THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 1078/2024

In the matter between:

N M **APPELLANT**

and

THE CENTRAL AUTHORITY FOR THE REPUBLIC OF SOUTH AFRICA **FIRST RESPONDENT**

M B M **SECOND RESPONDENT**

Neutral Citation: *N M v The Central Authority for the Republic of South Africa and Another* (1078/2024) [2024] ZASCA 178 (19 December 2024)

Coram: MOCUMIE, MEYER , KEIGHTLEY AND COPPIN JJA and MODIBA AJA

Heard: 2 December 2024

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Summary: Hague Convention on the Civil Aspects of International Child Abduction (the Hague Convention) – whether a defence to the application for the return of the child to Australia was established as envisaged in Article 12 and Article 13*(b)* – Article 12 jurisdictional requirements established by the left-behind parent – court has no option but to return the abducted child – Article 13*(b)* defence not established by the abducting parent – whether the high court erred in separating the constitutional challenge of s 275 of the Children's Act 38 of 2005 raised in the counterapplication from the main application – high court exercising inherent power in terms of s 173 of

the Constitution in separating the issues in the interest of justice, the best interest of the child and purpose of the Hague Convention.

ORDER

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

(a) The appeal is upheld in part.

(b) Save for paragraphs 1, 2 and 3 of the order of the high court, which remain unaffected by this appeal, the order of the high court is amended to read as follows:

'4 In the event of the respondent (NM) notifying the Office of the Central Authority, Pretoria forthwith/upon the date of the issue of this order that she intends to accompany the minor child (NEM) to Australia, the provisions of paragraph 5 shall apply.

5 Pending and/or upon the return of NM and NEM to Australia:

5.1 The second applicant (MBM) shall pay all fees associated with NEM's attendance at day-care or kindergarten in Brisbane, Australia, including the cost of any excursions, extra-curricular activities and educational materials.

5.2 For up to six months or until the finalisation of the custody proceedings, MBM will pay NM monthly instalments, of $1550 AUD per month, to contribute to the cost of accommodation of her choosing in Brisbane, Australia, utility bills and other maintenance costs for NEM. MBM shall provide proof, to the satisfaction of the Central Authority of South Africa, prior to the departure of NM and NEM from South Africa, of the nature and location of such accommodation and that such accommodation is available for NM and NEM immediately upon their arrival in Australia. The Central Authority for Australia shall decide whether the accommodation thus arranged by MBM is suitable for the needs of NM and NEM, should there be any dispute between the parties in this regard, and the decision of the Central Authority for Australia shall be final and binding on the parties.

5.3 MBM will purchase and deliver to NM in Australia, or any other person nominated in writing by NM, a roadworthy motor vehicle, to be registered in NM's name and for her sole use.

5.4 For up to six months and or until the finalisation of the custody proceedings, MBM will pay NM $200 AUD per month for her use in maintaining the motor vehicle.

5.5 MBM will facilitate that NEM's medical expenses will be covered by Medicare and the Australian Defence Force Family Health Program, in which he is enrolled. Should additional reasonable medical costs be incurred for NEM in Australia, MBM will cover the cost gap.

5.6 MBM will facilitate that both NM and NEM are eligible for Medicare entitlements, such as free public hospital treatment, free or subsidised treatment from general practitioners and specialists, including mental health specialists and subsidised pharmaceuticals.

5.7 MBM will ensure that NM has access to a range of financial and other support services available to her in Australia in line with the information sheet procedure produced by the Australian Central Authority relating to services and resources available to returning parents.

5. 8 It is recorded that to the best of MBM's knowledge, no relevant criminal charges are pending in Australia for which NM could be prosecuted in relation to her conduct in retaining NEM in South Africa. MBM undertakes not to pursue any criminal proceedings or assist in procuring the prosecution proceedings against NM in relation to her conduct in retaining NEM in South Africa.

5.9 MBM confirms that NEM will initially live with NM upon their return to Australia and that MBM will spend reasonable time with him to rebuild their relationship until parenting orders have been made by the Federal Court and Family Court of Australia (FCFCOA) in relation to care arrangements for NEM.

5.10 MBM shall commence proceedings, within 20 (twenty) days of this order, in the FCFCOA to seek parenting orders regarding NEM following his return to Australia. It is recorded that MBM understands that the FCFCOA is obligated to make parenting orders in NEM's best interests.

5.11 MBM is directed to purchase and pay for economy class air tickets, and if necessary, to pay the costs of additional necessary domestic travel to enable NM and NEM to travel by the shortest direct route from Johannesburg, South Africa, to Australia.

5.12 Pending the return of NM and NEM to Australia, MBM is to have reasonable telephone contact with NEM, including Skype and or video calls.

5.13 Pending the return of NEM to Australia as provided for in this order, NM shall not remove him 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.

5.14 In the event of NM notifying the Office of the Central Authority, Republic of South Africa forthwith/upon the date of the issue of this order that she intends to accompany, NEM to Australia, the Republic of South Africa Central Authority shall forthwith give notice thereof to the Registrar of the Gauteng Division of the High court, Johannesburg, the Central Authority for Australia, and MBM.

6 In the event of NM failing to notify the Republic of South Africa Central Authority in terms of paragraph 4 above of her willingness to accompany NEM on his return to Australia, or electing not to return to Australia with NEM, the Republic of South Africa Central Authority is authorised to make such arrangements as may be necessary to ensure that NEM is safely returned to the custody of the Central Authority for Australia and to take such reasonable steps as are necessary to ensure that such arrangements are complied with, and in such event, NEM is returned to Australia in the care of MBM, assisted by the Republic of South Africa Central Authority and the South African Police Services and/or Department of International Relations (DIRCO), Republic of South Africa to the extent necessary to avoid any friction and endangerment to him upon removing NM.

