child. Parents have a responsibility to their children to allow the law to take its course and not to attempt to resolve the dispute by resorting to self-help. Any attempt to do that inevitably increases the tension between the parents and that ordinarily adds to the suffering of the children. The Convention recognises this. It proceeds on the basis that the best interests of a child who has been removed from the jurisdiction of a Court in the circumstances contemplated by the Convention are

ordinarily served by requiring the child to be returned to that jurisdiction so that the law can take its course. It makes provision, however, in art 13 for exceptional cases where this will not be the case.

An art 13 enquiry is directed to the risk that the child may be harmed by a Court-ordered return. The risk must be a grave one. It must expose the child to "physical or psychological harm or otherwise place the child in an intolerable situation". The words "otherwise place the child in an intolerable situation" indicate that the harm that is contemplated by the section is harm of a serious nature. I do not consider it appropriate in the present case to attempt any further definition of the harm, nor to consider whether in the light of the provisions of our Constitution, our Courts should follow the stringent tests set by Courts in other countries.'

**[30]** Despite the litany of alleged incidents of physical and mental abuse of the mother by the 'left-behind' father on which counsel for the former relied in argument before the Constitutional Court in the *Sonderup* case,[31] as well as the report of a South African clinical psychologist to the effect (*inter alia*) that the continuation of the *status quo* in Canada would have a 'severely compromising effect on the healthy psychological development' of the child in question, the Court held that the harm to which the child would allegedly be subjected by a court-ordered return was not harm of the serious nature contemplated by art 13, but rather –

'…in the main harm which is the natural consequence of her removal from the jurisdiction of the Courts of British Columbia, a Court-ordered return, and a contested custody dispute in which the temperature has been raised by the mother's unlawful action. That is harm which all children who are subject to abduction and Court-ordered return are likely to suffer, and which the Convention contemplates and takes into account in the remedy that it provides.'[32]

The Constitutional Court thus confirmed the order made by the court a quo for the return of the child, subject to detailed conditions which were very similar to those imposed by Pillay J in the present matter.[33]

**[31]** As was canvassed in considerable detail by counsel for the appellant in her heads of argument before this Court, courts in other Contracting States have given art 13(b) a restrictive interpretation and, by and large, 'have resisted efforts to convert Article 13(b) into a substitution for a best interests determination',[34] on the basis that 'the Convention's drafters … did not intend for this exception to be used by defendants as a vehicle for the litigation or relitigation of the abducted child's best interests.'[35]

**[32]** Thus, for example, it has been held that the 'grave risk' required to establish an art 13(b) defence to return must be –

'…more than an ordinary risk, or something greater than would normally be expected on taking a child away from one parent and passing him to another…not only must the risk be a weighty one, but…it must be one of substantial, and not trivial, psychological harm. That, as it seems to me, is the effect of the words "or otherwise place the child in an intolerable situation".'[36]

**[33]** Courts in (*inter alia*) England, Canada, Australia and the United States of America have emphasised that:

'...the threshold to be crossed when an article 13(b) is raised is a high one and difficult to surmount…The risk must be grave and the harm must be serious. The courts are also anxious that the wrongdoer should not benefit from the wrong: that is, that the person removing the children should not be able to rely on the consequences of that removal to create a risk of harm or an intolerable situation on return.'[37]

**[34]** In the words of Ward LJ in *Re C (Abduction: Grave Risk of Psychological Harm)*:[38]

'There is, therefore, an established line of authority that the court should require clear and compelling evidence of the grave risk of harm or other intolerability which must be measured as substantial, not trivial, and of a severity which is much more than is inherent in the inevitable disruption, uncertainty and anxiety which follows an unwelcome return to the jurisdiction of the court of habitual residence.'[39]

**[35]** Referring to several of the more recent English cases cited above, counsel for the respondent argued that, in England, more is required (in an evidentiary sense) from a party seeking to establish a defence under art 13(b) of the Convention that would be the case in a normal civil matter. While this may or may not be so, I do not consider it to be either necessary or appropriate in the present case to consider whether South African courts should follow 'the stringent tests set by Courts in other countries'[40] in this regard. My reasons for this conclusion will become apparent later on in this judgment.

**The judgment of the Full Court**

**[36]** In *Smith v Smith*,[41] Scott JA stated that, once the applicant for a return order under the Convention has established that the child was habitually resident in the Contracting State from which he or she was removed immediately prior to the removal or retention and that such removal or retention was wrongful in terms of art 3:

'…the *onus* is upon a party resisting the order to establish one or other of the defences referred to in article 13(a) or (b) or that the circumstances are such that a refusal would be justified having regard to the provisions of article 20.[42] If the requirements of article 13(a) or (b) are satisfied, the judicial or administrative authority may still in its discretion order the return of the child.'

**[37]** In its judgment in this case, the Full Court, quoting this *dictum* of Scott JA, held that 'it is clear from the wording of Article 13 that the person opposing an application for the return of a child must "establish" circumstances falling within sub-paragraph (a) or sub-paragraph (b)'.[43] So far, so good. However, the court went on 'to consider precisely what was intended by the use of the term "onus" in [the] *dictum*' of Scott JA, and held that it was 'not appropriate to equate the requirement that the person opposing an order under Article 12 "establish" certain facts, to the customary requirements for the discharge of an onus in our civil law.'[44]

**[38]** In my view, this approach cannot be accepted. There is nothing in the wording of art 13 of the Convention or in the analysis of this wording by either the Constitutional Court in *Sonderup* or this Court in *Smith* to suggest that the person resisting an order for the return of a child under the Convention by relying on the art 13(b) defence does not bear the usual civil *onus* of proof, as it is understood in our law, in that regard, viz that he or she is required to prove the various elements of the particular art 13(b) defence on a preponderance of probabilities.[45]

[**39**] As regards the approach to be adopted to disputed evidence on affidavit in Convention applications, counsel for the appellant (at that stage the respondent) contended before the Full Court that the court should apply the time-honoured principles articulated by Corbett JA in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*[46] — where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order may be granted if

those facts averred in the applicant's affidavits that have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. This rule has been held to apply even in cases where the onus of proving facts in a dispute rests on the respondent and not only when the onus rests on the applicant.[47] The Full Court rejected this contention, stating that:

