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IN THE HIGH COURT OF SOUTH AFRICA
(EAST LONDON CIRCUIT LOCAL DIVISION)

CASE NO: EL 528/2019
1730/2019

In the matter between

THE CHIEF FAMILY ADVOCATE OF THE REPUBLIC OF SOUTH AFRICA AS REPRESENTED BY MR KEUBEN GOUNDEN, SENIOR FAMILY ADVOCATE, EAST LONDON **Applicant**

and

IRRJ **Respondent**

JUDGMENT

HARTLE J

[1] The applicant, acting as representative on behalf of the father of the two minor children hereinafter referred to, seeks an order under the aegis of the Hague Convention on the Civil Aspects of International Child Abduction, 1980 ("the Convention") read together with Chapter 17 of the Children's Act, No. 38 of 2005, as against their mother, the respondent, for their return to the jurisdiction of the central authority in New Zealand. Both South Africa and New Zealand are signatories to the Convention and "contracting states" within the meaning of the Convention.[1]

[2] The children are a boy ("L") and a girl ("A"), aged 10 and 5 years respectively ("the children"), who it is alleged were or are being wrongfully retained in South Africa in breach of the father's rights of custody under the circumstances to which I will shortly allude and must, so it is claimed, forthwith be returned to New Zealand, the contracting state in which they were habitually resident at the time of their "retention" in South Africa.

[3] Save for an *in limine* objection raised by the respondent that the father ought to have been personally joined in these proceedings (which objection I deal with below), the applicability of the Convention and its peculiar strictures and nuances are not in contention.

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[1] Mr. Gounden is a locally appointed senior Family Advocate to whom the Chief Family Advocate and designated Central Authority for the Republic of South Africa, Ms. Petunia Seabi-Mathope, delegated and assigned the powers and duties conferred on her under section 276 of the Children's Act, No. 38 of 2005, to him - in writing as is required, under section 277 of the Children's Act.

[4] The Convention was incorporated into South African law initially by the Hague Convention on the Civil Aspects of International Child Abduction Act, 72 of 1996, which came into operation on 1 October 1997. The latter act was repealed by the Children's Act with effect from 1 April 2010 but section 275 of the Children's Act provides in its place that the Convention, (the whole of which constitutes Schedule 2 to the Children's Act), "is in force in the Republic and its provisions are law in the Republic, subject to the provisions of this Act".[2]

[5] 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.[3]

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[2] Chapter 17 (sections 274 – 280) deals with child abduction. The stated purpose of the chapter itself is to give effect to the Convention and to combat parental child abduction, this in consonance with the philosophy underpinning the Convention which is to protect children as the primary victims and to prevent the proliferation of abductions.

[3] KG v CB and others [2012] 2 All SA 366 (SCA) at para 19.

[6] Article 1 of the Convention provides as follows:

> "The objects of the present Convention are-
>
> (a) to secure the prompt return of the children wrongfully removed or retained in any contracting state; and
> (b) to ensure that rights of custody and of access under the law of one contracting state are effectively respected in the other contracting states."

[7] Article 2 of the Convention provides that:

> "Contracting states shall take all appropriate measures to secure within their territories the implementation and objectives of the Convention. For this purpose they shall use the most expeditious procedures available."

[8] The Convention will apply when the removal or retention of the child is considered "wrongful" and in this regard Articles 3, 4 and 5 are applicable. These provide as follows:

> "Article 3
>
> The removal or the retention of a child is to be considered wrongful where –
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> a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
> b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

Article 4

The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years.

Article 5

For the purposes of this Convention –

a) "rights of custody" shall 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;
b) "rights of access" shall include the right to take a child for a limited period of time to a place other than the child's habitual residence."

[9] 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 Article 7 (f), one of the obligations imposed upon the Central Authorities is to "initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child". It is on this basis that this court has become seized of the matter through the agency of the applicant. The application was initially issued out of the Grahamstown High Court but was

transferred to this court on the basis of convenience to the mother who presently resides in East London.

[10] Article 8 further set out comprehensively what is to be contained in such an application and what documents should accompany or supplement the affidavit. One of these (stipulated in Article 8 (f)) is a certificate or an affidavit emanating from a Central Authority or other competent authority of the state of the child's habitual residence, or from a qualified person, concerning the relevant law of that state. In this instance an affidavit of Lisa Soljan, a longstanding Barrister and Solicitor practicing in Auckland with particular experience in family law, has been put up to give a context to the breach of the father's custody rights occasioned by the alleged wrongful retention of the children in South Africa by their mother. In short, the father - together with the children's mother, by virtue of their marriage, is a guardian of the children pursuant to the provisions of section 17 (1) of the Care of Children Act 2004, which came into force in July 2005. In the exercise of such guardianship, the father has the right, *inter alia*, to determine the children's place of residence and to veto any proposed change in residence (as identified in section 16 (2) of the Care of Children Act 2004), which right is independent and disjunctive of his physical contact with them.[4] Ms. Soljan concludes in her affidavit that the rights enjoyed by

[4] Section 16 (1)(e) of the Care of Children Act provides that the duties, powers, rights and responsibilities of a guardian of a child include (without limitation) the guardian's "determining for or with the child, or helping the child to determine question about important matters affecting the child" (section 16 (1) (c)) and, apart from having the role of providing day-to-day care for the child (section 16 (1)(a)), also "contributing to the child's intellectual, emotional, physical, social, cultural, and other personal developments" (Section 16 (1)(b)). Section 16 (2), in turn, stipulates what the matters referred to in section 16 (1)(c) might be, including, in sub-paragraph 2 (c) "changes to the child's place of residence (including without limitation changes of that kind arising from travel by the child) that may affect the child's relationship with his or her parents and guardians", 2 (d) "where, and how, the child is to be educated" and 2 (e) "the child's culture, language, and religious denomination and practice".

the father in this respect can be properly understood as rights of custody under the Convention which have been breached by the mother's act of retaining the children in South Africa. She is further satisfied that this right has not been extinguished or removed and continues to exist.[5]

[11] Article 3 sets out the jurisdictional prerequisites which an applicant is required to establish before a court may consider whether the removal or retention of a child is to be considered wrongful. These are that: (a) the child was habitually resident in the other State; (b) the removal or retention constitutes a breach of custody rights; and (c) the applicant was actually exercising such rights (either jointly or alone) at the time of removal or retention, or would have exercised such rights but for the removal or retention.

