



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**  
**JUDGMENT**

**Reportable**  
Case no: 737/2023

In the matter between

**C A R**

**APPELLANT**

and

**THE CENTRAL AUTHORITY OF**

**THE REPUBLIC OF SOUTH AFRICA**

**FIRST RESPONDENT**

**Y R**

**SECOND RESPONDENT**

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

**Coram:** MOLEMELA P, MOCUMIE ADP, GOOSEN and MOLEFE JJA and MBHELE AJA

**Heard:** 15 February 2024

**Delivered:** This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 11H00 on 21 June 2024

**Summary:** Hague Convention on the Civil Aspects of International Child Abduction – whether a defence to the application for the return of the child to Canada was established as envisaged in article 13(b) – abducting parent has not shown, on a balance of probabilities, that there was a grave risk that a court-ordered return of the child to Canada would expose him to psychological hardship or otherwise place him in an intolerable situation – article 13(b) defence not established – appeal upheld.

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## ORDER

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**On appeal from:** Gauteng Division of the High Court, Pretoria (Neukircher J, sitting as a court of first instance):

- 1 The appeal is upheld.
- 2 Each party to pay its own costs.
- 3 The order of the high court is set aside and replaced with the following:
  - ‘3.1 It is ordered and directed that the minor child (CJ) be returned forthwith, but subject to the terms of this order, to the jurisdiction of the Central Authority of Canada.
  - 3.2 In the event of the respondent (the mother) giving written notification to the Central Authority of the Republic of South Africa, Pretoria (the RSA Central Authority) within five days of the date of issue of this order that she intends to accompany CJ on his return to Canada, the provisions of paragraph 3.3 shall apply.
  - 3.3 The second applicant (the father) shall, within 20 days of the date of issue of this order, institute proceedings and pursue them with due diligence to obtain an order of the appropriate judicial authority in Canada in substantially the following terms:
    - 3.3.1 Unless and until ordered by the appropriate court in Canada:
      - 3.3.1.1 On date of departure of the mother and CJ from South Africa to Canada in terms of the order of the Supreme Court of Appeal of South Africa under SCA case number 737/2023, residence of CJ shall vest with the mother, subject to the reasonable rights of contact of the father.
      - 3.3.1.2 The father is ordered to purchase and pay for economy class air tickets for the mother and CJ to travel by the most direct route from Johannesburg, South Africa, to Calgary, Alberta, Canada.
      - 3.3.1.3 The father is ordered to make his current home, situated at 303, 380 Smith Street NW, Calgary, Alberta, T3B 6M4, (the Smith Street home), or equivalent accommodation available

to the mother and CJ as their residence, leaving all furniture, appliances, cutlery, crockery and linen in the home, and for such purpose shall vacate such home before date of departure of the mother and CJ from South Africa to Canada. In the event that the Smith Street home has been sold, the father shall provide CJ and the mother with equivalent accommodation.

3.3.1.4 The father is ordered to pay the following costs and expenses associated with the mother's and CJ's occupation of the home in para 3.3.1.3 above; rates, levies, electricity, refuse, water, heating and internet.

3.3.1.5 The father is ordered to pay the mother \$1 000.00 (one thousand Canadian dollars) per month, in addition to the amount that he currently pays in the sum of \$600.00 (six hundred Canadian dollars) per month (i.e. a total of \$ 1 600.00 (one thousand six hundred Canadian dollars)) per month), into an account of the mother's choosing, as cash maintenance for the mother and CJ. The first *pro rata* payment shall be made to the mother on the day upon which she and CJ arrive in Canada and thereafter monthly in advance on the first day of each succeeding month.

3.3.1.6 The father is ordered to pay the costs of and associated with the agreed upon crèche that CJ may attend, and for the continuation of therapy CJ is currently receiving from medical professionals.

3.3.1.7 The father is ordered to continue to pay for the medical aid on which he has registered the mother and CJ, and to cover any further reasonable and necessary medical costs not covered by the Canadian governmental medical coverage and medical aid.

3.3.1.8 The father is ordered to provide the mother with access to a roadworthy motor vehicle upon the mother's arrival in Calgary, Alberta, Canada.

3.3.1.9 The father and the mother are ordered to cooperate fully with the RSA Central Authority, the Central Authority for

Canada, the relevant court or courts in Canada, and any professionals who are approved or appointed by the relevant court or courts in Canada to conduct any assessment to determine what future residence and contact arrangements will be in the best interests of CJ.

- 3.4 In the event of the mother giving notice to the RSA Central Authority in terms of paragraph 3.2 above, the order for the return of CJ shall be stayed until an appropriate court in Canada has made the order referred to in paragraph 3.3 above and, upon the RSA Central Authority being satisfied that such an order has been made, he shall notify the mother accordingly and ensure that the terms of paragraph 3.1 are complied with.
- 3.5 In the event of the mother failing to notify the RSA Central Authority in terms of paragraph 3.2 above of her willingness to accompany CJ on his return to Canada, or electing not to return to Canada with CJ, the RSA Central Authority is authorised to make such arrangements as may be necessary to ensure that CJ is safely returned to the custody of the Central Authority for Canada and to take such steps as are necessary to ensure that such arrangements are complied with, and in such event CJ is to return to Canada in the care of his father.
- 3.6 Pending the return of CJ to Canada as provided for in this order, the mother shall not remove CJ on a permanent basis from the province of Gauteng and, until then, she will keep the RSA Central Authority informed of her physical address and contact telephone numbers.
- 3.7 The RSA Central Authority is directed to seek the assistance of the Central Authority for Canada in order to ensure that the terms of this order are complied with as soon as possible.
- 3.8 In the event of the mother notifying the RSA Central Authority, in terms of paragraph 3.2 above, that she is willing to accompany CJ to Canada, the RSA Central Authority shall forthwith give notice thereof to the Registrar of Gauteng Division of the High Court, Pretoria, to the Central Authority for Canada, and to the father.
- 3.9 In the event of the appropriate court in Canada failing or refusing to

make the order referred to in paragraph 3.3. above, the RSA Central Authority and/or the father is given leave to approach this Court for a variation of this order.