'Although this is, at first sight, an attractive proposition and one which has the substantial merit of providing the court with a familiar and eminently workable basis upon which to decide cases on paper without resorting to oral evidence, we do not feel that it is an appropriate test for the special circumstances which arise in proceedings under the Convention. This is because, in ordinary application proceedings, the applicant invariably has an option as to whether he should seek final relief on application or have the matter referred to trial or oral evidence. When he decides to dispense with reference to oral evidence such applicant is effectively required to argue his case for relief on what is common cause and on the respondent's version of the facts which are in dispute. In the case of proceedings under the Convention, the person seeking an order in terms of article 12 has little or no option but to proceed by way of application and, as pointed out above, the judicial authority must almost invariably make its assessment to grant or refuse the order on the basis of what is said in the affidavits before it. In those circumstances to load an applicant with the burden of making his or her case largely on the basis of contentious statements in the respondent's affidavits might well lead to unjust decisions. In our view, therefore, the approach to the question of whether a respondent has "established" circumstances such as are contemplated in Articles 13(a) or (b) must be the type of "robust approach" mentioned in a wide variety of judgments in our courts in situations where matters have to be disposed of expeditiously and without all of the trappings which go with a full-scale hearing.'[48]

[**40**] I am in agreement with the argument of counsel for the appellant that the Full Court erred in departing from the well-known *Plascon-Evans* rule, as applied in the *Ngqumba* case, with regard to disputes of fact in proceedings on affidavit. As indicated above, the Convention is framed around proceedings brought as a matter of urgency, to be decided on affidavit in the vast majority of cases, with a very restricted use of oral evidence in exceptional circumstances.[49] Indeed, there is direct support in the wording of the

Convention itself for return applications to be decided on the basis of affidavit evidence alone,[50] and courts in other jurisdictions have, in the main, been very reluctant to admit oral testimony in proceedings under the Convention.[51] In incorporating the Convention into South African law by means of Act 72 of 1996, no provision was made in the Act or in the regulations promulgated in terms of s 5 thereof indicating that South African courts should not adopt the same approach to proceedings under the Convention as that followed by other Contracting States. In accordance with this approach, that Hague proceedings are peremptory and 'must not be allowed to be anything more than a precursor to a substantive hearing in the State of the child's habitual residence, or if one of the exceptions is satisfied, in the State of refuge itself'.[52]

**[41]** As counsel for the appellant pointed out (correctly, in my view), there is no reason in law or logic to depart, in Convention proceedings, from the usual approach to the meaning and discharge of an onus in civil law and from the application of the *Plascon-Evans* rule to disputes of fact arising from the affidavits filed in such proceedings. In the circumstances of the present case, a proper application of this usual approach would have rendered it unnecessary for the Full Court to make somewhat confusing statements such as the following:[53]

'A further question arises, however, which was not dealt with either in the case of *Sonderup* (*supra*) or in the decision of the Supreme Court of Appeal in the case of *Smith* (*supra*). It concerns the meaning of the reference to a "grave risk" [in art 13(b) of the Convention]. In our view, the contemplated risk can have two possible sources. Firstly it can be a risk which emerges as a matter of probability from an assessment of the affidavit evidence. Secondly it can be a risk which must necessarily be associated with the rejection of relevant assertions made by the respondent without the benefit of having these assertions tested at a hearing of *viva voce* evidence. Accordingly where a respondent contends that the applicant is guilty of conduct which will compromise the safety, well-being and interests of the child, and the applicant puts up

evidence to refute these contentions, the court, in assessing whether an order for the return of the child will be associated with the "grave risk" should, even though it is not able to resolve the issue, be alert to the consequences that may possibly flow if the respondent's evidence is, in fact, true.'

**[42]** In considering the merits of the appeal, the Full Court 'tend[ed] to agree with the general statement by the learned judge in the court *a quo* that the respondent has not made out "an established pattern of domestic violence" in relation to her'.[54] It accepted that, 'on an objective appraisement of the evidence', the marriage relationship between the parties had deteriorated to the point where, at least from the respondent's perspective, cohabitation with the appellant had become physically and psychologically intolerable. In view of, *inter alia*, the fact that the parties had been attending marriage counselling for some time, the appellant's poor 'track record…insofar as his ability to participate in a successful marriage relationship is concerned', and the manner in which the respondent had left the United States with A., the Full Court was prepared to assume, in the respondent's favour, that her 'assertions that life with the [appellant] will be *intolerable for her* are *bona fide* and genuine' (emphasis added).[55] As the judges correctly stated, however, the main question to be determined was *not* whether the respondent's attitude to the continuation of her marriage was reasonable or justified, but rather whether or not the court should order the return of A. to New Jersey under the Convention.

**[43]** The Full Court disapproved of the reliance by the court of first instance on the above quoted *dictum* of Butler-Sloss LJ in *C v C (Minor: Abduction: Rights of Custody Abroad*), (henceforth referred to as *C v C (1989)*),[56] which *dictum* commenced with the following statements:

'The grave risk of harm arises not from the return of the child, but the refusal of the mother to accompany him. The Convention does not require the court in this country to consider the welfare

of the child as paramount, but only to be satisfied as to the grave risk of harm. I am not satisfied that the child would be placed in an intolerable situation if the mother refused to go back…'

According to the Full Court:

'There are several aspects of this passage which, to put the matter at its lowest, are not compatible with the law as applied in this country. In the first place, the statement that the Convention does not require English courts to consider the "welfare" of the child [*sic:* the words 'as paramount' appear to have been inadvertently omitted] is (if we have correctly understood "welfare" to mean "general interests and well-being") directly contrary to the express stipulation in the preamble which stipulates that the interests of children are "of paramount importance". Furthermore, we cannot accept the suggestion that the principle of international comity should outweigh the interests of the child. We do not think that the fact that the mother created a situation which would cause problems about the return of the child should be taken as a basis for deciding that the child should not be returned. The emphasis here seems to be to preclude the mother from relying on a situation which she had created when, instead, the court should have been considering the question posed by Article 13(b) from the child's point of view. It follows that we can also not agree with the "rule of thumb" that a mother who removes a young child from his or her habitual residence cannot rely on her own refusal to return with the child as a basis for opposing an application in terms of Article 12 ... Insasmuch, therefore, as *C v C* purports to lay down any principle of general application relating to young children or to situations where a parent refuses to accompany a child who is the subject of an order under Article 12, we do not consider such principle to be acceptable in our law. In our law where the interests of the child are paramount, the only basis on which to decide each case is on its own particular facts.'[57]

