



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

**Reportable**

Case no: 803/2020 and 812/2020

In the matter between:

**LD**

**APPELLANT**

and

**CENTRAL AUTHORITY (REPUBLIC OF SOUTH AFRICA) FIRST RESPONDENT  
PH SECOND RESPONDENT**

**Neutral citation:** *LD v Central Authority (RSA) and Another* (Case no 803/2020 and 812/2020) [2022] ZASCA 6 (18 January 2022)

**Coram:** SALDULKER ADP, MOCUMIE, PLASKET, GORVEN and HUGHES JJA

**Heard:** 10 November 2021

**Delivered:** This judgment was handed down electronically by circulation to the parties' representative via email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time of hand-down is deemed to be 10h00 on 18 January 2022.

**Summary:** Hague Convention on the Civil Aspects of International Child Abduction, 1980 – whether a defence to the return of a child to Luxembourg, in terms of art 13(b), was established – return of the child would have the effect of breaking up her family in South Africa – the evidence established that there was a grave risk that the child would, as a result, be exposed to psychological hardship or otherwise be placed in an intolerable situation – the art 13(b) defence established.

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## ORDER

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**On appeal from:** Gauteng Division of the High Court, Pretoria (Tuchten, Davis and Mokose JJ sitting as court of appeal):

The appeal is dismissed.

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## JUDGMENT

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**Plasket and Gorven JJA (Saldulker ADP and Hughes JA concurring)**

[1] The material facts in this appeal are all either common cause or have not been placed in dispute. The only issue for determination is whether, on those facts, the second respondent, PH, who we shall refer to as ‘the mother’, has successfully raised a defence in terms of article 13(b) of the Hague Convention on the Civil Aspects of International Child Abduction, 1980 (the Hague Convention) to the unlawful abduction by her of her daughter E from Luxembourg to South Africa.

[2] The appellant, LD, is E’s father. We shall refer to him as ‘the father’. He, with the assistance of the first respondent, the Central Authority (Republic of South Africa) (the Central Authority), instituted proceedings in the Gauteng Division of the High Court, Pretoria, in terms of the Hague Convention, for an order directing the mother to return E to Luxembourg. Collis J ordered the return of E to Luxembourg subject to various conditions. The mother appealed against this order to a full court. Tuchten J, with the concurrence of Davis and Mokose JJ, upheld the appeal, set aside Collis J’s order and replaced it with an order dismissing the application. Leave to appeal was then granted to the father by this court.

### **The Hague Convention**

[3] Article 3 of the Hague Convention renders the removal of a child wrongful where:

‘(a) it is in breach of rights of custody attributed to a person . . . 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.’

[4] It is not disputed that the removal of E from Luxembourg was unlawful and triggered the operation of article 12 of the Hague Convention. This article provides:

‘Where a child has been wrongfully removed or retained in terms of art 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.’

[5] It is clear that, absent a valid defence under the Hague Convention, the high court was obliged to order the return of E. The only substantive issue raised by the mother was under article 13(b) of the Convention. Article 13 provides in its material parts:

‘Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requesting State is not bound to order the return of the child if the person . . . [who] opposes its return establishes that –

(a) the person . . . having the care of the person of the child was not actually exercising the custody rights at the time of the 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 hardship or otherwise place the child in an intolerable situation.’

It is the second of these two provisions on which the mother relied.

### **The material facts**

[6] E was born on 25 August 2014. On 5 October 2018, in contravention of two orders by the courts of Luxembourg, the mother abducted E from Luxembourg, which was her habitual residence, and settled in South Africa. E’s half-brother, S, born from the mother’s previous marriage, accompanied them to South Africa with the consent of S’s father.

[7] The mother is a French citizen and the father a citizen of Belgium. They never married. At the time of E's birth, they lived in Belgium, together with S. During or about July 2015, the mother and children moved to Luxembourg and the father followed some seven months later. The parties subsequently separated, although there is disagreement as to when that took place. Nothing turns on this.

[8] The Juvenile and Guardianship Court of Luxembourg (the Juvenile Court) granted an order on 21 December 2016 awarding joint parental authority of E to the mother and the father. It is common cause that this includes rights of custody which, under the Hague Convention, includes rights related to the care of the person of E and, in particular, the right to determine E's place of residence. At all relevant times, the primary residence of E was with the mother, while the father had rights of visitation and accommodation. The rights of the father were increased steadily over time in terms of further orders of the Juvenile Court granted on 14 June 2017 and 7 March 2018.

[9] The order of 7 March 2018 included one calling for a social enquiry and appointing Ms Natalie Barthelemy as E's guardian ad litem. The order provided for weekly contact between E and the father and postponed the proceedings to 20 June 2018. Prior to that date, however, two important events occurred. In May 2018, the mother married a South African man, NC (the husband), in France. Secondly, she applied for leave to relocate E to South Africa with her, as she had been offered employment there. The father filed a conditional counter-application for E's habitual residence to vest with him if the mother wished to relocate without E.

[10] On 20 June 2018, the mother's application for leave to relocate E was joined with the existing proceedings and full argument was presented. Judgment was reserved. On 7 August 2018, the Juvenile Court refused the mother's application for leave to relocate to South Africa and ordered that the father's rights of visitation and accommodation would increase so that by 16 December 2018, they would include having E spend alternative weekends with him from Saturdays at 10h00 until Sundays at 18h00. The matter was postponed to 30 January 2019 for further argument and the court granted provisional enforcement of the judgment notwithstanding any appeal. The father's conditional application was not pronounced upon since that of the mother

was refused. The mother appealed against that refusal but the appeal was dismissed by an order granted on 3 October 2018. She noted a further appeal to the Court of Cassation in Luxembourg. This was heard on 17 October 2019 and dismissed by an order of five judges on 21 November 2019.

[11] In the interim, on or about 4 October 2018, the mother removed E from Luxembourg and moved to South Africa. The father and the Central Authority contended that the mother's actions were premeditated and malicious because she knew that the father was to have contact with E on 5 October 2018 but told him that he may not have contact as E had chickenpox, which was not truthful.