3.10 A copy of this order shall forthwith be transmitted by the RSA Central Authority to the Central Authority for Canada.

3.11 Each party to pay its own costs.'

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## JUDGMENT

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**Molemela P and Mocumie ADP (Goosen and Molefe JJA and Mbhele AJA concurring)**

### Introduction

[1] This case concerns the global phenomenon of child abduction and involves an application premised on the provisions of Hague Convention on the Civil Aspects of International Child Abduction (the Hague Convention).<sup>1</sup> The matter brings to the fore the difficult task faced by courts whenever they are called upon to decide whether to return an abducted or retained child to his or her home country as contemplated in article 12 of the Hague Convention. As aptly observed in a number of decisions, the task of a court in deciding such a matter is rendered difficult due to the fact that article 13(b) 'requires the court to make a decision about the interests of a particular child in a specific case in the context of, on the one hand, a factual situation that is more often than not charged with emotion and expectation, and on the other, the very limited determination of what constitutes an exception to the duty of the court to order the immediate return of the child'.<sup>2</sup>

[2] The present case comes to us as an appeal by the father of a minor child (CAR) against the judgment and order of the Gauteng Division of the High Court, Pretoria per Neukircher J (the high court), which dismissed the application for the return of the minor

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<sup>1</sup> The Convention was adopted at the 17<sup>th</sup> session of the Hague Convention on Private International Law on 24 October 1980. It entered into force between the signatories on 1 December 1983. It was drafted to ensure the prompt return of children who have been wrongfully removed from their country of habitual residence, or wrongfully retained in a country that is not their country of habitual residence. South Africa acceded to the Convention with the promulgation of the Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996, to which South Africa became a signatory on 1 October 1997.

<sup>2</sup> *Danaipour v McLarey* 286 F. 3d 1 (1st Cir. 2002) para 4.

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 during the family's visit to South Africa in July 2022. Before considering the defences raised by the respondent in the high court and in this Court, we set out the factual background, which is neatly summarised in the judgment of the high court.

### **Factual matrix**

[3] 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. They 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.

[4] On 20 July 2021, the couple's minor son, CJ, was born. The three lived together as a family in Calgary. YR subsequently suffered from postpartum depression, details whereof will be canvassed later in the judgment. 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.

[5] They subsequently made plans to visit their extended family in South Africa. They bought flight tickets for 9 July 2022 and the return flight was booked for 23 July 2022. However, on 8 July 2022, CAR observed that YR had packed her orthodontic equipment in her luggage, as well as the couple's marriage certificate, among others. The family nevertheless left Canada on 9 July 2022 and travelled to South Africa. 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. It appears that the Alberta Justice and Solicitor General only sent the required request to the Central Authority of South Africa on 15 November 2022. 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.

[6] In the high court, YR raised three defences namely:

- (a) disputing that CJ's habitual residence immediately before the abduction was Calgary, the Province of Alberta, Canada and contending that it was Pretoria, South Africa;
- (b) contending, on the basis of article 13(a) of the Hague Convention, that CAR had acquiesced to the retention of CJ in South Africa; and
- (c) contending, on the basis of article 13(b) of the Hague Convention, that returning CJ to Canada would expose him to grave physical or psychological harm or otherwise place him in an intolerable situation.

The high court appointed a legal representative for CJ and a social worker to investigate YR's circumstances in South Africa and Canada. YR appointed several experts: an educational psychologist, a speech therapist, an occupational therapist, a social worker in private practice and a clinical psychologist. Although the matter was initially enrolled for 24 January 2023, it had to be postponed as some of the expert reports had not yet come to hand. In its judgment, the high court remarked that 'given that a court may sometimes require the intervention of experts to assist in making decisions, the time line of 6 weeks as set out in Article 11 [of the Hague Convention] may prove to be unrealistic'.

### **Findings of the high court**

[7] Having heard the submissions by counsel for both parties and all the experts, the high court dismissed the application for the return of CJ to Canada. The high court made the following findings.

#### ***Habitual residence***

[8] 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 therefore 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. Having considered that YR had bought a one-way ticket to Canada, worked in Canada and applied for Canadian citizenship, as well as the strong sentiments she had expressed about not returning or raising CJ in South Africa and discouraging others from residing in South Africa, the high court found that CJ's habitual residence at the time of his retention was Canada.

### ***Acquiescence***

[9] Relying on *Senior Family Advocate, Cape Town and Another v Houtman*,<sup>3</sup> 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.

### ***Article 13(b) defence***

[10] In respect of the article 13(b) defence, the high court inter alia stated as follows:

'[46] Much of the argument presented, more especially by YR, focused on the abusive relationship she had with [CAR] after CJ's birth. Much of CR's argument to refute this issue focused on YR's emotional state and her alleged irrational behaviour. Collateral information from the friends and family was also of a nature as one would usually find in primary care and residence/contact applications under the [Children's Act 38 of 2005]. But it is not the function of the court to determine these issues.

...

[48] The *curatrix* has argued that the factors set out in art 13(b) have been established in this matter and that CJ should not be returned to Canada. In doing so she has reported that YR has indicated that, were this court to order CJ's return, she would also return to Canada. This, both she and YR argue, would give rise to intolerable circumstances because of the issues that so plagued the parties' relationship before they arrived in the RSA, and that this was a contributing factor to YR's emotional state which ultimately affects CJ. The other factor to be considered is that, by all accounts and according to CJ's Canadian doctors, he was doing well and reaching all his milestones (other than latching and sleeping issues) which has been shown to be incorrect.

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<sup>3</sup> *Senior Family Advocate, Cape Town and Another v Houtman* 2004 (6) SA 274 (C) para 17.



[66] There is absolutely nothing in Schutte’s report to indicate any effect that the issues raised by the *curatrix* will have on CJ were I to order his return save that she states, as a general observation, and according to recognised literature<sup>4</sup>, that toddlers (of 18 to 36 months) are sensitive to conflict between their caregivers and become distressed when their parents argue. However, she highlights none of the concerns mentioned by the *curatrix* or Jana van Jaarsveld. There is, however, as reason for this – her excuse is that the time constraints placed on her did not afford her the opportunity to conduct a proper art 13 investigation – I will deal with this aspect later.