[12] On the papers before me in this matter it is common cause that the children were habitually resident in New Zealand at least at the time of their departure from New Zealand to South Africa under the circumstances which I will shortly relate. Although somewhat ambivalently pleaded (a) because the respondent does not clearly place this jurisdictional pre-requisite in dispute, and (b) because she appears to miss that the focus of the applicant's case is on an alleged wrongful retention of the children as opposed to their removal contemporaneous with their departure from New Zealand, the implication (by the overall defence raised in her answering affidavit) is that the children were not habitually resident in New Zealand once they

[5] In terms of Article 14 of the Convention the judicial or administrative authorities of the requested State, in ascertaining whether there has been a wrongful removal or retention within the meaning of Article 3, "may take notice directly of the law of, and of judicial or administrative decisions, formally recognised or not in the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable."

permanently relocated to South Africa. (The mother's case in this respect is that the father agreed to their permanent relocation to South Africa or at least was aware that it was not her intention to return with them once she had departed from New Zealand and acquiesced in this permanent change of residence.) Despite the manner in which the respondent's case has been pleaded, however, counsel seemed to be *ad idem* that the onus was on the mother resisting the return order to establish the defence in Article 13 (a) principally relied upon.

[13] As to the second pre-requisite, the respondent raises no real challenge to the applicant's assertion that there was or is a breach of the father's custody rights on the grounds relied upon by him under the Care of Child Act aforesaid. Indeed, in KB v CB the SCA found that "(d)espite some initial uncertainty, there is now much authority from a number of Contracting State jurisdictions which establishes that … a parent's rights to prevent the removal of a child from the relevant jurisdiction, or at least withhold consent to such removal, is a right to determine where the child is to live and hence falls within the ambit of the concept of 'rights of custody' in articles 3 and 5 of the Convention. Thus, a custodian parent who removes the child from the state of the child's habitual residence … without the consent of the other parent (or leave of the court) commits a breach of 'rights of custody' of the other parent within the meaning of … a 'wrongful removal'".[6]

[14] This dictum must be of equal application to a "wrongful retention" envisaged in Articles 3 and 5, assuming that the child is habitually resident

[6] *Supra* at para 26.

in the contracting state at the relevant time the act of retention is perpetrated. In my view, retaining the children here in South Africa against the father's consent on the basis alleged by him (he says he only lent his consent for their departure with their mother for a fixed term) self-evidently constitutes a breach of such custody rights which arise by operation of law, as he is being denied the right to determine where the children are to live, how and where they are to be educated or to be consulted concerning changes that will significantly impact on his relationship with them and their culture, language and religious denomination and practice.[7] It is one thing for parents to have a shared intention for their children to be in the primary care of one of the parents in a strange country, even for an extended period, but quite another if that visiting parent seeks by her actions to permanently sever them from a state with which they have connections factually, culturally, socially or in other significant ways without respecting the left behind parent's vital rights as a co-guardian.

[15] As to the third pre-requisite the respondent appears by the overall tenor of her opposing papers to deny that the father was exercising his custodial rights at the time the children were brought to South Africa – by virtue of his lack of involvement in their lives, his failure to support them and because they had moved apart from the family home by then already, but it can hardly be suggested in my view that the facts demonstrating his supposed lack of interest as a father detract from his right as a co-guardian to determine where the children are to live. Rather, those complaints against him seem to go to the issue of his lack of suitability as a custodian parent or

[7] Article 5 (a) of the Convention.

one having the primary care of his children which are immaterial for present purposes.

[16] Be that as it may, the latter aspect falls to be proven by the respondent under the mantle of the Article 13 (a) defence to which I refer below.[8]

[17] Article 12 provides that where the removal or retention of the child in question is found to be wrongful within the meaning of article 3, and a period of less than a year after the wrongful removal or retention has elapsed – as is the case with the children in this instance – then the appropriate judicial or administrative authority of the requested State is *obliged* in terms of the Convention to order the immediate return of the child.

[18] There are, however, certain limited exceptions to the mandatory return of the children contained in Article 13, which directs that:

> "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

[8] Spilg AJ (as he then was) observed in Chief Family Advocate & Another v G 2003 (2) SA 599 (W) at 610 A – E that it is unlikely that a central authority which is entrusted with the initiation of legal proceedings can be expected to discharge an onus to prove that at the time of the removal (the mother in that instance) actually exercised rights of custody. Article 13 unequivocally provides that the parent who abducted the child bears the onus of proving that the other parent was not actually exercising the custody rights at the time of removal or retention. This is an express provision dealing with onus and must, negate any contrary interpretation that might appear from Article 13. The trend of the authorities however is that the applicant must establish the jurisdictional facts on a balance of probabilities and the onus is on the abducting parent to establish, by the same standard of proof, any article 13 defence relied upon.

> or retention, or had consented to or subsequently acquiesced in the removal or retention; or
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> 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.
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> 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.
>
> In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence."

[19] As an aside, Ms. Mitchell from the East London Justice Centre was appointed by this court on 8 July 2019, in compliance with the provisions of section 279 of the Children's Act, to represent the interest of the children. She conducted an interview with both of the children on 9 July 2019 and provided a report at the hearing of the matter. Whilst she considered that A was too young and immature to fully grasp what the legal request for their return was all about, she was able to glean that neither child had strong views against returning to New Zealand. To the contrary both children expressed a preference, independently of each other, to be in New Zealand and to see their father. Ostensibly both children understand from their mother that they cannot go back to New Zealand because of money issues, but no other concerns were flagged by Ms. Mitchell that would militate against the proposed return order. Indeed she fully supports the granting of the relief sought.

[20] The onus rests on the respondent to establish one or other of the defences referred to in Article 13 (a) and (b),[9] or that circumstances are such that a refusal would be justified having regard to the provisions of Article 20.[10]

[21] The latter article in turn provides that:

> "Article 20
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> 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."

[22] Even if the requirements of Article 13 (a) and (b) are met, however, the court retains a discretion to order the return of the children in any event.[11]

[23] As indicated above, the bedrock of the mother's opposition to the return order is that the children's *removal* was not wrongful in that their father consented to or acquiesced in their departure from New Zealand to live in South Africa. If I find for the mother on her principal version, which is that her agreement with the father was to permanently and indefinitely relocate with the children to South Africa, that would not only provide an

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[9] Smith v Smith [2001] 3 All SA 146 (A) at para 11; KG v CB *supra* and Family Advocate Port Elizabeth v Hide [2007] 3 All A 248 (SE) at para 7.
[10] Smith *supra* at para 9 and 11.
[11] Smith *supra* at para 11.

Article 13 (a) defence but would negate the purported act of wrongful retention on which the father's case is premised.

[24] I say principal version because, as will become apparent below, the mother equivocates between a conditional and unconditional agreement reached with the father for the supposed return of the children to South Africa.

[25] What in effect exists is a factual dispute regarding the nature of the parents' agreement or the conditions under which they agreed the children could depart to South Africa from New Zealand. The father says it was for a fixed term and season only, and the mother that it was "for good" and that he would visit the children in South Africa in December this year. It is common cause that the father at least consented to the children's departure with their mother from New Zealand, manifest by his consent given for them to travel alone with her and his presence at the airport to bid them all farewell.