[12] The father lodged a further application with the Juvenile Court, which granted an order on 19 December 2018 to the following effect. First, the competent South African authorities were requested to order a social enquiry with the objective of gathering all information regarding the personal situation of the mother and E (including aspects such as housing, schooling, activities, daily care, medical and psychological follow-up, and others), E's relationship with the mother, the mother's capacity to take care of E, and any other information to enable the Juvenile Court to consider the request for habitual residence and rights of access and accommodation to the other parent. The social enquiry report had to be filed by 15 April 2019. Secondly, pending receipt of the report, the father was granted rights of access and accommodation, from 22 January to 10 February 2019 in South Africa, save that during the first three days he would exercise his right of access from 10h00 to 18h00 from 2 to 16 March 2019 in Luxembourg, with the mother to bring, or have E brought to Luxembourg and to collect her from the father's home with the mother paying the travelling costs. Thirdly, the matter was postponed to 29 April 2019 and the order was made immediately enforceable notwithstanding the lodging of any appeal. In the meantime, in South Africa, the Hague Convention application was launched on 7 January 2019 in the Gauteng Division of the High Court, Johannesburg.

[13] The mother failed to adhere to the provisions of the order of the Juvenile Court. In anticipation of the father's arrival in South Africa, the mother insisted that Professor G M Spies, a social worker, be appointed to assess E with a view to preparing a report on whether or not E's best interests would be served by the father having sleepover

contact. The father agreed to meet with Professor Spies for an hour on 22 January 2019, for the sole purpose of facilitating and assisting with contact between E and him. After this meeting, the father was 'allowed' contact with E for 30 minutes supervised by Prof Spies. The latter wrote a letter dated 4 February 2019 saying that the quality of the short contact session between E and the father on that date 'was so meaningful that it had all the potential to form a strong basis to plan subsequent visits' which could include 'possible sleepover visits of which [E] first must be informed in advance'.

[14] On 23 January 2019, the father met with the mother and E, at a mall in Pretoria after which E and the father spent the day together at his hotel in Johannesburg. She was returned to the mother at 18h30. On 24 January 2019, E and the father spent the day at Sun City. As the father was no longer prepared to accede to the mother's demands that E should not have overnight contact with him, in terms of the order of 19 December 2018, there was no further contact with E between 25 January and 10 February 2019. The mother ignored the order requiring her to take E to Luxembourg for the contact in March 2019.

[15] Affidavits having been exchanged by the parties, the Hague Convention application came before the high court for the first time on 7 February 2019. In this hearing Ms Lia van der Westhuizen was appointed curator ad litem to E. She reported to the court on 13 February 2019. In her report, she stated that if the court regarded the information before it as sufficient, in the absence of a consultation with E, she was of the view that E ought to be returned to Luxembourg subject to mitigating factors such as those adopted in the well-known judgment of the Constitutional Court *Sonderup v Tondelli*.<sup>1</sup> If the court required further information and the participation of E, Ms van der Westhuizen requested an extension of her powers to allow for the appointment of a psychologist, Ms Mariaan de Vos, to conduct an emotional assessment of E. The court granted the further authorisation.

[16] Ms De Vos interviewed E twice, conducted an emotional assessment, and supplied her report to the curator on 26 February 2019. Her findings were, inter alia, that E was 'a happy young girl' who regarded her mother, grandmother, her mother's

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

husband and her half-brother, S, to be her support structure; that she felt emotionally safe and secure; that she avoided discussing her father because she was angry with him; that she had largely been sheltered from any adult conflicts; and that she had adapted to school and made a close friend. She concluded that E did not have the capacity to fully comprehend the implication of her objecting to a return to Luxembourg and that if E were to be returned to Luxembourg, this 'could potentially lead to an intolerable situation'.

[17] The potential intolerable situation referred to by Ms De Vos could be caused by having E uprooted again after she had settled at school and socially, together with the potential threat that her mother could be arrested and criminally prosecuted upon returning to Luxembourg. As E's mother was her primary attachment figure, Ms De Vos, said, this state of affairs could cause psychological harm to E, as well as being a possible intolerable situation on its own. Ms De Vos said too that E was very close to her half-brother, S, and the possibility of her being returned with him remaining in South Africa could also possibly be an intolerable situation. In the light of the fact that the father only sought visitation rights to E, Ms De Vos questioned whether returning E to her habitual residence in order to see her father every second weekend was enough reason to uproot E again.

[18] The application was argued before Collis J on 1 March 2019. Her judgment was delivered on 15 March 2019. As stated above, she ordered the return of E to Luxembourg, subject to certain conditions.

[19] Further proceedings took place in the Juvenile Court in Luxembourg on 29 April 2019 with both parties legally represented. E's guardian also presented argument. On 13 May 2019, the Juvenile Court granted an order that: E's habitual residence vested with the father; the mother was fined an amount of €100 per day until she returns E to the father's care, subject to a maximum of €5000; unless otherwise agreed between the father and the mother, the mother was granted rights of visitation during the entirety of all school holidays except during the father's annual leave, during each trip the mother may make to Luxembourg and by video communication on three days per week.

[20] Pursuant to the order of Collis J, the Central Authority consulted with its counterpart in Luxembourg which advised that there was no national or international arrest warrant issued for the mother's arrest and, as such, she would not face arrest upon her entering Luxembourg. In addition, although no investigation was being conducted into the criminal aspects of child abduction, if the mother returned to Luxembourg, whether voluntarily or by court order, a decision would have to be taken in this regard. Finally, the Luxembourg Authority advised that the mother would not be deported to France as she claimed.

[21] In the meantime, the mother pursued her appeal remedies in Luxembourg. She was uniformly unsuccessful in this regard. She also applied unsuccessfully for leave to appeal against Collis J's order. In August 2019, she was, however, granted leave to appeal to the full court. She enjoyed success in that court, hence this appeal with special leave from this court.

### **The issue**

[22] As stated above, the sole issue for decision in this appeal is whether the mother has established a defence in terms of article 13(b) of the Hague Convention to the effect that 'there is a grave risk that [E's] return would expose [her] to physical or psychological harm or otherwise place [her] in an intolerable situation'. Prior to addressing that issue on a factual basis, it is first necessary to sketch the legal framework within which that exercise must be undertaken.

### ***The law***

[23] The preamble to the Hague Convention states that it was promulgated in a desire 'to protect children internationally from the harmful effects of the wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access.' South Africa and Luxembourg are both signatories to the Hague Convention. They are therefore known as Contracting States.



[24] It is clear that the onus is on the person resisting return to establish the defence relied upon and that it is a full onus.<sup>2</sup> In *Pennello v Pennello (Chief Family Advocate as Amicus Curiae)*<sup>3</sup> Van Heerden AJA described it as follows:

‘There is nothing in the wording of art 13 of the Convention or in the analysis of this wording by either the Constitutional Court in *Sonderup* or this Court in *Smith* to suggest that the person resisting an order for the return of a child under the Convention by relying on the art 13(b) defence does not bear the usual civil *onus* of proof, as it is understood in our law, in that regard, viz that he or she is required to prove the various elements of the particular art 13(b) defence on a preponderance of probabilities.’