[67] As to CJ’s constitutional rights to have access to his family – there are thousands of children all over the world that are subjected every year to their parents separating and divorcing. In some instances, parents do not live in the same state or the same country. All of those children go through the emotional trauma of the nature described by the *curatrix*. They are sometimes separated not only from the one parent, but also from the extended family. In my view, the *curatrix* has taken the argument as regards intolerable circumstance too far and has brought it too close to the “best interests” principle applied in general matters falling under the Act. This is not permissible – the “best interests” principle is limited to the art 13(b) defence and that is a limited and more restricted enquiry.

[68] However, that being said, I am of the view that to return CJ to Canada would expose him to an intolerable situation – I say this mainly because of his medical history.’

[11] The high court’s conclusion that CJ’s medical history would expose him to a grave risk of physical or psychological harm or intolerable situation, was predicated on the fact that the Canadian doctors had not picked up any of the developmental issues that were subsequently diagnosed by three experts in South Africa. The high court’s conclusion was based on various allegations put forward by YR. YR alleged that CJ was exposed to CAR physically, verbally and emotionally abusing YR in Canada. She further alleged that CAR abused and neglected CJ by enforcing a traumatic parenting style of not attending to CJ’s cries, which created a toxic environment and caused CJ to develop a skin irritation. CAR denied these allegations. CAR alleged that these accusations emanate from a period when YR had severe depression and had developed suicidal tendencies which posed a threat to herself and CJ.

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<sup>4</sup> AFCC (2020:17).

[12] YR averred that shortly after returning to South Africa, she had a consultation with Ms van Jaarsveld, an educational psychologist. According to YR, Ms van Jaarsveld had noticed that CJ was constantly banging his head and had an inability to communicate or express emotion, which had not been picked up in Canada. Furthermore, CJ had undiagnosed food allergies which were ignored by CAR and the Canadian medical professionals; these food allergies severely impacted his nurturing and development. YR further asserted that various experts in South Africa had concluded that at twelve months old, CJ was already three to four months delayed in his development. She stated that due to multifaceted interventions CJ received in South Africa, his condition had significantly improved. CAR expressed shock at the allegation that CJ had a tendency of banging his head. He pointed out that Ms van Jaarsveld saw CJ in his (CAR's) absence and was based solely on information she had received from YR.

### **Issue to be determined**

[13] Given that the high court found in CAR's favour regarding the issue of habitual residence, and the issue of acquiescence by CAR, the central issue for determination in this appeal is whether or not the allegations made by YR established, as envisaged in 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.

### **The law**

[14] According to its preamble, the Hague Convention's objective is to protect children from the harmful effects of their wrongful removal or retention and to ensure their prompt return to the state of their habitual residence. With limited exceptions,<sup>5</sup> the Hague Convention provides for the prompt return of an abducted child to their home country, which is considered (internationally) to be the correct forum to deal with custody and related disputes, such as the long-term best interests of the child and who of the two parents must be the primary care giver and all the auxiliary responsibilities.

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<sup>5</sup> One of those exceptions is set out in article 13(b) of the Hague Convention. It provides that the judicial or administrative authority in the state which is hearing the application for the return of the abducted child may refuse to order the child's return if it is of the view that there is a grave risk that the child's return would expose him or her to physical or psychological harm, or otherwise place the child in question in an intolerable situation.

[15] The core provision in the Hague Convention which gives effect to its stated objectives is found in Article 12(1). It reads as follows:

‘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.’

Article 13(b) of the Hague Convention sets out the defences available to the abducting parent who is opposed to the return of the child. It reads as follows:

‘Notwithstanding the provisions of the preceding Article [12], 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.’

[16] It is trite that the burden of proof lies with the individual who opposes the return.<sup>6</sup> It bears mentioning that, in terms of article 20, a court deciding an application premised on article 12 of the Hague Convention may invoke its residual discretion to refuse to grant a return order if it considers that the granting of such an order would not be appropriate, considering the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms. It is evident from the provisions of article 13 that, notwithstanding that the respondent parent establishes one of the grounds mentioned in that provision, the court retains a general discretion to order the return of the child. In *Ad Hoc Central Authority for the Republic of SA and Another v Koch N.O. and Another (Koch)*, the minority judgment postulated that ‘[t]he existence of one of the grounds in Article 13 means only that the Court is not obliged (“bound”) to order the return of the child, but it may still do so’.<sup>7</sup>

<sup>6</sup> P Beaumont and P McEleavy *The Hague Convention on International Child Abduction* (1999) at 141.

<sup>7</sup> *Ad Hoc Central Authority for the Republic of SA and Another v Koch N.O. and Another* [2023] ZACC 37; 2024 (2) BCLR 147 (CC); 2024 (3) SA 249 (CC) (*Koch*) para 48.

[17] Article 13(b) has been interpreted by the Constitutional Court and this Court on several occasions. In a *trilogy* of cases (*Sonderup v Tondelli and Another (Sonderup)*,<sup>8</sup> *Pennello v Pennello and Another (Pennello)*<sup>9</sup> and *Koch*) the Constitutional Court laid to rest any uncertainty that may have previously prevailed, but the interpretation of this section sometimes seems to elude the lower courts. More than two decades ago, the Constitutional Court, in *Sonderup*, explained article 13 in the following terms:

‘A matrimonial dispute almost always has an adverse effect on children of the marriage. Where a dispute includes a contest over custody, that harm is likely to be aggravated. The law seeks to provide a means of resolving such disputes through decisions premised on the best interests of the child. Parents have a responsibility to their children to allow the law to take its course and not to attempt to resolve the dispute by resorting to self-help. Any attempt to do that inevitably increases the tension between the parents and that ordinarily adds to the suffering of the children. The Convention recognises this. It proceeds on the basis that the best interests of a child who has been removed from the jurisdiction of a court in the circumstances contemplated by the Convention are ordinarily served by requiring the child to be returned to that jurisdiction so that the law can take its course. It makes provision, however, in art 13 for exceptional cases where this will not be the case.

