



THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal
Date: 18 January 2022
Status: Immediate

Please note that the media summary is intended for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.

LD v Central Authority, Republic of South Africa and Another [2022] ZASCA 6

Today the Supreme Court of Appeal, by a majority of four to one, dismissed an appeal from the judgment of the Gauteng Division of the High Court, Pretoria (Tuchten, Davis and Mokose JJ sitting as court of appeal). That court had upheld an appeal against an order by Collis J to return a minor child, E, to Luxembourg subject to various conditions. The order was granted under the Hague Convention on the Civil Aspects of International Child Abduction, 1980 (the Hague Convention). It followed the unlawful abduction of E from Luxembourg to South Africa by her mother. This unlawful act required E to be returned to Luxembourg unless the mother could establish a legal basis to avoid it. The mother relied on article 13(b) of the Hague Convention. This required her to prove that ‘there is a grave risk that . . . her return would expose the child to physical or psychological hardship or otherwise place the child in an intolerable situation.’

E was born on 25 August 2014. Luxembourg became the habitual residence of the mother and father, who subsequently separated, and E. In May 2018, the mother married a South African man. She applied in Luxembourg for leave to take E with her to South Africa since she had been offered employment there. Her application

was refused and an appeal dismissed on 3 October 2018. On 4 October she removed E to South Africa, along with E's half-brother, S, born from the mother's previous marriage. A further appeal to the Court of Cassation in Luxembourg was dismissed on 21 November 2019.

The father visited South Africa to have contact with E as ordered by the Luxembourg court. The mother insisted that Professor Spies, a social worker, assess E concerning whether E's best interests would be served by the father having sleepover contact. She indicated that the 30 minute contact session 'had all the potential to form a strong basis to plan subsequent visits' which could include 'possible sleepover visits of which [E] first must be informed in advance'. According to her, though, given E's close bonds with the mother, as primary caregiver, it would cause E 'extreme trauma' if E was returned to Luxembourg without her mother. Professor Spies was also of the view that if E had to return to Luxembourg, the family unit would disintegrate, with traumatising consequences for E.

Proceedings were launched in South Africa by the Central Authority at the instance of the father. A curator ad litem to E who moved for appointment of Ms De Vos, a psychologist, to conduct an emotional assessment of E. She found that E was 'a happy young girl' who regarded her mother, grandmother, her mother's new husband and her half-brother, S, to be her support structure; that she felt emotionally safe and secure; that she avoided discussing her father because she was angry with him; that she had largely been sheltered from any adult conflicts; and that she had adapted to school and made a close friend. She concluded that if E were to be returned to Luxembourg, this 'could potentially lead to an intolerable situation'. She concurred in the observation of Prof. Spies concerning the potential 'extreme trauma' E would suffer if returned to Luxembourg without her mother. As E's mother was her primary attachment figure this could cause psychological harm to E, as well as being a possible intolerable situation on its own. E was also very close to her half-brother, S, and if she returned with him remaining in South Africa, this could also be an intolerable situation. In the light of the fact that the father only sought visitation rights to E, Ms De Vos questioned whether returning E to her habitual residence in order

to see her father every second weekend was enough reason to uproot E again.

The majority deplored the behaviour of the mother. However the focus is on the best interests of E. If the best interests of E has the effect of 'rewarding' the mother for her bad behaviour, that is an unfortunate but unavoidable result. It held that the mother had discharged the onus on her.

The minority judgment took a different view. It held that the assertions of the mother were general, and related to her risk and not the risk of E. They should not be considered as 'grave risk'. In contrast to that of the mother, the father's conduct had been impeccable. Whatever estrangement that has been caused between the father and E is of the mother's deliberate wrongdoing as she acted in contempt of the orders of the courts of Luxembourg. It concluded that there is no likelihood of undermining the best interests of E by ordering her return to Luxembourg.