REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

Case No: 6090/05

In the matter between:

THE FAMILY ADVOCATE CAPE TOWN **First Applicant**
(in her representative capacity as the delegated Central Authority for South Africa in terms of Section 4 of Act No 72 of 1996)

MALVERN TAPFUMANEYI CHIRUME Second Applicant

and

KUDZAISHE CHIRUME
aka KUDZAISHE MUNYUKI Respondent

JUDGMENT DELIVERED: 9 DECEMBER 2005

ZONDI, AJ:

INTRODUCTION

[1] This application was brought by the first applicant against the respondent, a mother of T. ("the minor child"), under the provisions of the Hague Convention on the Civil Aspects of International Child Abduction Act No 72 of 1996 ("the Act"). The first applicant brought the application in terms of the

powers and authority conferred upon it in terms of sections 3 and 4 of the Act for the return of the minor child to the United Kingdom in terms of article 12 of the Hague Convention on the Civil Aspects of International Child Abduction 1980 ("the Convention").

The provisions of the Convention were incorporated into South African law by the Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996 which came into operation on 1 October 1997.

[2] The second applicant is the father of the minor child who sought the intervention of the Central Authority for England and Wales in securing the return of the minor child. The South African Central Authority received a formal request from the Central Authority for England and Wales during May 2005 in which the return of the minor child was sought in terms of the Convention.

BACKGROUND

[3] The second applicant and the respondent ("the parties"), both citizens of Zimbabwe, were married to each other on 24 September 2001 in Harare, Zimbabwe and the said marriage still subsists. In and during October 2001 the second applicant left Zimbabwe with a view to settling in the United Kingdom. He is currently employed in the United Kingdom as a chartered accountant. The respondent remained behind in Zimbabwe as she was still busy with her studies. During January 2002 the respondent left Zimbabwe for the United Kingdom to join the second applicant.

[4] On 2 March 2002 the respondent returned to Zimbabwe to write her chartered accountants examination. She thereafter returned to the United Kingdom in April 2002. According to the respondent when she returned to the United Kingdom she had intended to live there on a temporary basis with the second applicant who was at that stage employed by Ernst & Young on a two or three year permit. It was the intention of the parties to go back to Zimbabwe after some few years after they had accumulated enough funds to enable them to buy property in

Zimbabwe. According to the second applicant that was their initial intention before the change in the social and political climate in Zimbabwe.

[5] On [day/month] 2002 and in London, United Kingdom the minor child was born between the parties. It is common cause between the parties that at some stage either immediately before or after the birth of the minor child the marriage relationship between them deteriorated considerably. Although there is a dispute between the parties on the circumstances which prompted the respondent to leave the matrimonial home and went to stay with her relatives, it is, however, clear that her departure was as a result of marital problems.

According to the respondent she left the matrimonial home after having been ordered to do so by the second applicant. This version is denied by the second applicant. He avers that the respondent had told him that she wanted to visit her aunt in Hull. In any event the second applicant welcomed the respondent's departure as he felt that staying apart might help

to improve their strained marriage relationship. The respondent stayed with her aunt for about three weeks.

[6] On or about 20 July 2002 the respondent returned to the matrimonial home in the hope that the parties would resolve their marital differences. The second applicant denies that when the respondent left the matrimonial home they were already talking about reconciliation. He, however, admits that over the weekend of 20 July 2002 and in an effort to get their marriage "back on track" he had invited the family friends to mediate in the escalating conflict between them. This subsequent version by the second applicant is clearly inconsistent with his previous denial of reconciliation attempts.

[7] On 27 July 2002 the respondent and the minor child left the United Kingdom for Zimbabwe. While in Zimbabwe she stayed with her parents. The parties did not see each other until 23 or 25 December 2002 when the second applicant visited the respondent at her parents' house. It was at this visit that the parties discussed their marital problems and

agreed to give their marriage another chance. According to the respondent she decided to travel back to the United Kingdom on 28 February 2003 on a trial basis to see if she and the second applicant could reconcile their marital differences.