An article 13 enquiry is directed to the risk that the child may be harmed by a court ordered return. *The risk must be a grave one.* It must expose the child to “physical or psychological harm or otherwise place the child in an intolerable situation.” The words “otherwise place the child in an intolerable situation” indicate that the harm that is contemplated by the section *is harm of a serious nature*.’<sup>10</sup> (Emphasis added.)

[18] In *Pennello*, Van Heerden AJA explained it as follows:

‘The primary purpose of the [Hague] 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 [Hague] 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

<sup>8</sup> *Sonderup v Tondelli and Another* [2000] ZACC 26; 2001 (2) BCLR 152; 2001 (1) SA 1171 (*Sonderup*).

<sup>9</sup> *Pennello v Pennello and Another* [2003] ZASCA 147; [2004] 1 All SA 32 (SCA); 2004 (3) BCLR 243 (SCA); 2004 (3) SA 117 (SCA) (*Pennello*).

<sup>10</sup> *Sonderup* para 43-44.

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.'<sup>11</sup>

Since the accusations and counter accusations made by CAR and YR against each other regarding alleged flaws in their respective parenting styles are aspects that are directed at the merits of a custody or primary care dispute, the authorities best placed to determine those issues are the Canadian domestic courts. Such aspects must therefore not detain this Court's attention in this appeal.

[19] Similar sentiments were recently echoed by the Constitutional Court in *Koch*.<sup>12</sup> Madjiet J, writing for the majority, aptly explained the import of this article 13(b) as follows: 'In *G v D*, the Court cited *Re E*, where the UK Supreme Court set out the principles applicable in Article 13(b) defences. These are (with my emphasis):

(a) There is no need for Article 13(b) to be narrowly construed. By its very terms, its application is restricted. The words of Article 13(b) are quite plain and need no further elaboration or gloss.

(b) The burden lies on the person (or institution or other body) opposing return. It is for them to produce evidence to substantiate one of the exceptions. The standard of proof is the ordinary balance of probabilities but, in evaluating the evidence, the court will be mindful of the limitations involved in the summary nature of the Convention process.

(c) The risk to the child must be "grave". It is not enough for the risk to be "real". It must have reached such a level of seriousness that it can be characterised as "grave". Although "grave" characterises the risk rather than the harm, there is in ordinary language a link between the two.

(d) The words "physical or psychological harm" are not qualified but do gain colour from the alternative "or otherwise" placed "in an intolerable situation". "Intolerable" is a strong word but, when applied to a child, must mean "a situation which this particular child in these particular circumstances should not be expected to tolerate".

(e) Article 13(b) looks to the future: the situation as it would be *if the child were returned forthwith to his or her home country. The situation which the child will face on return depends crucially on the protective measures which can be put in place to ensure that the child will not be called upon to face an intolerable situation when he or she gets home.* Where the risk is serious enough, the court will be concerned not only with the child's immediate future because the need for protection may persist.

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<sup>11</sup> *Pennello* para 25. Compare to *X v Latvia* App no 27853/09 (European Court of Human Rights 26 November 2013) (*X v Latvia*) para 100-101.

<sup>12</sup> *Koch* para 158.

(f) Where the defence under Article 13(b) is said to be based on the anxieties of a respondent mother about a return with the child, which are not based upon objective risk to her but are nevertheless of such intensity as to be likely, in the event of a return, to destabilise her parenting of the child to a point where the child's situation would become intolerable, in principle, such anxieties can found the defence under Article 13(b).'

## Analysis

[20] Having set out the salient facts of this case, the parties' submissions and the applicable legal principles, the question before us is whether, on the facts, YR succeeded in discharging the onus of showing, on a balance of probabilities, that CJ's return to Canada would pose a grave risk of physical or psychological harm to him, or expose him to an intolerable situation as envisaged in s 13(b) of the Hague Convention.

[21] As mentioned in *Sonderup*, an article 13 enquiry is directed to the risk that the child may be harmed by a court ordered return. The risk must be a grave one which exposes the child to physical or psychological harm or otherwise place the child in an intolerable situation.<sup>13</sup> The words 'otherwise place the child in an intolerable situation' are considered to throw light, not only on the degree of the seriousness of the risk of harm, but also on the harm itself.<sup>14</sup> *Koch*<sup>15</sup> is the most recent authority of the Constitutional Court regarding the approach that courts must follow when considering applications premised on the Hague Convention. That court reiterated that:

'... it is important to bear in mind that the [Hague] Convention is concerned with the return of a child to the jurisdiction of their country of habitual residence to enable the appropriate authorities and the courts of that country to decide issues relating to custody. Issues about who would be the more suitable person to be given rights of custody or access to the child are to be determined by the appropriate judicial or other authorities that will eventually be asked to determine the long-term best interests of the child. Matters such as lifestyle and parental fitness bear upon the ultimate issues to be determined in a full hearing by the appropriate forum. At the stage of Hague proceedings for the return of an abducted child, the enquiry should rather be focused on a consideration of the availability of adequate and effective measures of protection in the state of habitual residence pending the final determination of care proceedings.'

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<sup>13</sup> *Sonderup* para 44.

<sup>14</sup> *Koch* para 62.

<sup>15</sup> *Ibid* para 88.

[22] It is clear that what constitutes ‘the risk of harm’ will be determined by the facts of each case ‘and the nature of the projected harm’.<sup>16</sup> Although a child’s best interests are central to legal decisions involving children, in the context of an application for a return order premised on the Hague Convention, the Hague Convention presupposes that the child’s best interest is served by their prompt return to their country of habitual residence; as such, the concept of ‘the best interests of the child’ must be evaluated in the light of the exceptions set out in article 13(b) of the Hague Convention.<sup>17</sup> A court that is considering an application for a child’s return premised on the Hague Convention, must, not only consider the allegations of a ‘grave risk’ for the child in the event of the granting of a return order, but must also consider any undertakings made by the applicant parent in an effort to obviate the eventuation of that harm.

[23] We have carefully considered all the allegations made by YR as a basis for her contention that CJ will be harmed and placed in an intolerable situation by a court ordered return to Canada. We are, however, of the view that YR has not shown, on a balance of probabilities, that such harm will eventuate should a return order be granted. The following insightful observation made in *Sonderup* is apposite in determining whether there are any ameliorative measures that may mitigate the risk of grave harm:

‘. . . [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.