[25] She proceeded to explain the underlying reasoning for this position:<sup>4</sup>

‘The Convention is predicated on the assumption that the abduction of a child will generally be prejudicial to his or her welfare and that, in the vast majority of cases, it will be in the best interests of the child to return him or her to the state of habitual residence. The underlying premise is thus that the authorities best placed to resolve the merits of a custody dispute are the courts of the state of the child’s habitual residence and not the courts of the state to which the child has been removed or in which the child is being retained.’

[26] In *Sonderup*,<sup>5</sup> Goldstone J made the point that it ‘would be quite contrary to the intention and terms of the Convention were a court hearing an application under the Convention to allow the proceedings to be converted into a custody application’. Article 19 of the Hague Convention makes that clear in express terms. It provides that a ‘decision under this Convention concerning the return of a child shall not be taken to be a determination on the merits of any custody issue’. He then proceeded to consider the question of the harm that an abducted child may suffer as a result of an order that they be returned to the jurisdiction of their habitual residence. He held:<sup>6</sup>

‘A matrimonial dispute almost always has an adverse effect on children of the marriage. Where a dispute includes a contest over custody, that harm is likely to be aggravated. The law seeks to provide a means of resolving such disputes through decisions premised on the best interests of the child. Parents have a responsibility to their children to allow the law to take its course and not to attempt to resolve the dispute by resorting to self-help. Any attempt to do

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<sup>2</sup> *Smith v Smith* [2001] ZASCA 19; 2001 (3) SA 845 (SCA) para 11.

<sup>3</sup> *Pennello v Pennello (Chief Family Advocate as Amicus Curiae)* [2003] ZASCA 147; 2004 (3) SA 117 (SCA) para 38.

<sup>4</sup> Paragraph 25.

<sup>5</sup> Footnote 1 para 30.

<sup>6</sup> Paragraphs 43-44.

that inevitably increases the tension between the parents and that ordinarily adds to the suffering of the children. The Convention recognises this. It proceeds on the basis that the best interests of a child who has been removed from the jurisdiction of a Court in the circumstances contemplated by the Convention are ordinarily served by requiring the child to be returned to that jurisdiction so that the law can take its course. It makes provision, however, in art 13 for exceptional cases where this will not be the case.

An art 13 enquiry is directed to the risk that the child may be harmed by a Court-ordered return. The risk must be a grave one. It must expose the child to “physical or psychological harm or otherwise place the child in an intolerable situation”. The words “otherwise place the child in an intolerable situation” indicate that the harm that is contemplated by the section is harm of a serious nature. I do not consider it appropriate in the present case to attempt any further definition of the harm, nor to consider whether in the light of the provisions of our Constitution, our Courts should follow the stringent tests set by Courts in other countries.’

[27] Also in the context of the question of harm, in *Pennello*,<sup>7</sup> this court cited with apparent approval a dictum of Ward LJ in *Re C (Abduction: Grave Risk of Psychological Harm)*:<sup>8</sup>

‘There is, therefore, an established line of authority that the court should require clear and compelling evidence of the grave risk of harm or other intolerability which must be measured as substantial, not trivial, and of a severity which is much more than is inherent in the inevitable disruption, uncertainty and anxiety which follows an unwelcome return to the jurisdiction of the court of habitual residence.’

[28] It also commented on the approach adopted by the Constitutional Court to the question of harm in *Sonderup*, stating:<sup>9</sup>

‘Despite the litany of alleged incidents of physical and mental abuse of the mother by the ‘left-behind’ father on which counsel for the former relied in argument before the Constitutional Court in the *Sonderup* case, as well as the report of a South African clinical psychologist to the effect (*inter alia*) that the continuation of the *status quo* in Canada would have a “severely compromising effect on the healthy psychological development” of the child in question, the Court held that the harm to which the child would allegedly be subjected by a court-ordered return was not harm of the serious nature contemplated by art 13, but rather –

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<sup>7</sup> Footnote 3 para 34.

<sup>8</sup> *Re C (Abduction: Grave Risk of Psychological Harm)* [1999] 1 FLR 1145 (CA) at 1154A-B.

<sup>9</sup> Footnote 3 para 30.

“... in the main harm which is the natural consequence of her removal from the jurisdiction of the Courts of British Columbia, a Court-ordered return, and a contested custody dispute in which the temperature has been raised by the mother’s unlawful action. That is harm which all children who are subject to abduction and Court-ordered return are likely to suffer, and which the Convention contemplates and takes into account in the remedy that it provides”.’

[29] From the cases cited above, the position, when an art 13(b) defence is raised to an application for the return of a child to their habitual residence, may be summarised thus: (a) the party who raises the defence bears the onus to prove it because the Hague Convention’s default position is the return of abducted children to their habitual residences; (b) a certain degree of harm is inherent in the court ordered return of a child to their habitual residence, but that is not harm or intolerability envisaged by art 13(b); (c) that harm or intolerability extends beyond the inherent harm referred to above and is required to be both substantial and severe.

***The application of these principles to the facts***

[30] It is necessary at the outset to say something of the conduct of the mother. Her behaviour has been deplorable. She engaged with the legal process in Luxembourg to the extent that it suited her. When it did not suit her any longer, she simply took the law into her own hands and abducted E. In considering the facts relevant to the art 13(b) defence, the focus is on the best interests of E. If giving effect to the paramountcy of her best interests has the effect of ‘rewarding’ the mother for her bad behaviour, that is an unfortunate but unavoidable result.

[31] When E was abducted in early October 2018, she was four years and two months old. Some five months earlier, the mother married her new husband. The mother, E and her half-brother, S, have, since coming to South Africa, lived with the husband as a family. They have done so now for more than three years.

[32] The mother has always been E’s primary caregiver. As a result, not surprisingly, there is a strong bond between them. There is also a strong bond between E and S; between E and the husband, who she referred to when interviewed by Ms De Vos as her father; and, it would appear, between E and the husband’s daughter, R.

[33] Given E's close bonds with the mother, as primary caregiver, it would, according to Professor Spies, cause E 'extreme trauma' if E was returned to Luxembourg without her mother. Professor Spies was also of the view that if E had to return to Luxembourg, the family unit would disintegrate, with traumatising consequences for E.