[8] It is common cause between the parties that the marriage relationship between them got worse after the respondent's return to the United Kingdom. On 24 December 2003 because of their differences, the respondent moved out of the matrimonial home. She however moved back to the matrimonial home on or about 13 January 2004 with a view to saving the marriage. This, however, did not work as in October 2004 the second applicant walked out of the matrimonial home. At this stage the parties were renting premises situated at No. 1 Harrogate Court, Lee Green, London. According to the respondent the second applicant terminated the lease without notifying her.

[9] On 28 January 2005 the respondent and the minor child left

the United Kingdom for Zimbabwe. They both stayed with the respondent's family until 6 April 2005 when she came to South Africa where she had found employment. The respondent started working on 14 August 2005. It is common cause that the respondent did not obtain consent from the second applicant to have the minor child removed from the United Kingdom.

[10] The second applicant thereafter sought the intervention of the Central Authority for England and Wales to secure the return of the minor child in terms of the Convention.

STATEMENT OF THE ISSUES

[11] I have to decide whether the return of the minor child to the United Kingdom in terms of the Convention should be ordered and if so subject to what conditions.

APPLICABLE INSTRUMENT

[12] The Hague Convention on the Civil Aspects of International Child Abduction (1980) is an instrument which addresses

problems arising from the removal and retention of children in breach of existing custody rights. The provisions of the Convention were incorporated into the Republic of South African law by way of the Civil Aspects of International Child Abduction Act 72 of 1996 which came into operation on 1 October 1997.

[13] The stated purpose of the Convention is to "protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access": The Convention places an obligation on the Contracting States to take all appropriate measures to secure within their territories the implementation of its objects which are :

"(a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and

(b) to ensure the rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting

States." (article 1)

[14] It is clear from the provisions of article 1 that the primary purpose of the Convention is to secure the prompt return of children wrongfully removed to or retained in any Contracting State. To give effect to this purpose, the Convention establishes a procedure through which the prompt return of the children wrongfully removed or retained is facilitated.

[15] In terms of articles 3 and 4 of the Convention the removal or the retention of a child is said to be wrongful if "it is in breach of rights of custody attributed to a person, an institution …under law of the State in which the child was habitually resident immediately before the removal or retention and at the time of removal or retention those rights were actually exercised…". The custody rights referred to in article 3 may arise by operation of law (such as Guardianship Act No 192 of 1993) or by reason of a judicial or administrative decision or of any legally binding agreement under the law of the State. The provisions of the Convention apply to any child under the age

of 16 years who was habitually resident in a Contracting State immediately before any breach of custody or access rights.

[16] In terms of articles 6 and 7 a Contracting State should designate a Central Authority to discharge the duties imposed by the Convention. In the case of South Africa the Chief Family Advocate is the Central Authority who is appointed in terms of the Mediation in Certain Divorce Matters Act 24 of 1987. A party claiming that a child has been wrongfully removed or retained must apply to the Central Authority of the State in which the child is habitually resident or to the Central Authority of any other Contracting State. The Central Authority receiving such a request must initiate or facilitate the institution of judicial or administrative proceedings in order to secure the return of the child.

[17] In this matter the second applicant filed an application with England and Wales Central Authority for its assistance to secure the return of the minor child and that Central Authority in turn instructed the Chief Family Advocate of South Africa for

further action. The second applicant's application is based on the fact that the removal of the minor child by the respondent was wrongful in that the minor child was habitually resident in England immediately prior to her removal and that both South Africa and the United Kingdom are signatories to the Convention. The application is made in terms of article 12 which provides:

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

I shall not deal with the rest of the provisions of the article as the matter before me concerns the wrongful removal or retention which falls within the 12 month period.

[18] In terms of articles 3 and 12 of the Convention a party who seeks to secure the return of the child must show that the child was habitually resident in the requesting State immediately before the removal or retention, that such

removal or retention was wrongful in that it was in breach of rights of custody in terms of the law of the requesting State and that the applicant actually exercised the custody rights at the time of the wrongful removal or retention and that he would have exercised those rights but for the removal or retention.