**[44]** These statements by the Full Court reveal several misconceptions regarding the objectives of the Convention and its underlying assumptions, as well as a misunderstanding of the meaning of the *dictum* of Butler-Sloss LJ in *C v C (1989),* particularly as regards the meaning of the word 'welfare' as utilised in such *dictum.*

**[45]** It is clear from the judgments of courts in other Contracting States that, in considering the art 13(b) defence to the summary return of an abducted child, the court must distinguish between its role as a court determining matters of custody and access, on the one hand, and its role under the Convention as a court dealing with an application for the return of an abducted child to the state of his or her habitual residence, on the other. From several *dicta* in judgments subsequent to *C v C (1989),* it is apparent that the reference by Butler-Sloss LJ to the 'welfare of the child' in the abovequoted *dictum* from her judgment in that case was a reference to the principles guiding the courts in the determination of custody and other like matters.[58] Thus, in *Re M (Abduction: Psychological Harm),*[59] Butler-Sloss LJ stated that:

'…the approach of the Convention is directed to the welfare of the child but the welfare test generally is to be applied in such a way as to enable the courts of the habitual residence of the child to make decisions as to what are the best interests of that child…the Convention none the less exceptionally makes provision for specific consideration of the welfare of the particular child with whom the requested State is concerned, where the threshold has been crossed and the needs of the child require the court to take another course than summary return under Article 12. That specific consideration of welfare is only to be found in Article 13' (the relevant part which is then cited as being art 13 (b)).[60]

At a later stage in this judgment,[61] Butler-Sloss LJ again pointed out that–

'Article 13 gives the requested State this limited but none the less important opportunity to look at the specific welfare of these children at the time when the application for summary return is made.'

**[46]** The same point was cogently made by Laws LJ in the English Court of Appeal judgment in *TB v JB (Abduction: Grave Risk of Harm),*[62] in which case the abducting parent (the mother) had relied upon, *inter alia,* the art 13(b) defence, alleging that the children in question would be exposed to a grave risk

of physical or psychological harm or would be placed in an intolerable situation should the court order their return to New Zealand:

'In my judgment it is critical to recognise and to bear in mind at every stage of the court's consideration of the case, the difference between the judicial exercise upon which we are here engaged in administering the Convention on the Civil Aspects of International Child Abduction 1980…and the task which family courts daily undertake (in care proceedings and otherwise) of deciding where the welfare of a child or children lies. In dealing with an application to return a child under art 12 of the Convention we do not apply a straightforward welfare test; if we did, we should risk frustrating the plain purpose of the Convention.'

**[47]** As was submitted by counsel for the appellant, these *dicta* are entirely consistent with – indeed, are predicated upon – the preamble to the Convention which records that the States signatory to the convention are '[f]irmly convinced that the interests of the children are of paramount importance in matters relating to their custody', and desire 'to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence.'

**[48]** As regards the statement by the Full Court (in the passage quoted above) to the effect that 'we cannot accept the suggestion that the principle of international comity should outweigh the interests of the child', this too reflects a misunderstanding of the purpose and scope of the Convention which, *as a matter of international comity*, has as its basic premise the idea that the policy of prompt return to the state of habitual residence protects the interests of children *generally* by reversing the ill-effects of the wrongful removal or retention as quickly as possible and by deterring wrongful removals or retentions in the first place.[63]

**[49]** The misconceptions underpinning the statements of the Full Court in the passage quoted above are thrown into further relief by the following *dicta* of the Constitutional Court in *Sonderup v Tondelli and Another:*[64]

'The Convention itself envisages two different processes – the evaluation of the best interests of children in determining custody matters, which primarily concerns long-term interests, and the interplay of the long-term and short-term best interests of children in jurisdictional matters. The Convention clearly recognises and safeguards the paramountcy of the best interests of children in resolving custody matters. It is so recorded in the preamble',[65]

and

'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…Rather, the Convention seeks to ensure that custody issues are determined by the court in the best position to do so by reason of the relationship between its jurisdiction and the child…

Given the appropriateness of a specific forum, the Convention also aims to prevent the wrongful circumvention of that forum by the unilateral action of one parent. In addition, the Convention is intended to encourage comity between States parties to facilitate co-operation in cases of child abduction across international borders. These purposes are important and are consistent with the values endorsed by any open and democratic society.'[66]

**[50]** The passage from the judgment of Butler-Sloss LF in *C v C (1989)* cited by the Full Court, as clarified in subsequent cases, also does not support the interpretation given to it by the Full Court to the effect that 'the fact that the mother has created a situation which would cause problems about the return of the child should be taken as a basis for deciding that the child should not be returned'.[67] It is evident from the judgments of *inter alia* the English Court of Appeal, including that of Butler-Sloss LJ herself in *Re M (Abduction: Psychological Harm),*[68] that the approach to the art 13(b) defence always

remains focused on the *child* in question and the risk of harm to which a return order may expose the *child*, while the conduct of the abducting parent may, in appropriate cases, be *one* of the factors relevant to the determination of the existence and gravity of such risk of harm to the child.[69]

**[51]** The Full Court referred to 'the fundamental assumption' upon which the Convention is based, namely 'that it is a child's best interests to have questions of custody and/or access decided by the judicial authority in the place of the child's habitual residence'.[70] In this regard, however, they expressed the view that –

'As a general statement this is probably true, especially of children who have developed social relationships with peers and who have attended schools or even day-care institutions as part of their lifestyle. It is also plainly true of children whose parents are, for one reason or another, not living together and whose custody and access arrangements have been governed by agreement or order in their place of habitual residence. *But when it comes to a young child on the very threshold of life such as [A.], the applicability of the assumption becomes doubtful. It is difficult to conceive [of] any benefit which might flow to [A.] by having the question of her custody and the parties' respective access rights decided by a court in Princeton [New Jersey].'* [71]
(Emphasis added.)