. . .

Pursuant to section 38, read with section 28(2), this Court *is entitled to impose conditions in the best interests* of [the minor child]. Such conditions should be consistent with, and not hamper, the objectives of the Convention, and in particular, should not unnecessarily delay the return of the child to the proper jurisdiction.’<sup>18</sup>

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<sup>16</sup> Ibid para 63.

<sup>17</sup> *X v Latvia* para 101.

<sup>18</sup> *Sonderup* para 35 and 51.

[24] Similar sentiments were expressed in *KG v CB and Others*, where this Court stated that '[t]he situation which the child will face on return depends crucially on the protective measures which the court can put into place to ensure that the child will not have to face a harmful situation when he or she returns to the country of habitual residence'.<sup>19</sup>

[25] The aforementioned *dicta* from the Constitutional Court and this Court point to the fact that, in determining whether the child in question will be placed under physical or psychological harm, or an intolerable situation, the court must consider the possibility of alleviating or extinguishing the circumstances causing the grave risk by way of imposing conditions or protective measures that will apply upon the child's return to their rightful jurisdiction. For instance, in *Sonderup*, the Court made an order with a condition that the father of the minor child in that case obtain an order from the Supreme Court of British Columbia to the effect that the warrant for the arrest of the mother is withdrawn and she will not be subject to arrest by reason of her failure to return [the minor child] to British Columbia on 14 July 2000 or for any other past conduct relating to [the minor child].<sup>20</sup>

[26] In this matter, it was contended that there was a serious risk that a return order would result in YR having to make an agonising choice of being forced to leave a conducive environment to which CJ has adjusted (South Africa) for an unfamiliar environment in Canada, thereby causing YR anxiety, which would in turn expose CJ to grave harm or place him in an intolerable situation. As authority for this proposition, YR relied on the judgment of this Court in *LD v Central Authority RSA and Another (LD)*.<sup>21</sup> The facts of *LD* are briefly as follows. The minor child, E, was born on 25 August 2014. Luxembourg became the habitual residence of the mother and father, who subsequently separated. In May 2018, the mother married a South African man. She then 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 a subsequent appeal was dismissed on 3 October 2018. On 4 October 2018, she removed E to South Africa, along with E's half-brother, S, who was born from the mother's previous marriage. A further appeal to the Court of Cassation in Luxembourg was dismissed on 21 November 2019.

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<sup>19</sup> *KG v CB and Others* [2012] ZASCA 17; 2012 (4) SA 136 (SCA); [2012] 2 All SA 366 (SCA) (*KG v CB*) para 51.

<sup>20</sup> *Sonderup* para 56.

<sup>21</sup> *LD v Central Authority RSA and Another* [2022] ZASCA 6; [2022] 1 All SA 658 (SCA); 2022 (3) SA 96 (SCA) (*LD*).



[27] Proceedings were launched in South Africa by the Central Authority at the instance of E's father. E's curator ad litem moved for the appointment of Ms De Vos, a psychologist, to conduct an emotional assessment of E. The latter 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. In addition, it was stated that E felt emotionally safe and secure and that she had adapted to school and made a close friend. The psychologist concluded that if E were to be returned to Luxembourg, this 'could potentially lead to an intolerable situation'.

[28] This Court endorsed the finding of the court *a quo* to the effect that, if a return order was to be granted, E's mother would face 'an agonising choice' of having to oversee the dismemberment of her family in that she either had to leave her husband and her son, or E. Another consideration was the close bond between E and her brother. This Court found that the impact on E, of her being returned to Luxembourg went far beyond the normal hardship and dislocation that is associated with cases of this nature. It held that the evidence showed, on a balance of probabilities, that there was a grave risk that the emotional stress under which the mother would inevitably be placed by the terms of the order of that court order would have a negative impact on E's sense of security and well-being. 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. The appeal against the refusal to grant a refusal order was therefore dismissed.

[29] It was contended on behalf of YR that the curatrix ad litem had correctly opined in her report that, compelling YR to return with CJ to Canada would force her to make an 'agonising choice' in that she would have to return to a country where she had been very unhappy; she would thus have to live with CAR in a situation where she was emotionally and physically abused and which exacerbated her emotional breakdown. We are of the view that the facts in *LD* are vastly different to those in this matter and that reliance on *LD* was therefore misplaced.

[30] The Hague Conference on Private International Law (the HCCH) has developed and published a 'Guide to Good Practice under the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction'. Part VI of the said guide seeks to guide central authorities, legal practitioners, litigants and courts on the interpretation and

practical application of article 13(b).<sup>22</sup> Amongst the practical measures it recommends, is the inclusion of conditions (commonly referred to as undertakings) in the return orders that courts are inclined to grant. These are protective measures aimed at ameliorating what would otherwise constitute harsh consequences of court ordered returns on the abducting parents. The ameliorative measures may include undertakings to accede to the inclusion of a non-prosecution clause so as to ameliorate the fears of the abducting parent, or the applicant parent undertaking that upon the child returning to the habitual country of residence, the abducting parent and the minor child would exclusively occupy the matrimonial home (or any other alternative accommodation that is offered) until the custody and care-related disputes are resolved in the country of habitual residence.<sup>23</sup>

[31] In this case, CAR has furnished an undertaking and YR was given an opportunity to comment on its feasibility. CAR has undertaken to provide YR with separate accommodation where she will stay with CJ. He has undertaken to pay her maintenance and provide her with all necessities during her period of unemployment. It is not difficult for this Court to take such an undertaking into consideration and include it in the order which is ultimately crafted. This is what is typically known as a ‘mirror order’ which has been fashioned since *Sonderup* by the Constitutional Court in South Africa. It has become a common feature in most orders compelling the return of the child. This is more so the case between member States that promote the conclusion of ‘undertakings’ as some of the measures which strengthen the practical application of the Hague Convention. Canada, as a signatory to the Hague Convention, is one of the signatories that is receptive of undertakings from other member States. In our view, the undertaking made by CAR regarding YR and CJ not sharing the same accommodation with CAR serves to assuage the feared risk of emotional and physical abuse.