[19] These are the jurisdictional facts which the applicant must establish in an application for the return of the minor child under the Convention. Once these objective facts are established the Court must order the return of the child to the requesting State unless the person who seeks to oppose the application raises exceptions or defences set out in articles 12, 13 and 20. The exceptions set out in article 12 do not apply in this matter as it is common cause that a period of less than a year has elapsed from the date of the wrongful removal or retention and that the child has not been taken outside the Republic of South Africa. The exceptions contained in articles 13 and 20 are relevant to this matter. Article 13 provides:

"Notwithstanding the provisions of the preceding Article, the judicial or

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

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

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

The judicial 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."

Article 20 provides:

"The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms".

The respondent is opposing the application and in addition to raising the defences under article 13, has also raised a point in *limine* to the effect that the first and second applicants had breached the duty of good faith and full disclosure when they applied for an *ex parte* order.

POINT IN *LIMINE*

[20] It was submitted by *Mr Tredoux,* who appeared for respondent, that the *rule nisi* should be discharged as the first and second applicants breached the duty of good faith. *Ms Weyer*, who appeared for both applicants, argued for the confirmation of the *rule nisi*. *Mr Tredoux* argued that when the first and second applicants approached the Court for an *ex parte* order they stated that the second applicant had been permanently resident in the United Kingdom since October 2001 and has permanent residency in the United Kingdom. He further submitted that the first and second applicants had no reasonable grounds on which to believe that the respondent was a flight risk.

It is correct that an applicant especially in the case of an *ex parte* application, should place all relevant facts before the court and should not furnish incorrect information. (***Hall and Another v Heyns and Another 1991*** *(1) SA 381 (C) at 397 B-C*).

[21] It is clear on the papers that the averment that the second applicant has permanent residency in the United Kingdom is incorrect. In his replying affidavit the second applicant avers that he only had a work permit which entitled him to remain in the United Kingdom for two years. I am, however, not of the view that the mere fact that the second applicant had provided incorrect information regarding his residency status in the United Kingdom will be a reason for discharging the *rule nisi*, particularly in view of the fact that the *ex parte* order was not granted solely on the basis thereof. The respondent's contention is in the circumstances rejected.

The next question is whether I should discharge the *rule nisi* on the ground that the first and second applicants had no reasonable grounds on which to believe that the respondent was a flight risk. The second applicant had initially tried to seek help from the Zimbabwean Central Authority to secure the return of the minor child and when there was inaction in Zimbabwe he directed his application in South Africa. In the

light of the explanation given by the first and second applicants in their reply I am satisfied that based on the fact that the exact whereabouts of the minor child were uncertain the first and second applicants were entitled to believe that the respondent was a flight risk. In the circumstances I reject the respondent's contention.

ARTICLE 13 DEFENCES.

[22] It is contended by the respondent that at the time of the removal of the minor child from the United Kingdom the second applicant was not actually exercising any of his rights as a parent and that being so the removal was not unlawful within the meaning of article 4 of the Convention. It is accordingly submitted by the respondent that the application should be dismissed.

The respondent's contention is based on the fact when she removed the minor child from the United Kingdom for Zimbabwe on 29 January 2005, the second applicant had not exercised his rights of custody since 18 October 2004 when he moved out of the matrimonial home. This version is disputed by the second applicant. He avers that in the jurisdiction of England and Wales, both parents are deemed to have full parental responsibility for the child and should be jointly involved in all major decisions which affect the

child's life. The second applicant further avers further that since his separation with the respondent in mid October 2004 he had attempted to exercise his rights of custody through his lawyers. This averment is confirmed by the respondent who states that on or about 20 January 2005 she received an e-mail from the second applicant's lawyers stating that he wanted to pay maintenance for the minor child and to have access to her. These are some of the custody rights which the second applicant wanted to exercise.

In the circumstances I am satisfied that the second applicant would have exercised the rights of custody over the child but for the removal.