**[52]** I agree with the submission made by counsel for the appellant that the approach of the Full Court in this regard (particularly the statements highlighted above) is also questionable. While the age of the child in question may well, in certain circumstances, be *one* of the factors relevant to the determination of whether a court-ordered return would expose the child to a grave risk of physical or psychological harm or otherwise place the child in an intolerable situation, there is no basis to differentiate *in principle* on the basis of age, or to be swayed by some kind of 'tender years' principle in the application of the Convention. Moreover, while it *may* be so (as was apparently accepted

by the Full Court),[72] that the appellant's chances of ultimately obtaining custody (joint or otherwise) of A., judged according to South African law, are somewhat slim – I do not express any view one way or the other in this regard – I share the doubts expressed by Ward LJ in *Re C (Abduction: Grave Risk of Psychological Harm)*[73] as to the appropriateness of a court hearing a return application under the Convention 'to engage in speculation'[74] on the possible outcome of a custody dispute or leave to relocate application to be heard in the courts of the State of habitual residence.

**[53]** It is important to bear in mind that a return order made under art 12 of the Convention is an order for the return of the child in question to the Contracting State from which he or she was abducted, and *not* to the 'left-behind' parent. The child is not, *by virtue of a return order*, removed from the care of one parent, or remanded to the custody of the other parent. In the words of Butler-Sloss P in the very recent case of *Re H (Children)*:[75]

'The return of children under the convention is to the jurisdiction of their habitual residence and it is not generally necessary or likely that the return would be to the same situation.'

**[54]** Furthermore, it must be remembered that the policy of the Convention appears to require that the evaluation of risk, for the purposes of consideration of an art 13(b) defence, be carried out:

'... on the basis that the abducting parent will take all reasonable steps to protect herself and her children and that she cannot rely on her unwillingness to do so as a factor relevant to risk...' [76]

As in several of the cases referred to above, the respondent before us is, to a large extent, the author of her present predicament and it would be reasonable to expect her to make all appropriate use of the welfare system and the machinery of the courts which may be available to her in New Jersey for her protection and that of her daughter. In any event, the undertakings given by the appellant, which formed the basis of the conditions imposed by the court of first instance, in my view do ameliorate to a large extent the concerns expressed by the respondent and the potential hardships to which A. might be exposed should her return to New Jersey be ordered. I agree fully with the submission by counsel for the appellant and for the *amicus curiae* that the reasons given by the Full Court for finding that there was a grave risk that A. would be exposed to harm or be placed in an intolerable situation were she to be returned to New Jersey under the aegis of the protective order (framed as a mirror order in New Jersey), are inadequate and unconvincing. Accepting at face value the relevant allegations made by the respondent, I am firmly of the view that she has *not* discharged the onus resting on her, in terms of art 13(b) of the Convention, of showing that the return of A. to New Jersey will expose the child to a grave risk of physical or psychological harm or otherwise place the child in an intolerable situation.

**[55]** What then is the effect (if any) on this conclusion of the 'new' evidence which this Court allowed both the appellant and the respondent to adduce on appeal? Despite the contention of counsel for the respondent to the contrary, the fact that the appellant has, subsequent to the date of the judgment of the Full Court, obtained a decree of divorce against the respondent, does not in my view in itself assist the respondent in establishing the 13(b) defence. As indicated above, despite this divorce order, the New Jersey courts have not yet finally adjudicated upon and determined the key issues of custody of and access

to A.. It would, however, appear from the report of the *amicus curiae* to this Court and other documentation (emanating from the United States Central Authority) placed by the *amicus curiae* before us at the hearing of the appeal, that the permanent resident's status and work permit ('green card') held by the respondent in the United States of America prior to her departure in September 2002 might well have lapsed because of her absence from the United States for more than 12 consecutive months. Furthermore, it would seem that, because the appellant has obtained a divorce from the respondent in the interim, he will not be able to 'sponsor' the respondent to obtain permanent residence (and a work permit) in the United States of America – she is no longer his direct family member. There is therefore a possibility that the respondent will not be permitted to return to the United States and an even stronger possibility that, should she be allowed to return with A., this will only be for a limited period of time and she will not legally be able to work while in the United States.

**[56]** It was for the above reasons that the draft order presented to this Court (at our request) on behalf of the respondent, setting out the conditions which should, in the respondent's submission, be imposed should this Court order A.'s return to New Jersey, stipulated that such return order should only operate once the respondent had been granted leave to reside *permanently* in the United States of America and be lawfully employed there. The order proposed by the *amicus curiae* and accepted by the appellant, on the other hand, appears to envisage only a temporary visa enabling the respondent to reside in the United States for a limited period (to encompass the period of the custody proceedings). I am of the view that, were this Court to impose a condition along the lines of that proposed in this regard by the respondent, this would thwart the objectives of the Convention and in effect allow the respondent to rely on the consequences of her wrongful removal of the child to avoid having to return to

the state of habitual residence so as to allow the courts of that state to adjudicate upon the issues of custody and access.[77] This would amount to permitting the respondent 'to effectively blackmail this Court into shirking its obligations under the Convention'.[78]

**[57]** It follows from what I have said above that, in my view, the respondent has not established the art 13(b) defence relied upon by her and that A.'s return to New Jersey must be ordered in terms of art 12 of the Convention. I have carefully considered the draft conditions for such a return order prepared and filed (at our request) on behalf of the respondent, on the one hand, and the *amicus curiae* and the appellant, on the other. In formulating the conditions which I intend to impose, I have attempted, as far as possible, to secure the best possible interim protection of A.'s needs, while at the same time not subjecting the appellant to unreasonable and excessive financial demands with which he has little or no chance of complying.

**[58]** To a large extent, the order which we intend to make is very similar to that made by Pillay J on 22 November 2002. Because of the lapse of time since that order was made, however, there have in the interim been various changes in the circumstances of both the appellant and the respondent, and other developments. It has *inter alia* been made clear by counsel for the respondent that, should this Court order A.'s return to New Jersey, the respondent *will* accompany her daughter. Thus, certain parts of the order made by Pillay J are no longer necessary, while other parts require amendment. It is therefore more convenient to replace Pillay J's order in its entirety, despite the fact that many of the conditions, as originally formulated, remain largely unchanged.