[32] The crisp question is whether YR’s anxieties about the return of CJ to Canada are nevertheless of such intensity as to be likely to destabilise her parenting of CJ to a point where CJ’s situation would become intolerable, thus founding a defence under article 13(b). However, what should not be taken for granted or watered down is the impact of post-partum depression on any mother. This case is a typical example. This Court pays due consideration to the common cause fact that YR suffered from post-partum

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<sup>22</sup> Published by The Hague Conference on Private International Law (HCCH) in 2020.

<sup>23</sup> Compare *Thomson v. Thomson*, [1994] 3 SCR 551. Also see Z Du Toit and B Van Heerden ‘International Child Abduction in South Africa’ (2023) 12(4) *Laws* 1 at 11.

complications which left her severely depressed in a faraway country, where she could not enjoy the support of extended family. As a result, YR remained inconsolable, extremely concerned about CJ's health and developmental milestones despite many assurances from the medical professionals in Canada, which probably exacerbated her condition. That said, the facts of the case also reveal a husband who took over the responsibilities of a mother during a very difficult period his wife went through, with both hands, to be the primary care giver. That should not be reduced to nothing now that the parties are locked in a dispute over the return of their child to Canada.

[33] YR asserted that she has recovered from that condition owing to the support she received from extended family, among others. We note that YR's clinical psychologist, Ms Karen Adams, stated in her report that, even though YR showed no current symptoms suggesting the presence of a psychiatric disorder, 'the resurgence of the symptoms of a major depression cannot be excluded' in the event of YR being exposed to a 'hostile environment'. It was argued that this would have an impact on CJ, and that his exposure to his parents' conflict would place CJ in an intolerable situation. The curatrix ad litem, inter alia, mentioned the following in her report:

'South Africa is the habitual residence of the greater-known part of CJ's family save for his father. CJ has become accustomed to the security and care of his greater family, he goes to school with his cousin, sees his maternal grandparents on a weekly basis and must be encouraged to see his paternal grandparents who love him dearly. Removing him from South Africa would deprive him from the company and protection of the extended family.'

[34] It bears emphasising that the importance of a child's support structure cannot be downplayed. We are therefore mindful of the fact that the effect of a return order will somehow impact on the bond that CJ has formed with his maternal grandparents and friends, which bond has by now been cemented by the period of time he has spent in South Africa on account of the delays in the finalisation of the matter in the courts, for which none of the parties can be held responsible. The majority judgment in *Koch* has observed that 'courts vigilantly ensure that the parent who has removed the child should not be able to rely on the consequences of that removal (in this case depriving CJ of his attachment to extended family) to create a risk of harm or an intolerable situation on return.'<sup>24</sup> It definitively clarified that regrettable as they may be, inordinate delays cannot

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<sup>24</sup> *Koch* para 164; 167-168.

be held against the parent applying for the child's return, because to do so would subvert the Hague Convention's aims.<sup>25</sup>

[35] We take note of the fact that should a return order be granted, CJ and YR will return to Canada and the living arrangements will be in accordance with the undertaking made by CAR. As correctly observed by the high court, there is no evidence to suggest how CJ was truly emotionally affected by YR's post-partum depression; neither was there any evidence to suggest that the delay in reaching his milestones was as a result of the conflict between his parents. Furthermore, the high court correctly observed that at the time when YR was suffering from postpartum depression, CAR became very involved in CJ's daily care and took him to his doctor's appointments. This was confirmed by the CJ's erstwhile caregiver, Ms Castillo-Cogasi, who stated that CJ related more with CAR than with YR during the period that she was employed by the couple.

[36] The high court also accepted that everything pointed to CAR 'being a very involved and loving parent in every sense of the word'. The same sentiments were expressed in the report of Ms Irma Schutte, the only expert who consulted with both parties. That being the case, it is not farfetched to accept that, pending the decision of the Canadian courts regarding the care and custody of CJ, he will enjoy the attention of both parents as they will be living in the same city. In this regard, due consideration must be paid to the undertaking that was made by CAR in relation to providing accommodation and maintenance to YR pending the decision of the Canadian courts regarding the custody and care of CJ. This undertaking will duly be incorporated in the return order in the hope that it will ameliorate any harsh consequences that may result from CJ's court ordered return to Canada.

[37] Considering all the circumstances of the case, it is clear that the high court erred in its approach to the application of article 13(b). The first, and more obvious, error is the manner in which it dealt with the onus which rests on YR and the evidence she led to discharge that onus. 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, which were obviously exacerbated by the YR's severe depression, the high court inexplicably endorsed Ms van Jaarsveld's opinion that 'to put a child at risk by returning

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<sup>25</sup> Ibid para 215-216.

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'. Given that Ms van Jaarsveld's observations were based only on her interactions with YR (her report confirms that she did not consult with CAR and expressly states that she did not seek to validate the factual accuracy of the narratives contained in the report), the high court attached too much weight to Ms van Jaarsveld's report in relation to the conclusion that CJ would be exposed to the same circumstances which were possibly 'the root of his development delays'. The concession made by YR's counsel to the effect that there is no factual basis for motivating that CJ will be exposed to the same adverse circumstances if he is returned to Canada, was rightly made.

[38] The high court stated that its finding that CJ's return would expose him to an intolerable situation was 'mainly because of his medical history' and '[t]he fact that these [developmental] issues were not picked up and therefore not addressed in Canada is cause for grave concern'. On this score, the high court seems to have paid little regard to the fact that there was nothing to refute the findings of the medical experts that had examined CJ in Canada as they were done when he was six months old. His medical issues were reassessed in South Africa when he was 13 months old. Based on the caregiver and CAR's evidence, the argument that this lapse of time could have a bearing on some of the symptoms not being picked up earlier cannot be summarily rejected as fanciful.