[23] The Convention defines "rights of custody" to include rights relating to the care of the person of the child and in particular, the right to determine the child's place of residence. As *Goldstein J* correctly points out in **Sonderup v Tondelli and Another 2001**(1) SA 1171(CC) at 1179B-C:

"In applying the Convention "rights of custody" must be determined according to this definition independent of the meaning given to the concept of "custody" by the domestic law of any State Party. Whether a person, an institution or any other body had the right to determine a child's habitual residence must, however, be established by the domestic law of the child habitual residence"

It is clear on the papers that the minor child's habitual residence was England and that the rights of custody must be determined according to the laws of England. It is the second applicant's version that in the jurisdiction of England and Wales both parents have full responsibility for the child including the right to determine his or her place of residence.

[24] In my view the custody rights are actually exercised when an

aggrieved parent's consent is needed in major decisions affecting the child's life in terms of the domestic law of the child's habitual residence. I am in agreement with the views expressed by *Spilg AJ* in **Chief Family Advocate and Another vs G 2003** (2) SA 599 (W) at 610 E-G**:**

"[W]here parties are still married to each other at the time of abduction, each parent exercises de facto 'rights of custody' as understood by the Convention, even if it is in a passive form, such as being required to give permission if the other parent wishes to take the child out of school. In these circumstances, acquiescence or non-objection to a decision the other parent had taken in respect of the child does not amount to a non-exercise of 'rights of custody'. It is not tested in this way. It is tested rather by whether a parent still retains the right to object should the other parent wish to affect rights relating to the care of the person of the child."

[25] In the circumstances I find that at the time of the removal of a minor child from the United Kingdom the second applicant had rights of custody within the meaning of the Convention and has objectively demonstrated that he would have actually exercised those rights if the minor child had not been removed from the United Kingdom. The respondent's contention in this regard is accordingly dismissed.

[26] It is the respondent's contention that the minor child was not

habitually resident in the United Kingdom at the time of her removal to Zimbabwe and subsequently to South Africa and that accordingly the application should be dismissed. There is a dispute between the parties on the question of habitual residence of the minor child at the time of her removal from the United Kingdom. The second applicant bears the *onus* to establish the jurisdictional facts for the summary return of the minor child to the United Kingdom. According to *Scott JA* in **Smith v Smith 2001**(3) SA 845 (SCA) at 850J-851B*:*

"[a] party seeking the return of a child under the Convention is obliged to establish that the child was habitually resident in the country from which it was removed immediately before the removal or retention and that the removal or retention was otherwise wrongful in terms of Article 3. Once this has been established the onus is upon a party resisting the order to establish one or other of the defences referred to in article 13(a)or (b) or that the circumstances are such that a refusal would be justified having regard to the provisions of article 20. If the requirements of article 13(a) or (b) are satisfied, the judicial or administrative authority may still in the exercise of its discretion order the return of the child."

[27] In view of the fact that there is a dispute between the parties

regarding the place of residence of the minor child at the time of the removal, it is necessary to determine the meaning of the phrase "habitual residence". The concept of "habitual residence" is not defined in the Convention. However in the words of *NC Erasmus, J* in ***Senior Family Advocate, Cape Town and Another v Houtman 2004****(6) SA 274 (C) at 281 G -282D:*

"*.. the fact that that there is 'no objective temporal baseline' on which to base a definition of habitual residence requires that close attention to be paid to subjective intent when evaluating an individual's habitual residence. When a child is removed from its habitual environment, the implication is that it is being removed from the family and social environment in which its life has developed. The word 'habitual' implies a stable territorial link; this may be achieved through length of stay or through evidence of a particularly close tie between the person and the place. A number of reported foreign judgments have established that a possible prerequisite for 'habitual residence' is some 'degree of settled purpose' or 'intention'.*

A settled intention or settled purpose is clearly one which will not be temporary. However it is not something to be searched for under a microscope. If it is there at all it will stand out clearly as a matter of general impression. Where there is no written agreement between the parties and where the period of residence fails to indicate incontrovertibly that it is habitual, it is accepted that the Court may look at the intentions of the person concerned. In practice, however, it is often impossible to make a distinction between the habitual residence of a young child and that of its custodians- it cannot reasonably be expected that a young child would have the capacity or intention to acquire a separate habitual residence." (footnote omitted)

