THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 1396/2024

In the matter between:

THE CENTRAL AUTHORITY FOR THE
REPUBLIC OF SOUTH AFRICA **APPELLANT**

and

MV **FIRST RESPONDENT**

VL **SECOND RESPONDENT**

Neutral citation: *The Central Authority for the Republic of South Africa v MV and Another* (1396/2024) [2025] ZASCA 197(18 December 2025)

Coram: MOCUMIE and MBATHA JJA and NORMAN AJA

Heard: 28 OCTOBER 2025

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and released to SAFLII. The time and date for hand-down is deemed to be 11h00 on 18 December 2025.

Summary: The 1980 Hague Convention on the Civil Aspects of International Child Abduction – application for the return of a minor child to Switzerland – meaning of habitual residence – determination of the habitual residence of a minor child born of unmarried

parents – consideration of custodial rights of unmarried parents in terms of Italian and Swiss laws – defences in terms of Article 13 – whether consent or acquiescence is proven – whether the child would be at grave risk of psychological harm and be placed in an intolerable situation should he be returned to his habitual residence – whether the return of the minor child to Switzerland should follow.

ORDER

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

1 The appeal is upheld, with each party to pay their own costs.

2 The order of the high court is set aside and substituted with the following:

2.1 It is ordered and directed that the minor child (L) be returned forthwith, subject to the terms of this order, to the jurisdiction of the Central Authority of Switzerland.

2.2 In the event of the first respondent, Ms MV, the mother, giving written notification to the Central Authority of the Republic of South Africa, Pretoria (the RSA Central Authority) within ten (10) days of the date of issue of this order that she intends to accompany, the minor child, L on his return to Switzerland, the provisions of paragraph 2.3 and 2.4 shall apply.

2.3 In the event of 2.2, above, ie, Ms MV being willing to accompany the minor child, L, on his return to Switzerland, the following undertakings given by Mr VL, the father, are recorded :

2.3.1 He will not institute or support any proceedings, whether criminal or contempt of court proceedings, if any, for the arrest or punishment of Ms MV, or any member of her family, whether by imprisonment or otherwise, for any matter arising out of the retention of the minor child, L, in South Africa. He will take all steps that he reasonably can for the withdrawal of any criminal charges pending against Ms MV, in this regard.

2.3.2 Upon Ms MV, the mother indicating that she intends to remain in Switzerland, Mr VL shall take steps that he reasonably can to assist Ms MV, the mother, to obtain Swiss citizenship.

2.4 The second respondent, Mr VL, the father, shall, within 20 (twenty) 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 Switzerland in substantially the following terms:

2.4.1 Unless and until ordered by the appropriate court in Switzerland:

2.4.1.1 On the date of departure of Ms MV, the mother, and the minor child, L from South Africa to Switzerland in terms of the order of the Supreme Court of Appeal of South Africa (SCA) under SCA case number 1396/2024, the residence of the minor child, L shall vest with Ms MV, the mother, subject to the reasonable rights of contact of Mr VL, the father.

2.4.1.2 The minor child, L, will remain in the *de facto* custody of Ms MV, the mother, pending the final adjudication and determination of the proceedings pending in Switzerland on the issues of custody, care and access to the said minor child which adjudication and determination, the applicant and Mr VL, the father, or either of them, must request forthwith.

2.4.1.3 Mr VL, the father, is ordered to purchase and pay for economy-class air tickets for Ms MV, the mother, and the minor child, L, to travel by the most direct route from South Africa to Geneva, Switzerland, or any other route from South Africa to Geneva, Switzerland, including Johannesburg and or Cape Town.

2.4.1.4 Mr VL, the father, is ordered to make his current home, situated at Avenue de Riant Parc 16, 1209, Geneva, Switzerland, (the Riant Parc home), or equivalent accommodation available to, Ms MV, the mother and the minor child, L 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 Ms MV, the mother, and the minor child, L from South Africa to Switzerland. In the event that the Riant Parc home has been sold, or leased out, or occupied by his family, Mr VL, the father, shall provide Ms MV, the mother, with equivalent accommodation.

2.4.1.5 Mr VL, the father, is ordered to pay the following costs and expenses associated with the minor child, L and Ms MV's occupation of the

home in para 2.4.1.4 above: rates, levies, electricity, refuse, water, heating, and internet.

2.4.1.6 Mr VL, the father, is ordered to pay the mother 1500 (one thousand five hundred) Swiss Francs per month in advance or by the 1st of every month, into an account of Ms MV, the mother's choosing, as cash maintenance for her and the minor child, L. The first *pro rata* payment shall be made to Ms MV, the mother, three days prior to the day upon which she and the minor child, L, arrive in Switzerland and thereafter monthly in advance on the first day of each succeeding month. All payments must be made into her bank account, which she will provide through the Central Authority. The details will be communicated to both the Central Authority, RSA, and Switzerland, as well as Mr VL.

2.4.1.7 Mr VL, the father, is ordered to pay the costs of and associated with the agreed upon crèche that the minor child, L, may attend in Switzerland.

2.4.1.8 Mr VL, the father, is ordered to continue to pay for the medical aid on which he has registered the minor child, L, and to cover any further reasonable and necessary medical costs not covered by the government of Switzerland or any medical aid.

2.4.1.9 In the event that Ms MV, the mother and the minor child, L, are not registered on Mr VL's medical aid as his dependants, Mr VL must pay all reasonable expenses, including hospitalisation for the minor child, L and Ms MV, the mother, should a need for such medical expenses arise.

2.4.1.10 Mr VL, the father, is ordered to provide Ms MV, the mother, with access to a roadworthy motor vehicle upon her arrival in Geneva, Switzerland. Alternatively, provide Ms MV, the mother, with reasonable transport expenses.

2.4.1.11 Mr VL, the father, and Ms MV, the mother, are ordered to cooperate fully with the Central Authority, RSA and the Central Authority for

Switzerland, the relevant court(s) in Switzerland, and any professionals who are approved or appointed by the relevant court(s) in Switzerland to conduct any assessment to determine what future residence and contact arrangements will be in the best interests of the minor child, L.

2.5 In the event of Ms MV, the mother, giving notice to the Central Authority, RSA in terms of paragraph 2.2 above, the order for the return of the minor child, L shall be stayed until an appropriate court in Switzerland has made the order referred to in paragraph 2.4 above and, upon the Central Authority, RSA being satisfied that such an order has been made, it shall notify Ms MV, the mother, accordingly and ensure that the terms of paragraph 2.4.1 are complied with.

2.6 In the event of Ms MV, the mother, failing to notify the Central Authority, RSA in terms of paragraph 2.2 above, of her willingness to accompany the minor child, L on his return to Switzerland, or electing not to return to Switzerland with the minor child, L, the Central Authority, RSA is authorised to make such arrangements as may be necessary to ensure that the minor child, L is safely returned to the custody of the Central Authority for Switzerland and to take such steps as are necessary to ensure that such arrangements are complied with, and in such event the minor child, L is to return to Switzerland in the care of Mr VL, his father.

2.7 Pending the return of the minor child, L to Switzerland as provided for in this order, Ms MV, the mother, shall not remove the minor child, L, permanently from the province of Gauteng, and, until then, will keep the Central Authority, RSA, informed of her physical address and contact telephone numbers.

2.8 The Central Authority, RSA, is directed to seek the assistance of the Central Authority for Switzerland in order to ensure that the terms of this order are complied with as soon as possible.

2.9 In the event of Ms MV, the mother, notifying the Central Authority, RSA in terms of paragraph 2.2, above, that she is willing to accompany the minor child, L to Switzerland, the Central Authority, RSA shall forthwith give notice thereof to the Registrar of Gauteng Division of the High Court, Pretoria, to the Central Authority for Switzerland, and to Mr VL, the father.

2.10 In the event of the appropriate court in Switzerland failing or refusing to make the order referred to in paragraph 2.4 above, the Central Authority, RSA and/or Mr VL, the father, is given leave to approach this Court for a variation of this order.

2.11 A copy of this order shall forthwith be transmitted by the Central Authority, RSA to the Central Authority for Switzerland.