[34] These views were confirmed by Ms De Vos. From her report, it was clear that E regarded her mother, the husband and S to form a family unit within which she felt safe and secure. Ms De Vos confirmed that E was 'securely attached to her mother', that she saw the husband as 'an integral part of her home structure' and that it was evident that they, along with S were the most important figures in E's life. She commented specifically on the 'close bond' between E and S.

[35] Ms De Vos was of the view that in the light of these circumstances, if E was to be returned to Luxembourg, this '**could potentially lead to an intolerable situation**'; and that would have been caused by '**having [E] uprooted again after she has now been settled at school and socially**'. In respect of E's relationship with S, Ms De Vos was of the opinion that 'the possibility of her being returned with him staying behind in South Africa could also possibly become an intolerable situation'.

[36] The views of both Professor Spies and Ms De Vos were endorsed by Ms Van der Westhuizen, the curator ad litem for E. In her supplementary report, she stated: 'In the event that [E's] return to Luxembourg might result at all in a separation from her mother or her brother [S], then [E] should not be ordered to return to Luxembourg. As detailed in the report of Ms De Vos, this might result in possible trauma to be experienced by [E] considering her attachment to her biological mother and her brother.'

[37] It appears to us that there is merit in the views expressed by Professor Spies, Ms De Vos and Ms Van der Westhuizen. The consequences were, in our view, correctly described by Tuchten J in the court below when he said of the effect of the order of the court of first instance:

'The order contemplates that a functioning family unit must be disrupted and its members dispersed. Relationships which [E] values must be severed or, at the very least, placed under grave strain. [E] must be deprived of the company and comfort of her brother [S], with whom

she shares a bedroom. This would be in conflict with [E's] right under s 28(1)(b) of the Constitution, which I take to include the nurturing and support a child receives from its immediate family group.'

[38] Tuchten J continued to point out that the order of the court below presented the mother with 'agonising choices': she had to oversee the 'dismemberment of her family' because its effect was that she either had to leave her husband and her son, or her daughter. There was, he held, a grave risk that 'the emotional stress under which the mother will inevitably be placed by the terms of the order of the court below will have a harsh and negative impact on [E's] sense of security and well-being'.

[39] The impact on E of her being returned to Luxembourg goes far beyond the normal hardship and dislocation that is associated with cases of this sort. In all likelihood, it cannot but have a profound, adverse effect on E for the reasons cited above. In our view, the mother has established that there is a grave risk that E's return to Luxembourg would expose her to psychological harm or otherwise place her in an intolerable situation.

### **Conclusion**

[40] In the result, the appeal cannot succeed. For the same reason given by Tuchten J in the court below, we make no costs order: the mother's unlawful conduct was the cause of the litigation, which the father was entitled to take part in. We accordingly make the following order:

The appeal is dismissed.

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C PLASKET  
JUDGE OF APPEAL

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T R GORVEN  
JUDGE OF APPEAL

### **Mocumie JA (dissenting)**

[41] I have had the benefit of reading the judgment of my colleagues Plasket and Gorven JJA with which other colleagues agree. They found in favour of the first respondent in respect of the main issue on appeal ie, whether the first respondent had discharged the onus resting on her under article 13(b) of The Hague Convention on the Civil Aspects of International Child Abduction, 1980 (the Convention). I hold a different view.

[42] There are essentially two issues raised by this appeal: First, the interpretation of the provisions of article 13(b) of the Convention as incorporated into South Africa's national legislation, the Children's Act of 2008 (the Children's Act). Second, whether the first respondent discharged the onus resting on her in terms of article 13(b).

[43] I endorse the findings of the court of first instance that the provisions of the Convention's main purpose is for the prompt return of the 'abducted' child to their habitual place of residence without any enquiry into issues of custody (parental responsibilities), access (contact) including guardianship, which are better left in the domain of the domestic courts of the State of habitual residence of the abducted child. Also, that article 13(b) is triggered by the unlawful removal of the minor child out of their State of habitual residence without the consent of the other parent who has parental authority over the abducted child. I also endorse the finding of the court of first instance that the first respondent unlawfully relocated to South Africa despite her application for relocation being refused by the Court of Cassation, and on appeal. By so doing, she resorted to self-help against two court orders ordering her not to remove E from the jurisdiction of Luxembourg, Europe. And lastly that the finding that the first respondent 'has failed [on a balance of probability<sup>10</sup>] to allege facts sufficient to either point to potential harm or grave risk referred to in article 13'. For the reasons that follow I would uphold the appeal.

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<sup>10</sup> It must be kept in mind that in Hague Convention proceedings to discharge the onus resting on her, the first respondent must discharge the onus on a balance of probability.

[44] South Africa is a signatory to the Convention and thus a Contracting State as defined in the Convention.<sup>11</sup> As such it has an international and legal duty to ensure that the applications under the Convention are dealt with expeditiously,<sup>12</sup> a task also entrusted to South African courts.<sup>13</sup>

[45] The first respondent raised the defence of article 13(b). The article provides:

‘(1) Notwithstanding the provisions of the preceding Article 12, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that –

...

(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*.’ (Emphasis added.)

[46] In *Pennello v Pennello*,<sup>14</sup> this Court left open the level of ‘grave risk’ which an applicant who raises the exception under article 13(b) must show or what qualifies as ‘grave risk’ or ‘intolerable situation’. Years later, in *KG v CB*<sup>15</sup> it stated:

‘In both *Sonderup v Tondelli*<sup>16</sup> and *Pennello v Pennello*<sup>17</sup> the question whether South African courts should follow the stringent test set by courts in other countries was left open. I am of the view that the correct approach is that adopted by the United Kingdom Supreme Court in *Re E (Children) (Wrongful Removal: Exceptions to Return)*. In that case the court held<sup>18</sup> that: “[T]here is no need for the article [art 13(b)] to be ‘narrowly construed’. By its very terms, it is of restricted application. The words of art 13 are quite plain and need no further elaboration or gloss. First, it is clear that the burden of proof lies with the person, institution or other body which opposes the child’s return. It is for them to produce evidence to substantiate one of the exceptions. There is nothing to indicate that the standard of proof is other than the ordinary balance of probabilities. Second, the risk to the child must be grave. It is not enough, as it is in other contexts such as asylum, that the risk must be real. It must have reached such a standard of seriousness as to be classified as grave. Although grave characterises the risk

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<sup>11</sup> Article 2(1)(f) of the Vienna Convention on the Law of Treaties, 23 May 1969, defines a Contracting State as follows:

“‘contracting State” means a State which has consented to be bound by the treaty, whether or not the treaty has entered into force.’

