THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

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C A R v The Central Authority of The Republic of South Africa and Another (737/2023) [2024] ZASCA 103 (21 June 2024)

Today the Supreme Court of Appeal (SCA) upheld an appeal, ordering each party to pay its own costs. It further set aside and replaced the order of the Gauteng Division of the High Court, Pretoria (the high court).

The proceedings concerned the Hague Convention on the Civil Aspects of International Child Abduction (the Hague Convention) and the matter came to the SCA as an appeal by the father of a minor child (CAR) against the judgment and order of the high court, which dismissed the application for the return of the minor child (CJ) to CAR in Canada. The application in the high court was launched by the Central Authority of the Republic of South Africa (the Central Authority) against CJ's mother, (YR) who, it was alleged, had retained CJ in Pretoria in July during the family's visit to South Africa in July 2022.

CAR and YR were married in 2011. At that time, they were South African citizens who lived and worked in South Africa. During 2014, they decided to relocate to Canada. YR was accepted in a Master's degree orthodontic programme at the University of Manitoba, Winnipeg, Canada in early 2015. She was granted a temporary Canadian student visa and, CAR was granted a temporary open work visa. They arrived in Winnipeg on 11 June 2015 and stayed with friends. They subsequently applied for Manitoba's Provincial Department Programme, which is considered a stepping stone for the application for permanent residency. They were granted permanent residency on 30 January 2017 and then applied for citizenship. In 2018, they moved to Calgary, the province of Alberta, where YR opened a dental practice. CAR and YR also purchased fixed property and took out a mortgage bond. YR was later appointed as an associate at a well-known orthodontics practice in Calgary. In 2021 she renewed that contract for another two years.

On 20 July 2021, the couple's minor son, CJ, was born. The three lived together as a family in Calgary. On 22 December 2021, the couple was invited to take a citizenship test. In April 2022, the couple attended the Canadian Citizen Oath Ceremony and, on 27 April 2022, a certificate of Canadian citizenship was issued to the couple, thus officially making them Canadian citizens.

During July 2022, the family a planned family visit to South Africa. They bought flight tickets for 9 July 2022 and the return flight was booked for 23 July 2022. On arrival in South Africa on 10 July 2022, YR informed CAR that she no longer intended to go back to Canada and that she intended to keep CJ with her in South Africa. CAR did not agree and sought legal advice. On 19 July 2022, CAR left South Africa

and upon arrival in Canada, approached the Central Authority of Canada and initiated proceedings for the return of CJ in terms of the Hague Convention. On 20 December 2022, an application was launched in the high court by the Central Authority of the Republic of South Africa as the first applicant and CAR as the second applicant.

In the high court, YR raised three defences namely: (a) she disputed that CJ's habitual residence immediately before the abduction was Calgary in Canada and contended that it was Pretoria, South Africa; (b) she raised a defence predicated on article 13*(a)* of the Hague Convention, in terms of which it was alleged that CAR had acquiesced to the retention of CJ in South Africa; and (c) she raised a defence predicated on article 13*(b)* of the Hague Convention, in terms of which it was alleged that returning CJ to Canada would expose him to grave harm physical or psychological harm or otherwise place him in an intolerable situation.

The high court stated that on the basis of article 3, read with article 4 and article 12 of the Hague Convention, CAR had initiated the proceedings within weeks of CJ's retention. It found that the article 12(2) defence was not available to YR in this matter as the application was launched within a period of one year, finding that CJ's habitual residence at the time of his retention was Canada. In relation to the defence of acquiescence, the high court found that by returning alone to Canada on 10 July 2022, CAR could not have acquiesced to CJ's retention in South Africa. Lastly, in relation to the defence predicated on article 13*(b)* of the Hague Convention, the high court concluded that to return CJ to Canada would expose him to an intolerable situation – mainly because of his medical history, and due to the fact that some medical issues, which were picked up two months after CJ's arrival in South Africa, were not picked up and therefore not addressed in Canada.

Given the findings by the high court, the crisp issue before the SCA was whether the high court correctly found that YR had established, under article 13*(b)* of the Hague Convention, that there is a grave risk that CJ's return to Canada would expose him to physical or psychological harm or otherwise place him in an intolerable situation.

In arriving at its conclusion, the SCA held that, in consideration of all the circumstances of the case, it was clear that the high court erred in its approach to the application of article 13*(b)* because, firstly, despite its own finding that there was no evidence that tied CJ's delayed milestones to the conflict arising from the marital problems between YR and CAR, the high court inexplicably endorsed Ms van Jaarsveld's opinion that 'to put a child at risk by returning him to Canada where he will be exposed to the same circumstances which is possibly the root of his development delays will be emotionally and psychologically irresponsible'.

In the second instance, the SCA stated that although the high court had commended CAR for being a loving father who took CR for medical appointments, it paid little or no regard to his averments in terms of which he pledged to take CJ for all the necessary medical tests and interventions aimed at addressing linguistic delays, once they were in Canada. On this point, it held that of crucial significance was that while CJ's developmental delays could not be disputed, there was insufficient evidence regarding the cause thereof.

Lastly, the SCA held that another error related to the high court not having conducted the two-pronged enquiry, as envisaged in article 13*(b)* which takes into account the interplay of the short term and long term best interests of children in that did not address itself to the option of imposing protective measures which it could possibly put into place to ensure that CJ would not have to face a harmful situation if he was returned to Canada and failed to balance both the interests of the child and the general purposes of the Hague Convention, which it was obliged to do.

In the result, the SCA upheld the appeal, ordering each party to pay its own costs and further set aside and replaced the order of the high court.

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