JUDGMENT

Norman AJA (Mocumie and Mbatha JJA concurring):

Introduction

[1] This is an appeal against the judgment and order of the Gauteng Division of the High Court, Pretoria (the high court), per Swanepoel J, who dismissed with costs, an application by the Chief Family Advocate in her capacity as the Central Authority for the Republic of South Africa (the Central Authority), in terms of the 1980 Hague Convention on the Civil Aspects of International Child Abduction (the 1980 Hague Convention). In the application, the Central Authority sought an order for the return of a now four-year-old minor child, a boy (L), to Geneva, Switzerland. The appeal centres around the issue of habitual residence of the minor child, L prior to being retained in South Africa after his parents attended a wedding in South Africa with him. The appeal is with the leave of the high court.

[2] The first respondent, Ms MV, is the biological mother of the minor child, L. She holds dual citizenship: South Africa and Italy. The second respondent, Mr VL, is the minor child L's biological father. He is an Italian national. He obtained Swiss citizenship during these proceedings. This matter engages both Italian and Swiss laws.

Factual background

[3] It is necessary to set out the factual background in some detail for context. Ms MV and Mr VL met in June 2019 in Rovere di Rocca di Mezzo (Rovere), a small village in the

city of L'Aquila, Abruzzo province, Italy. Both their families were living in Rovere. At that time, Mr VL was employed by the city council of Lausanne, Switzerland (Lausanne).

[4] On 26 December 2019, the parties got engaged to be married in Cerveteri, Rome. During March 2020, due to the Covid-19 pandemic, Mr VL sought and was granted permission to travel to Italy, where he remained until June 2020. When the international borders reopened, Ms MV agreed to leave Rovere and moved to Lausanne with Mr VL. It is common cause that Ms MV's parents, based on their religious beliefs, were against Ms MV living together with Mr VL ,as they were not married.

[5] During August 2020, when the COVID-19 restrictions were lifted, Ms MV and Mr VL returned to Rovere for the summer holidays. After the holidays, they returned to Lausanne. Ms MV discovered that she was pregnant. During September 2020, VL joined the United Nations High Commissioner for Refugees (the UNHCR), Geneva. He stayed together with Ms MV in Lausanne and worked from home. Shortly before the minor child L's birth, they travelled to Roseto degli Abruzzi, Italy (Abruzzi), where the midwife had her rooms. It is common cause that Mr VL was responsible for paying for all the travelling, accommodation, and birthing costs because Ms MV was unemployed. The minor child, L was born on 14 May 2021 in Abruzzi. After his birth, the family went back to Geneva. Mr VL was responsible for maintaining both Ms MV and the minor child, L.

[6] From June 2021 until October 2021, Ms MV and Mr VL travelled between Switzerland, Italy, and France. In October 2021, Mr VL bought an apartment in Geneva, and they moved in together. In January 2022, when the minor child, L was about eight months old, the parties agreed to have the child enrolled at a crèche. Mr VL also applied for the minor child, L to be issued with an official Swiss identity document, and in this regard, Ms MV signed the authorization form. The minor child, L was also listed as a dependent on Mr VL's travel insurance, issued in line with VL's United Nations passport.

[7] During November 2021, Mr VL was on a work mission in Chad, Africa. The relationship between the parties deteriorated. Mr VL ended the relationship through a text

message. Ms MV and the minor child, L went back to Rovere to stay with her parents. During December 2021, Mr VL went to Rovere for the holidays, whereupon the parties reconciled. After the holidays, they returned to Geneva with the minor child, L.

[8] During March 2022, VL was hospitalised due to mental illness, which he described as a burnout due to work-related pressures. His mother and sister joined them in Geneva to assist Ms MV in taking care of Mr VL. After his recovery, Ms MV suggested, and Mr VL agreed to attend a wedding of Ms MV's brother in South Africa, which was going to be held on 14 May 2022. Ms MV and the minor child, L arrived in South Africa on 6 May 2022, and Mr VL joined them on 11 May 2022. They stayed as a family at a guest house in Waterkloof, Pretoria. Mr VL had booked return tickets, and they were scheduled to return to Geneva on 19 May 2022. On 19 May 2022, Ms MV tested positive for the COVID-19 virus. As a result, Mr VL left alone for Geneva. The parties agreed that Ms MV and minor child, L would join Mr VL once she was cleared of the infection.

[9] After her recovery from the COVID-19 infection, Ms MV made several excuses to delay her return to Switzerland. On 18 November 2022, Ms MV purchased an air ticket and sent confirmation of a return flight for herself and the minor child, L, to Geneva, Switzerland. She subsequently cancelled the flight booking. She decided not to return to Mr VL and opted to stay in South Africa, where she had a support system. Mr VL told Ms MV that the minor child, L, should stay with him in Europe, and if she wished, she could always come and visit the child during holidays, or she should relocate to Europe to live closer to him and the child.

[10] Mr VL consulted Bollo and Lamberti attorneys in Italy. On 28 November 2022, Ms MV was contacted and invited to attend a meeting with Judge Luca Pascali, an Italian judge at the Italian embassy in Pretoria, who enquired into, the minor child, L's circumstances. She attended the meeting and was advised by the judge that he also intended to do a home visit. Post that meeting, she attempted to register the minor child as a South African citizen, but the Italian embassy did not cooperate.

[11] On 6 December 2022, Ms MV approached the high court in an ex parte application to seek various orders. The high court, amongst others, granted Ms MV full parental responsibilities and rights over, minor child, L in terms of s 18 and 19 of the Children's Act 38 of 2005 (the Children's Act); Mr VL was granted parental responsibilities and rights over L in terms of s 21 of the Children's Act; the minor child L's primary care vested in Ms MV; the Department of Home Affairs was ordered to register, the minor child, L as a South African citizen and to provide him with a South African identity document. The high court also awarded Mr VL contact rights over the minor child, L, pending investigations by the Office of the Family Advocate.

[12] On 1 January 2023, Mr VL travelled to South Africa together with his mother. In South Africa, Mr VL exercised his visitation rights in terms of the court order and opposed the ex parte application, which is pending the finalisation of this appeal.

The findings of the high court

[13] As aforementioned, the high court dismissed the application with costs. It made the following findings:

13.1 Ms MV admitted that the parties both enjoy full parental rights and responsibilities. The issue of marriage was important in the case. The parties returned to Switzerland after the birth of their son. In October 2021, the parties relocated to Geneva, where Mr VL had purchased an apartment. The parties rekindled their relationship during December 2021 and they returned to Geneva in January 2022. There is no doubt that upon travelling to South Africa, Ms MV had the intention of returning to Europe. The parties had booked return tickets to Rome via Addis Ababa on 19 May 2022, and they were scheduled to then travel to Geneva. In the emails exchanged between the parties, Mr VL did not say the home of the minor child, L was in Geneva, but he said he was resident in Rovere;

13.2 The messages between the parties did not support the version of Mr VL that he had always demanded that Ms MV and the minor child, L return to Switzerland. Mr VL made it clear that he did not want the minor child, L to return to Switzerland without Ms MV. Ms MV had moved to Switzerland with a view to marrying Mr VL. As soon as they

were settled in Switzerland, Mr VL had started making excuses for not marrying her. It seems that neither the minor child, L nor Ms MV had settled in the Swiss community;

13.3 Ms MV did not intend to remain in Switzerland permanently unless Mr VL married her;

13.4 It is not certain that Mr VL regarded Geneva as the minor child, L's habitual residence. The court did not believe that the parties had the settled purpose of residing in Switzerland. Consequently, it found that the minor child , L was not a habitually resident in Switzerland at the time of his removal to South Africa;

13.5 That removing the minor child, L from Ms MV's care would cause the minor child, L serious emotional harm. Mr VL brought a belated application to the Swiss authorities some eight months after Ms MV had travelled to South Africa and five weeks after Ms MV had obtained an *ex parte* order in respect of parental rights. Therefore, Mr VL had acquiesced to the minor child, L residing in South Africa;

13.6 There is no evidence that if the minor child, L returned to Europe with Ms MV that he would be at grave risk of harm. If the minor child , L were to be returned to Switzerland, Ms MV would have to be placed in a position to return with him. Mr VL would have to be ordered to assist Ms MV in obtaining a residency permit. Mr VL would have to be ordered to provide for Ms MV and the minor child , L in the form of a place to reside and maintenance;

13.7 Mr VL has no regard for court orders as he hatched a kidnap plan to remove the minor child, L from South Africa in defiance of the court order of 6 December 2022. Mr VL's conduct is appalling, and [it] had no confidence that he would comply with any condition imposed on Ms MV's return to Switzerland;

13.8 For these reasons, it exercised its discretion against ordering the minor child, L's return to Switzerland.

13.9 Even if the findings regarding habitual residence were wrong, it would have exercised its discretion against ordering the minor child, L's return to Switzerland.