[39] Although the high court had commended CAR for being a loving father who took CJ 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. It bears noting that the medical issues alluded to by the high court were based on the following opinions of experts:

- (a) the slight delay of 3-4 months in receptive as well as expressive language (which was later reduced to 2 months) noted by Ms Theresa Olivier, a speech therapist, regarding CJ's language development;
- (b) his listening skills were 'not on par' (the fact that he was mostly exposed to English in Canada during his first year was said to have had an effect on his language development);

(c) Ms Elna Beukes, an occupational therapist, had found that CJ showed a delay in his sensory motor skills, fine motor and perceptual development, language development and his expression of independence;

(d) Ms van Jaarsveld expressed concern that CJ did not closely resemble a typical boy of a similar age, took no interest in his environment, did not explore nor try to interact with her.

[40] Of crucial significance is that CJ's developmental delays have not been disputed. What remains in dispute is the cause thereof. Regardless of the cause, what is beyond question is that the developmental issues raised by the experts would expose CJ to physical or psychological harm or otherwise place him in an intolerable situation if left unattended. The question is whether the grave risk of the occurrence of harm can be effectively mitigated by taking adequate ameliorative measures in Canada in the event of a return order being granted. If such measures are available, CJ would have been sufficiently protected and would therefore 'not in fact face a "grave risk" of serious harm as contemplated by Article 13(b).<sup>26</sup>

[41] Notably, YR placed no cogent evidence before the high court that could have established the absence of adequate or effective measures which may address the concerns raised by YR and her experts. YR therefore failed to show that there are inadequate measures in Canada to mitigate any risks of harm that may expose CJ to physical or psychological harm or to an intolerable situation if he is returned to Canada. In the absence of cogent evidence that shows that the medical interventions received by CJ in South Africa are not, or will not be available in Canada, or that his condition would not be adequately monitored in Canada, the high court's conclusion that to return CJ to Canada would expose him to an intolerable situation on account of his medical history is not sustainable. Moreover, since YR stated that she would return to Canada if a return order were granted, the high court failed to consider that YR's presence in Canada would ensure that CJ continues to see the relevant medical experts who will constantly monitor, review and evaluate his developmental milestones.

[42] Another error relates 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

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<sup>26</sup> *Koch* para 66.

term and long-term best interests of children. In *Sonderup*, the Constitutional Court explained the approach as follows:

‘The Convention itself envisages two different processes — the evaluation of the best interests of children in determining custody matters, which primarily concerns long-term interests, and the interplay of the long-term and short-term best interests of children in jurisdictional matters. The Convention clearly recognises and safeguards the paramountcy of the best interests of children in resolving custody matters. It is so recorded in the preamble which affirms that the states 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.” As was stated by Donaldson MR in *Re F*:

“I agree with Balcombe LJ ‘s view expressed in *Giraud v Giraud* . . . that in enacting the 1985 Act [giving effect to the Convention], Parliament was not departing from the fundamental principle that the welfare of the child is paramount. Rather it was giving effect to a belief —

‘that in normal circumstances it is in the interests of children that parents or others shall not abduct them from one jurisdiction to another, but that any decision relating to the custody of the children is best decided in the jurisdiction in which they have hitherto been habitually resident’”.<sup>27</sup>

[43] Although a reading of the judgment of the high court reveals that its basis for its refusal to grant a return order was that CJ’s medical condition posed a grave risk that precluded it from granting a return order, there is no explicit finding that CJ’s medical condition constituted an article 13(b) defence. However, we are of the view that such a finding is implicit in the reasoning of the high court and, therefore, accept the establishment of the article 13(b) defence as the basis for the relief granted by the high court. It is settled law that a court that considers an article 13(b) defence to have been established, still has to exercise a discretion whether or not to return the child to the country of habitual residence.<sup>28</sup> In that exercise, it may, in the spirit of achieving the purpose and objects of the Hague Convention, consider making a return order on certain conditions. What is clear from the judgment is that the high court 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.<sup>29</sup> One such measure would be an order compelling the continuation of all therapies and medical examinations on CJ in Canada upon his return. All things considered, including

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<sup>27</sup> *Sonderup* para 28.

<sup>28</sup> *Koch* para 217.

<sup>29</sup> *KG v CB* para 51.

the protective measure mentioned above, the harm that YR has alleged does not extend beyond the harm that flows naturally from a court-ordered return.<sup>30</sup> In our view, the high court failed to balance both the interests of the child and the general purposes of the Hague Convention, which it was obliged to do.<sup>31</sup>

[44] For all the reasons set out in the preceding paragraphs, it follows that the order of the high court falls to be set aside. It remains now to raise an aspect which is of concern to this Court, namely, the non-participation of the Central Authority in this appeal. The Central Authority is, in terms of Articles 6 and 7 of the Hague Convention, key to the initiation of the proceedings under the Hague Convention.<sup>32</sup> It is the centre that holds these proceedings together. Without the Central Authority as a party before this Court, this Court was at a loss as to whether the Central Authority of Canada would be willing to enforce, or, at least, assist CAR to apply for a mirror order complementing the order which this Court is inclined to grant. This attests to the importance of the involvement of the Central Authority until the exhaustion of the available appeal processes. It is thus

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<sup>30</sup> *Sonderup* para 46.

<sup>31</sup> *Koch* para 217.

<sup>32</sup> Article 6 of the Hague Convention provides as follows:

‘A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities.

Federal States, States with more than one system of law or States having autonomous territorial organisations shall be free to appoint more than one Central Authority and to specify the territorial extent of their powers.

Where a State has appointed more than one Central Authority, it shall designate the Central Authority to which applications may be addressed for transmission to the appropriate Central Authority within that State.’

Article 7 provides:

‘Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention.

In particular, either directly or through any intermediary, they shall take all appropriate measures -

- (a) to discover the whereabouts of a child who has been wrongfully removed or retained;
- (b) to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures;
- (c) to secure the voluntary return of the child or to bring about an amicable resolution of the issues;
- (d) to exchange, where desirable, information relating to the social background of the child;
- (e) to provide information of a general character as to the law of their State in connection with the application of the Convention;
- (f) to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organising or securing the effective exercise of rights of access;
- (g) where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers;
- (h) to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child;
- (i) to keep each other informed with respect to the operation of this Convention and, as far as possible, to eliminate any obstacles to its application.’



important that this judgment and this Court's misgivings about the non-participation of the Central Authority in the appeal be brought to its attention. In the event of the designated Central Authority not being able to attend court, then the Family Advocates in the various divisions of the high court or the State Attorney could step in. This will also ensure that the matters are finalised expeditiously as envisaged in article 11 of the Hague Convention.