[26] Also raised as an Article 13 (b) defence is the assertion that the children's wellbeing will be compromised by their return to New Zealand assuming the issue of a return order because since their departure from the family home their father has not supported them financially. The mother is further concerned that if the children are returned their father will neglect them. The fear is also voiced that circumstances have changed since their departure. The home that the children think they will be returning to no longer exists. The mother also complains that the father has never been a stable father figure and that she was always the primary caregiver. Despite

this the mother concedes that the father loves his children and that this love is reciprocated by them. In reality the mother has not suggested in so many words that there is a "grave risk that (the children's) return would expose (them) to physical or psychological harm or otherwise place (them) in an intolerable situation" in the sense contended for in this provision, but appears to rely on a broader general assertion that the proposed return order will not conduce to their best interest.

[27] The issue of onus and approach to be adopted in resolving the disputes of fact which ostensibly exists on the papers has been helpfully set out in NF v MC[12] as follows:

> "[9] What must be borne in mind is that in evaluating whether the applicant and the respondent have each discharged the onus resting upon them as outlined in *Smith supra,* the well-established *Plascon-Evans* rule (*Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635C) nonetheless still applies. Accordingly, in motion proceedings where a court is confronted by disputes of fact, a final order may only 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.
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> [10] As to a respondent's version in motion proceedings it can only be rejected where the allegations made -
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> > *...fail to raise a real, genuine or bona fide dispute of fact...[*or] *are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers...*
> >
> > *Practice in this regard has become considerably more robust, and rightly so. If it were otherwise, most of the busy motion courts in the country might cease functioning. But the limits remain, and however*

[12] [2012] ZAWCHC 198 (27 November 2012).

robust a court may be inclined to be, a respondent's version can be rejected in motion proceedings only if it is " fictitious" or so far-fetched and clearly untenable that it can confidently be said, on the papers alone, that it is demonstrably and clearly unworthy of credence. ' [emphasis supplied]

Fakie NO v CCII Systems (Pty) Ltd 2006 (4) SA 326 (SCA) paras 55-56.

[11] In *Pennello v Pennello (Chief Family Advocate as Amicus Curiae)* 2004 (3) SA *117 (SCA) at paras 40-41 Van Heerden AJA (as she then was) found as follows:*

'[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. 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, and courts in other jurisdictions have, in the main, been very reluctant to admit oral testimony in proceedings under the Convention. 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 section 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, the 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'.*
>
> *[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. '* [footnotes omitted]"

[28] Although the applicant in this instance bears the onus to prove the jurisdictional facts required by Article 3 that will trigger the provisions of Article 12, the existence or not of those depend ultimately on the question whether the father agreed to their removal and by necessary implication retention in this country, alternatively acquiesced therein.

[29] The essential facts, the social background of the children and the relevant circumstances appear below.

[30] The parents, citizens of South Africa, were married at Johannesburg in 2008. L was born in the country in November 2008. The family immigrated to New Zealand when he was just a year old. They spent two years there before leaving for Australia where the father was transferred for work purposes. A was born whilst the parties temporarily resided in Australia. L attended preschool and commenced school there. At the end of 2013 the parties returned to live in New Zealand (after a short visit to South Africa in between) and have lived there permanently since 2014. L was enrolled in a school in South Auckland at first but transferred to North Auckland when the family moved there at the end of September 2016.

[31] Although New Zealand has been home to the family, both parents have on occasion travelled to South Africa together with the children, the mother both with and without the children for significant periods *inter alia* after her father's death in March 2017 specifically to sort out the latter's estate, and the father on his own for a random visit to surprise his mother in July 2018. On the last trip when the children accompanied the mother to attend to her late father's estate, L took scheduled time off school in New Zealand because the father's work commitments did not permit him to look after them in the mother's absence.

[32] The family entered New Zealand initially on a work visa issued to the father. After a while they were granted residency and in mid-2018 were all granted permanent residency status which entitles them to live, work and stay in the country and to travel freely to and from it. The plan according to the father was for all of them to apply for full citizenship in New Zealand once eligible, the mother herself having made concerted efforts to obtain permanent residency status there.

[33] In October 2018 the common realization set in that the parents' marriage was at risk of failing. The father claims that initial discussions held to plot the way forward focused around the mother's return to South Africa for two purposes, one to finalize her father's estate and, two, to give her some time and space to work on what they needed to do to reconcile their relationship. (The latter notion is utterly rejected by the mother).

[34] By the end of 2018 they recognized however that a divorce was inevitable and would be pursued by one of them in due course.

[35] This gives a context to the parties' agreement reached which he says was the basis upon which the children departed New Zealand for South Africa with their mother.

[36] He claims that he lent his consent for the children to depart from New Zealand and spend up to one year in South Africa with her. This would, in his view, afford her an opportunity both to wind up her late father's business and to enable her to spend time with family whilst coming to terms with the breakdown of their marriage. The period was specifically limited to one year only but could be extended to January 2020 if return flights were too expensive in December. There was however no reason to doubt that the mother would return with the children at the conclusion of that period. He himself was again unavailable because of work constraints to look after the children while their mother travelled to South Africa, hence the concession that they accompany her and, by obvious implication, live and school in South Africa during their stay here.

[37] The children thus departed "in accordance with (their) agreement" on 12 January 2019. They travelled on one-way tickets on the basis that they would book flights back at the relevant time. The mother and children travelled with one suitcase each. (The mother contrariwise says she took all their belongings which they needed.) They used the opportunity to do a spring clean of the family home, the mother taking two boxes of belongings to her aunt and uncle's house in Henderson, Auckland, which he considered appropriate since they were in the process of separating. He claims that he still maintained a glimmer of hope that they would be able to reconcile.

[38] Once the mother had departed from New Zealand however their relationship worsened and she became reluctant to engage with him about their future, more especially concerning what would happen upon the children's return to New Zealand. On Tuesday, 2 April 2019 he sent her an email making clear that from his point of view their relationship was over.

[39] On 23 March 2019 the mother sent an email which significantly contained the following statement:

> "When and if I come back to New Zealand is something I would like to leave open for discussion with L …. I told him months ago and I still stand … if he is absolutely unhappy at the end of the year we will go, and if he feels he is ok to stay we will. For that reason I cannot say when for sure we will come back. I would also need to be financially stable when and if we do come back. I would like for him to get used to it here before we set everything or anything in stone."