7 Either party may approach the family courts in Brisbane, Queensland, Australia, *inter alia*:

7.1 To vary the terms of this order, and/or

7.2 Making this order a mirror order of court in Brisbane, Queensland, Australia.

8 In the event of the appropriate court in Australia failing or refusing to make the order as set out in this order, the Republic of South Africa Central Authority and/or MBM is granted leave to approach this Court for a variation of this order.

9 A copy of this order shall forthwith be transmitted by the Republic of South Africa Central Authority to the Central Authority for Australia.

10 Each party is to pay their own costs.'

(c) Save for the aforementioned, the appeal is dismissed with each party to pay their own costs.

JUDGMENT

Mocumie and Keightley JJA (Meyer and Coppin JJA and Modiba AJA concurring)

Introduction

[1] This is an appeal from the Gauteng Division of the High Court, Johannesburg, per Crutchfield J (the high court). The high court granted an order returning a two-year-eight-month-old baby, NEM, to his country of habitual residence in Brisbane, Australia from where he was removed to South Africa and wrongfully retained by his mother, NM, a South African citizen. NM unsuccessfully sought leave to appeal from the high court. The appeal is with leave of this Court.

[2] The second respondent, MBM, is NEM's father. With the assistance of the first respondent, the Central Authority of the Republic of South Africa (the Central Authority), he instituted proceedings in the high court in terms of the Hague Convention on the Civil Aspects of International Child Abduction (the Hague Convention),[1] for an order directing the appellant, NM, to return NEM to Australia. The high court ordered the return of NEM to Australia, subject to various conditions.[2] The Central Authority is the first appellant.

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[1] The Convention was adopted at the 17th 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.

[2] The order reads:

'1. The respondent's counter application is separated from the first and second applicant's application and postponed *sine die*.

2. The respondent is granted leave to pursue the counterapplication in terms of Rule 6 of the Uniform Rules of Court.

3. The minor child, N M, is to be returned forthwith to the jurisdiction of Australia in accordance with the provisions of Article 12 of the Hague Convention on the Civil Aspects of International Child Abduction.

4. The respondent is to surrender forthwith the passport of the minor child to the first applicant pending the outcome of the proceedings, or until otherwise directed by this Court.

5. The Sheriff of this Court or his/her deputy is authorised to seize the passport of the minor child wherever it is found and hand the passport over to the first applicant, in the event that the respondent fails to comply with prayer 4 above.

6. The respondent is to indicate to the applicants within seven (7) days of this order whether she intends to travel with the minor child to Australia.

Factual background

[3] The material facts in this appeal are common cause and are briefly as follows. At the end of 2019 NM, and MBM, met on holiday in Mauritius. MBM was and remains a citizen and resident of Australia and NM was a citizen and resident of South Africa. The two started a long-distance relationship. During their relationship, MBM visited NM several times in South Africa. The couple subsequently married in South Africa on 1 December 2020. After NM fell pregnant, NM and MBM agreed that their child should be born in Austrailia and should have Australian citizenship. Consequently, NM joined MBM in Australia and gave birth there. The three stayed together as a family in a modest family home. After NEM's birth, they visited South Africa on holiday as a family and returned to Australia. MBM works for the Australian Defence Force.

[4] When NEM was 13 months old, NM requested to visit her parents in South Africa with NEM. MBM agreed and bought return tickets for both. The two departed from Australia on 27 September 2022 to return on 29 October 2022. On 18 October 2022, approximately two weeks before their return, NM sent MBM a WhatsApp message to inform him that she did not intend to return to Australia as, apparently, she was unhappy in their marriage. On 22 October 2022, she sent another WhatsApp message telling him that she was no longer returning to Australia permanently. On the return date of 29 October 2022, NM and NEM did not arrive back in Australia. MBM instituted an application for the return of NEM in terms of the Hague Convention through the Central Authority of Australia in December 2022. The Central Authority duly instituted proceedings in the high court for NEM's return, with MBM as the second applicant. NM opposed the application and raised a defence under Article 13*(b)* of the Hague Convention, namely that there was a grave risk that NEM's return to Australia would expose him to physical or psychological harm or otherwise place him in an intolerable situation. The matter was set down for hearing on 27 November 2023.

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7. In the event that the respondent elects not to return to Australia with the minor child, the second applicant or a representative of the Australian Central Authority, being a registered social worker, or an advocate of the High Court, duly appointed by the Family Advocate, shall be entitled to remove the minor child from the borders of South Africa and travel with him to Australia.
8. Either party may approach the family courts in Brisbane, Queensland, Australia, *inter alia*:
8.1 To vary the terms of this order, and/or
8.2 Making the order a mirror order of court in Brisbane, Queensland, Australia.'

[5] At the eleventh hour, on 14 November 2023, NM filed a counterapplication (which we conveniently refer to as NM's constitutional challenge) in which she sought to have s 275 of the Children's Act 38 of 2005 (the Children's Act)[3] declared inconsistent with the Constitution and 'thus unconstitutional, to the extent that it incorporates Articles 12 and 13 of the Hague Convention. . .' into the Children's Act. She sought to file a supplementary affidavit to join the Minister of Justice and Constitutional Development in the application in support of the constitutional challenge. She alleged that the return of NEM does not prioritise his 'best interests' as envisaged in s 28(2) of the Constitution of South Africa,1996 (the Constitution).