<sup>12</sup> Article 11.

<sup>13</sup> Articles 2 and 11.

<sup>14</sup> *Pennello v Pennello (Chief Family Advocate as Amicus Curiae)* 2004 (3) SA 117 (SCA).

<sup>15</sup> *KG v CB and Others* [2012] ZASCA 17; 2012 (4) SA 136 (SCA) para 50.

<sup>16</sup> *Sonderup v Tondelli and Another* 2001 (1) SA 1171 (CC) para 44.

<sup>17</sup> *Ibid* para 35.

<sup>18</sup> *Ibid* paras 31-34.

rather than the harm, there is in ordinary language a link between the two. Thus a relatively low risk of death or really serious injury might properly be qualified as grave while a higher level of risk might be required for other less serious forms of harm.

Third, the words physical or psychological harm are not qualified. However, they do gain colour from the alternative *or otherwise* placed in an intolerable situation. As was said in *Re D* [2007] 1 All ER 783 at [52], 'Intolerable is a strong word, but when applied to a child must mean "a situation which this particular child in these particular circumstances should not be expected to tolerate."' Those words were carefully considered and can be applied just as sensibly to physical or psychological harm as to any other situation. Every child had to put up with a certain amount of rough and tumble, discomfort and distress. It is part of growing up. But there are some things which it is not reasonable to expect a child to tolerate . . .

[10] I agree that by its very terms article 13(b) is of restricted application. What is abundantly clear is that the 'grave risk' is with reference to the child; not the abducting or the left behind parent. That without being restrictive or prescriptive on what grave risk should mean and slavishly following how other jurisdiction interpret 'grave risk', each case must obviously be determined on its own peculiar facts'.

[47] Section 39 of the Constitution of South Africa empowers courts in South Africa to interpret the law in line with international and foreign law where there is no definite answer or where solutions can be imported, which are not readily available in their jurisdiction, from other jurisdictions, to dispense with Hague Convention applications in a justiciable manner. It is apposite therefore to look at a few relevant cases of foreign jurisdictions.

[48] In *Re C (a minor) (abduction)* [1989] FCR; *sub nom C v C*<sup>19</sup> a mother refused to accompany a young child back to Australia and asserted that the child would suffer harm if he returned without her. Butler-Sloss LJ, stated as follows in this respect:

'The grave risk of harm arises not from the return of the child, but the refusal of the mother to accompany him . . . Is a parent to create a psychological situation and then rely upon it? If the grave risk of psychological harm to the child is to be inflicted by the conduct of the parent who abducted him, then it would be relied upon by every mother of a young child who removed him out of his jurisdiction and refused to return. It would drive a coach and four through the

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<sup>19</sup> *Re C (a minor) (abduction)* [1989] FCR 197 at 205, [1989] 2 All ER 465 at 471; reported *sub nom C v C*.



Convention at least in respect of applications relating to young children. I, for my part, cannot believe that this is in the interests of international relations.'

[49] In *TB v JB*<sup>20</sup> (*abduction: grave risk of harm*) (2001) the court held:

'Hence the courts in this country have always adopted a strict view of art 13(b). The risk must be grave and the harm must be serious. As Lord Donaldson of Lymington MR said in *Re C* (a minor) (*abduction*) [1989] FCR 197 at 208, [1989] 2 All ER 465 at 473: "the words 'or otherwise place the child in an intolerable situation' . . . cast considerable light on the severe degree of psychological harm which the Convention has in mind." The courts are also anxious that the wrongdoer should not benefit from the wrong: that is, that the person removing the children should not be able to rely on the consequences of that removal to create a risk of harm or an intolerable situation on return. This is summed up, after a review of the authorities, in the words of Ward LJ in *Re C* (*abduction*) (*grave risk of psychological harm*) [1999] 2 FCR 507 at 517, quoted by the judge in the present case:

"There is, therefore, an established line of authority that the court should require clear and compelling evidence of the grave risk of harm or other intolerability, which must be measured as substantial, not trivial, and of a severity which is much more than is inherent in the inevitable disruption, uncertainty and anxiety which follows an unwelcome return to the jurisdiction of the court of habitual residence."

Thorpe LJ has taken matters a step further in the now oft-cited passage from another *Re C(B)* (*child abduction: risk of harm*) [1999] 3 FCR 510 at 520, also quoted by the judge:

"In testing the validity of an art 13(b) defence trial judges should usefully ask themselves what were the intolerable features of the child's family life immediately prior to the wrongful abduction? If the answer be scant or non-existent then the circumstances in which an art 13(b) defence would be upheld are difficult to hypothesise. In my opinion art 13(b) is given its proper construction if ordinarily confined to meet the case where the mother's motivation for flight is to remove the child from a family situation that is damaging the child's development."

. . . on the basis that the abducting parent will take all reasonable steps to protect herself and her children and that she cannot rely on her unwillingness to do so as a factor relevant to risk.'

[50] In *Sabogal v Velarde*<sup>21</sup> the United States District Court of Maryland concluded that it would order the return of the children to the left behind father if he were to arrange for the criminal charges or investigation against the mother to be dismissed or closed, and to have the temporary custody order in his favour vacated (in order for

<sup>20</sup> *T.B. v. J.B. (Abduction: Grave Risk of Harm)* [2001] 2 FLR 515 paras 40, 41 and 97.

<sup>21</sup> *Sabogal v. Velarde*, 106 F. Supp. 3d 689 (2015) at 711.

the underlying temporary custody order in favour of the mother to effectively be reinstated). Under such conditions, the court would be prepared to order the children's return to Peru. If the father could not meet these 'pre-conditions' (ie undertakings), however, the children's return would be refused in accordance with article 13(b) of the Convention. However, as the Constitutional Court held in *Pennello*,<sup>22</sup> '[t]he absence of a provision such as s 28(2) of the Constitution in other jurisdictions might well require special care to be taken in applying *dicta* of foreign courts where the provisions of the Convention might have been applied in a narrow and mechanical fashion'. I consider the facts of this matter hereafter conscious of this warning by the Constitutional Court.