Before this Court

Submissions by the Central Authority

[14] Counsel for the Central Authority submitted that the high court misdirected itself by placing too much emphasis on the issue of marriage and making it a central issue in the case. The sole enquiry is whether or not the parties and the minor child, L were habitually resident in Switzerland at the time Ms MV retained the minor child, L in South Africa without Mr VL's consent as contemplated in Article 3, read with Articles 5,12, and 13 of the 1980 Hague Convention.

[15] It contended further that the high court erred in finding that Mr VL did not establish that Ms MV intended to return to Geneva as Ms MV's family had relocated to South Africa, and she had only one place to return to, namely Switzerland. Therefore, Mr VL succeeded in proving that the minor child ,L was habitually resident in Switzerland before his retention in South Africa.

[16] It was submitted that the high court misdirected itself in failing to order the return of the minor child, L in terms of the Hague Convention. In this regard, reliance was placed on *Sonderup v Tondelli and Another (Sonderup)*[1] .

Submissions by Mr VL

[17] Mr VL supported the submissions on behalf of the Central Authority. He placed reliance on the decision in *Senior Family Advocate, Cape Town, and Another v Houtman (Houtman)*[2] for the meaning of the word '*habitual residence'* . He contended that , on these facts, the word 'habitual residence' should have some degree of settled purpose or intention.

[18] He argued that in terms of the registration of the minor child , L's birth in Italy, both parents were automatically granted shared parental authority and custody rights under

[1] *Sonderup v Tondelli and Another* [2000] ZACC 26; 2001 (1) SA 1171 (CC); 2001 (2) BCLR 152 (CC).
[2] *Senior Family Advocate, Cape Town, and Another v Houtman* 2004 (6) SA 274 (C).

Articles 316, 337(ter), and 337(quarter) of the Italian Civil Code. Parental responsibility, which exists under the law of the State of the child's habitual residence, subsists after a change of that habitual residence to another State. This means that the parental rights awarded to him, under Italian law, automatically remained vested in him when Ms MV retained the child in South Africa. Joint parental authority recognized in Italy does not need to be officially re-registered in Switzerland for it to be valid, so he contended. This position arose by operation of law.

Submissions by Ms MV

[19] This Court records its appreciation to Mr Zietsman SC, with Mr Van der Merwe, his junior counsel, of the Free State Bar, for their invaluable assistance in this complex matter, rendered *pro bono.* This Court is indebted to both counsel for their services.

[20] Counsel for Ms MV submitted that Mr VL has no parental rights because he was not married to her. And in terms of Swiss laws, as an unmarried mother, she was the minor child , L's sole custodial parent. Ms MV and Mr VL neither agreed nor determined the child's habitual residence for it to be Switzerland or Italy, for that matter. Mr VL never demanded that they should return to Switzerland but wanted her to return to Italy, which, it was contended, was indicative of the fact that Mr VL regarded Italy as their home. Mr VL did not obtain any rights under Article 298(*a*) of the Swiss Civil Code.

[21] It was further contended with reliance on the provisions of Article 252 of the Swiss Civil Code that, because they were not married to each other and absent a declaration, Mr VL had no rights. That a distinction must be made between pure parental rights and custodial rights. Mr VL has failed to make out a case about the rights that he has over the minor child, L.

[22] If this Court accepts that Mr VL obtained rights in terms of Italian law, that will not be the end of the matter because Article 316 of the Italian Civil Code affords both parents the right to determine the child's habitual residence by mutual agreement. In the absence of such mutual agreement, it means Mr VL did not approach the Italian court for judicial

intervention in terms of Article 316.2 of the Italian Civil Code. The onus, therefore, rests on Mr VL to establish custodial rights.

[23] He argued that Mr VL had to concede that the minor child, L's habitual residence was Italy. If not, the Swiss Civil Code provides that the father does not have any automatic parental rights. That, it was argued, in line with the dictum in *KLVC v SDI*[3], Mr VL had not established that the minor child,L had been retained unlawfully in South Africa.

[24] Habitual residence has to be determined at the outset of a return application, as the law of the country of habitual residence determines whether a person had rights of custody at the time of the removal or retention. If the person requesting the return of the child did not have custody rights in terms of the law of the country of habitual residence at the time of the removal or retention, the 1980 Hague Convention would also not apply.

[25] Relying on *Central Authority for the Central Republic of South Africa and Another v LC*[4], he submitted that an appreciable period of time and a settled intention are necessary to enable the child to become habitually resident. Habitual residence must be determined by the facts of the matter, and this must be done on a balance of probabilities. He submitted that the high court was correct in its finding that the parties did not have a settled purpose to reside in Switzerland. And that Mr VL, the father, had no rights of custody to the minor child, L.

[26] He argued that Mr VL did not exercise his rights as contemplated in Article 5 of the 1980 Hague Convention. The dependency model test[5] should be applied, considering that the minor child, L was too young to decide where his habitual residence was. Over

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[3] *KLVC v SDI* [2014] ZASCA 222; [2015] 1 All SA 532 (SCA) 4.
[4] *Central Authority for the Central Republic of South Africa and Another v LC* 2021 (2) SA 471 (GJ) 56.
[5] In *Central Authority for the Central Republic of South Africa and Another v LC,* Opperman J stated:
[63] 'Three basic models of determining habitual residence of a child have developed from judicial interpretation of habitual residence, namely: the dependency model, the parental rights model and the child centred model. In terms of the dependency model, a child acquires the habitual residence of his or her custodians whether or not the child independently satisfies the criteria for acquisition of habitual residence in that country.'

and above, Mr VL is emotionally and psychologically unstable, and the minor child, L will be subjected to emotional abuse if left in his care as contemplated in Article 13(*b*) of the 1980 Hague Convention. That Mr VL gave tacit or implied consent that the minor child,L may remain in South Africa in terms of Article 13(*a*).

[27] He further submitted that it was not necessary to decide the consent or acquiescence defence unless this Court finds that the minor child, L was habitually resident in Switzerland and that Mr VL had settled rights of custody to the minor child, L. Mr VL was open to working towards Ms MV, staying in South Africa whilst asserting that 'she had abducted the minor child, L illegally to South Africa', he had acquiesced in the retention of the minor child, L in South Africa. On this ground, too, he argued that the appeal should be dismissed.

Curator ad litem

[28] With the belief that the minor child , L's best interests should be taken into account in the application before it, the high court appointed a curator ad litem, Adv Fitzroy.[6] She filed an interim report. She also filed heads of argument in this Court. The report filed by her focused mainly on the minor child L's contact and primary residence. This is for purposes of a full best interests inquiry, which ought not to have been conducted considering that the court was only supposed to consider short-term best interests in an application of this nature in line with the approach espoused by the Constitutional Court in *Ad Hoc Central Authority,South Africa and Another v Koch N.O. and Another (Koch).* [7]

Issues for determination

[29] Before this Court, the core issue is the minor child, L's habitual residence at the time Ms MV retained him in South Africa. Put in another fashion, the minor child, L's habitual residence prior to his alleged unlawful retention in South Africa. Flowing from

[6] A curator ad litem is appointed by a judge to investigate the circumstances of the child and whether it is in the child' best interest to remain in a particular jurisdiction or be returned.
[7] *Ad Hoc Central Authority, South Africa and Another v Koch N.O. and Another (Koch)* 2023 ZACC 37; 2024(2) BCLR 147 (CC) ; 2024(3) SA 249 (CC).

this, whether the minor child, L's retention by Ms MV in South Africa without Mr VL's consent is wrongful. The resolution of the core issue will, of necessity, as found by this Court in *KLVC v SDI,*[8]entail determining two aspects stipulated in Article 3 of the 1980 Hague Convention, namely, first, in terms of Article 3(*a*), whether the removal of the child was wrongful because it was in breach of Mr VL's rights of custody of L under Swiss law, immediately before the minor child, L's removal. Second, in terms of Article 3(*b*), whether the relevant rights of custody were actually being exercised at the time of the minor child L's removal. That enquiry will resolve the custodial rights and wrongfulness of the minor child L's retention in the present case.

[30] If it is found that the minor child, L's retention is wrongful, the next issue would be whether the minor child, L's return to Switzerland should follow. And whether the minor child, L would be at grave risk of psychological harm, or be placed in an intolerable situation, should he be returned as envisaged in Article 13(*b*) of the 1980 Hague Convention.