The position under the English courts is succinctly

summarised by *Waite, J* in **Re B (minors) (Abduction) (No. 2) [1993]** FLR 993 at 995:

"*1. The habitual residence of the young children of parents who are living together is the same as the habitual residence of the parents themselves and neither parent can change it without the express or tacit consent of the other or an order of the court.*

2. Habitual residence is a term referring, when it is applied in the context of married persons living together, to their abode in a particular place or country which they have adopted voluntarily and for settled purposes as part of the regular order of their life for the time-being, whether of short or of long duration.

All that the law requires for a "settled purpose" is that the parents' shared intentions in living where they do have a sufficient degree of continuity about them to be properly described as settled.

3. Although habitual residence can be lost in a single day, for example upon departure from the initial abode with no intention of returning, the assumption of habitual residence requires an appreciable period of time and a settled intention. The House of Lords in ***RE J, sub nom C v S*** *(above) refrained, no doubt advisedly, from giving any indication as to what an 'appreciable period' would be. Logic would suggest that provided the purpose was settled, the period of habitation would not be long. Certainly in* ***Re F*** *(above) the court of appeal approved a judicial finding that a family had acquired afresh habitual residence only one month after arrival in a new country."*

[28] On the facts presented in this matter I am satisfied that the minor child was habitually resident in the United Kingdom at the time of her removal. The fact that the respondent and the minor child left the United Kingdom for Zimbabwe on various occasions during the period August 2003 and January 2005 did not mark a change of the parties' heart towards the United Kingdom. They still regarded the United Kingdom as their place of residence. To them the place had become "their heart and soul" and they used it as a base from which to execute their future plans. For these reasons I accordingly reject the respondent's contentions.

[29] It is also argued by the respondent that the removal of the minor child from the United Kingdom was not wrongful in that the second applicant, by agreeing to have the minor child's name endorsed on her passport, consented to her removal to Zimbabwe. This refers to an occasion on 26 July 2002 when the respondent wanted to leave the United Kingdom for Zimbabwe together with the minor child. The second applicant had consented to having the minor child accompany the respondent to Zimbabwe. I reject this contention.

The consent given by the second applicant related to that specific occasion. The consent must precede the removal or retention. In this case it is clear that the second applicant, though had previously consented to the removal of the minor child from the United Kingdom, had not consented to this particular removal. In the circumstances I find that the removal or retention of the minor child was wrongful in that the second applicant had not consented to it.

[30] The next question to determine is whether there is a grave risk that the return of the minor child would expose her to psychological harm or otherwise place her in an intolerable situation.

[31] In this regard it is submitted by the respondent that the application should be dismissed as there is a grave risk that the minor child's return to the United Kingdom would expose

her to psychological harm or otherwise place her in an intolerable situation. It is argued that the second applicant has never been a father to the minor child. This assertion by the respondent is based on the fact that she has established herself in Cape Town, South Africa where she intends to remain. She has a steady job in South Africa and her prospects are good. She points out that she does not have a visa which entitles her to work in the United Kingdom or to stay there and being so she would not be able to remain in the United Kingdom and which would mean that the minor child would be separated from her. She is afraid that the minor child would be subjected to the emotions and stress associated with being removed from the primary care giver and especially in the light of the manner in which the second applicant badly treated her and the minor child while they were in the United Kingdom.

[32] The facts upon which the respondent relies to justify her opposition to the application for the return of the minor child to

the United Kingdom are disputed by the second applicant. It is clear that there are substantially disputes of fact between the parties and that unless there is a request for the matter to be referred to oral evidence I have to make a decision in so far as any dispute of fact is concerned, on the basis of the respondent's version unless her version is so far fetched or clearly untenable that I am justified in rejecting it merely on the papers. (**Plascon-Evans Paints v Van Riebeeck Paints 1984** (3) SA 623 (A).) I must, however, point out that the Hague Convention cases by their very nature should be dealt with expeditiously and generally without reliance upon oral evidence.