[51] In her pleaded case, the first respondent conceded that she left Luxembourg against two orders and that she did not have the consent of the second respondent to emigrate permanently to South Africa to get married and start a new life with E in South Africa; and that she chose to marry in South Africa far from everyone else including her own mother in France. She undertook to return to Luxembourg without any fear of facing prosecution. She accepted the offer that the second respondent had made, undertaking to pay for all her expenses including accommodation for as long as the dispute remained unresolved in Luxembourg. A tender that was repeated before this Court. To this the first respondent had even made a counter proposal for the second respondent to increase her living expenses during her stay in Luxembourg. The full court noted that the second respondent's conduct during the dispute was impeccable.

[52] What assertions did the first respondent make in order to prove on a balance of probabilities that 'grave risk' to E would result? In her answering affidavit, supplemented later in a supplementary affidavit, the first respondent alleged that she feared being arrested upon her return to Luxembourg, hence she could not return thereto. She would further be at risk of being deported to France once her visa expired before the custody dispute could be resolved. E's separation from the first respondent as her primary care giver and from her sibling brother would expose her to psychological harm. A proper bond between E and the second respondent was lacking since they have never lived together and have been apart since she relocated to South Africa. The second respondent's habitual residence was Belgium and not

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<sup>22</sup> Footnotes 18.

Luxembourg. E's return to Luxembourg would also separate her from her step-father and step-sister. Lastly, E had fully integrated into her new environment and settled in South Africa.

[53] In my view the first respondent's assertions are general, and they relate to her risk and not the risk of the minor child. In the light thereof these assertions should not be considered as 'grave risk'. What puts this case out of the 'grave risk' category of other cases where the defence was upheld is the following. The first respondent removed E from Luxembourg when she was younger than she is currently (four years and two months old). The appellant initiated a voluntary return engagement with the first respondent hardly four months after E's unlawful removal from Luxembourg as reported by the second respondent to the CA for Luxembourg. During these interactions, the first respondent confirmed during the interview with the appellant on 31 October 2018, that she would return to Luxembourg with both E and S which she confirmed in her answering affidavit of on 22 January 2019. She only made a volte face in February 2019 after the court appointed *Re E (Children) (Wrongful Removal: Exceptions to Return) curator ad litem*, where she asserted that a return order should not separate E from her siblings namely, S and her step-sister born of the husband and someone else in his previous relationship. The first respondent in a veiled threat then stated that she would leave S behind in South Africa. This meant a separation of the siblings.

[54] It is indisputable that during all the court applications in Luxembourg the first respondent did not raise the fact that E and the second respondent were not staying together. During the intervention by the appellant less than three months after she had arrived in South Africa and a case had been opened against her, the first respondent made no such allegation nor did she raise any concern. Instead, she admitted that she removed E unlawfully from her the State of habitual residence. Thereafter all that was discussed was when could E be returned to the State of habitual residence. As part of the intervention by the appellant in co-operation with her counterpart, the CA for Luxembourg, upon the directive of the court of first instance, E and the second respondent met several times on their own and also as the court of instance directed under the supervision of a social worker to observe how the two interacted. They fared

well under the circumstances as reported by Prof Spies although the second respondent did not feel comfortable with her.

[55] Furthermore, the second respondent initiated proceeding under the Convention for E's prompt return hardly three months upon the discovery of the abduction through E's school in Luxembourg. E, was at that stage, not yet integrated into her new environment at all. The first respondent married her husband some five months before the abduction, it seems that the first respondent married a South African to secure her roots in South Africa and then chose to rely on this as a factor that will cause psychological harm to E who was uprooted from her own family, the second respondent, her school and her friends. It is ironic that the first respondent should call E's return to her State of habitual residence as uprooting her from her established environment which would cause psychological harm. A thorough and careful reading of her affidavits does not deal with nor point out any psychological difficulties that E suffered as a result of being uprooted from a familiar environment when the first respondent abducted her. Thereafter she cut off any communication between E and the second respondent including the video calls that she had initially agreed to. The first respondent makes no mention of the fact that E had a good relationship not only with the second respondent but her paternal aunt, the second respondent's sister too. The two are E's only blood relatives. That relationship is certainly stronger than that of step-parents or step-siblings. More significantly E is the only child of the second respondent. This definitely had a psychological impact on E.

[56] The wording of article 13(b) makes it clear that the issue is whether there is a grave risk that the return would expose the *child* to physical or psychological harm or otherwise place the *child* in an intolerable situation. The word '*child*' is mentioned twice in the aforementioned article, which clearly indicates that it does not refer to a parent. More glaringly, the abducting parent is not mentioned at all. However, I am alive to the fact that there may be instances where there is sufficient evidence that because of a risk of harm directed at a removing parent there may be a grave risk to the child. The question that arises is, what evidence has the first respondent produced which falls within this category? The first respondent did not and could not make any allegations of direct grave risk on E as she and the second respondent were not staying together at any point according to their living arrangement before and after they moved to

Luxembourg which she also stated. Her case is and has always been that because of her unlawful removal of E from the State of habitual residence, a warrant of arrest was issued against her by the prosecuting authority in Luxembourg. Thus, if she were arrested, E would be psychologically harmed by being separated from her. The court of first instance, although not sympathetic to the first respondent and regarding her as the author of her own misfortune, nonetheless in an endeavour to ameliorate any harsh consequences that might ensue, directed the appellant to contact her counterpart, the Central Authority (CA) for Luxembourg, which it did. Apart from the confirmation that there was a warrant of arrest pending, the CA for Luxembourg, in writing, committed her office to ensure that the prosecuting authority would not pursue the first respondent upon her return. The second respondent gave an undertaking not to press charges (so to speak) which would lead to the arrest of the first respondent.

[57] In my view, although it is correct that the undertaking by the second respondent does not remove the risk that the first respondent could be arrested, many member States promote co-operation among them. If the respectful, cordial and helpful relationship between the two CAs can be used as a barometer, which it should, it is highly unlikely that Luxembourg would jeopardise its relations with South Africa and other signatories to the Convention over one dispute between parents of an abducted child. The likelihood is greater that the two States will continue to assist each other without prejudicing E in any way because both know that if the abducting parent is arrested the likelihood of that affecting E would have adverse psychological effects. As she grows up and learns about this; she would blame the second respondent for the first respondent's incarceration.

[58] Furthermore, it must be accepted that investigations have commenced in respect of the criminal aspects of child abduction. However, that in itself cannot be used as defence as it occurs by operation of the law. It must be considered with other factors including the conduct of the first respondent who acted in blatant disregard of the two court orders; leaving E's State of habitual residence whilst proceedings were pending and the alleged acts of grave risk and or intolerable situation which E will be placed in if returned. It cannot be taken as a factor which justifies the first respondent's refusal to return E to Luxembourg. Without the second respondent's co-operation and in the light of his undertakings made a number of times, the likelihood of the criminal

investigation proceedings translating to the first respondent's arrest in Luxembourg are non-existent.