Applicable Legislative Framework

[31] The objects of the 1980 Hague Convention are to secure the prompt return of children wrongfully removed or retained in any contracting state, and to ensure that rights of custody and access under the law of one contracting state are effectively respected in the other contracting state. It also entrenches the interests of children as being of paramount importance in matters relating to their custody. It gives effect to its objects by providing, amongst others, in Articles 3, 5, 16, 18, and 19 in the following terms:

Article 3 provides:

'The removal or the retention of a child is to be considered wrongful where -

a) it is in breach of rights of custody attributed to a person, an institution, or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

[8] Op Cit fn 3 para 4.

b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.
The rights of custody mentioned in sub-paragraph *a)* above may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.'

Article 5 states:
'For the purposes of this Convention-
a) "rights of custody" shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;
b) "rights of access" shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.'

Article 16 stipulates:
'After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be retained under this convention or unless an application under this convention is not lodged within a reasonable time following receipt of the notice.'

Article 18 states:
'The provisions of this chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time.'

Article 19 reads:
'A decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue.'

[32] Article 3 of the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (the 1996 Hague Convention) provides:
'*Article 3*
The measures referred to in Article 1 may deal in particular with –

a) the attribution, exercise, termination or restriction of parental responsibility, as well as its delegation;
b) rights of custody, including rights relating to the care of the person of the child and in particular, the right to determine the child's place of residence, as well as rights of access, including the right to take a child for a limited period of time to a place other than the child's habitual residence;. . . ’

[33] Articles 12 and 13 of the 1980 Hague Convention read:

Article 12 :
‘Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of 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 child forthwith. The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.
Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay proceedings or dismiss the application for the return of the child.’

Article 13:
‘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 established 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. The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views. In considering the circumstances referred to in this Article, the judicial and administrative

authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence'

Article 17 of the 1996 Hague Convention reads:

'The exercise of parental responsibility is governed by the law of the State of the child's habitual residence. If the child's habitual residence changes, it is governed by the law of the State of the new habitual residence.'

Swiss Federal Act on Private International Law

[34] In terms of the Swiss Federal Act on Private International Law[9] (PILA), Article 14 thereof provides:

'Art.14

1 If the applicable law refers back to Swiss law or to another foreign law, such *renvoi* shall be taken into account only if this Act so provides.

2 In matters of personal or family status, a *renvoi* from the foreign law to Swiss law is accepted.'

[35] *Renvoi* is defined as the action or process of referring a case or dispute to the jurisdiction of another country. It is used as a tool for judges to engineer the determination of the *lex causae* towards the legal system that is considered to provide the best decision.[10]

[36] Section 4 of PILA reads:

'Section 4 Domicile, Seat and Citizenship

'Art. 20 reads:

1 Within the meaning of this Act, a natural person:

a. has their domicile in the state where they reside with the intent of establishing permanent residence;

b. *has their habitual residence in the state where they live for a certain period of time, even if this period is of limited duration from the outset;* (Emphasis added)

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[9] Federal Act on Private International Law of 18 December 1987.

[10] *Renvoi* defined in the book *Dasar- Dasar Hukum Perdata Internasional (Fundamentals of International Private Law)* by Dr Bayu Seto Hardjowahono.

c. has their establishment in the state where the centre of their professional or commercial activities is located.

2 No person may have more than one domicile at the same time.If a person does not have a domicile anywhere, the habitual residence is the relevant place.*The provisions of the Civil Code relating to domicile and residence do not apply.'*[11] (Emphasis added)

'Art .82:

1 The relations between parents and child are governed by the law of the state of the child's habitual residence.'

[37] The Swiss Civil Code provides :

'Section Three: Parental Responsibility

Art.296

1 Parental responsibility serves the best interests of the child.

2 Until such time as they attain the age of majority, children remain the joint parental responsibility of their father and mother.'

This article is provided as outlining the principles applicable under parental responsibility.

South African Law

[38] Section 28 of the Constitution of the Republic of South Africa of 1996 (the Constitution) entrenches the paramountcy principle in every matter concerning a child.[12]

[39] The Children's Act was promulgated as stated in the Preamble to, *inter alia*, give effect to certain rights of children as contained in the Constitution; to define parental responsibilities and rights, and to give effect to the Hague Convention on International Child Abduction. The Children's Act specifically dedicated Chapter 17 to deal with child abduction and wrongful removal or retention of a child in addressing its obligations in terms of the 1980 Hague Convention.

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[11] (Civil code is referenced as footnote 23, which is SR210.)

[12] Section 28(2) of the Constitution 108 of 1996 provides: 'A child's best interests are of paramount importance in every matter concerning the child'.

[40] One of the objects of the Children's Act is to reinforce the constitutional right that the best interests of a child are of paramount importance in every matter concerning the child; to promote the preservation and strengthening of families; to give effect to the Republic's obligations concerning the wellbeing of children in terms of international instruments binding on the Republic; and to generally promote the protection, development and wellbeing of children.

Analysis

Is the Hague Convention applicable?

[41] I hasten to state that although this was an issue in Ms MV's answering affidavit, it was not pursued with vigour in argument. Nevertheless, it was not abandoned, and it is for that reason that it shall be addressed herein. Switzerland is the signatory to the 1996 Hague Convention. South Africa is a signatory to the 1980 Hague Convention but not the 1996 Hague Convention.

[42] On 12 January 2023, the Swiss authorities, relying specifically on the 1980 Hague Convention, submitted an application to the office of the Chief Family Advocate, Central Authority for the Republic of South Africa, requesting it to take all the necessary steps and measures for the speedy and safe return of the child. Of importance is that it is in that correspondence that the Swiss authorities recorded, inter alia, that the parents have joint custody according to the Italian Family Law. According to Article 16(3) of the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co- Operation in respect of Parental Responsibility and Measures for the Protection of Children (the 1996 Hague Convention), which is in force between Switzerland and Italy, parental responsibility which exists under the law of the State of the child's habitual residence subsists after a change of that habitual residence to another State.

[43] It is the 1996 Hague Convention that enables the determination of the issues that are extra-territorial such as these. Absent the 1996 and the 1980 Hague Conventions, our courts and so is our State would not be able to lean on the international agreements

between states on matters involving, amongst others, the international abduction and retention of children.

[44] The Constitutional Court in *Sonderup*[13], outlined the purpose of the 1980 Hague Convention, namely 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. There is no doubt that the 1980 Hague Convention applies to these proceedings for the reasons advanced above.

Did Mr VL have custodial rights? If so, did he exercise them?

[45] Ms MV relied on the provisions of Article 298a of the Swiss Civil Code for the contention that Mr VL does not and never had custodial rights because the parties did not sign a joint declaration as envisaged in this section.

[46] Article 298 a of the Swiss Civil Code provides:

'Art 298a

1 If the parents are not married to each other and if the father recognises the child,or the parent-child relationship is established by court judgment but joint parental responsibility was not ordered at the time of the judgment, joint parental responsibility is established based on a joint declaration by the parents.

2 In the declaration, the parents confirm that they :

1. are prepared to accept joint responsibility for the child; and

2. have agreed on residence and contact or on the sharing of parenting duties and on the child maintenance contribution for the child.

3. . .

4. . .

5 Unless and until the declaration has been made, the mother has sole parental responsibility.'

[47] Ms MV relied on the provisions of Article 298a of the Swiss Civil Code . Throughout the proceedings Ms MV contended that the habitual residence of the minor child , L is in

[13] Op cit fn 1 para10.

Italy and not in Switzerland. Some of the relief sought, and the averments made by Ms MV in the ex parte application, were that, amongst others, Mr VL has full parental responsibilities and rights over the minor child, L. She sought an order declaring that those rights were vested in terms of s 21 of the Children's Act. The reliance on Article 298a contradict the posture adopted by Ms MV before the high court . I , therefore, find that in the light of those admitted facts by Ms MV , her reliance on the provisions of Article 298a , is misplaced.

[48] Since the child is Italian and had been registered as such at birth, his habitual residence was Italy, and when the parties moved to settle with him in Switzerland, it changed to Switzerland. Therefore, the founding principles on parental responsibility to be relied upon are those prescribed in terms of Italian laws because those are the responsibilities that both parents acquired by operation of law on the day the child was born. Articles 316 and 337 ter of the Italian Code entrench those rights. The Italian Code, as translated, provides :

'Article 316

1. *Both parents have parental responsibility, which is exercised by mutual agreement , taking into account the child's abilities, natural inclinations and aspirations. The parents, by mutual agreement, determine the minor's habitual residence.* (Emphasis added)

2. In the event of disagreement on matters of particular importance, each of the parents may refer the matter to the judge without formalities indicating the measures he or she considers most appropriate.