[6] At the hearing, MBM and the Central Authority successfully applied from the bar for an order in terms of which NM's constitutional challenge was separated from the rest of the issues in the application in terms of uniform rule 33(4). That order (the separation order) was granted, and the high court proceeded to consider the main application, namely whether an order under Article 12 should be made. This necessarily involved a determination of whether NM had established the requirements for a defence under Article 13(*b*).

[7] The high court relied on *Ad Hoc Central Authority for the Republic of South Authority for the Republic of South Africa v Koch N.O and Another (Koch),*[4] which had recently been delivered by the Constitutional Court. On the merits of the main application, the high court found that '[a]ll of the jurisdictional facts required in order to invoke the obligatory provisions of Article 12 are present in this matter. . . less than a year passed since the date of [NEM's] unlawful retention in South Africa and the date that the [Central Authority] commenced the return application proceedings under the Convention in the High Court'. It also found that the appellant had failed to discharge the onus that rested upon her in terms of Article 13(*b*)*,* in that she failed to prove that NEM would be exposed to a grave risk or be placed in an intolerable situation if the

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[3] Section 275 of the Children's Act 38 of 2005 provides as follows:
'Hague Convention on International Child Abduction to have force of law.—The Hague Convention on International Child Abduction is in force in the Republic and its provisions are law in the Republic, subject to the provisions of this Act.'

[4] The high court cites the judgment as it was originally cited: *Ad Hoc Central Authority for the Republic of South Africa and PB v HK N.O and H.K* [2023] ZACC 37, however, the matter is currently cited as *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*).

court ordered his return to Australia. It held that a report by a social worker, Ms Keeve, should be accorded limited weight as Ms Keeve had conducted no interviews with MBM, nor had she sought to obtain his views or any contributions from him in compiling her report. Neither did she note and take into account that the existence of support services available in Australia, that could mitigate the disruption to NEM on his return to Australia, is an important factor in an Article 13(*b*) determination. The high court was of the opinion that the facts and evidence before it '[did] not meet the threshold [contemplated] in Article 13(*b*)'.

[8] On the issue of s 275 of the Children's Act being declared unconstitutional, it found as follows:

'The counterapplication requires the joinder of various government departments to the proceedings. All of the parties must be given an opportunity to answer once the respondent has filed her supporting affidavits. . . There is little if any prospects that the counter application can be made "court ready" within an expeditious period of time as required by the proceedings under the Convention.

. . .

The decision of the court seized with the counterapplication will likely be taken on appeal through the hierarchy of our courts and take a correspondingly lengthy period of time to resolve.

. . .

The duration necessary to determine the counterapplication finally will violate the essential premise of the Convention, being the determination of the return application as expeditiously as possible.'

[9] Consequently, the high court ordered the separation of the counterapplication and directed that it be postponed for subsequent determination in terms of rule 6 of the uniform rules of court.

Before this Court

[10] NM raises several grounds of appeal. In her submissions, counsel for NM, correctly, distilled these grounds into four and, finally, whittled them down to the most critical two. First, the high court erred by separating the counterapplication from the main application on the merits. And second, the high court erred in holding that the appellant did not discharge the onus upon her in terms of Article 13(*b*).

Submissions by both counsel

[11] The submissions on behalf of NM were essentially that:

(a) MBM physically abused her on one occasion when they were on holiday;

(b) he did not help her with NEM after his birth when she struggled with postpartum depression;

(c) MBM could not care for NEM during the 13 months they stayed together as he was sometimes away on duty for five to six weeks at a time, leaving her alone for the better part of that time;

(d) MBM's family lived far away from them and did not provide support as they were not a close-knit family, they had a history of drug use, and they could not assist MBM in taking care of NEM if he was returned without her to Australia; and

(e) she did not intend to return to Australia at all and had instituted divorce proceedings against MBM.

All these factors, counsel submitted, would create an intolerable situation and cause grave harm to NEM as contemplated in Article 13(*b*) as Ms Keeve, the social worker, who is an expert, confirmed. Counsel submitted that Ms Keeve's evidence was not rebutted, nor was it rejected by the high court.

[12] Counsel for MBM and the Central Authority submitted that the Constitutional Court in *Koch* has reaffirmed the law on what 'grave harm' to a child entails and what the party who raises a defence in terms of Article 13*(b)* has to prove.[5] From the evidence presented, NM failed to discharge the onus on a balance of probabilities.[6] Counsel submitted further that the high court adopted the approach as guided by the Constitutional Court and that it cannot be faulted.

The Hague Convention

[13] Article 12(1) of the Hague Convention provides that:

'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

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[5] Op cit fn 5.

[6] *Penello v Penello and Another* [2003] ZASCA 147; [2004] 1 All SA 32 (SCA); 2004 (3) BCLR 243 (SCA); 2004 (3) SA 117 (SCA) para 36-38 and 41, citing *Smith v Smith* [2001] ZASCA 19; [2001] 3 All SA 146 (A); 2001 (3) SA 845 (SCA) states that the onus is one of civil ie on a balance of probabilities.

of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.'

[14] Article 13 provides an exception to the obligation of the court to order the child's return. It states, in the relevant part:

'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) . . .; 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.'

[15] Most recently, the Constitutional Court, in *Koch*,[7] reaffirmed the well-established law in applications under the Hague Convention as stated some two decades ago in *Sonderup v Tondelli (Sonderup)*[8]. In the latter judgment the Constitutional Court held as follows:

'A South African court seized with an application under the Convention is obliged to place in the balance the desirability, in the interests of the child, of the appropriate court retaining its jurisdiction, on the one hand, and the likelihood of undermining the best interests of the child by ordering her or his return to the jurisdiction of that court. *As appears below, the court ordering the return of a child under the Convention would be able to impose substantial conditions designed to mitigate the interim prejudice to such child caused by a court-ordered return. 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." ' (Emphasis added and footnotes omitted.)