[33] Although there are substantial disputes of fact between the parties, these factual disputes, however, relate to custody which is not an issue at this stage and which would render the need for oral evidence inappropriate. Custody and other related issues in respect of the minor child should be adjudicated upon by the courts of the minor child's habitual

residence and not by South African courts. Perhaps it is important to explain the purpose of the Convention. According to *Hlophe, MJ* ***"The Judicial approach to"*** **Summary Applications For The Child's Return: A Move Away From Best Interests Principle"** (1998) 115 SALJ 439 at 441, the purpose of the Contention is to "*deter the abduction of children by depriving fugitive parents of any possibility of having their custody of the children recognized in the country of refuge and thereby legitimizing the situation for which they are responsible*". A similar view is expressed by *Van Heerden AJA* (as she then was) in **Pennello vs Pennello (Chief Family Advocate as Amicus Curiae 2004**(3) SA 117 SCA at 134B-D where she makes the following point:

"*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. 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." (Footnote omitted).*

[34] It is against this background that the respondent's defence to

the mandatory return of the minor child should be looked at. I think I should emphasise that the second applicant seeks the return of the minor child and not her mother. The minor child is about 3 years old now and quite obviously because of her age the respondent will have to accompany her to the United Kingdom should her return be ordered. The question which should be determined is whether there is a grave risk that the mandatory return of the minor child will expose her to psychological harm or otherwise place her in an intolerable situation.

In terms of Section 28 (2) of the Constitution of the Republic of South Africa "*a child's best interests are of paramount importance in every matter concerning the child*" and article 20 of the Convention appreciates and recognises this important constitutional consideration by stating that "*the return of the child under the provisions of article 12 may be refused if this would not be permitted by fundamental principles of the requested State relating to the protection of human rights*". In **Sonderup v Tondelli** *supra* the Act incorporating the Convention was held to be consistent with the Constitution. At 1186D the Constitutional Court explained that this was so because "*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.*"

[35] It would seem that courts in other Contracting States adopt a restrictive interpretation in applying the provisions of article

13(b). For instance in considering article 13 (b) the English Courts have taken the view that "a high degree of intolerability must be established in order to bring into operation article 13(b) **(B v B (Abduction: Custody Rights)[1993]** 2 ALL ER 144 CA at 152 H-J). In **Pennello v Pennello**, *supra* at 137E-F*, Van Heerden AJA* did not consider it necessary to express the view whether South African Courts should follow the stringent tests set by courts in other countries.

Turning to the facts of this case, it is clear that upon an objective assessment of the evidence, the marriage relationship between the parties has irretrievably broken down and that the respondent is no longer prepared to have anything to do with the second applicant. In the circumstances I am prepared to assume in her favour that her refusal to return to the United Kingdom with a minor child may be justifiable. The question is whether the minor child would be placed in an intolerable situation if the respondent refused to accompany her. The answer to this question is to be found in the **Pennello v Pennello,** *supra* at 145B-D.

"*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. It must be remembered that the policy of the Convention appears to require the evaluation of risk, for the purpose 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." (footnote omitted.)*

[36] The intolerability of the situation should be looked at from the viewpoint of the minor child and not of the respondent. The

grave risk of harm should arise from the return of the child but not from the refusal of the respondent to accompany the minor child. According to *Butler-Sloss LJ in* ***C v C (*Minor: Abduction *:* Rights of Custody Abroad) [1989]*** 2 ALL ER 465 AT 471) an abducting person is not entitled to create psychological situation and rely upon it. In the result I reject the respondent's contention. I accordingly order that the minor child should be returned to the United Kingdom.