**Costs**

**[59]** As indicated above,[79] the appellant initially applied, via the United States Central Authority, to the Office of the Durban Family Advocate (as the relevant delegate of the South African Central Authority), for its assistance in securing A.'s return. Had the Chief Family Advocate or her delegate carried out the obligation imposed by the Convention 'to initiate or facilitate the institution of judicial ... proceedings with a view to securing the return of the child',[80] the Chief Family Advocate or her delegate would probably have brought the application for A.'s return. As pointed out by the Constitutional Court in *Sonderup v Tondelli and Another*,[81] the Chief Family Advocate 'is a State official acting in terms of an International Convention which provides in art 26 that each Central Authority should bear its own costs in applying the Convention'.[82] In terms of the regulations made under s 5 of the Act, it is envisaged that the Chief Family Advocate or her delegate will represent a return applicant in any court proceedings necessary to give effect to the provisions of the Convention in those cases where the applicant either does not qualify for legal aid or does not wish to appoint his or her own legal representative.[83] Thus, had the Office of the Durban Family Advocate not misconstrued its role and declined to assist the appellant, the latter would probably have been spared most of the costs incurred by him in the legal battles to secure A.'s return to New Jersey. This being so, I am of the view that it would be just and equitable to order the Chief Family Advocate and the (ultimately) unsuccessful respondent to pay jointly and severally the costs incurred by the appellant in the appeal to the Full Court, as well as in the appeal in this Court.

**[60]** The court of first instance took the view that it would be inappropriate to make a costs order against the respondent in relation to the application before

it. Pillay J thus ordered each party to bear his or her own costs. There was no appeal against this order and I do not propose to alter it in any way.

**[61]** As concerns the costs of the respondent's application to this Court for leave to adduce further evidence on appeal, and the appellant's conditional counter-application in this regard, I am of the view that the most equitable outcome is that each party should pay his or her own costs.

**Order**

**[62]** The following order is made:

A. The appeal is upheld and the Order of the Full Court dated 14 February 2003 is set aside.

B. The Order of Pillay J in the Durban and Coast Local Division dated 22 November 2002 is replaced by the following order:

1 It is ordered and directed that the minor child, A.M.P. (A.), be returned forthwith, subject to the terms of this Order, to the jurisdiction of the Central Authority, New Jersey, United States of America.

2.1 The order for the return of A. shall only come into operation once Hayley Sarah-Dawn Pennello (the respondent) has been granted leave by the relevant immigration authorities of the United States of America to enter and remain in the United States of America until at least the final adjudication and determination, by the New Jersey courts, of the issues of custody and care of and access to A., including any appeal. To this end the respondent is ordered forthwith to contact the relevant American immigration authorities and to comply timeously with all of their requirements and procedures. The Family

Advocate (Kwa-Zulu Natal) is directed to request the United States Central Authority to do everything within its power to facilitate and expedite the granting of such leave to the respondent by the relevant immigration authorities.

2.2 Should the respondent fail to contact the relevant immigration authorities within seven days of this Order or thereafter fail to comply timeously, to the satisfaction of the Family Advocate (Kwa-Zulu Natal), with any requirements or procedures of such authorities, the order for the return of A. in terms of paragraph 1 above shall, subject to the terms set out in the other paragraphs of this Order, come into immediate operation.

3 Robert Salvatore Pennello (the appellant) shall, within 14 days of the date of this Order, launch proceedings and pursue them with due diligence to obtain an order of the appropriate judicial authority in the State of New Jersey, United States of America, in the following terms:

3.1 The warrant for the arrest of the respondent is withdrawn and will not be re-instated and the respondent will not be subject to arrest or prosecution by reason of her removal of A. from New Jersey and the United States of America on 25 September 2002 or for any past conduct relating to A.. The appellant will not institute or cause to be instituted or support any legal proceedings or proceedings of any other nature in the United States of America for the arrest, prosecution or punishment of the respondent or any member of her family, for any past conduct by the respondent relating to A..

3.2 The respondent is awarded interim custody of A. pending the final adjudication and determination by the appropriate court in New Jersey of the

issues of custody and care of and access to A., which adjudication and determination shall be requested forthwith by the appellant.

3.3 Until otherwise ordered by the appropriate court in New Jersey:

3.3.1 The appellant is ordered to arrange, and to pay any required deposit for, suitable separate furnished accommodation (either a rented apartment or hotel accommodation) for the respondent and A. in New Jersey, in a similar neighbourhood to that in which the former matrimonial home was situated, and to pay all the rentals or tariffs for such accommodation timeously and in full. The appellant shall provide proof to the satisfaction of the Family Advocate (Kwa-Zulu Natal), prior to the departure of the respondent and A. from South Africa, of the nature and location of such accommodation and that such accommodation is available for the respondent and A. immediately upon their arrival in New Jersey. The Family Advocate (Kwa-Zulu Natal) shall (in consultation with the Central Authority, New Jersey, United States of America) decide whether the accommodation thus arranged by the appellant is suitable for the needs of the respondent and A., should there be any dispute between the parties in this regard, and the decision of the Family Advocate shall be binding on the parties.

3.3.2 The appellant is ordered to pay maintenance for A. from the date of her arrival in New Jersey at the rate of US $102 per week or such other amount as may reasonably be required for her maintenance and upkeep, and failing agreement between the parties in this regard, such amount as may be ordered by the appropriate authority responsible for such matters in New Jersey. The first such payment shall be made to the respondent on the day upon which she and A. arrive in New Jersey and thereafter weekly in advance on the Monday of every week.

3.3.3 The appellant is ordered to pay maintenance for the respondent in the sum of US $200 per month from the date of her arrival in New Jersey, the first such payment to be made on the day upon which she and A. arrive in New Jersey and thereafter monthly in advance on the first day of every month.

3.3.4 The appellant is ordered to pay any medical expenses reasonably incurred by the respondent in respect of herself and/or A..