3. *The parent who has recognised the child exercises parental responsibility over the child. If the recognition of the child, born out of wedlock, is carried out by both parents, the exercise of parental responsibility belongs to both.'*(Emphasis added)

'Article 337 ter provides:

1. The minor child has the right to maintain a balanced and continuous relationship with each of his or her parents, to receive care, education, instruction and moral assistance from each of them, and to maintain meaningful relationships with relatives of each branch of parenthood.

2. ....

3. *Parental responsibility is exercised by both parents*. Decisions of major interest to children concerning the education, health and choice of the minor's habitual residence are taken by mutual

agreement, taking into account the capacities , natural inclinations and aspirations of the children.'(Emphasis added)

[49] The body of evidence shows that prior to birth and after the minor child , L's birth, the parties exercised joint parental responsibilities. For context, the following common cause facts do not support the contention that Mr VL never had custodial rights over the minor child, L: Prior to minor child, L's birth, Ms MV and Mr VL , were living together in Switzerland and were engaged to be married. During the relevant period immediately prior to minor child L's birth, from 22 January 2021 until 10 April 2021, they were residing in Switzerland. On 10 April 2021, they left for Italy in preparation for the minor child, L's birth, who was born in Italy on 14 May 2021. Mr VL was present and supportive throughout the pregnancy and the minor child , L's birthing. He was responsible for all the expenses relating to accommodation and the minor child , L's birth. On 10 June 2021, Ms MV and Mr VL returned to Switzerland with their newly born baby, L.

[50] They all lived together, with Mr VL being away sometimes due to work commitments. After the minor child, L's birth, the parties travelled and stayed together with the minor child, L on vacation, weekends, or paternity leave in Italy, France, and Switzerland. Ms MV and Mr VL resided in Switzerland together with the minor child, L, in an apartment purchased by Mr VL, from 16 January 2022 until 5 May 2022, before their departure to South Africa. Before their departure to South Africa, Mr VL had been admitted to hospital due to mental illness. They travelled to South Africa to attend a wedding of Ms MV's brother. Both Ms MV and Mr VL intended to return to Switzerland after the wedding. They were all due to return to Switzerland on 19 May 2022 and had return air tickets evincing that. The reason Ms MV and the minor child, L remained behind on 19 May 2022 was that Ms MV had contracted the COVID–19 virus. The relationship between the parties became strained. Ms MV intended to return to Switzerland during November 2022, and she purchased an air ticket, which she sent to Mr VL. She later cancelled it. VL was responsible for all expenses and maintenance relating to the minor child, L and Ms MV in Switzerland, and was responsible for the child's expenses and maintenance even after the retention of the minor child, L in South Africa.

[51] Those facts demonstrate that Mr VL had custodial rights to the minor child, which were exercised prior to his retention in South Africa. The high court correctly found that Ms MV did not deny that Mr VL enjoys custodial rights. It also correctly found that Ms MV admitted that the parties both enjoy full parental rights and responsibilities. In light of those findings and the evidence tendered, the contention by Ms MV that Mr VL never had custodial rights and had never exercised them at the time of the retention of the minor child, L in South Africa is legally untenable, and it stands to be rejected. VL had demonstrated, as found by the high court, that he had acquired full parental responsibilities in respect of the minor child, L. Once those parental responsibilities, including joint custody, were acquired under Italian laws, they were not relinquished or extinguished when the parties moved to Switzerland. They remained extant. In this regard, Article 16(3) of the 1996 Hague Convention recognises and enforces them.

'Article 16:

(1) The attribution or extinction of parental responsibility by operation of law, without the intervention of a judicial or administrative authority, is governed by the law of the State of the habitual residence of the child.

(2). . .

(3) Parental responsibility which exists under the law of the State of the child's habitual residence subsists after a change of that habitual residence to another state.'

[52] The continuity of those rights where there is a change of habitual residence accords with the best interests of the child principle that the Hague Convention seeks to protect. This legal position exists in order to ensure continuity of the parental authority without requiring official re-registration in Geneva. I therefore find in this regard, and as correctly found by the high court, the first leg of the article 3 test has been satisfied.

Is the retention of the minor child, L in South Africa wrongful?

[53] The retention of the minor child, L in South Africa was a decision taken by Ms MV alone without the consent of Mr VL. She wanted to be closer to her family, that had at that point in time indicated that it was not returning to Italy but was going to remain in South Africa. Her other reason was that Mr VL was not committing to marriage. She retained the child without consulting Mr VL, as the father of the child, who had custodial rights.

She decided unilaterally to retain the child in South Africa. Ms MV has failed to offer a satisfactory explanation to dispel the presumption of wrongful retention of the minor child.

[54] Having found, as the high court did, that both parents had custodial rights towards the child in Switzerland, Mr VL's consent to the retention of the child in South Africa was peremptory. It follows that failure to seek and obtain Mr VL's consent before retaining the child in South Africa was wrongful. I find that Ms MV's actions of retaining the minor child, L in South Africa were wrongful.

Did Mr VL consent or acquiesce to the minor child, L, remaining in South Africa?

[55] When Ms MV approached the high court in Pretoria on an *ex parte* basis, she had already been contacted by the Italian Judge and by an Italian attorney. Despite such knowledge, she sought an *ex parte* order awarding her full parental responsibilities towards the minor child. The fact that, after the *ex parte* order, Mr VL visited his son in South Africa does not amount to consent or acquiescence because there was a court order which gave him rights of access to the child, and he was obliged to comply therewith or challenge it as he did.

[56] Ms MV invoked one of the defences provided for in Article 13*(a)* of the 1980 Hague Convention that Mr VL had consented to or subsequently acquiesced in the removal or retention of the minor child in South Africa. Ms MV bore the onus to establish that defence. That defence is also provided for in Article 7*(a)* of the 1996 Hague Convention.

[57] In *Smith v Smith (Smith),*[14] this Court, in making findings on acquiescence, relied on the following facts: That the appellant had been aware of the 1980 Hague Convention and that the respondent was retaining the children in South Africa unlawfully. He had been aware, too, that the 1980 Hague Convention afforded him a remedy. Armed with this knowledge, he had nonetheless instructed his attorney to withdraw his application under the 1980 Hague Convention. Those facts, this Court found, clearly justified the inference that, with knowledge of his rights, the appellant had in fact acquiesced in the wrongful

[14] *Smith v Smith* [2001] ZASCA 19; [2001] 3 All SA 146 (A); 2001 (3) SA 845 SCA para 19.

retention of the children in South Africa. His conduct would certainly have led the respondent reasonably to believe that he was not insisting on their summary return. It found that the respondent succeeded in discharging the onus of establishing that the appellant acquiesced in the wrongful retention of the children in South Africa.[15]

[58] The facts in this case are distinguishable from those in *Smith* in that, after the cancellation of the flight return ticket by Ms MV, amongst others, Mr VL established that Ms MV was not intending to return with the child to Switzerland. He consulted lawyers, and a report was made to Swiss authorities, which culminated in the application for the return of the minor child, L, to Switzerland. He pursued it until it reached this Court. It is important to note that a finding of acquiescence by the high court is based on the following obiter:

'. . . It is only on 13 January 2013, some eight months after MV travelled to South Africa, and five weeks after MV had obtained an ex parte order in respect of parental rights, that VL brought this belated application to the Swiss authorities. Therefore, I find that VL acquiesced to L residing in South Africa.'

[59] By relying solely on the above-mentioned obiter remarks, the high court failed to take into account the following uncontroverted facts: That Mr VL had made it clear to Ms MV that he intended to take L to Europe. He reported the minor child, L's retention in South Africa to the Italian authorities immediately he realised that Ms MV was set on retaining the minor child, L when he was issued with an interim court order of 6 December 2024. Mr VL approached the Swiss Central Authority to process the minor child , L's return to Switzerland. The Swiss Central Authority took action within one (1) year of the minor child , L's wrongful retention in South Africa as provided for in Article 12 of the 1980 Hague Convention. All these facts militate against the finding by the high court that Mr VL acquiesced to the minor child L's retention in South Africa.