[59] Having said that, this brings into focus the voice of the child in these proceedings. The Convention and the Children's Act provide for the child's voice to be heard. They provide in broad that every child who may be affected by any decision must be legally represented by a professional, distinct from the parents, who in the warring fight over the child will may be biased and even influence the child against each other. The appointment of a curator ad litem to represent the child to ensure the child's voice is heard is an important part of the Convention. As was stated in *Central Authority of the Republic of South Africa v B*:<sup>23</sup>

'The provisions of the Hague Convention are, in terms of s 275 of the Children's Act, subject to those of the Children's Act. *A legal representative must, in terms of s 279 of the Children's Act, represent the child involved in all applications in terms of the Hague Convention. I have in the as yet unreported judgment of B and Others v G 2012 (2) SA 329 (GSJ) accepted the correctness of the submission by CJ Davel & AM Skelton Commentary on the Children's Act at 17 – 21 that —*

*"in cases where very young children are involved, the role of the legal representative would be more akin to that of a curator ad litem, while with older children, the legal representative would take instructions from the child, act in accordance with those instructions and represent the views of the child."* (In para [12]).' (Emphasis added.)

In line with this prerequisite, the court of first instance appointed a *curator ad litem* who interviewed E and all who lived with her including her step-father and filed a report. The same *curator ad litem* recommended the appointment of an education psychologist who also submitted a report. Both reports were taken into account by the court of instance.

[60] It is evident in the report by the *curator ad litem* that E could not voice an opinion on her own due to her age at that stage. Nonetheless, no adverse remarks were made except (beyond the scope of her mandate by the court of first instance) that the separation of the siblings. ie separating E from S and the first respondent's husband and his daughter to whom she had grown close to in less than a year, would cause

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<sup>23</sup> *Central Authority of the Republic of South Africa and Another v B* 2012 (2) SA 296 (GSJ); [2012] 3 All SA 95 (GSJ) para 2.

her emotional trauma. In the context of these facts and as correctly noted by the court of first instance, the first respondent caused all this to the children and in particular E. Whatever estrangement that has been caused between the second respondent and E is of the first respondent's deliberate wrongdoing as she acted in contempt of the orders of the courts of Luxembourg, irrespective that she was legally represented. She terminated the mandate of her legal representatives and has not provided any reasons for doing so. The courts should draw an inference from such conduct that she did not want to abide by the terms of the court order. It must be accepted that she deliberately disobeyed the court processes and now expects protection from the courts. This is a classic case of abduction which cannot be countenanced by any Contracting State.

[61] The allegations by the first respondent, which became even stronger during the argument before this Court as a last resort when all others clearly failed, that E will be separated from her new family, her step-father, Mr Carelsen, and his daughter, R, are ironic and opportunistic to say the least. It is even more difficult to explain how E's return to her habitual residence with the first respondent and the second respondent as her biological parents (all three European Union citizens) can equate to 'grave risk of harm' to E. This is so in the light of the first respondent's initial willingness to go back with E which only changed much later after the possibility was raised by the educational psychologist in her supplementary affidavit.

[62] From the discussion in the preceding paragraphs, it is clear that the approach the full court adopted goes against the precedents of this Court<sup>24</sup> and the Constitutional Court.<sup>25</sup> This approach is also erroneous as by so doing the full court stepped into the arena of the merits of the rights of custody of the parents, comparing the favourability of the different jurisdictions of Luxembourg and South Africa. The full court also erred in dealing with 'what harms might flow' from an order refusing the return. This question was irrelevant for the test to be applied. The finding that 'despite the language of the Convention, the question is whether the return of E to Luxembourg is in E's best interests. . .', should not have been posed by the full court at all. As the Constitutional Court stated in *Sonderup*,<sup>26</sup> ' . . . [t]he paramountcy of the best interests

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<sup>24</sup> Footnote 18.

<sup>25</sup> Footnote 20.

<sup>26</sup> *Ibid* para 32.

of the child must inform our understanding of the exemptions without undermining the integrity of the Convention. . .’.

[63] It is pivotal to reiterate what the Constitutional Court stated in *Sonderup*<sup>27</sup>, to underscore the import of the Convention where a court is faced with a balancing exercise between the best interests of the child and the exemption in [a]rticle 13. It states:

‘There is also a close relationship between the purpose of the Convention and the means sought to achieve that purpose. The Convention is carefully tailored, and the extent of the assumed limitation is substantially mitigated by the exemptions provided by arts 13 and 20. They cater for those cases where the specific circumstances might dictate that a child should not be returned to the State of the child's habitual residence. They are intended to provide exceptions, in extreme circumstances, to protect the welfare of children. Any person or body with an interest may oppose the return of the child on the specified grounds.

[33] The nature and extent of the limitation are also mitigated by taking into account s 28(2) of our Constitution when applying art 13. The paramountcy of the best interests of the child must inform our understanding of the exemptions without undermining the integrity of the Convention. The absence of a provision such as s 28(2) of the Constitution in other jurisdictions might well require special care to be taken in applying *dicta* of foreign courts where the provisions of the Convention might have been applied in a narrow and mechanical fashion.’

Furthermore, at para 35, that:

‘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 art 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.’<sup>28</sup>

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<sup>27</sup> Ibid para 33.

<sup>28</sup> Ibid para 35.



[64] In my view, there is no likelihood of undermining the best interests of E by ordering her return to Luxembourg. This is not a case where extreme circumstances exist in which E's welfare is truly endangered. This Court has recently in *L v Ad Hoc Central Authority for the Republic of South Africa and Others*<sup>29</sup> ordered the return of abducted children on the simple basis that the Convention applied and the prompt return was the correct approach the high court adopted.

[65] In conclusion, the court of first instance was correct to order that E be returned promptly to Luxembourg. All that the full court ought to have done, was to correct the protective measures which the court of first instance did not put in place to ameliorate any harm the first respondent might suffer which could translate into grave risk to E. Added to the protective measurements, particularly in respect of the possibility of an arrest upon her return to Luxembourg (not that there should be any doubt in the undertakings made by the second respondent and the commitment of the CA for Luxembourg in ensuring that the criminal processes should not cause more delay in the finalisation of the matter between the first and second respondent); precedents are replete of mirror orders which the second respondent can pursue in Luxembourg on the basis of the order granted in this Court, before E can finally be returned to Luxembourg. That way, the first respondent's only fear will be addressed. This was done in *Pennello v Pennello*, *KC v CB* and so too in *Sonderup*. This in my view would be in compliance with the Convention, taking into account E's interim best interests until the courts of the State of habitual residence have finally decided the custody issues, having given the first respondent the right to present her side of the story through that State's system of appeals and reviews without any interference by the courts of South Africa.