## **Order**

[45] In the result, the following order is issued:

- 1 The appeal is upheld.
- 2 Each party to pay its own costs.
- 3 The order of the high court is set aside and replaced with the following:
  - '3.1 It is ordered and directed that the minor child (CJ) be returned forthwith, but subject to the terms of this order, to the jurisdiction of the Central Authority of Canada.
  - 3.2 In the event of the respondent (the mother) giving written notification to the Central Authority of the Republic of South Africa, Pretoria (the RSA Central Authority) within five days of the date of issue of this order that she intends to accompany CJ on his return to Canada, the provisions of paragraph 3.3 shall apply.
  - 3.3 The second applicant (the father) shall, within 20 days of the date of issue of this order, institute proceedings and pursue them with due diligence to obtain an order of the appropriate judicial authority in Canada in substantially the following terms:
    - 3.3.1 Unless and until ordered by the appropriate court in Canada:
      - 3.3.1.1 On date of departure of the mother and CJ from South Africa to Canada in terms of the order of the Supreme Court of Appeal of South Africa under SCA case number 737/2023, residence of CJ shall vest with the mother, subject to the reasonable rights of contact of the father.
      - 3.3.1.2 The father is ordered to purchase and pay for economy class air tickets for the mother and CJ to travel by the most direct route from Johannesburg, South Africa, to Calgary, Alberta, Canada.

3.3.1.3 The father is ordered to make his current home, situated at 303, 380 Smith Street NW, Calgary, Alberta, T3B 6M4, (the Smith Street home), or equivalent accommodation available to the mother and CJ as their residence, leaving all furniture, appliances, cutlery, crockery and linen in the home, and for such purpose shall vacate such home before date of departure of the mother and CJ from South Africa to Canada. In the event that the Smith Street home has been sold, the father shall provide CJ and the mother with equivalent accommodation.

3.3.1.4 The father is ordered to pay the following costs and expenses associated with the mother's and CJ's occupation of the home in para 3.3.1.3 above; rates, levies, electricity, refuse, water, heating and internet.

3.3.1.5 The father is ordered to pay the mother \$1 000.00 (one thousand Canadian dollars) per month, in addition to the amount that he currently pays in the sum of \$600.00 (six hundred Canadian dollars) per month (i.e. a total of \$ 1 600.00 (one thousand six hundred Canadian dollars)) per month, into an account of the mother's choosing, as cash maintenance for the mother and CJ. The first *pro rata* payment shall be made to the mother on the day upon which she and CJ arrive in Canada and thereafter monthly in advance on the first day of each succeeding month.

3.3.1.6 The father is ordered to pay the costs of and associated with the agreed upon crèche that CJ may attend, and for the continuation of therapy CJ is currently receiving from medical professionals.

3.3.1.7 The father is ordered to continue to pay for the medical aid on which he has registered the mother and CJ, and to cover any further reasonable and necessary medical costs not covered by the Canadian governmental medical coverage and medical aid.

3.3.1.8 The father is ordered to provide the mother with access to a roadworthy motor vehicle upon the mother's arrival in Calgary, Alberta, Canada.

3.3.1.9 The father and the mother are ordered to cooperate fully with the RSA Central Authority, the Central Authority for Canada, the relevant court or courts in Canada, and any professionals who are approved or appointed by the relevant court or courts in Canada to conduct any assessment to determine what future residence and contact arrangements will be in the best interests of CJ.

- 3.4 In the event of the mother giving notice to the RSA Central Authority in terms of paragraph 3.2 above, the order for the return of CJ shall be stayed until an appropriate court in Canada has made the order referred to in paragraph 3.3 above and, upon the RSA Central Authority being satisfied that such an order has been made, he shall notify the mother accordingly and ensure that the terms of paragraph 3.1 are complied with.
- 3.5 In the event of the mother failing to notify the RSA Central Authority in terms of paragraph 3.2 above of her willingness to accompany CJ on his return to Canada, or electing not to return to Canada with CJ, the RSA Central Authority is authorised to make such arrangements as may be necessary to ensure that CJ is safely returned to the custody of the Central Authority for Canada and to take such steps as are necessary to ensure that such arrangements are complied with, and in such event CJ is to return to Canada in the care of his father.
- 3.6 Pending the return of CJ to Canada as provided for in this order, the mother shall not remove CJ on a permanent basis from the province of Gauteng and, until then, she will keep the RSA Central Authority informed of her physical address and contact telephone numbers.
- 3.7 The RSA Central Authority is directed to seek the assistance of the Central Authority for Canada in order to ensure that the terms of this order are complied with as soon as possible.
- 3.8 In the event of the mother notifying the RSA Central Authority, in terms of paragraph 3.2 above, that she is willing to accompany CJ to Canada, the RSA Central Authority shall forthwith give notice thereof to the Registrar of Gauteng Division of the High Court, Pretoria, to

- the Central Authority for Canada, and to the father.
- 3.9 In the event of the appropriate court in Canada failing or refusing to make the order referred to in paragraph 3.3. above, the RSA Central Authority and/or the father is given leave to approach this Court for a variation of this order.
- 3.10 A copy of this order shall forthwith be transmitted by the RSA Central Authority to the Central Authority for Canada.
- 3.11 Each party to pay its own costs.'

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M B MOLEMELA  
PRESIDENT  
SUPREME COURT OF APPEAL

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B C MOCUMIE  
ACTING DEPUTY PRESIDENT  
SUPREME COURT OF APPEAL

## Appearances

For the appellant:

C Woodrow SC

Instructed by:

Clarks Attorneys, Johannesburg

Phatshoane Henney Attorneys, Bloemfontein

For the second respondent:

I Vermaak-Hay

Instructed by:

Arthur Channon Attorneys, Pretoria

Huggett Retief Incorporated, Bloemfontein