[16] The above quotation has permeated the South African jurisprudence on Hague Convention matters since *Sonderup* and has been cited with approval by courts outside the borders of South Africa, including courts in the United Kingdom.[9] Nothing as clear as this needs to be stated or restated. This Court, in its most recent judgment,

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[7] *Koch* para 214.
[8] *Sonderup v Tondelli* [2000] ZACC 26; 2001 (1) SA 1171 (CC); 2001 (2) BCLR 152 (CC) para 35.
[9] *G v D (Article 13b: Absence of Protective Measures)* [2020] EWHC 1476 (Fam) para 35.

C A R v Central Authority of the Republic of South Africa and Another (*C A R*),[10] followed *Koch* and the precedents cited therein. It confirmed the use of the 'Guide to Good Practice under the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction on Article 13*(b)*', which was developed by the Hague Conference on Private International Law (HCCH) in 2020 (Guide to Good Practice) as a step-by-step tool to guide courts on the practical application of the Hague Convention.

[17] In *Koch*, the Constitutional Court reflected once more on 'the best interests of the child', Article 13*(b)*, and the interplay between the two. The following key aspects, relevant to the present appeal, may be extracted from the Constitutional Court's interpretation of Article 13*(b)*:

(a) The prompt return of the child: The judgment confirms that the Convention proceeds on the basis that the best interests of a child who has been unlawfully abducted from one jurisdiction are ordinarily served by requiring the return of the child to that jurisdiction so that the law can take its course.[11] As the Constitutional Court put it: 'The prompt return of the child lies at the heart of the Convention's entire scheme.'[12]

(b) Grave risk threshold: The Court emphasised that the threshold for invoking Article 13*(b)* is high.[13] It is not sufficient to demonstrate that the child would face some level of harm or discomfort upon return; rather, the risk must be 'grave,' meaning serious or severe.[14]

(c) Nature of harm: The Court considered the nature of the harm that the child might face if returned to their country of habitual residence. This included an assessment of the psychological impact on the child of being separated from her primary attachment figure and the environment in which she had become settled in South Africa.[15] In making reference to *Sonderup*, the Court reiterated that '[t]he harm must be grave'.[16]

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[10] *C A R v The Central Authority of the Republic of South Africa and Another* [2024] ZASCA 103; [2024] 3 All SA 653 (SCA); 2024 (6) SA 351 (SCA).
[11] *Koch* para 159, which made use of a direct quote from *Sonderup* para 43.
[12] Ibid para 215.
[13] Ibid para 161.
[14] Ibid para 158, with reference to *Re E (Children) (Wrongful Removal: Exceptions to Return)* [2011] UKSC 27.
[15] Ibid para 164 with reference to *Re C (A minor)Abduction* [1989] 1FLR 403,CA.
[16] Ibid para 162.

(d) In considering an Article 13*(b)* defence, evidence of the child's attachment to one parent should not be overemphasised. To do so misapplies the test in Hague Convention proceedings. The attachment factor does not belong in the Article 13*(b)* inquiry, it is a test utilised for custody and care proceedings.[17]

(e) There must be clear and compelling evidence of the grave risk of harm or other intolerability which should be measured as substantial.[18]

(f) Source of harm: The Court noted that, under Article 13*(b)*, the source of the risk of harm is irrelevant. What matters is the existence of a grave risk to the child, regardless of whether this risk arises from the circumstances in the country to which the child is to be returned or from the process of removal itself.[19]

(g) Balancing act: The Court balanced the grave risk of harm against the objectives of the Hague Convention. It recognised that while protecting children from harm is paramount, this must be balanced against the Convention's goals of deterring child abduction and ensuring the prompt return of abducted children to their habitual residence for custody disputes to be resolved.[20]

(h) Context-specific analysis: The Court's interpretation underscored that the application of Article 13*(b)* must be tailored to the specific circumstances of each case. It involves a careful, fact-specific inquiry into the potential harm to the child in the context of the particular case.[21]

(i) Determination of factual disputes and the analysis of evidence: The application of the *Plascon-Evans* rule is not conducive to a determination of factual disputes in Convention proceedings for several reasons. Since, it is not open to an applicant in Convention proceedings to choose the procedural form of the proceedings, he or she will be imperilled by factual disputes irresolvable on the papers. Convention proceedings are summary in nature. The body of evidence placed before the court in proceedings under the Convention may consist of a hotchpotch of different types of

[17] Ibid para 214.
[18] Ibid para 161 with reference to *G v G* [2020] EWCA Civ 1185 para 61.
[19] Ibid para 119.
[20] Ibid para 182,209 and 214.
[21] Ibid para 165.

material. A determination made in terms thereof must be based on an overall assessment of all the evidential material placed before the court.[22]

(j) Expert evidence, even if uncontradicted, remains an opinion that must be scrutinised by a court to determine its value.[23]

(k) Nature of the inquiry: A Hague Convention inquiry involves a two-stage process in which the long- and short-term interests of the child must be balanced. The latter interests, with which the inquiry is primarily concerned, centre around jurisdictional issues. The long-term interests involve custody and care issues. These are best determined by the court having jurisdiction over the child. The aim of the Convention is to facilitate the child's prompt return to that jurisdiction to enable it to make the necessary determination regarding long-term custody and care. The two inquiries should not be conflated.[24]

(l) Caution should be exercised when the abducting parent relies on the time that has elapsed since the child has been in South Africa as a factor in establishing an Article 13*(b)* defence. It may undermine the primary objective of the Convention and could become a strategic tool to evade its objectives.[25]

[18] In conclusion, the Constitutional Court's interpretation of Article 13(*b*) involved a nuanced analysis of the grave risk threshold, the nature of the potential harm to the child, and the balancing of these factors against the broader objectives of the Hague Convention.