[66] For the conclusion I have reached, it is unnecessary to consider a peripheral issue which the appellant raised; the applicability of s 275 of the Children's Act in the context of the application of the best interests of the child under s 28 of the Constitution which both counsel addressed in the Heads of Argument and before this Court.

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<sup>29</sup> *L v Ad Hoc Central Authority for the Republic of South Africa and Others* [2021] ZASCA 107.

[67] For the reasons set out in the preceding paragraphs, I would have granted the following order:

A The appeal is upheld, with no order as to costs.

B The order of the full court is set aside and substituted with the following order:

‘1 It is ordered and directed that the minor child, E, is to be returned forthwith, but subject to the terms of this order, to the jurisdiction of the Central Authority for Luxembourg.

2 In the event of the first respondent (the mother) notifying the Office of the Central Authority, Pretoria within one week of the date of issue of this order that she intends to accompany E on her return to Luxembourg, the provisions of para 3 shall apply.

3 The second appellant (the father) shall within one month 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 Luxembourg in the following terms:

3.1 Any warrant for the arrest of the first respondent (the mother) will be withdrawn and will not be reinstated and the mother will not be subject to arrest or prosecution by reason of her removal of E from Luxembourg on 14 October 2018 or for any past conduct relating to E. The father will not institute or cause to be instituted or support any legal proceedings or proceedings of any other nature in Luxembourg for the arrest, prosecution or punishment of the mother, for any past conduct by the mother relating to E.

3.2 Unless otherwise ordered by the appropriate court in Luxembourg:

3.2.1 The second respondent (the father) is ordered to arrange, and pay for, suitable accommodation for the mother and E in Luxembourg. The father shall provide proof to the satisfaction of the Central Authority, prior to the departure of the mother and E from South Africa, of the nature and location of such accommodation and that such accommodation is available for the mother and E immediately upon their arrival in Luxembourg. The Central Authority for Luxembourg shall decide whether the accommodation thus arranged by the father is suitable for the needs of the mother and E, should there be any dispute between the parties in this regard, and the decision of the Central Authority for Luxembourg shall be binding on the parties.

3.2.2 The second respondent (the father) is ordered to pay the mother maintenance for herself and E from the date of E's arrival in Luxembourg at the rate of 355,44 euros per month. The first pro rata payment shall be made to the mother on the day upon

which she and E arrive in Luxembourg and thereafter monthly in advance on the first day of every month. Should the mother receive State support, then the monthly amount thereof shall be deducted from the 355,44 euros per month payable by the father.

3.2.3 The second respondent (the father) is ordered to pay any medical and dental expenses reasonably incurred by the mother in respect of E, such as are not covered by the National Health Service in Luxembourg.

3.2.4 The second respondent (the father) is ordered to pay for the reasonable costs of E's schooling and also the costs of her other reasonable educational and extra-mural requirements in Luxembourg, such as are not provided by the State.

3.2.5 The second respondent (the father) is ordered to purchase and pay for economy class air tickets, and if necessary, pay for rail and other travel, for the mother and E to travel by the most direct route from Johannesburg, South Africa, to Luxembourg.

3.2.6 The second respondent (the father) and the (first respondent) the mother are ordered to co-operate fully with the Central Authority for Luxembourg, the relevant court or courts in Luxembourg, and any professionals who are approved by the Central Authority for Luxembourg to conduct any assessment to determine what future residence and contact arrangements will be in the best interests of E.

3.2.7 The second respondent (the father) is granted reasonable supervised contact with E, which contact shall be arranged through the Central Authority for Luxembourg and South Africa without the necessity of direct contact between the father and the mother.

4 In the event of the first respondent (the mother) giving notice to the Central Authority referred to in para 2 above, the order for the return of E shall be stayed until the appropriate court in Luxembourg has made the order referred to in para 3 and, upon the Central Authority being satisfied that such an order has been made, they shall notify the first respondent (the mother) accordingly and ensure that the terms of para 1 are complied with.

5 In the event of the first respondent (the mother) failing to notify the Central Authority in terms of para 2 above of her willingness to accompany E on her return to Luxembourg, it is to be accepted that the first respondent (the mother) is not prepared to accompany E, in which event the Central Authority for South Africa is authorised to make such arrangements as may be necessary to ensure that E is safely returned to

the custody of the Central Authority for Luxembourg and to take such steps as are necessary to ensure that such arrangements are complied with.

6 Pending the return of E to Luxembourg as provided for in this order, the first respondent (the mother) shall not remove E on a permanent basis from the Province of Gauteng and, until then, she shall keep the Central Authority for South Africa informed of her physical address and contact telephone numbers.

7 Pending the return of E to Luxembourg, the second respondent (the father) is to have reasonable telephone contact with E including Skype and or video calls.

8 There is no order as to costs.'

C The Central Authority for South Africa is directed to seek the assistance of the Central Authority for Luxembourg in order to ensure that the terms of this order are complied with as soon as possible.

D In the event of the first respondent (the mother) notifying the Central Authority for South Africa, in terms of para B.2 above, that she is willing to accompany E to Luxembourg, the Central Authority for South Africa shall forthwith give notice thereof to the registrar of the Gauteng Division of the High Court, Johannesburg to the Central Authority for Luxembourg, and to the second respondent (the father).

E In the event of the appropriate court in Luxembourg failing or refusing to make the order referred to in para B.3 above, the Central Authority and/or the second respondent (the father) is given leave to approach this Court for a variation of this order.

F A copy of this order shall forthwith be transmitted by the Central Authority for South Africa to the Central Authority for Luxembourg.

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B C MOCUMIE  
JUDGE OF APPEAL

## Appearances

For appellant:

S Liebenberg

Instructed by:

Du Toit Attorneys, Randburg

Symington De Kok, Bloemfontein

For first respondent:

C Woodrow and N Thokoane

Instructed by:

The State Attorney, Pretoria

The State Attorney, Bloemfontein

For second respondent:

M L Haskins SC

Instructed by:

Couzyn Hertzog Horak Inc, Pretoria

Honey Attorneys, Bloemfontein