[40] It was evidently on the basis of this communication, coupled with the mother's intimation that she would issue out the divorce action in South Africa in which she *inter alia* intended to claim custody of the children, that the father resolved that she had disavowed their agreement about the basis upon which he had lent his consent to the children accompanying her to South Africa. This prompted him to seek their immediate return to New Zealand under the Convention. He asserted that he no longer agreed to the children's continued presence in South Africa. He attempted to get the mother to state categorically that she had no intention of returning to New

Zealand with the children, but she had by then limited her communication and informed him that she was obtaining legal advice.

[41] He disavows any risk to the children's welfare or safety should they return to New Zealand. He envisages that if the mother returns with them that they would share the children's care in some way and has offered the undertaking to attend mediation to discuss such plans. He has further tendered child support. Should the mother not return to New Zealand with the children he claims that he is presently able to take care of them himself and that his work circumstances lend themselves favourably to such a contingency. He has also made an undertaking to fund the costs of the travel of the children back to New Zealand in the event that a return order is made, and the mother is unable or unwilling to pay these.

[42] He agreed to receive divorce proceeding by email issued out of South Africa which it appears were commenced by the mother making the necessary application for leave to sue by edictal citation out of this court in May 2019. He protests the jurisdiction of the South African courts to address any matters relating to the children which in his view ought to be dealt with in the New Zealand court system.

[43] After the proceedings under the Hague Convention were commenced, the Family Advocate attempted to mediate the voluntary return of the children to New Zealand by the mother, but to no avail.

[44] The contents of the information sessions with the parents has some bearing on the central issue of consent and/or acquiescence which this court is required to decide and bears repeating.

> "Mediation was held on 16 and 17 May 2019. Both (parents) participated.
>
> 1. On 16 May 2019: (The father who is in NZ) had not responded to email correspondence sent by Ms Loggenberg and mediation commenced with (mother) only:
>
> (a) After an information session with (mother) iro the Hague Convention and mediation to secure a voluntary return (Mother) informed that she and (father) separated soon after Christmas 2018 whereafter (mother) and the children moved to family members in NZ). There was not a lot of communication between the parties but according to (mother) she informed and (father) was aware that she is returning to South African with the children permanently. (Father) gave her consent to travel with the children.
>
> (b) The version of (father) was shared with (mother) – (mother) disputes (father's) version but agreed that subsequent to the eldest child (L) being unhappy in SA (around April 2019) and wanting to return to NZ, she sought psychological assistance for L. She also informed L and (father) that if L was still unhappy at the end of 2019, that they would return to NZ.
>
> (c) (Mother) informed that she has had discussions with her attorney, Mr Wayne Smith, about divorce proceedings but that divorce action has not been instituted.
>
> (d) …
>
> (e) …
>
> On 17 May 2019: the interview with (mother) continued – (father) had still not responded to the email correspondence.

(a) (Mother) confirmed that she has no document confirming the agreement between herself and (father) that he conceded to her relocating with the children to SA on a permanent basis, except the Affidavit of Consent for Children Travelling Abroad, as forwarded by her attorney on 16 May 2019, in which the return date of the children is underdetermined.

(b) (Mother) indicated that she resigned her job in NZ prior her departure and informed the school/s of the children that they are not returning to NZ. She further indicated that before she could tell the caregiver (Wilma Boskett) of the youngest child (A) that she and the children were not returning to NZ, (father) had already informed the caregiver. She further informed that the parties discussed the relocation with the children and (father) told L that as soon as he (father) gets citizenship in Australia, L can come and live with him in Australia.

(c) (Mother) indicated that she cannot return to NZ as she is in a much better "place" in SA and requested to discuss the matter further with her attorney and will return to the Office soonest.

(d) (Mother) provide(d) the cell number of (father) and confirmed that she has no contact concerns between (father) and the children in SA or NZ and that (father) has been in regular telephonic contact with the children since they left NZ.

<u>Undersigned phoned (father) – (mobile number provided)</u>

(a) …

(b) …

(c) (Mother's) version was shared with (father): (Father) denied that the parties separated formally prior to (mother's) departure but concedes that their relationship was strained and that (mother) and the children stayed with family members for a few days prior their departure to SA.

(d) He confirmed the version of events in his affidavit and made it clear that he definitely did not agree to the relocation of the children. He informed that the agreement between the parties was in order to assist (Mother) to finalise her late father's business and estate. The only reasons he agree(d) for the children to accompany (mother) at the time, for such a possible lengthy period, was because he had a very demanding job and would not have been able to care for the children on his own – as indicated in his affidavit, he has since changed jobs and is now in a position to care for the children in NZ. He reportedly works more flexible hours and can also work from home or anywhere else.

(e) (Father) informed that he never foresaw, at the time that (mother) would not return with the children. He informed that they all have, sometime prior to her departure, applied for citizenship in New Zealand and had discussed moving to Australia as (mother), amongst other things, has many relative in Australia.

(f) (Father) proposed:

- Should (mother) return to NZ he will cover the return expenses of the children but is of the view that (mother) is able to cover her own travel expenses.
- He will then also concede to the original agreement to remain in place, (i.e. that (mother) returns with the children at the latest January 2020) as he would firstly not want the children's school year disrupted and secondly that the children will miss (their mother) if they should return without her as they are missing him now, while they are in SA without him.
- Should (mother) not be willing to return with the children as mention(ed) above, he would seek the immediate return of the children to NZ.

- Should the children return to NZ without (mother), he has no contact concerns between (mother) and the children in either SA or NZ.

(g) He is concerned that (mother) wants to base the entire future of the family on the decision of a 10 year old child (L) – he does not believe that L should be the one to make the decision whether the family remains in SA or returns to NZ.

(h) (Father) informed that he is not badmouthing SA or that the children will not prosper here but feels NZ is the children's home. They refer to NZ as "home" and have both told him telephonically that they want to come "home" (NZ)."

[45] The upshot of the mediation, and after the mother seeking legal advice, is that she was not prepared to voluntarily return the children to New Zealand on the basis that "she disputes the version of the (father) and will contest it in court". This stance, to contest the matter litigiously, was repeated by her even after the Family Advocate advised her of the burden of proof she would have to bear in the present application.

[46] The mother in her answering affidavit asserts that for several years she was subjected to emotional abuse by the children's father as a result of which she lost all love and affection for him and the parties had already by 2017 virtually stopped communicating with each other. She vacated the family home on 30 December 2018 with the two minor children.

[47] During this period, she resided with her uncle and aunt in New Zealand with the children remaining in her care and on 12 January 2019 departed for South Africa. A confirmatory affidavit of her aunt and uncle

attached to her affidavit lends credence to the fact that the culmination of her relationship with the father was strained and emotional and that they offered her emotional succor at their home where she moved together with the children to live for three weeks before her departure with the children to South Africa. The father confirms the interim arrangement but denies any formal separation at that point.