[60] It follows that the high court, misdirected itself on the facts in assessing whether or not Mr VL had acquiesced as alleged by Ms MV. By so doing, it reached a decision which,

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[15] Ibid para 20.

in the result, could not reasonably have been made by a court properly directing itself to all the relevant facts and principles. This court is accordingly at large to interfere with the decision of the high court[16]. I find that on the correct facts, Mr VL did not acquiesce to the minor child, L's retention in South Africa. Ms MV failed to discharge the onus resting on her and that defence must accordingly fail.

Is Switzerland the habitual residence of the minor child, L ?

[61] There are certain facts which have been outlined above that militate against Ms MV's contention that Italy was the habitual residence of the parties. I shall repeat them herein briefly for context. When the international borders reopened during 2020, Ms MV agreed to leave Rovere and moved to Lausanne with Mr VL. They went to Italy for the minor child, L's birth. After his birth, they returned to Geneva. Mr VL bought an apartment in Geneva. They stayed in that apartment until they left for South Africa in May 2022. Most importantly, they had booked tickets to return to Geneva on 19 May 2022 after the wedding in South Africa, which was on 14 May 2022.

[62] Ms MV contends that on two occasions when their relationship ended, she took L, with her to Italy, and Mr VL did not protest. It is common cause that during the relevant times, the minor child, L was still being breastfed, even when they travelled to South Africa for the wedding. During those times, both Ms MV and Mr VL had their families in Italy. As found earlier in this judgment, Italy was L's habitual residence and his birth residence until his parents moved to Switzerland. At that point, the minor child , L's habitual residence and his parents became Switzerland. The facts outlined above fortify that conclusion.

[63] The arguments on behalf of Ms MV seem to be that she had no intention of residing in Switzerland permanently. That view only came to the fore after she had retained the child in South Africa. Her actions of even looking for a crèche for the minor child, L and intending to return to Switzerland by booking air tickets in November 2022 do not support

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[16] *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another* [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) para 88; and also *Media Workers Association of South Africa and Others v Press Corporation of South Africa Limited* [1992] ZASCA 149 ; 1992 (4) SA 791 (A) at 1392E.

that argument. She had spent almost two years in Switzerland. In any event, that argument is flawed for two reasons. First, it goes against the definition of habitual residence that Swiss laws accord to that term. Article 20*(b)* of PILA refers to habitual residence as '*has their habitual residence in the state where they live for a certain period of time, even if this period is of limited duration from the outset'*. Second, if it is accepted that according to the dependency model, a child acquires the habitual residence of his or her custodians whether or not the child independently satisfies the criteria for acquisition of habitual residence in that country, then it would make no sense to contend that although the minor child, L was residing with his parents in Switzerland, his habitual residence (alone) was in Italy.

[64] To hold as such would go against the intention of the 1980 Hague Convention, which distinguishes the ' habitual residence' that is relevant for the purposes of Article 3, as being the one*' prior to the removal or retention of the child'.* Third, that contention would also go against the principles in *Houtman*[17] where the court stated*:*

'In practice, however, it is often impossible to make a distinction between the habitual residence of a young child and that of its custodians- it cannot reasonably be expected that a young child would have the capacity or intention to acquire a separate habitual residence.'[18]

[65] The court further held[19]: defining 'habitual residence':

'The word 'habitual'implies a stable territorial link; this may be achieved through length of stay or through evidence of a particularly close tie between the person and the place. A number of reported foreign judgments have established that a possible prerequisite for ' habitual residence' is some degree of 'settled purpose' or 'intention'.

A settled intention or settled purpose is clearly one which will not be temporary. However, it is not something to be searched for under a microscope. If it is there at all it will stand out clearly as a matter of general impression."[20]

[17] Op cit fn 2 para 8
[18] Ibid para 10.
[19] Ibid para 9.
[20] Ibid para 10.

[66] There was a 'settled purpose' that made Mr VL and Ms MV as the minor child , L's parents to be in Switzerland. That settled purpose was Mr VL's employment in Geneva. He had been working in Switzerland long before the minor child , L was born. Ms MV was staying with him even when he was in Lausanne.Ms MV was offered a job to provide English lessons to an Albanian diplomat in Geneva. Although the minor child, L was born in Italy, the Italian Consulate General in Geneva wrote, on 15 December 2022, to Mr VL after he had made a report about the '*missing return of minor L...*', *that he must submit a repatriation request to Swiss authorities, recognized as the minor's place of residence before the minor's removal to South Africa.'*

The letter further provided instructions and contact details for the competent federal office in Switzerland. This then puts to bed the suggestion that the minor child, L's habitual residence was in Italy prior to his removal.

[67] I find that the high court misdirected itself when it focused on the issue of marriage as an important issue when determining the issue of habitual residence. Although the high court had found that the parties had 'settled' in Switzerland, contrary to that finding, it found that it did not believe that the parties had the settled purpose of residing in Switzerland and thus found that Switzerland was not the habitual residence of the parties.

[68] The correct facts show that the parties were settled in Switzerland, as correctly found by the high court. They had applied for the minor child, L to be enrolled at a crèche in Switzerland, Mr VL applied and Ms MV consented to the minor child, L being registered with the Swiss authorities; they moved and stayed in an apartment that Mr VL had purchased; the minor child, L's name was displayed on the entrance door and on the letter box of the apartment; at the time they left for South Africa on, 5 May 2022, they were in Switzerland; both parents and, the minor child L, had return tickets from Geneva to South Africa and back to Geneva on 19 May 2022; Mr VL had applied for Swiss citizenship which he obtained in December 2024 thus entitling the minor child, L to Swiss citizenship and social benefits attendant thereto. Ms MV returned to the apartment in Switzerland without the minor child, L to collect her jewellery and belongings in May 2024. All these factors

and the conduct of both Ms MV and Mr VL demonstrate that they both regarded Switzerland as their home and that of the minor child , L.

[69] In arriving at this conclusion, one must be guided, in particular, by Article 20 of PILA, above which states categorically that their habitual residence is in the state where they live for a certain period of time, even if this period is of limited duration from the outset; or have their establishment in the state where the centre of their professional or commercial activities is located. In this instance, both categories have been met.

[70] Once the custodial rights are established in terms of Italian laws, as I have found, they are automatically recognized in Swiss law in terms of Article 85 of PILA[21], and in terms of Article 7 of the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children[22], recognition is given to the authorities of the

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[21] Article 85 of PILA provides:
1.In respect of protection of children, the jurisdiction of the Swiss judicial or administrative authorities, the applicable law and the recognition and enforcement of foreign decisions or measures are governed by the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children.
2. . . . .
3. . . ..
4 Measures taken in a State which is not party to the Conventions referred to in paragraphs one and two are recognized if they were taken or are recognized in the State of habitual residence of the child or the adult.'

[22] Articles 5 and 7 of the 1996 Hague Convention provide :
'Article 5
(1)The judicial or administrative authorities of the Contracting State of the habitual residence of the child have jurisdiction to take measures directed to the protection of the child's person or property.
(2) Subject to Article 7,in case of a change of the child's habitual residence to another Contracting State, the authorities of the State of the new habitual residence have jurisdiction.
'Article 7
(1) In case of wrongful removal or retention of the child, the authorities of the Contracting State in which the child was habitually resident immediately before the removal or retention keep their jurisdiction until the child has acquired a habitual residence in another state and
(a) each person, institution or other body having rights of custody has acquiesced in the removal or retention; or
(b) the child has resided in that other State for a period of at least one year after the person, institution or other body having rights of custody has or should have had knowledge of the whereabouts of the child, no request for return lodged within that period is still pending, and the child is settled in his or her new environment.
(2) The removal or retention of a child is to be considered wrongful where –

State in which the child was habitually resident immediately prior to the removal or retention. Those authorities retain their competence to take measures for the protection of the child, even after the child's removal. The actions taken by the Swiss authorities in requesting the Central Authority to take measures for the minor child , L's return are consistent with those legislative imperatives.

[71] It must follow that Ms MV's argument on habitual residence must accordingly fail. For all the reasons advanced I find that the minor child, L's habitual residence, prior to his retention in South Africa was Switzerland.