[**37]** The next question to determine concerns the conditions in terms of which the child's return to the United Kingdom should be ordered. The respondent made allegations of financial hardship, domestic violence and other difficult circumstances that would be caused to the child and her returning to the United Kingdom. It is correct that the respondent has settled in South Africa where she has a steady job. She cannot simply abandon her employer and leave for the United Kingdom. It is also correct that while in the United Kingdom the respondent had her own accommodation after the second applicant had terminated the lease in respect of the property

the family was renting. He did not provide the respondent and the minor child with alternative accommodation. Thus unless satisfactory arrangements are made for her accommodation in the United Kingdom, the respondent will have nowhere to live when she and the minor child return to England. It is therefore clear that in certain respects the respondent's concerns and fears may be justifiable. One cannot turn a blind eye to these concerns. In ***Sonderup vs Tondelli and Another,*** *supra at 1185I-1186C****,*** *Goldstone J had this to say in connection with claims of domestic violence: "[I]n the application of article 13, recognition must be accorded to the role which domestic violence plays in inducing mothers, especially of young children, to seek to protect themselves and minor children by escaping to another jurisdiction. Our courts should not trivialise the impact on children and families of violence against woman…Where there is an established pattern of domestic violence, even though not directed at the child, it may very well be that return might place the child at grave risk of harm as contemplated by art 13 of the Convention."*

[38] It is clear from the *dictum* of this case that the mere fact that the other party's conduct constitutes domestic violence, will

not in itself be a sufficient reason to justify the conclusion that the return might place the child at grave risk of harm as contemplated by article 13 of the Convention. A party who wishes to rely on domestic violence as a defence to an application for a return of a child must show an established pattern in the other party's conduct that constitutes domestic violence.

[39] I think it is then appropriate to deal with conduct which may constitute domestic violence in our law. Section 1 of the Domestic Violence Act No 116 of 1998 defines "domestic violence" to mean, *inter alia*, physical abuse, sexual abuse, emotional, verbal and psychological abuse, economic abuse etc. In turn "economic abuse" includes-

"(a) the unreasonable deprivation of economic or financial resources to which a complainant is entitled under law or which the complainant requires out of necessity, including …….. payment of rent in respect of the shared residence; or

(b) ……"

On the facts presented in this matter I am unable to find that

the minor child will suffer physical harm if she is returned to the United Kingdom. I am aware that the court ordered return will adversely affect the minor child and the respondent. It is for this reason that I consider it appropriate to impose substantial conditions in the order.

In this regard I requested both Counsel to file supplementary heads of argument to deal with financial positions of the parties and the expected duration of the custody proceedings in the United Kingdom. I have received supplementary heads of argument from both Counsel as well as affidavits from the parties verifying information contained in the supplementary heads of argument. The Court is greatly indebted to both Counsel for these supplementary heads of argument. They have assisted the Court in formulating an order which, I believe, will address the concerns of both parties.

COSTS

[40] The second applicant is being assisted by the Family Advocate in this matter and the latter is acting on the instruction of the

Central Authority. The second applicant may not be required to make any payment for costs and expenses of the proceedings in terms of article 26 of the Convention. Central Authorities are required to bear their own costs in applying the Convention. The second applicant has accordingly incurred no costs. For these reasons I am of the view that it will not be just and equitable to order the respondent to pay costs. In the result I shall make no order as to costs.

THE ORDER

[41] In the circumstances the following order is made:

1. That the respondent be ordered to return the minor child, T.C., born on [day/month] 2002, to the United Kingdom, forthwith, but in any event no later than 31 January 2006 and in accordance with the provisions of Article 12 of the Schedule to the Hague Convention on the Civil Aspects of International Child Abduction, Act No 72 of 1996.

2. That in the event of the respondent refusing and/or failing to accompany the said minor

child back to the United Kingdom as herein ordered, second applicant shall be granted leave and authorisation insofar as same may be necessary, to remove the said minor child from the Republic of South Africa and return with her to the United Kingdom, without the respondent.

3. The Sheriff of this Honourable Court (assisted where necessary by the South African Police), is authorised to take any steps as may be necessary to give effect to this Order. Such authorisation shall include, but not be limited to the rights of search and seizure in order to ascertain the whereabouts of the minor child, in the event of the respondent failing to co-operate with the Sheriff.

4. The passport in regard to the minor child

currently held by the first applicant, shall be retained until immediately prior to the departure of the said minor child from the Republic of South Africa on the date to be appointed by this Honourable Court.