[48] She states that whilst residing with her uncle and aunt, the father delivered some of the children's bedroom furniture and made further arrangements with a Mr. De Vries to have the remainder of the children's bedroom furniture removed and sold. An affidavit from the latter is attached confirming at least that the father was amenable to selling the children's beds to him after they had departed for South Africa and that the latter was planning on getting rid of some of the "excess items" and downscaling.

[49] The mother claims that the father further communicated with A's educator already in September 2018 to advise her that A would be going to South Africa in December "for good". A copy of the educator's affidavit was also attached confirming such disclosure and venturing the further opinion that he was "fully aware that his wife and two kids are going to live in South Africa".

[50] The crux of the mother's defence of consent and/or acquiescence is stated thus:

> "I submit that the minor children remained in my care at all times and the respondent was well aware of the fact that the minor children will continue

> to reside in my care upon our return to South Africa. I confirm that I had no intention of returning to New Zealand with the minor children. He indicated to the minor children prior to our departure that he would visit in December 2019. My intentions were made known to the respondent. I always believed that that was the agreement between us."

[51] According to the mother a clear indication of the father's acceptance of her intention not to return to New Zealand with the children within a specified period or at all is indicated by the Affidavits of Consent for Children Travelling Abroad which the father signed and which were attached to his affidavit. In it the date of return is stated as "undetermined".

[52] It is common cause that the children are presently residing at their maternal grandparents' house with their mother and that both have been enrolled at and are attending schools in East London. According to the mother both children have made good progress in adjusting to their new surroundings and have made new friends. She has also ensured that L attends therapy sessions with a psychologist for his wellbeing and to assist with his adaptation to South Africa. It is evident from a letter put up by the latter (dated 13 June 2019) that L was referred to her for counseling as early as 31 January 2019 already on the basis that his parents had "recently separated" and that his mother had moved to East London from New Zealand with him and his sister.

[53] Far from conceding that the father is concerned to play a role in the care of the children she asserts that he has not been interested in spending any quality time with them; that the nature of his work had required him to

travel on a regular basis leaving her alone with the children; that during holiday periods he chose to spend more time with his friends and in pursuit of his hobbies than with his children; that he changed jobs frequently and that he has never been a stable father figure in the children's lives. Despite this she does not deny that he loves his children and that they love him.

[54] Consent or acquiescence which is the cornerstone of the mother's defence involves an informed consent to or acquiescence in breach of the wronged party's rights. The SCA in KG v CB[13] discussed this aspect and referred with approval to the sentiments expressed by Hale J in re K (Abduction : consent) as follows:

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

[55] In regards to acquiescence KG v CB[14] approved of the approach in Re H and others (minors) (Abduction : acquiescence). In that case, Lord Brown-Wilkinson held that:

> "Acquiescence is a question of the actual subjective intention of the wronged parent, not of the outside world's perception of his intentions . . . In the process of this fact-finding operation, the judge, as a matter of ordinary judicial common sense, is likely to attach more weight to the express words or conduct of the

[13] *Supra* at para 37.
[14] *Supra* at para 40.

> wronged parent than to his subsequent evidence as to his state of mind. In reaching conclusions of fact, judges always, and rightly, pay more attention to outward conduct than to possibly self-serving evidence of undisclosed intentions. But in so doing the judge is finding the actual facts. He can infer the actual subjective intention from the outward and visible acts of the wronged parent. That is quite a different matter from imputing to the wronged parent an intention which he did not, in fact, possess."

[56] In Smith v Smith[15] the court held that there can be little doubt that acquiescence in Article 13 (a) involves an informed acceptance of the infringement of the wronged party's rights. That is not to say that acquiescence requires full knowledge of the precise nature of those rights and every detail of the guilty party's conduct. What is required is that he/she should at least know that the removal or retention of the child is wrongful under the Convention and that he/he is afforded a remedy against such wrongful conduct.

[57] In my view the mother's defence under Article 13 (a) that the father had consented to or subsequently acquiesced in the removal or retention of the children is anything but clear and unequivocal. Her version is unsatisfactory in several respects.

[58] Firstly, there is no evidence establishing consent as such. She does not state explicitly that the father consented to her and the children relocating permanently to South Africa. To the contrary she limply asserts that she "always believed that that was the agreement" and waivers between there being a lot of communication on the issue and yet, on the other hand, a

[15] *Supra* at para 16.

complete breakdown that meant they were not communicating on essential aspects. At best she could only put up the Affidavits of Consent as the purported proof that he had so agreed (given his "full consent") to their permanent relocation to South Africa which on the face of it does not establish consent to a permanent change of residence or for the children to give up their habitual residence. In any event, a study of the consent suggest that they were probably perfunctorily completed as the given departure date (24 December 2018) even precedes the date of which the affidavits were commissioned. Further they were obviously provided by the father for the express purpose of allowing the children to exit New Zealand at customs, unaccompanied by him.

[59] Her reliance on the date of return on the ticket as being "undetermined" and as providing a clear indication of her intention not to return with the children either "within a specified period or at all" appears to have been opportunistically seized upon *ex post facto* and in any event does not tally with what the parents' supposed agreement ultimately morphed into according to her evidence. In this regard, despite her reliance on the so-called firm consent or acquiescence to the relocation on her terms at the outset, she yet relies on a "factor" which was left open for consideration, being whether L adapted to living in South Africa, but it is unclear when this factor was discussed between them. (In her answering affidavit she says that she did so after consulting with Denise Kriel, the psychologist, and informed him of her advices but this is not borne out in the psychologist's correspondence at all.)

[60] This is later contradicted by her assertion that the father was aware thereof that she will not be returning to New Zealand unless it became apparent after a year that L and A *both* had not adapted to their circumstances in South Africa, the conditional relocation now no longer being limited to L's circumstances, but being inclusive of A's adaption as well.

[61] The assertions in her answering affidavits are further clearly at odds with her prior communication with the father by email in March 2019 in which she reserves the right, apparently exclusively and unilaterally, to decide what will happen going forward concerning L. She does not say emphatically that she won't be returning with the children (which supports the father's case that she was equivocating) and the "if" is dependent not only on L's happiness, but also her financial stability. This email communication ring entirely contrary to her case that by the time she departed from New Zealand with the children there was no doubt that it was on a non-return basis.

[62] She randomly asserted that in February 2019 the father had a "change of mind" and kept asking when the children would return but takes it no further than that.

[63] Her meandering and contradiction are demonstrated in several other respects as well which renders her version untenable and as not raising a real, genuine or *bona fide* dispute of fact.

[64] It emerges from the consultation held with the children by Ms. Mitchell that they are under the impression that they have been displaced from their New Zealand home because of financial constraints, which is self-evidently not the primary reason on the mother's version for being in South Africa. Independently of each other both children advised Ms. Mitchell that their mother informed them that they cannot go back "because of money", or a lack of it, to go back and live in New Zealand. Neither seem to be obviously aware of a permanent decision to have relocated to South Africa which is unlikely if everyone was on the same page regarding their status. Rather they appear to be resolved that this is their lot (a holding space) because their mother cannot afford to go back there.