[19] In *C A R*, this Court cautioned as follows:[26]

'In a trilogy of cases (*Sonderup v Tondelli and Another (Sonderup), Pennello v Pennello and Another (Pennello)* 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.'

This, then, is the law as it prevails.

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[22] Ibid para 217.
[23] Ibid para 194.
[24] Ibid para 165 and 218.
[25] Ibid paras 215 and 216.
[26] Ibid para 17.

[20] It is common cause that the proceedings in this matter were commenced within 12 months of NEM's unlawful retention by NM in South Africa. Therefore, the sole question for consideration on the merits is whether the high court was correct in concluding that NM had failed to establish a defence under Article 13*(b)*.

[21] NM relied on the social worker, Ms Keeve's report and recommendations for her Article 13(*b*) defence. Ms Keeve did not consult with MBM, relying on information provided by NM, and her observations at a home visit and in an interactional analysis session in her play therapy room. Ms Keeve made several recommendations, including the recommendation that, given the very strong and meaningful bond between [NM] and [NEM], '*separation from his biological mother* as his primary caregiver and from his extended family would expose NEM to psychological harm'. (Emphasis added.) In addition, she expressed the opinion that 'it would cause extreme trauma *if [NEM] was returned to Brisbane Australia without his mother*'. (Emphasis added.) The report lacked the important characteristic of providing a balanced assessment of MBM's position, as highlighted in *Koch*. Consequently, the report took no account of the extensive support services available to NEM in Australia through MBM's employment. The existence of support services to mitigate the disruption to a child on her or his return to the requesting State are an important factor in an Article 13(*b*) determination.

[22] A fundamental flaw in the report and recommendations is that Ms Keeve's opinion that NEM's return to Australia would cause him 'extreme trauma' is premised on the assumption that his return would necessarily involve a separation from NM. This is plainly apparent from the emphasised portions of the extract from the report cited above. The report does not consider at all the effects on NEM of a return *with* NM. This may well be because NM stated in her founding affidavit that she never intended to return to Australia. Her uncompromising and unexplained recalcitrance can never constitute a justifiable basis for establishing an Article 13(*b*) defence. As the Constitutional Court noted in *Koch*,[27] in such situations, the refusal of a parent to accompany the child is what gives rise to the risk, not the return itself. As the parent

[27] *Koch* para 164, citing *Re C (A Minor) Abduction* [1989] 1 FLR 403 at 410.

who unlawfully retained NEM, NM should not be permitted to rely on the consequences of that removal to create a risk of harm on NEM's return.

[23] A final notable aspect of the report is that it relies on the strong attachment between NEM and NM in support of the conclusion that returning NEM to Australia would be severely traumatic for him. It is obvious that a causal factor in this attachment is the almost two years that had elapsed between the time that NM unlawfully retained NEM and the date of the report. During that period, because of NM's unlawful conduct, NEM was denied the opportunity to form any proper attachment to MBM, who remained in Australia. To place weight on the strong attachment between NM and NEM in these circumstances would be to permit NM to gain an advantage from her unlawful conduct, and would undermine the purposes of the Hague Convention. In any event, as noted in *Koch*, attachment issues are primarily relevant at any subsequent care and custody inquiry, and not at the Article 13(*b*) inquiry stage.

[24] There is nothing in the report of Ms Keeve that is persuasive and indicates that NEM will be subjected to psychological harm or otherwise placed in an intolerable situation. Her report and her recommendations do not constitute clear and compelling evidence to establish that NEM's return would place him at grave risk of exposure to physical or psychological harm or otherwise place the child in an intolerable situation. The fact that the high court did not reject the report, or that MBM did not lead contradictory expert evidence, does not strengthen NM's case at all. What NM presented was not 'harm which extends beyond the harm that flows naturally from a court-ordered return'. Article 13(*b*) sets a high threshold. In this respect, the Constitutional Court affirmed the judgment of this Court in *LD v Central Authority RSA and Another*,[28] where this Court held:

'[A] certain degree of harm is inherent in the court-ordered return of a child to their habitual residence, but that is not the harm or intolerability envisaged by art 13*(b)*; . . . that harm or intolerability extends beyond the inherent harm referred to above and is required to be both substantial and severe'.

[28] *LD v Central Authority* [2022] ZASCA 6; [2022] 1 All SA 658 (SCA); 2022 (3) SA 96 (SCA) para 29.

[25] With the above in mind, it is clear that the approach adopted by the high court on the applicability of Article 13(*b*) is beyond reproach. On the evidence presented, NM comes nowhere close to meeting the very high threshold of Article 13*(b)*. On this basis alone, the appeal ought to be dismissed. What remains are the allegations of domestic violence which the appellant raised, albeit in somewhat veiled fashion, as part of her Article 13(*b*) defence.

[26] Across the world, domestic violence is recognised as an invidious epidemic that eats at the moral fibre of every society with a devastating impact on those abused and the children who grow up in that environment. It should not be allowed to fester in any home where allegations are made by one party. It is therefore important to acknowledge that, although the prime focus of proceedings under the Hague Convention is the child, it is relevant to consider the effects of exposure to domestic violence which may place a child at grave risk of harm in applications under the Hague Convention.