5.1 Pending the departure of the minor child from the Republic of South Africa, alternatively after the child's arrival back in the United Kingdom, the second applicant shall be entitled to reasonable contact/access to the minor child on a daily basis should he either be in South Africa for purposes of accompanying her on her return to the United Kingdom, or once she is back in the United Kingdom until such time as the relevant authority in the United Kingdom dealing with such matters may make its ruling in substitution of this aspect of this Order.

5.2 Such contact/access shall be arranged without the necessity for direct contact between the second applicant and the respondent.

6. Pending the minor child's departure from the Republic of South Africa, second applicant shall be entitled to reasonable telephonic access/contact to the minor child. Respondent is ordered to provide a contact telephone number at which telephonic access can take place and to have the child available at such number at a specified time twice per week. The days and times in question are to be arranged by agreement between the parties' and/or their respective legal representatives.

7. The second applicant and the respondent are ordered to co-operate fully with the Family Advocate (first applicant), the United Kingdom, and any professionals who conduct an assessment to determine what future custody, care and access arrangements will be in the best interests of T..
8. The minor child shall remain within the

jurisdiction of this Honourable Court, pending her departure from the Republic of South Africa in terms of this Order.

9. The second applicant is ordered to:

9.1 Provide an airticket for the minor child, from Cape Town to London, at his own expense. Respondent shall bear 50% costs of respondent's return airticket.

9.2 Provide the respondent and the minor child with suitable accommodation in the United Kingdom immediately upon their arrival and to pay the cost of such reasonable accommodation until such time as a Court of appropriate jurisdiction in the United Kingdom may make an order to the contrary. The Central Authority for England and Wales is specifically requested to ensure that this has been suitably arranged and secured prior to the child's arrival back in the United Kingdom.

9.3 Pay maintenance to the respondent and the minor child upon their arrival in the United Kingdom, the sum of £350-00 per week, until such time as a Court of competent jurisdiction in the United Kingdom may make a determination in this regard. The first week's payment of £350-00 shall be paid into such account as the Central Authority for England and Wales may direct, prior to the departure of the child to the United Kingdom.

9.4 Ensure that such legal proceedings as may be relevant to the minor child are either instituted or proceeded with on an urgent basis in the United Kingdom after 31 January 2006 and accordingly to do all such things as may reasonably be required of him in anticipation of the child's return by 31 January 2006.

10.1 In the event of the respondent continuing to

maintain that she does not have the requisite authority to enter the United Kingdom on her current visa she is hereby ordered with the assistance of her legal representatives to immediately make urgent application for the requisite travel visa/documentation and to provide the British High Commission with a copy of this Order when so doing. The British High Commission is requested to take into account when considering this request on an urgent basis that this Court has made this Order pursuant to a request received from the Central Authority for England and Wales in terms of the Hague Convention on the Civil Aspects of International Child Abduction.

10.2 In the event of the relevant immigration authorities of the United Kingdom failing and/or refusing to grant leave to the respondent to enter and remain in the United Kingdom for a minimum period of three months, the respondent is given leave to approach

this Court, on an urgent basis if necessary, for a variation of this Order, provided that she has done all things necessary immediately after the granting of this Order to make the relevant visa applications and can provide written proof of all such relevant correspondence to this Court.

11. The second applicant, in accordance with his proffered undertaking, is interdicted and restrained from in any way assaulting, threatening, harassing or abusing the respondent and from entering any residence occupied by her or any place of employment obtained by her: it being noted that second applicant makes no admission that he has in the past engaged in any such conduct in respect of the respondent.

12. The first applicant is directed to seek the assistance of the Central Authority for England and Wales in order to ensure that the terms of this order are complied with and implemented in the United Kingdom with due consideration

for the best interests of the minor child.

13. A copy of this Order shall be served by way of facsimile on all ports of exit from South Africa, as also on the Central Authority for England and Wales at the instance of first applicant.

14. There shall be no order as to costs.

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ZONDI, AJ