[72] The findings made above are consistent with the interpretation given to the term 'habitual residence' in Switzerland. In *X v Y* [23], in its judgment the Federal Tribunal held : 'The Hague Convention on the Civil Aspects of International Child Abduction (Hague Child Abduction Convention) is limited in its scope to children who, immediately prior to a violation of custody or visitation rights, had their habitual residence in a contracting state and have not yet reached the age of 16 (Art. 4 Hague Child Abduction Convention). The point of contention is whether the Hague Child Abduction Convention applies to the two children. The appellant accuses the High Court of having wrongly assumed that the two children had their habitual residence in Italy (as a contracting state).
The concept of habitual residence within the meaning of the Hague Convention on the Protection of Children corresponds to the connecting factor concept as used in the Hague Convention on the Protection of Children and other Hague Conventions. This refers to the actual center of the child's life, which results from the actual duration of the stay and the relationships established thereby, or from the expected duration of the stay and the integration that can be anticipated.'(Footnotes omitted)

(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
(b) at the time of removal or retention, those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.
The rights of custody mentioned in sub-paragraph a above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.'

[23] *X v Y* Federal Tribunal Judgment; 5P.367/2005 ; judgment of 15 November 2005; II Civil Division; at para 5-5.1; Constitutional Appeal against the decision of the High Court of the Canton of Zurich, Second Civil Chamber of 30 September 2005 (NL050087).

Allegations of Ms MV's arrest upon her return to Switzerland

[73] These allegations have no merit because Ms MV travelled to Switzerland during May 2024 and remained there for six days. Unfortunately, this misinformation was given to the *curator ad litem,* and it must have influenced some of her findings. Even if there was a pending criminal case against Ms MV in Switzerland, this Court ,as the Constitutional Court did in *Sonderup*, referred to above, would add a protective measure that Mr VL must not pursue any such criminal charges or assist in the same[24]. In fact, that is exactly what Mr VL undertook to do even before the high court, which the high court ignored.

Whether a return of the minor child, L to Switzerland poses a grave risk of harm to him?

[74] The high court made the following findings in this regard: There was no evidence to suggest that if the minor child, L is returned to Europe with Ms MV, he would be at grave risk of harm; if the minor child, L were to be returned to Switzerland, Ms MV would have to be placed in a position to return with him. Having made those findings, the high court inexplicably found that Ms MV couldn't return to Switzerland because she does not have permanent rights of residence in Switzerland. The high court further stated in *obiter* that to resolve that difficulty, one would have to order Mr VL to assist Ms MV in obtaining a residency permit if possible.

[75] Ms MV, on the other hand, raises the mental and psychological state of Mr VL as posing a grave risk of harm to the minor child, L. She refers to the two incidents when Mr VL was admitted to the hospital due to his mental state. Mr VL explained that he suffered from burnout due to work pressures. She also mentioned an incident where, when the minor child, L was still very young, Mr VL fell asleep in the bath whilst holding him. Before this Court, counsel for Mr VL confirmed that from July until August 2025, Ms MV and the minor child, L visited Mr VL. During that visit, the minor child, L spent twenty one nights with Mr VL. This fact was brought to the attention of the Registrar of this Court in an email sent to the Court by Ms MV advising the Court of the minor child, L's visit to Switzerland

[24] Op cit fn 1 para 49.

for the July/August 2025 holidays. Without downplaying her concerns, the lack of expert evidence that Mr VL posed any danger at all to the minor child, L does not assist her.

[76] It is worth mentioning that a report from Dr Giada Del Fabbro, suggested that the primary residence of the minor child should remain with the mother, Ms MV, with the father, Mr VL exercising contact rights. This recommendation is based on the time that the child has spent with the mother, Ms MV. As indicated in this judgment, a full best interests inquiry conducted by the high court was not warranted, which is what was addressed in the medical report. Dr Del Fabbro did not suggest that the child would be at grave risk of harm if returned to Switzerland.

[77] The body of evidence shows that both Ms MV and Mr VL do have some mental challenges. Those challenges will be better addressed by the Swiss Court, which will be deciding the merits on parental and custody rights and the measures to be taken to assist the parties with parental skills, if needed. Those are not factors for decision by this Court or any South African court, for that matter. The presence of mental challenges does not translate to the grave risk of harm contemplated in Article 13(*b*). It is apparent from the record that the minor child, L's retention in South Africa also contributed to Mr VL's mental state. There is accordingly no reason to disturb the findings of the high court in this regard.

Should the minor child, L, be returned to Switzerland?

[78] It is common cause that there were delays in having the application for the minor child, L's return to Switzerland finalised. Those delays range from the *curator ad litem* taking almost a year in filing her report to various supplementary affidavits filed by the parties, including processes relating to appeals. Whilst all that was happening, the minor child, L was growing up, attending crèche in South Africa, and inevitably becoming accustomed to Ms MV's family only.

[79] The fact that the minor child, L has stayed longer in South Africa is largely due to Ms MV's actions retaining him, including the delays occasioned by the *curator ad litem* referred to above. In *C.A.R v The Central Authority of the Republic of South Africa and*

Another[25], this Court, relying on *Koch,*[26] citing with approval *LD v Central Authority RSA and Another* ,[27] stated that regrettable as they may be, inordinate delays cannot be held against the parent applying for the child's return, because to do so would subvert the Hague Convention's aims.

[80] The Court further held that the fact that there had been these developments does not mean that the minor child, L's return to Switzerland is not in his best interests. To refuse an order for the minor child, L's return to Switzerland would reward unlawful conduct. On these facts, the central authorities of Switzerland and South Africa have co-operated with one another. The fact that the minor child, L spent 21 nights with Mr VL dispels any alleged fears of harm. It cannot be in the minor child, L's best interests, in the circumstances, to consider the period that he has been in South Africa in favour of the party who retained him unlawfully in the first place. That, would render the application of the 1980 Hague Convention nugatory. And would leave aggrieved parents without the protection that the 1980 Hague Convention affords them.

[81] In *Koch*, the Constitutional Court expressed its disquiet about the length of time that had lapsed in adjudicating the application under the 1980 Hague Convention. Those remarks apply equally herein. Article 11 of the 1980 Hague Convention enjoins contracting states to act expeditiously in proceedings for the return of children. If there is no decision reached within six weeks from the date of commencement of the proceedings, the Central Authority of the requesting state has the right to request a statement of the reasons for the delay. These time limits must be borne in mind by the litigants, including the courts, whenever there is litigation of this nature.

[82] In this case, unlike in *Koch*, no evidence evinces a grave risk of harm if the minor child, L is returned to Switzerland. I find that the high court erred in not ordering the prompt

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[25] *C.A.R v Central Authority of The Republic of South Africa and Another* [2024] ZASCA 103; [2024] 3 All SA 653 (SCA); 2024 (6) SA 351 (SCA).
[26] Op cit fn 7 paras 132 -133.
[27] *LD v Central Authority RSA and Another* [2022] ZASCA 6; [2022] 1 All SA 658 (SCA); 2022 (3) SA 96 (SCA).

return of the minor child, L to Switzerland once it had found that there was no grave risk of harm.

[83] Counsel for Mr VL submitted that Mr VL supports the order proposed by the Central Authority properly modified by this Court to cater for the minor child, L's needs and so too those of Ms MV, in the event she chooses to return to Switzerland with the minor child, L. One of the reasons advanced by the high court for not ordering the minor child, L's return was that Ms MV does not have Swiss citizenship. I have no doubt that if she chooses to accompany the minor child , L, the Swiss courts will make provision for her stay in Switzerland in such a way that, in exercising her parental rights, she will not be prejudiced. I accordingly find that, on the facts of this case, it would be in the minor child, L's best interests to be returned to Switzerland.

[84] In *Carlson v Switzerland*[28], the Court held:

'It is therefore a matter, once the conditions for the application of the Hague Convention have been met, of restoring as soon as possible the *status quo ante* in order to avoid the legal consolidation of *de facto* situations that were brought about wrongfully, and of leaving the issues of custody and parental responsibility to be determined by the courts that have jurisdiction in the place of the child's habitual residence, in accordance with Article 19 of the Hague Convention. . .'

I endorse this judgment.

Costs

[85] Ms MV was afforded an opportunity to agree to the minor child, L's voluntary return to Switzerland. She declined that opportunity. Mr VL, on the other hand, burdened the court record with unnecessary evidence, which displayed all sorts of problems that existed between him and Ms MV, matters that were not relevant to the adjudication of the issues before us, including translated versions of the Italian and Swiss laws which this Court only had to consider on a very narrow issue: what Swiss and Italian laws say on the habitual residence of a child of unmarried parents. Both Ms MV and Mr VL failed to

[28] *Carlson v Switzerland* (Application no. 49492/06: Council of Europe : European Court of Human Rights, First Section at 17, para 74

reflect on this course and failed to take steps to keep out of the record those parts that were not relevant. As a result, this Court had to trawl through a record consisting of 15 volumes plus 4 extra core bundles. It is for that reason that in this Court's discretion, even the successful party would be deprived of their costs.