[65] The suggestion that the father would be visiting the children during the holidays (on some undisclosed date according to A) appears also to have emanated from the mother herself (rather than the father), offering this as a sop to A who wants to be in New Zealand where her father lives. It is improbable in my view that A, who enjoys a close relationship with both parents, would not have conveyed to Ms. Mitchell a definite plan by the father to visit them in South Africa in December 2019 if he had suggested as much to her. Evidently both children are longing for their father and would have taken comfort from knowing that a plan is in place for him to visit them in South Africa later this year.

[66] Allied to these insights offered by the curator is the letter attached to the respondent's answering affidavit penned by the counseling psychologist, Ms. Denise Kriel. It is notably significant that she refers to only a separation of the parents and not to any agreement by the parents for the children to be

permanently relocated to South Africa, or indeed to follow L's adaptation. One would have expected that such a firm agreement would have conduced to greater certainty regarding L's future than musings about whether his parents may or may not be reconciled. She opines that the child would be better able to cope if there is "a clear parenting plan". If the mother is to be believed on her version that there was a firm and final agreement in place that the children were to permanently live in South Africa with the father's blessing and support, why is the psychologist mum about this aspect. It is also significant in my view that these counseling sessions commenced in January 2019 already. If the therapist had been informed at the onset of this engagement with her that had been a permanent change to their children's lives, it is most unlikely that the projected therapy of the child at the time would be presented on such a tentative uncertain basis in her letter.

[67] The mother's sessions with the mediator to secure the voluntary return of the children also belie a clear consistent agreement purportedly having been put in place with the father for the children to have permanently relocated to South Africa. For example, she did not advert to the terms of any specific agreement, contenting herself instead with the assurance given to the Family Advocate conducting the mediation that the father "was aware that she is returning to South Africa with the children permanently". The consent put up in support of this supposed awareness the following day was confined to the Consent to Travel, a document obviously provided for a very specific purpose. When the father's version as represented by the convention application was revealed to her, she offered the alternative and purportedly varied plan B that subsequent to L being unhappy in South Africa and wanting to return to New Zealand (around April 2019) she had

sought psychological assistance for him and thereupon informed his father that if he was still unhappy at the end of 2019 that they would return to New Zealand. It appears that following this session with the mediator on 16 May 2019, her attorneys forwarded the consent to travel as "proof" in lieu of a written document confirming her agreement with the father that he intended thereby to show that the return date for the children is undetermined.

[68] Ostensibly having consulted with her legal representative, she also offered as "proof" the disclosure made by the father to the A's caregiver in September 2018 already that the children would not be returning to school. She also indicated contrary to what appears from Ms. Kriel's letter and the children's advices to Ms. Mitchell, that the parties supposedly discussed the relocation with the children and that their father informed L that he could come and live in Australia with him. The sticking point, as far as she was concerned why she was not prepared to return to New Zealand is that she is "in a much better place" in South Africa. Her decision in this respect obviously bears no reference to the children but was focused on her narrow interests.

[69] Objectively the father's version as to the children's departure from New Zealand and retention in South Africa remains steadfast throughout his affidavit and the recordal of the mediation process concerning him does not ring improbable. Evidently, he became convinced of a breach of his custody rights at the latest on receipt of the respondent's legal representatives letter of 17 April 2019, wherein he was advised that the respondent would be instituting legal proceedings for divorce in South Africa. It makes sense that it was only then when he became aware of the mother's intention not to

return to New Zealand with the children. Once he was apprised of such intention, he took steps without delay which culminated in the institution of these proceedings.

[70] The evidence presented by the mother fails to establish the purported consent by any stretch of the imagination neither do the random vignettes relied upon by her (the hodge-podge *indicia* on which it was submitted such an intention ought to be inferred) suggest acquiescence on the part of the father to change the children's place of habitual residence. Whereas the contention was advanced that he only commenced the proceedings under the Convention out of malice and spite once it became clear to him that the mother was intent on proceeding with a divorce summons (not a surprise according to him although he had hoped for a reconciliation), the facts demonstrate to the contrary that he acted the moment it became apparent to him that the mother was equivocating about the return of the children and showing herself by her conduct to be acting unilaterally and in defiance of his rights as a co-guardian to have a say in where the children were to live in the future.

[71] In my view the applicant has succeeded in proving on a balance of probabilities (the mother conversely having failed to establish by the same standard of proof that the father had consented to or acquiesced in the retention of the children under the circumstances) that the children were therefore at the time of both their removal and retention in South Africa still habitually resident in New Zealand. The retention was further self-evidently in breach of the father's rights as a co-guardian (not having consented to the wrongful act of their retention), such rights having been conferred on him by

virtue of his marriage to the mother under the Care of Child Act and extant at the time. It follows too that but for the act of retention, the father would have continued to exercise his custody rights in this respect.

[72] Whether one approaches this matter from the point of view that the onus was on the applicant to establish the jurisdictional facts referred to in Article 3, or on the mother to establish the Article 13 (a) defence, the tenor and quality of her evidence (even absent any affidavit by the father himself to gainsay her allegations in the answering affidavit) avails the same outcome. The mother's principal defence of consent and/or acquiescence cannot be sustained on the evidence. Even if the father conveyed to A's educator in September 2018 already that the child was going to South Africa for good, this does not establish consent on the terms relied upon by her and/or the supposed acquiescence in the retention. Similarly, the fact that the father hurried the family out and downscaled after their leaving is consistent with the acceptance on his part (but hope for a different outcome), that a fixed term separation was inevitable rather than a permanent relocation of the children on the vague basis asserted by the mother.

[73] One of the indicators relied upon by the mother (in demonstrating consent/acquiescence) is that the father has failed to maintain the children. This is most unfortunate (the father has not dealt with these allegations in reply), but in the context of weighing the onus it is a factor that plays more naturally into the father's favour. He realized early after the family had departed that the hoped-for prospect of reconciliation was dimming, and I suspect withheld financial support as leverage. One can only speculate as to why he would do something so prejudicial to the children, but if he had

agreed to their permanent relocation, it is more probable than not that he would have paid their support and not withheld it. And that the mother would have enforced their supposed parenting plan if it existed.

[74] The alleged lack of support does of course go to the question whether the mother has established an Article 13 (b) "defence", but the clear indication is that the father does have funds at his disposal to pay for the travelling costs and expenses of the children's return trip and has not balked in tendering these. Further he is working and has means at his disposal (despite what he might have said to the mother) to meet the children's costs of living.