3.3.5 The appellant is ordered to provide a roadworthy motor vehicle equipped with a child seat for A., for the use of the Respondent and A. from the date of their arrival in New Jersey, and to pay the deposit, rental and insurance costs in respect thereof.

3.3.6 The appellant is granted reasonable access to A., which access shall be arranged without the necessity of direct contact between the appellant and the respondent.

3.4 The appellant is interdicted and restrained from assaulting, threatening, harassing or abusing in any way the respondent and from entering any residence occupied by the respondent or any place of employment obtained by her, it being noted that the appellant makes no admission that he has in the past engaged in any such conduct in respect of the respondent.

3.5 The appellant and the respondent are ordered to co-operate fully with the Family Advocate (Kwa-Zulu Natal), the United States Central Authority, the relevant court or courts in New Jersey, and any professionals who conduct an assessment to determine what future custody, care and access arrangements will be in the best interests of A..

3.6 The appellant is ordered to pay for the costs of economy class air tickets, and if necessary, the costs of rail or other travel, for the respondent and A. to travel by the most direct route from Knysna, South Africa, to New Jersey, United States of America.

4 Subject to the provisions of paragraph 2 above, the order for the return of A. to New Jersey shall be stayed until the respondent has been granted leave (as referred to in paragraph 2 above) by the relevant immigration authorities of the United States of America to enter and remain in the United States of America, until the appropriate court in New Jersey has made an order in the terms set out in paragraph 3 above, and further until the Family Advocate (Kwa-Zulu Natal) has been satisfied, by the submission to him or her of all relevant documents, that such leave has been granted, that such an order has been made, and that the appellant has taken the necessary steps to secure the accommodation and the motor vehicle for the respondent referred to in, respectively, paragraphs 3.3.1 and 3.3.5 above.

5 Pending the return of A. to New Jersey, as provided for in this Order, the respondent shall not remove A. from the district of Knysna and, until then, she shall keep the Family Advocate (Kwa-Zulu Natal) informed of her physical address and contact telephone numbers.

6 Pending the return of A. to New Jersey, the appellant is to have reasonable telephone access to A..

7 The Family Advocate (Kwa-Zulu Natal) is directed to seek the assistance of the United States Central Authority in order to ensure that the terms of this Order are complied with as soon as possible.

8 In the event of the relevant immigration authorities of the United States of America failing or refusing to grant leave to the respondent to enter and remain in the United States, as envisaged in paragraph 2 above, or in the event of the appropriate court of competent jurisdiction in New Jersey failing or refusing to make the order referred to in paragraph 3 above, the appellant is given leave to approach this Court for a variation of this Order.

9 The Chief Family Advocate of South Africa and the respondent are ordered to pay, jointly and severally, the one paying the other to be absolved, the costs incurred by the appellant in the appeal to the Full Court of the Natal Provincial Division, as well as the costs incurred by the appellant in the appeal to this Court.

10 No order as to costs is made in respect of either the respondent's application to this Court for leave to adduce further evidence on appeal, or the appellant's conditional counter-application to this Court for leave to adduce further evidence on appeal.

11 A copy of this Order shall forthwith be transmitted by the Family Advocate (Kwa-Zulu Natal) to the United States Central Authority and its representative in New Jersey.

_____

**BJ VAN HEERDEN AJA**

**CONCUR:**

**MPATI DP**

**FARLAM JA**

## BRAND JA

## LEWIS JA

**1** Section 2 of the Act provides that the Convention (the full text of which is annexed to the Act as a Schedule) applies in South Africa. Thus, in terms of s 231(4) of the Constitution of the Republic of South Africa Act 108 of 1996, the Convention has the force of law.

**2** The judgment of the Full Court is reported as *Pennello v Pennello* **[2003] 1 All SA 716** (N).

**3** Article 6 of the Convention requires every Contracting State to designate a Central Authority to discharge numerous duties imposed on Central Authorities by the Convention. In terms of s 3 of the Act, the Chief Family Advocate is designated as the Central Authority for the Republic of South Africa.

**4** The removal (or retention) of a child under the age of 16 years is considered to be 'wrongful' for the purposes of the Convention where it is in breach of custody rights attributed to a person, an institution or any other body under the law of the state in which the child in question was habitually resident immediately prior to the removal or retention, provided that those custody rights were actually being exercised at the time of the removal or retention, or would have been so exercised but for the removal or retention: articles 3 and 4 of the Convention (see further *Sonderup v Tondelli and Another* **[2000] ZACC 26**; **2001 (1) SA 1171** (CC) para [10] at 1178I-1179E, Van Heerden *et al* (eds) *Boberg's Law of Persons and the Family* (2ed 1999) 578-80, and the other authorities there cited).

**5** In terms of art 9 of the Convention, '[i]f the Central Authority which receives an application referred to in Article 8 has reason to believe that the child is in another Contracting State, it shall directly and without delay transmit the application to the Central Authority of that Contracting State and inform the requesting Central Authority or the applicant, as the case may be.'

[6] The province in which the respondent and Alyssa were staying (with the respondent's parents) at that time.

[7] The Chief Family Advocate, as the Central Authority for South Africa, may delegate or assign any of her powers or duties under the Convention to any Family Advocate appointed in terms of the Mediation in Certain Divorce Matters Act 24 of 1987: see s 4 of the Act, read with regulation 3 of the regulations promulgated under s 5 of the Act in Government Notice R1282 of Government *Gazette* No.18322 dated 1 October 1997.

**8** See the reported judgment of the Full Court (n 2) at 723a-b. In terms of art 29 of the Convention, a person claiming that a child has been wrongfully removed or retained may apply directly to the judicial or administrative authorities of a Contracting State for the return of such child.

**9** Above (n 4).

**10** In *Sonderup* above (n 4) para [34] at 1185I-1186C, Goldstone J said that, in the application of art 13(b) of the Convention, South African courts should not trivialise the impact of domestic violence on children and families and that 'recognition must be accorded to the role which domestic violence plays in inducing mothers, especially of young children, to seek to protect themselves and their children by escaping to another jurisdiction ... where there is an established pattern of domestic violence, even though not directed at the child, it might very well be that return might place the child at grave risk of harm as contemplated by art 13 of the Convention.'