[27] When considering a return/retention order, it is important to consider the situation of the accompanying parent and to take the necessary measures to protect them.[29] While this Court is minded that domestic violence, in general, has a harmful impact on children, NM's allegations do not come close to asserting that if returned, NEM would be exposed to domestic violence between his parents and that the exposure would affect him to such an extent that there is a grave risk that his return would expose him to physical or psychological harm or otherwise place him in an intolerable situation.[30]

[28] Without saying so expressly, the high court, acknowledged that the merits of NM's allegations were not determinative of the issues before it. The high court cannot be faulted in this regard. The allegations of controlling behaviour and related conduct

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[29] Opening address of the Chief Justice of South Africa, Chief Justice Maya at the inaugural Forum on Domestic Violence, June 2023, Sandton South Africa reported by the Secretary General of the HCCH to CGAP January 2024, HCCHC website, updated 2024.

[30] Guide to Good Practice at note 272 ii which provides:

'The court ought to consider the facts and circumstances of each individual case, and may take into account the following considerations:

. . .

ii Exposure of child to domestic violence between the child's parents upon return.'

made by NM will be for the relevant authorities in Australia to consider when it determines an appropriate long-term care and custody regime for NEM. These are, correctly, factors that in the normal course are not relevant to the Article 13(*b*) inquiry. There was nothing extraordinary about NM's allegations (which MBM denied) warranting a departure from this principle.

[29] The high court correctly rejected the defence of Article 13(*b*). However, that is not the end of the matter. The reality of the situation (which the high court glossed over) is that the law requires that NEM must be returned to Australia. He has been raised by one parent (whether wrongfully or not) since September 2022. He would certainly need the stability of the parent he is used to seeing every day in the transition that he will go through upon his return to his country of habitual residence. Counsel for NM advised this Court, from the bar at the hearing of the appeal, that NM had had a change of heart, and that she was willing to accompany NEM to Australia should her appeal fail. Further, that she has retained her visa which is still valid for travelling between the two countries and which will permit her to remain in Australia without fear of transgressing any immigration laws.

[30] This Court was also advised that, at the time of the high court hearing, in line with the co-operation between Central Authorities and judicial authorities of Contracting States under the Hague Convention, MBM and the Central Authorities of South Africa and Australia, offered a proposed list of undertakings to ameliorate the perceived harsh consequences of a return order by the high court. They covered both the situation, in the event of NM refusing, or in her agreeing to return to Australia with NEM.

[31] Unfortunately, the high court refused to consider those negotiated/mediated undertakings under the wrong impression that it could not get involved in negotiations between the parties. Yet, such undertakings are pivotal to expedite these proceedings and to ameliorate any harm that NEM may suffer as a result of the court ordering his return to his country of habitual residence. The high court did not include the undertakings by MBM in its final order. For that reason, this Court is bound to consider the undertakings. Hence, it is minded to amend the order of the high court to the extent necessary.

[32] A court that considers a return/retention order must take into account protective measures that can ameliorate the perceived harshness of that order in certain circumstances, including where there are allegations of domestic violence. Protective measures to accompany the return order are undertakings which can be understood as official promises, concessions or agreements given by the left-behind parent seeking an order for the return of the child.

[33] NM was provided with a list of services available in Australia upon her and NEM's return to Australia. These include calling 000 if she is in immediate danger of domestic violence, as well as the National Sexual Assault and Domestic Violence Hotline 1800 RESPECT (1800 737 732), which is a 24-hour service. This is apart from the counselling services which MBM's employer offers families if they encounter marital problems. NM turned down this offer when it was made, but it remains open for her to access.

[34] MBM made several undertakings which the high court ought to have included as part of its order. In this Court MBM filed a supplementary affidavit confirming that his undertakings stand. He also attached a document outlining the extensive resources that the Australian government makes available to a parent returning to Australia under a court order issued pursuant to a Hague Convention application. These undertakings, which include the offer of separate accommodation for NM and the provision of maintenance for her and NEM pending the resolution of custody matters between the parents, will go a long way to ameliorate any perceived harshness of the return order. The same may be said of the resources that will be available to NM and NEM on their return. Accordingly, our Order amends the high court order by expressly including mitigatory measures based on the undertakings made by MBM.

Separation of issues: NM's constitutional challenge

[35] What remains is the question of whether the high court erred in separating NM's constitutional challenge from the main application. Section 173 of the Constitution empowers high courts to regulate their own process. This must include the power to separate issues, when necessary, convenient and in the interest of justice. The high

court found that to consider as broad an application as declaring s 275 of the Children's Act unconstitutional without any proper basis, and where the relevant Ministers and/or departments were not cited, would lead to undue delay in the Hague Convention proceedings. This would undermine what the Convention seeks to achieve, namely, the expeditious and prompt return of abducted children. We cannot agree more.

[36] As cited above, Article 12 of the Hague Convention uses peremptory language, as indicated by the use of the injunction 'shall', to underline that a court seized with an application in which an Article 12 challenge is raised, has no option but to return the abducted or unlawfully retained child. Article 12 is premised on Article 1, which provides for the prompt return of the child. The high court cannot be faulted for having adopted this approach. To do otherwise would be to undermine, the essence of the Hague Convention. Article 16 makes it clearer. It stipulates that a court which is approached for the return or retention of an abducted child must return the child forthwith without conducting an enquiry into the merits of the custody of the child.

[37] The high court considered all that was placed before it in the counterapplication ad, faced with an application as urgent as this, it exercised its inherent power to separate the issues. Counsel for NM submitted that the constitutional challenge was inseparable from the merits. She referred this Court to two cases on the impermissibility of the separation of issues under rule 33(4) in motion proceedings namely, *Braaf v Fedgen Insurance Ltd*[31] and *Ascendis Animal Health (Pty) Ltd v Merck Sharpe Dohme Corporation and Others.*[32] These cases do not assist her case in these circumstances. These are urgent proceedings (under the Hague Convention) with serious ramifications for the life of a minor child who was wrongfully removed from his country of habitual residence. In any event, as noted earlier, even in the absence of rule 33(4), the high court retains a constitutional discretion to regulate its own proceedings. That discretion must cover a situation like the present.