[75] I have already indicated above that the facts do not demonstrate any grave risk that the children's return would place them in harm's way or in an intolerable situation. There are bound to have been changes in the father's lifestyle since the parents' separation, but no glaring factors stand out as providing a basis not to return the children as envisaged by Article 13 (b).

[76] As for the general assertion that a consideration of the best interests of the children militates against a return order and that I should exercise my discretion against making such an order, the concerns raised by the mother that the father is not a suitable custodian really go to the heart of the custody dispute between the parents which I am not required to determine.

[77] The Constitutional Court in Sonderup v Tondelli[16] has eloquently set out the approach that this court must adopt in a Hague Convention matter when considering the children's best interests:

> "The Convention itself envisages two different processes – the evaluation of the best interests of children in determining custody matters, which primarily concerns long-term best 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 which affirms that the State parties who are signatories to it, and by implication those who subsequently ratify it, are '[f]irmly convinced that the interests of children are of paramount importance in matters relating to their custody'. . . .
>
> What, then, of the short-term best interests of children in jurisdictional proceedings under the Convention? One can envisage cases where, notwithstanding that a child's long-term interests will be protected by the custody procedures in the country of the child's habitual residence, the child's short-term best interests may not be met by immediate return. In such cases, the Convention might require those short-term best interests to be overridden. I shall assume, without deciding, that this argument is valid. To that extent, therefore, the Act might be inconsistent with the provisions of s 28(2) of the Constitution which provide an expansive guarantee that a child's best interests are paramount in every matter concerning the child. I shall proceed therefore to consider whether such an inconsistency is justifiable under s 36 of the Constitution, which requires a proportionality analysis and weighing up of the relevant factors.
>
> . . . The purpose of the Convention is important. It is to ensure, save in the exceptional cases provided for in art 13 (and possibly in art 20), that the best interests of a child whose custody is in dispute should be considered by the appropriate court. It would be quite contrary to the intention and terms of the

[16] 2001 (1) SA 1171 (CC).

> Convention were a court hearing an application under the Convention to allow the proceedings to be converted into a custody application."

[78] In concluding that the Children's Act incorporating the Convention is consistent with the South African Constitution, Goldstone J pointed out that:

> "(T)he 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 Article 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."

[79] In KG v CB the SCA referred with approval to the United Kingdom case of Re E (children) (wrongful removal : exceptions to return) which followed an approach similar to Sonderup v Tondelli, in which case the court held that:

> "There is no provision expressly requiring the court hearing a Hague Convention case to make the best interests of the child its primary consideration; still less can we accept the argument . . . that s 1(1) of the 1989 Act [the United Kingdom Children Act 1989] applies so as to make them the paramount consideration. These are not proceedings in which the upbringing of the child is in issue. They are proceedings about where the child should be when that issue is decided, whether by agreement or in legal proceedings between the parents or in any other way.
>
> On the other hand, the fact that the best interests of the child are not expressly made a primary consideration in Hague Convention proceedings, does not mean

that they are not at the forefront of the whole exercise. The preamble to the convention declares that that the signatory states are 'Firmly convinced that the interests of children are of paramount importance in matters relating to their custody', and 'Desiring to protect children internationally from the harmful effects of their wrongful removal or retention'. This objective is, of course, also for the benefit of children generally: the aim of the convention is as much to deter people from wrongfully abducting children as it is to serve the best interests of the children who have been abducted. But it also aims to serve the best interests of the individual child. It does so by making certain rebuttable assumptions about what will best achieve this . . . .

Nowhere does the convention state that its objective is to serve the best interests of the adult person, institution or other body whose custody rights have been infringed by the abduction (although this is sometimes how it may appear to the abducting parent). The premise is that there is a left behind person who also has a legitimate interest in the future welfare of the child: without the existence of such a person the removal is not wrongful. The assumption then is that if there is a dispute about any aspect of the future upbringing of the child the interests of the child should be of paramount importance in resolving that dispute. Unilateral action should not be permitted to pre-empt or delay that resolution, Hence the next assumption is that the best interests of the child will be served by a prompt return to the country where she is habitually resident . . . .

Those assumptions may be rebutted, albeit in a limited range of circumstances, but all of them inspired by the best interests of the child. Thus the requested state may decline to order the return of the child if proceedings were begun more than a year after her removal and she is now settled in her new environment (art 12); or if the person left behind had consented to or acquiesced in the removal or retention or was not exercising his rights at the time (art 13(*a*)); or if the child objects to being returned and has exercised an age and maturity at which it is appropriate to take account of her views (art 13); or, of course, if "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' (art 13(*b*)). These

> are all situations in which the general underlying assumptions about what will best serve the interests of the child may not be valid . . .
>
> We conclude, therefore, that . . . the Hague Convention . . . [has] been devised with the best interests of children generally, and of the individual children involved in such proceedings, as a primary consideration."

[80] There is as I have already stated no glaringly obvious reason why this court should be hesitant to feel itself bound by the Convention to return to the children to New Zealand.

[81] The conditions which I impose by my order below will of necessity ameliorate or seek to address any potential hardships.

[82] I indicated above that I would deal with the issue of the mother's objection that the father was not joined in these proceedings. The principal basis for this objection and counter-application for the father to be joined is premised on the remarks of Van Heerden JA in CB v Houwert[17] who noted that the father in that instance had not been joined as co-applicant "as is usually the case".[18] She had observed further that such omission entailed that any conditions imposed on such a parent to govern the child's return, insofar as the court imposed obligations on him, would not be binding on him unless he consented in some way to be bound by the judgment notwithstanding that he had not been cited as a party. The applicant's retort to this submission is that it is unnecessary to join the father as co-applicant. It appears to be standard that the requesting individual seeks the assistance of the central authority of any contracting state to secure the return of a child

[17] [2007] SCA 88 RSA.
[18] at para [12].

under the Convention where the necessary jurisdictional basis exists, and that the proceedings are instituted *nomine officio* on behalf of the requesting individual. It is the central authority receiving a return application who is tasked with collating the necessary documents stipulated by Article 8 and ensuring that the completed application together with supporting documents is directly and without delay transmitted to the central authority of the corresponding contracting state for actioning. It appears from Article 9 that it is the function of the central authority of the requesting individual to act as the gateway to assistance being extended under the Convention and who verifies that a basis exists for such an application to be transmitted to the corresponding contracting state for actioning.

[83] Article 7 imposes numerous powers and responsibilities on central authorities who are all bound to promote co-operation amongst themselves in order to secure the prompt return of children and achieve the other objects of the Convention, all of which reinforces the significance of the duly represented official bringing the application in that capacity to unlock the machinery that flows from the statutory framework, and representing the interests of the contracting state concerned in making certain that the integrity and efficacy of the Convention is maintained. Even the costs and expenses of the proceedings are spared against a requesting individual genuinely seeking to pursue proceedings falling within the scope of the Convention.[19]

[84] Article 28 requires that an application initiated on behalf of a requesting individual be accompanied by a written authorization

[19] Articles 22, 25 and 26.

empowering it "to act on behalf of the applicant, or to designate a representative so to act". In all of this it therefore appears unnecessary for a requesting individual to be joined to the proceedings.