[86] The Central Authority did not seek any cost order against Ms MV. Mr VL, on the other hand, sought all costs and disbursements that he paid to the *curator ad litem*. There is no basis for such an order because the *curator ad litem* was appointed by the high court and no appeal served before us in respect of those costs. This is a matter where it would be fair and just to order that each party is to bear their own costs. Suffice to say that courts of first instance in applications under the 1980 Hague Convention should be very circumspect on when and why they order the appointment of a *curator ad litem*, conscious that it is the Central Authority and thus the Department of Justice that has to bear these extraordinary costs. This is so for the simple reason that when the court of first instance considers the best interests of a minor child in circumstances such as in this case, it does not hold a full blown best interests inquiry, as the Constitutional Court has reiterated since *Sonderup*, followed up in *Koch* and judgments of this Court.

[87] In the result, the following order is granted:

1 The appeal is upheld, with each party to pay their own costs.

2 The order of the high court is set aside and substituted with the following:

2.1 It is ordered and directed that the minor child (L) be returned forthwith, subject to the terms of this order, to the jurisdiction of the Central Authority of Switzerland.

2.2 In the event of the first respondent, Ms MV, the mother, giving written notification to the Central Authority of the Republic of South Africa, Pretoria (the RSA Central Authority) within ten (10) days of the date of issue of this order that she intends to accompany, the minor child, L on his return to Switzerland, the provisions of paragraph 2.3 and 2.4 shall apply.

2.3 In the event of 2.2, above, ie, Ms MV being willing to accompany the minor child, L, on his return to Switzerland, the following undertakings given by Mr VL, the father, are recorded :

2.3.1 He will not institute or support any proceedings, whether criminal or contempt of court proceedings, if any, for the arrest or punishment of Ms MV, or any member of her family, whether by imprisonment or otherwise, for any matter arising out of the retention of the minor child, L, in South Africa. He will take all steps that he reasonably can for the withdrawal of any criminal charges pending against Ms MV, in this regard.

2.3.2 Upon Ms MV, the mother indicating that she intends to remain in Switzerland, Mr VL shall take steps that he reasonably can to assist Ms MV, the mother, to obtain Swiss citizenship.

2.4 The second respondent, Mr VL, the father, shall, within 20 (twenty) 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 Switzerland in substantially the following terms:

2.4.1 Unless and until ordered by the appropriate court in Switzerland:

2.4.1.1 On the date of departure of Ms MV, the mother, and the minor child, L from South Africa to Switzerland in terms of the order of the Supreme Court of Appeal of South Africa (SCA) under SCA case number 1396/2024, the residence of the minor child, L shall vest with Ms MV, the mother, subject to the reasonable rights of contact of Mr VL, the father.

2.4.1.2 The minor child, L, will remain in the *de facto* custody of Ms MV, the mother, pending the final adjudication and determination of the proceedings pending in Switzerland on the issues of custody, care and access to the said minor child which adjudication and determination, the applicant and Mr VL, the father, or either of them, must request forthwith.

2.4.1.3 Mr VL, the father, is ordered to purchase and pay for economy-class air tickets for Ms MV, the mother, and the minor child, L, to travel by the most direct route from South Africa to Geneva, Switzerland, or any other route from South Africa to Geneva, Switzerland, including Johannesburg and or Cape Town.

2.4.1.4 Mr VL, the father, is ordered to make his current home, situated at Avenue de Riant Parc 16, 1209, Geneva, Switzerland, (the Riant Parc home), or equivalent accommodation available to, Ms MV, the mother and the minor child, L 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 Ms MV, the mother, and the minor child, L from South Africa to Switzerland. In the event that the Riant Parc home has been sold, or leased out, or occupied by his family, Mr VL, the father, shall provide Ms MV, the mother, with equivalent accommodation.

2.4.1.5 Mr VL, the father, is ordered to pay the following costs and expenses associated with the minor child, L and Ms MV's occupation of the home in para 2.4.1.4 above: rates, levies, electricity, refuse, water, heating, and internet.

2.4.1.6 Mr VL, the father, is ordered to pay the mother 1500 (one thousand five hundred) Swiss Francs per month in advance or by the 1st of every month, into an account of Ms MV, the mother's choosing, as cash maintenance for her and the minor child, L. The first *pro rata* payment shall be made to Ms MV, the mother, three days prior to the day upon which she and the minor child, L, arrive in Switzerland and thereafter monthly in advance on the first day of each succeeding month. All payments must be made into her bank account, which she will provide through the Central Authority. The details will be communicated to both the Central Authority, RSA, and Switzerland, as well as Mr VL.

2.4.1.7 Mr VL, the father, is ordered to pay the costs of and associated with the agreed upon crèche that the minor child, L, may attend in Switzerland.

2.4.1.8 Mr VL, the father, is ordered to continue to pay for the medical aid on which he has registered the minor child, L, and to cover any further

reasonable and necessary medical costs not covered by the government of Switzerland or any medical aid.

2.4.1.9 In the event that Ms MV, the mother and the minor child, L, are not registered on Mr VL's medical aid as his dependants, Mr VL must pay all reasonable expenses, including hospitalisation for the minor child, L and Ms MV, the mother, should a need for such medical expenses arise.

2.4.1.10 Mr VL, the father, is ordered to provide Ms MV, the mother, with access to a roadworthy motor vehicle upon her arrival in Geneva, Switzerland. Alternatively, provide Ms MV, the mother, with reasonable transport expenses.

2.4.1.11 Mr VL, the father, and Ms MV, the mother, are ordered to cooperate fully with the Central Authority, RSA and the Central Authority for Switzerland, the relevant court(s) in Switzerland, and any professionals who are approved or appointed by the relevant court(s) in Switzerland to conduct any assessment to determine what future residence and contact arrangements will be in the best interests of the minor child, L.

2.5 In the event of Ms MV, the mother, giving notice to the Central Authority, RSA in terms of paragraph 2.2 above, the order for the return of the minor child, L shall be stayed until an appropriate court in Switzerland has made the order referred to in paragraph 2.4 above and, upon the Central Authority, RSA being satisfied that such an order has been made, it shall notify Ms MV, the mother, accordingly and ensure that the terms of paragraph 2.4.1 are complied with.

2.6 In the event of Ms MV, the mother, failing to notify the Central Authority, RSA in terms of paragraph 2.2 above, of her willingness to accompany the minor child, L on his return to Switzerland, or electing not to return to Switzerland with the minor child, L, the Central Authority, RSA is authorised to make such arrangements as may be necessary to ensure that the minor child, L is safely returned to the custody of the Central Authority for Switzerland and to take such steps as are necessary to

ensure that such arrangements are complied with, and in such event the minor child, L is to return to Switzerland in the care of Mr VL, his father.

2.7 Pending the return of the minor child, L to Switzerland as provided for in this order, Ms MV, the mother, shall not remove the minor child, L, permanently from the province of Gauteng, and, until then, will keep the Central Authority, RSA, informed of her physical address and contact telephone numbers.

2.8 The Central Authority, RSA, is directed to seek the assistance of the Central Authority for Switzerland in order to ensure that the terms of this order are complied with as soon as possible.

2.9 In the event of Ms MV, the mother, notifying the Central Authority, RSA in terms of paragraph 2.2, above, that she is willing to accompany the minor child, L to Switzerland, the Central Authority, RSA shall forthwith give notice thereof to the Registrar of Gauteng Division of the High Court, Pretoria, to the Central Authority for Switzerland, and to Mr VL, the father.

2.10 In the event of the appropriate court in Switzerland failing or refusing to make the order referred to in paragraph 2.4 above, the Central Authority, RSA and/or Mr VL, the father, is given leave to approach this Court for a variation of this order.

2.11 A copy of this order shall forthwith be transmitted by the Central Authority, RSA to the Central Authority for Switzerland.

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T V NORMAN

ACTING JUDGE OF APPEAL

Appearances

For the appellant:	KM Mokotedi SC with SR Mabaso and CV Beukes
Instructed by:	The State Attorney, Pretoria C/o The State Attorney Bloemfontein
For the First respondent:	P Zietsman SC with R van der Merwe Acting Pro bono
Instructed by:	The Free State Society of Advocates
For the Second Respondent:	F Botes SC
Instructed by:	Hartzenberg Incorporated, Pretoria C/o Van Wyk Attorneys Inc. Bloemfontein.