[39] This matter required the high court's urgent attention. NM counterclaimed at the eleventh hour before the hearing. It is difficult to escape the inference that this was

[31] *Braaf v Fedgen Insurance Ltd* 1995 (3) 938 (C); [1995] 2 All SA 478 (C).
[32] *Ascendis Animal Health (Pty) Ltd v Merck Sharpe Dohme Corporation and Others* [2019] ZACC 41; 2020 (1) SA 327 (CC); 2020 (1) SA BCLR 1 (CC); 2019 BIP 34 (CC).

done in an effort to stymie the proceedings and, ultimately, to further alienate NEM from MBM, given that her decision at that stage was never to return to Australia. She did not cite or serve the counterapplication on any of the relevant Ministers. The required notice in terms of uniform rule 16A(1) was not given, and NM furnished no substantial and acceptable reason for the non-compliance with this rule. Moreover, she gave no reason for not filing the counterapplication as prescribed by the practice rules. On this second leg, as well, the appeal stands to be dismissed.

[40] It would be remiss not to address the issue of the delay in finalising this matter. MBM applied for the return of NEM on 6 December 2022. The matter reached the office of the Central Authority of South Africa on 17 March 2023. The Central Authority instituted the return application later in March 2023. The counterapplication was filed on 14 November 2023, eight months later. The high court heard the application in November 2023 and reserved judgment. However, the judgment and order of the high court was only handed down on 6 May 2024, some six months after the application was heard. There was no reason advanced why it took six months for the high court to deliver the judgment in a matter as urgent as this.

[41] The Gauteng Division, Johannesburg Practice Directive,[33] does not provide a time frame within which Hague Convention applications must be finalised.[34] However, regulation 23 of the regulations promulgated under the Children's Act provides that '[p]roceedings for the return of a child under the Hague Convention must be completed within six weeks from the date on which judicial proceedings were instituted in a High Court, except where exceptional circumstances make this impossible.' This regulation is a replication of Article 11 of the Hague Convention.[35]

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[33] Paragraph 29.3.14 of the 2024 Consolidated Practice Manual, read with paragraph 10.15 of the 2018 Practice Manual.

[34] Compare with the Practice Manual for the Gauteng Division, Pretoria for detailed content including time frames.

[35] Article 11 provides:

'The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children.

If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay.

If a reply is received by the Central Authority of the requested State, that Authority shall transmit the reply to the Central Authority of the requesting State, or to the applicant, as the case may be.'

[42] A period of almost six months elapsed between the hearing before the high court and the delivery of its judgment. The high court provided no 'exceptional circumstances' for this delay of six months or any other reasons, for that matter. This is regrettable. Courts should play a more active role in ensuring that they expedite these applications. This would serve to prevent any of the parties from using the excuse that the abducted or retained child has already settled in their new environment, thus permitting the abducting parent potentially to be advantaged by their unlawful conduct. Most critically, it would serve to avert a situation where the underlying objectives of the Hague Convention are undermined, in breach of South Africa's international obligations. Regulation 24 of the Children's Act provides courts with extra resources to enable them to give interim orders, and thus avoid further delays, which can have a devastating impact on the abducted or retained child.[36]

[43] One of the features of appeals under the Hague Convention, which is of concern to this Court, is the non-participation of the Central Authority in the proceedings before this Court. The same concern was raised in *C A R* in which this Court stated:

'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. 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 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.'

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[36] Regulation 24 provides:
'Where an application has been made to a High Court by the Central Authority of the Republic under the Hague Convention, that Court may, at any time before the application is determined, give any interim direction that it deems fit in order to regulate any aspect of the progress of an application under the Hague Convention and to ensure the welfare of the child in question and to prevent any changes in the circumstances relevant to the determination of the application.'

[44] The matter was set down on the earliest possible date, during recess, in terms of the Supreme Court of Appeal Practice Directive of 1/2024, to ensure that there was no further delay in the determination of this matter. Neither the Central Authority nor the *Ad Hoc* Central Authority, Johannesburg were in attendance when this Court heard oral arguments in this appeal. This is against the background that the President of this Court had constituted a special court sitting in the Labour Court precinct in Johannesburg, Gauteng Division, to facilitate easy access by all the parties and to dispose of the appeal within the six weeks provided for under Article 11 of the Hague Convention and regulation 23 of the Children's Act.

[45] However, when the appeal was heard, the undertakings provided by MBM via the Central Authority could not be found, nor could the draft order that was referred to by both counsel. This had been uploaded onto Caselines for purposes of the high court proceedings, but was not available to this Court. Because the Central Authority was not in attendance, the Court was not privy to the undertakings and the draft order the parties had proposed. The Court had to request that they be provided by the Friday before the hearing on Monday. However, as the Central Authority was not in attendance on the day of the hearing, the Court struggled to obtain clarity on these missing documents. It is not clear whether this was as a result of a misunderstanding on the part of the Central Authority about whether she is required to attend court proceedings in Hague Convention cases, particularly in this Court. It is suggested that this requires clarification by the relevant authorities, including the Director-General and Minister of Justice and Constitutional Development.

[47] Finally, we address the issue of costs. The second respondent was assisted by the Central Authorities of both Australia and South Africa throughout the proceedings and thus did not incur costs out of his own pocket. It is only fair that each party should pay their own costs.

[48] In the result, the following order issues.