[85] I take the respondent's point, however, that the difficulty arises, in enforcing return orders where there is no compunction on the party concerning whom the directions in the order are made, to meet the implementing terms. In CA v Houwert the court got around this by extracting an undertaking from the parent that he would be bound by the court's order and I intend to do the same to encompass the aspects not covered by him in his undertaking.

[86] Whilst it certainly appears sufficient for the applicant to assist a parent *nomine officio*, it may be desirable to join him or her, but I would not go so far as to say that the non-joinder of the requesting individual would be fatal to the application.

[87] One word of caution though. In applying the Plascon-Evans principle to the resolution of disputes in applications of this nature (where the opportunity for the referral to oral evidence does not naturally present itself), the applicant should be astute to canvas the parent's responses to damning allegations by a proper reply and/or confirmatory affidavit being put up to deal with contentious aspects. The applicant does the parent a disservice where such issues are left unanswered. I would have been particularly interested in understanding in this instance for example why the father has not maintained his children.

[88] There were other objections raised by the respondent, most of which have become academic or are unnecessary to deal with.

[89] Concerning the proposed order, the father has not said where he presently lives, or what day to day care arrangements can or will be made for the children to live back at home especially since he was hopeful that the respondent would accompany the children on their return trip. It has also never been his stance that he should exclusively be responsible for the primary care of the children. The mother has unequivocally said that she will not accompany the children but may be well placed to reconsider her decision given the order which I intend to make. The father has also not indicated how and when he intends to get on with the business of litigating in the New Zealand courts to finally assert his rights of custody and indeed what should apply in the interim pending the divorce and determination of these important aspects. For this reason, I intend to invite the applicant and the mother's legal representatives to furnish the court with a consensual draft order regarding the implementing terms ancillary to the return order itself. Supplementation of the principal order, or a variation thereof, may be necessary given the multitude of factors that have probably not been thought through by the parties beyond the question of whether the immediate return of the children was warranted in all the circumstances.

[90] I am constrained to order the return of the children forthwith (as I must), but given the applicant's concession that some administrative arrangements need to be put in place for the order to be implemented and that some latitude should be allowed to facilitate the process with as little

trauma as possible, I am further inclined to direct that the order not take effect until the children have completed the present term at school (20 September 2019) which appears more or less to coincide with the New Zealand's school terms.

[91] As for the issue of costs, the parties are *ad idem* that there should be no order as to costs, as is the norm in these matter given each parent's concern and desire to act in the manner that they believe to be in the best interests of their children.[20] As for the costs of the transfer application, these were reserved. I understood that the applicant moved this application in the Grahamstown High court for the transfer of the matter to the East London circuit court, which would have been in accordance with my directive and at the behest of the respondent. It would therefore have been unnecessary for her to have opposed the application, even notionally. I am uncertain why the costs were reserved, but it appears to me to be sensible that each party should simply bear their own costs in that respect as well.

[92] In the premises I issue the following order:

1. The retention of the children, namely L and A, is declared wrongful within the meaning of Article 3 (a) of the Convention.
2. The children are to be returned forthwith, but subject to the terms of this order, to the jurisdiction of the Central Authority in New Zealand.

[20] See the remarks of King J in McCall v McCall 1994 (3) SA 201 (C) at 209 C.

3. The order in paragraph 2 for the return of the children shall however be stayed until the end of the present South African school term on 20 September 2019.
4. The respondent is to notify Mr. Keuben Gounden, acting in his capacity as Family Advocate on the authority of the Chief Family Advocate of South Africa (the "the Family Advocate) by 22 August 2019 whether she intends to accompany the children on their return to New Zealand, and , if so, the Family Advocate shall forthwith give notice thereof to the registrar of this court, to the Central Authority in New Zealand and to the children's father.
5. In the event of the respondent failing to notify the Family Advocate of her willingness to accompany the children on her return to New Zealand, alternatively, if the respondent notifies the Family Advocate of her unwillingness to accompany the children to New Zealand, then the Family Advocate will be authorized to make such arrangements as may be necessary to ensure that the children are safely returned to the custody of the Central Authority for New Zealand, and to take such steps as may be necessary to ensure that such arrangements are complied with.
6. The parties and the curator, Ms. Mitchell, are required to consult and advise this court by 10h00 on Friday 23 August 2019 on the form of a practical order to give effect to the children's safe return and to deal with the implications going forward of the day-to-day care of them in New Zealand, the obligations of the parents to maintain them, access to them, and any other arrangements that flow from the return order, especially if they are not to be accompanied by their mother and primary caregiver. Counsel are

requested to report to this court next week with a draft order and in the event of a consent order not being provided should ready themselves to promptly make oral submissions in court on the ancillary aspects with a view to the court redressing any hardship that might be occasioned by the return order.

7. The children's father shall within one month of this court order institute proceedings and pursue them with due diligence to obtain an order of the appropriate jurisdiction in New Zealand for custody and care of the children and/or access to them and if needs be, seek interim relief pending the final determination of those aspects.
8. The children's father is ordered to purchase and pay for economy class air tickets, and if necessary, rail and other travel costs to be occasioned by the children's return from East London, South Africa, by the most direct route to New Zealand, alternatively to reimburse the State on demand for such expenses or costs incurred in pursuit of this order.
9. This order is further subject to the children's father furnishing an affidavit in which he concedes that he is aware of its terms and of the contingency that a variation or supplementation thereof may issue as a result of which he will be subject to certain obligations imposed thereby and that he freely, voluntarily and unequivocally consents to and submits himself to the jurisdiction of this court in respect of such orders with full and complete acceptance and adherence to the terms thereof.
10. There is no order as to costs either in respect of this application or the interlocutory application for the removal of the matter to the circuit court in East London.

11. A copy of this order (and the supplementation of it envisaged in paragraph 6 above) shall forthwith be transmitted by the Family Advocate to the Central Authority in New Zealand.

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B HARTLE
JUDGE OF THE HIGH COURT

DATE OF HEARING : 23 July 2019
DATE OF JUDGMENT : 16 August 2019

Appearances:

For the applicant : Ms. T Rossi instructed by the State Attorney, East London (ref. Ms. Tyani)
For the respondent : Ms. D Mostert instructed by Wesley Pretorius & Associates, East London (ref. Mr Smith)
Curator ad litem : Ms. N Mitchell of Legal Aid Board, East London