**11** In this regard, Pillay J cited the judgment of the English Court of Appeal in *C v C (Minor: Abduction: Rights of Custody Abroad)* **[1989] 2 All ER 465** (CA) where (at 471b-c) Butler-Sloss LJ held that, '[i]n weighing up the various factors, I must place in the balance and of the greatest importance the effect of the court refusing the application under the Convention because of the refusal of the mother to return for her own reasons, not for the sake of the child. Is a parent to create the psychological situation, and then rely on it? If the grave risk of psychological harm to a child is to be inflicted by the conduct of the parent who abducted him, then it would be relied on by every mother of a young child who removed him out of the jurisdiction and refused to return. It would drive a coach and four through the Convention, at least in respect of applications relating to young children. I, for my part, cannot believe that this is in the interests of international relations. Nor should the mother, by her own actions, succeed in preventing the return of a child who should be living in his own country and deny him contact with his other parent.'

**12** See the reported judgment (n 2) at 722c-f.

**13** *Gsponer v Johnston* **(1988) 12 Fam LR 755** (Family Court of Australia) at 769. See also *Re C (Abduction: Grave Risk of Physical or Psychological Harm)* **[1999] 2 FLR 478(CA)** at 483 D-F, Beaumont & McEleavy *The Hague Convention on International Child Abduction* (1999) 257-9 and the other authorities there cited.

**14** **[1997] EWCA Civ 2841** (27 November 1997) (CA).

**15** See further in this regard *C v C (Minor: Abduction: Rights of Custody Abroad)* above (n 11) at 466j and 469 g; *Re C (Abduction: Grave Risk of Psychological Harm)* [1999] 1 FLR 1145 (CA) at 1155G-H; *S (A Child)* **[2002] EWCA Civ 908** (3 July 2002) (CA) at paras 20, 66, 76, 80-93; *Re B (Children) Abduction: New Evidence)* (2002) 2 FCR 531 (CA) para [23] at 537g-538a (per Butler-Sloss P) and para [42] at 542b-c (per Waller LJ). This would include the admission of oral evidence, but only in exceptional circumstances: see, for example, *Re F ( A Minor) ( Child Abduction)* **[1992] 1 FLR 548** (CA) at 553-4, where Butler-Sloss LJ suggested that oral evidence might be heard where both parties were present in court and there was irreconcilable affidavit evidence on an issue of crucial importance. See also *Re F ( Child Abduction: Risk of Returned)* **[1995] 2 FLR 31** (CA) at 37H-38B.

**16** See Erasmus *et al Superior Court Practice* (1993, with loose-leaf updates) A1-54A – A1-58, *Herbstein and Van Winsen: The Civil Practice of the Supreme Court of South Africa* (4ed 1997, by Van Winsen, Cilliers & Loots) 909-911, and the other authorities cited by these writers.

**17** In terms of the order made by Pillay J, it was envisaged that the respondent would have interim custody of Alyssa 'pending final adjudication and determination by a Court in New Jersey on the issues of care and custody of and access to Alyssa, which adjudication and determination shall be requested forthwith by the

father [the appellant]', and that the appellant would have 'reasonable access to Alyssa' in the interim period.

18 ie about 3 and a half weeks after her arrival in South Africa and before the appellant's application under the Convention for Alyssa's return was instituted on 5 November 2002.

19 Per Butler-Sloss P in *Re H (Children)* **[2003] EWCA Civ 355** (20 March 2003) (CA) para 36.

20 Per Lord Donaldson of Lymington MR in *C v C* (*Minor: Abduction: Rights of Custody Abroad*) above (n 11) at 473e-f. See further, in this regard, Beaumont & McEleavy *op cit* (n 13) 156 *et seq* and the other authorities there cited.

21 Article 1(a), read with the preamble to the Convention.

22 See, for example, Anton 'The Hague Convention on International Child Abduction' **(1981) 30 *ICLQ* 537** at 543-545 (this writer was the chairperson of the Commission of the Hague Conference on Private International Law which drafted the Convention); Reddaway & Keating 'Child Abduction: Would Protecting Vulnerable Children Drive a Coach and Four through the Principles of the Hague Convention?' (1997) 5 *Int J of Children's Rights* 77 at 78-9, 86-7 and 94.

23 See n 4 above.

24 Article 12 of the Convention. See further in this regard *Sonderup v Tondelli and Another* above (n 4) para [12] at 1179F – 1180B and *Smith v Smith* **2001 (3) SA 845** (SCA) para [8] at 850 B-C.

25 Section 28(2) of the Constitution provides what has been called 'an expansive guarantee that a child's best interests are paramount in every matter concerning the child': *Sonderup v Tondelli and Another* above (n 4) para [29] at 1184F-G.

26 Above (n 4).

27 Op cit para [30] at 1185A-C.

28 These objectives of the Convention were reiterated by this Court in *Smith v Smith* above (n 24) para [6] at 849E-F.

29 *Sonderup* above (n 4) paras [35] – [36] at 1186D-F.

30 Above paras [43] – [44] at 1189 B-E.

31 Above para [39] at 1187B-1188F.

32 Above para [46] at 1189H-1190A.

33 Above para [56] at 1195B-1197D.

34 Silberman 'Hague Convention on International Child Abduction: A Brief Overview and Case Law Analysis' **(1994) 28 *Fam LQ* 9** at 27.

**3**[5] LeGette 'International Child Abduction and the Hague Convention: Emerging Practice and Interpretation of the Discretionary Exception' (1990) 25 *Texas Int LJ* 287 at 297.

**3**[6] Per Nourse LJ in *Re A (A Minor) (Abduction)* **[1988] 1 FLR 365** (CA) at 372, cited with approval in a number of subsequent cases, including *Thomson v Thomson* (1994) 119 DLR (4th) 253 (Supreme Court of Canada) at 286-287 (per La Forest J), *Re C (Abduction: Grave Risk of Psychological Harm)* above (n 15) at 1152G-1153B (per Ward LJ), *Gsponer v Johnstone* above (n 13) at 766.