(a) The appeal is upheld in part.

(b) Save for paragraphs 1, 2 and 3 of the order of the high court, which remain unaffected by this appeal, the order of the high court is amended to read as follows:

‘4 In the event of the respondent (NM) notifying the Office of the Central Authority, Pretoria forthwith/upon the date of the issue of this order that she intends to accompany the minor child (NEM) to Australia, the provisions of paragraph 5 shall apply.

5 Pending and/or upon the return of NM and NEM to Australia:

5.1 The second applicant (MBM) shall pay all fees associated with NEM’s attendance at day-care or kindergarten in Brisbane, Australia, including the cost of any excursions, extra-curricular activities and educational materials.

5.2 For up to six months or until the finalisation of the custody proceedings, MBM will pay NM monthly instalments, of $1550 AUD per month, to contribute to the cost of accommodation of her choosing in Brisbane, Australia, utility bills and other maintenance costs for NEM. MBM shall provide proof, to the satisfaction of the Central Authority of South Africa, prior to the departure of NM and NEM from South Africa, of the nature and location of such accommodation and that such accommodation is available for NM and NEM immediately upon their arrival in Australia. The Central Authority for Australia shall decide whether the accommodation thus arranged by MBM is suitable for the needs of NM and NEM, should there be any dispute between the parties in this regard, and the decision of the Central Authority for Australia shall be final and binding on the parties.

5.3 MBM will purchase and deliver to NM in Australia, or any other person nominated in writing by NM, a roadworthy motor vehicle, to be registered in NM’s name and for her sole use.

5.4 For up to six months and or until the finalisation of the custody proceedings, MBM will pay NM $200 AUD per month for her use in maintaining the motor vehicle.

5.5 MBM will facilitate that NEM’s medical expenses will be covered by Medicare and the Australian Defence Force Family Health Program, in which he is enrolled. Should additional reasonable medical costs be incurred for NEM in Australia, MBM will cover the cost gap.

5.6 MBM will facilitate that both NM and NEM are eligible for Medicare entitlements, such as free public hospital treatment, free or subsidised treatment from general practitioners and specialists, including mental health specialists and subsidised pharmaceuticals.

5.7 MBM will ensure that NM has access to a range of financial and other support services available to her in Australia in line with the information sheet procedure produced by the Australian Central Authority relating to services and resources available to returning parents.

5. 8 It is recorded that to the best of MBM's knowledge, no relevant criminal charges are pending in Australia for which NM could be prosecuted in relation to her conduct in retaining NEM in South Africa. MBM undertakes not to pursue any criminal proceedings or assist in procuring the prosecution proceedings against NM in relation to her conduct in retaining NEM in South Africa.

5.9 MBM confirms that NEM will initially live with NM upon their return to Australia and that MBM will spend reasonable time with him to rebuild their relationship until parenting orders have been made by the Federal Court and Family Court of Australia (FCFCOA) in relation to care arrangements for NEM.

5.10 MBM shall commence proceedings, within 20 (twenty) days of this order, in the FCFCOA to seek parenting orders regarding NEM following his return to Australia. It is recorded that MBM understands that the FCFCOA is obligated to make parenting orders in NEM's best interests.

5.11 MBM is directed to purchase and pay for economy class air tickets, and if necessary, to pay the costs of additional necessary domestic travel to enable NM and NEM to travel by the shortest direct route from Johannesburg, South Africa, to Australia.

5.12 Pending the return of NM and NEM to Australia, MBM is to have reasonable telephone contact with NEM, including Skype and or video calls.

5.13 Pending the return of NEM to Australia as provided for in this order, NM shall not remove him 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.

5.14 In the event of NM notifying the Office of the Central Authority, Republic of South Africa forthwith/upon the date of the issue of this order that she intends to accompany, NEM to Australia, the Republic of South Africa Central Authority shall forthwith give notice thereof to the Registrar of the Gauteng Division of the High court, Johannesburg, the Central Authority for Australia, and MBM.

6 In the event of NM failing to notify the Republic of South Africa Central Authority in terms of paragraph 4 above of her willingness to accompany NEM on his return to

Australia, or electing not to return to Australia with NEM, the Republic of South Africa Central Authority is authorised to make such arrangements as may be necessary to ensure that NEM is safely returned to the custody of the Central Authority for Australia and to take such reasonable steps as are necessary to ensure that such arrangements are complied with, and in such event, NEM is returned to Australia in the care of MBM, assisted by the Republic of South Africa Central Authority and the South African Police Services and/or Department of International Relations (DIRCO), Republic of South Africa to the extent necessary to avoid any friction and endangerment to him upon removing NM.

7 Either party may approach the family courts in Brisbane, Queensland, Australia, *inter alia*:

7.1 To vary the terms of this order, and/or

7.2 Making this order a mirror order of court in Brisbane, Queensland, Australia.

8 In the event of the appropriate court in Australia failing or refusing to make the order as set out in this order, the Republic of South Africa Central Authority and/or MBM is granted leave to approach this Court for a variation of this order.

9 A copy of this order shall forthwith be transmitted by the Republic of South Africa Central Authority to the Central Authority for Australia.

10 Each party is to pay their own costs.'

(c) Save for the aforementioned, the appeal is dismissed with each party to pay their own costs.

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B C MOCUMIE

JUDGE OF APPEAL

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R KEIGHTLEY

JUDGE OF APPEAL

Appearances

For the appellant:	L Grobler
Instructed by:	Alice Swanepoel Attorneys, Boksburg Symington De Kok, Bloemfontein
For the first and second respondent:	M Simelane
Instructed by:	The State Attorney, Johannesburg The State Attorney, Bloemfontein.