**3**[7] *Re H (Children)* above (n 19) para 30 (per Butler-Sloss P). See also *Director-General, Department of Families, Youth and Community Care v Bennett* **[2000] Fam CA 253(16 March 2000)** (Full Court of the Family Court of Australia) paras 25-35, *Sonderup v Tondelli and Another* above (n 4) 1189 n 41, and the other cases there cited.

**3**[8] Above (n 15) at 1154A-B.

**3**[9] As was pointed out by Lord Donaldson of Lymington MR in *C v C (Minor: Abduction: Rights of Custody Abroad)* above ( n 11) at 473 e-f: '… in a situation in which it is necessary to consider operating the machinery of the Convention, some psychological harm to the child is inherent, whether the child is or is not returned. This is, I think, recognised by the words "or otherwise place the child in an intolerable situation", which cast considerable light on the severe degree of psychological harm which the Convention has in mind.' This approach is very much along the same lines at that followed by the Constitutional Court in *Sonderup v Tondelli and Another* above (n 4) paras [43] – [44] at 1189B-E, as quoted above.

**4**[0] *Sonderup* above (n 4) para [44] at 1189E-F.

**4**[1] Above (n 24) para [11] at 850J-851B.

**4**[2] On the 'defence' referred to in art 13(a), see *Smith* above paras [16] ─ [20] at 852H-854I. This was the defence raised by the 'abducting' parent which ultimately succeeded before this Court in *Smith*. On the exception to a mandatory return of the child contained in art 20, see Van Heerden *et al op cit* (n 5) 591-592.

**4**[3] See the reported judgment (n 2) at 724d-e.

**4**[4] Above 724g-h.

**4**[5] See 'Evidence' *LAWSA* Vol 9 (first re-issue, 1996) para 642. Cf also *Chief Family Advocate and Another v G* **2003 (2) SA 599** (W) at 610-D.

**4**[6] **[1984] ZASCA 51**; **1984 (3) SA 623** (A) at 634E-635C.

**4**[7] *Ngqumba en 'n Ander v Staatspresident en Andere; Damons NO en Andere v Staatspresident en Andere; Jooste v Staatspresident en Andere* **1988 (4) SA 224** (A) at 259C-263E. It should be mentioned that, in the recent judgment of this court in *ABSA Bank Ltd t/a Bankfin v Jordashe Auto CC* **2003 (1) SA 401** (SCA) para [23] at 409 D-E, there was an oblique indication that the correctness or otherwise of the *Ngqumba* case might have to be reconsidered at some stage.

**4**[8] See the reported judgment (n2) at 725b-e.

**4**[9] See para [18] above.

5[0] Article 30 of the Convention provides that '[a]ny application submitted to the Central Authorities or directly to the judicial or administrative authorities of a Contracting State in accordance with the terms of this Convention, together with documents and any other information appended thereto or provided by a Central Authority, shall be admissible in the courts or administrative authorities of the Contracting States.'

5[1] See the authorities cited in notes 13, 14 and 15 above.

5[2] Beaumont & McEleavy *op cit* (n 13) 258.

5[3] See the reported judgment (n 2) at 725j-726c.

5[4] Above 726d-e.

5[5] Above 726f-h.

5[6] Above (n 11) at 471a-c.

5[7] See the reported judgment (n 2) at 727c-g.

5[8] Sometimes referred to, particularly by English courts, as 'the welfare principle': see Reddaway & Keating *op cit* (n 22) 79-83 and the other authorities there cited. This is hardly surprising, as s 1(1) of the UK Children Act 1989 provides that '[w]hen a court determines any question with respect to: (a) the upbringing of a child, or (b) the administration of a child's property or the application of any income arising from it, *the welfare of the child shall be the court's paramount consideration'* (emphasis added).

5[9] **[1997] FLR 690** (CA).

6[0] At 694F-H.

6[1] At 699F.

6[2] (2001) 2 FCR 497 (CA) para 109 at 527f-g.

6[3] See for example Schuz 'The Hague Child Abduction Convention: Family Law and Private International Law' (1995) 44 *ICLQ* 771 at 775-6 and the other authorities cited by this writer.

6[4] Above (n 4).

6[5] Above para [28] at 1183G-1184B

6[6] Above paras [30] – [31] at 118 A-D.

6[7] See the reported judgment (n2) at 727e.

6[8] Above (n 59) at 699B-700E.

6[9] See also the judgment of Arden LJ in *TB v JB (Abduction: Grave Risk of Harm)* above (n 62) para 95 at 524d-e.

7[0] See the reported judgment (n 2) at 728d-e.

7[1] Above 728e-g.

7[2] Above 730f-h.

7[3] Above (n 15) at 1159 C-E. See also *TB v JB (Abduction: Grave Risk of Harm)* above (n 62) para 43 at 509i-510a (per Hale LJ) and para 67 at 516a-b (per Arden LJ).

7[4] This was also the approach followed by the Constitutional Court in *Sonderup* above (n 4) para [53] at 1194B-C.

7[5] Above (n 19) para 33. See also *Gsponer v Johnstone* above (n 13) at 768 and *In re the Application of John Walsh* **31 F. Supp 2d 200** (United States District Court: Massachusetts) (1998) para 30.

7[6] *TB v JB (Abudction: Grave Risk of Harm)* above (n62) para 97 at 5241-525a.

7[7] The circumstances of the present case can easily be distinguished from those in the case of *State Central Authority of Victoria v Ardito* (Family Court of Australia, unreported 29 October 1997) where, despite strenuous efforts on the part of the abducting mother, she was not able to obtain even a temporary visa to return to the United States with the child she had wrongfully removed to Australia.

7[8] *Director-General, Department of Families, Youth and Community Care v Hobbs* **[1999] FamCA 2059** (24 September 1999) (Family Court of Australia) para 94-102, especially para 99.

7[9] See paras [5]-[7] above.

8[0] Article 7(*f*) of the Convention.

8[1] Above (n 4) para [55] at 1194I-1195A.

8[2] Article 26 provides further that a Central Authority may not require a return applicant to contribute to the costs and expenses of the return proceedings, including the costs of legal representation or advice, although payment may be demanded in respect of expenses related to implementing the child's return.

8[3] Above (n 7) regulation 5, read with regulation 2.