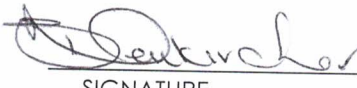


**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: 061066/2022

(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: YES
(3)	REVISED: YES
<u>29 May 2023</u> DATE	 SIGNATURE

In the matter between:

CENTRAL AUTHORITY, REPUBLIC OF SOUTH AFRICA

First Applicant

C A R

Second Applicant

and

Y R

Respondent

JUDGMENT

NEUKIRCHER J:

1] In all matters where a minor child informs the subject matter of the central dispute between parties, a Court must carefully weigh the evidence put before it in order to decide the issues. This is not just because the Children's Act 38 of 2005 (the Act) itself lays the basis for the court exercising a judicial discretion, but also because a Court is the Upper Guardian of all minor children, and must comply with the principle set out in s 28 of the Constitution that:

"(2) A child's best interests are of paramount importance in every matter concerning a child."

2] That principle is re-iterated in s 9 of the Act which provides:

"9 In all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance, must be applied."

3] However, what distinguishes this matter is that it is not brought in terms of the general provisions of the Act – this application is brought under Schedule 2 of the Act i.e. it is brought in terms of the provisions of The Hague Convention of the Civil Aspects of International Child Abduction (the Convention).¹

4] This means that it is not for this court to determine issues relating to the primary care and residence of any minor child (CJ) that forms the subject matter of the application. The enquiry of this court is (on these papers) limited to four main issues:

- (a) whether CJ was "habitually resident" in the contracting state immediately before any breach of custody or access rights;²
- (b) whether, at the date of commencement of the Convention proceedings, a period of less than one year had lapsed from the date of wrongful removal or retention³;

¹ The Convention was adopted at the 17th session of The Hague Convention on Private International Law on 24 October 1980. South Africa acceded to the Convention with the promulgation of The Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996 – to which South Africa became a signatory on 1 October 1997. This was repealed by the present Children's Act and the provisions are now included in Schedule 2 of the Act.

² Articles 3 and 4 of the Convention

³ Article 12

- (c) whether the second applicant (CR) had acquiesced to the removal/retention; and
- (d) whether the exceptions set out in art 13 of the Convention regarding CJ's return, have been established⁴.

BACKGROUND

5] The main background facts in this matter are neither contentious nor in dispute. CR and YR⁵ were married in November 2011. At the time, they both lived and worked in South Africa (RSA). During 2014 they decided to relocate to Canada as they both had concerns regarding the high crime rate and deteriorating infrastructure here. YR was also interested in furthering her studies in orthodontics for which there were limited opportunities in RSA. She applied for, and was accepted into, a Master's degree in orthodontics at the University of Manitoba in Winnipeg, Canada in early 2015.

6] CR was granted a temporary Open Work Visa and YR a temporary Student Visa, and they both departed RSA for Canada on a one-way ticket on 9 June 2015. They arrived in Winnipeg, Manitoba on 11 June 2015. Once in Canada, they lived with friends⁶.

7] The parties eventually moved to Calgary in July 2018 where they purchased a property and took out a mortgage. YR opened a practice called Y Roos Professional Corporation in Alberta, registered with the Alberta Dental Association to practice in Alberta and took out malpractice insurance. In late 2018 she was appointed as an associate in a well-known orthodontics practice in Calgary called Family Braces and in December 2021 she renewed this contract for another two years until December 2023.

⁴ I.e. whether there is a "grave risk" or "intolerable situation" were the child to be returned

⁵ The respondent and CJ's mother

⁶ Dr Kozak and her husband, Colonel Kozak. Dr Kozak is a close friend of YR's and both were enrolled for the same Master's degree

8] CR started off at Deloitte, Canada and then went to PWC in Calgary. In 2020 he took up a position at West Jet⁷. He is presently a director at a tech start-up company known as Tugboat Logic.

9] During 2015/2016 the parties applied for Manitoba's Provincial Department Programme which is a stepping stone for the application for permanent residency and citizenship. This was granted on 30 December 2016 and on 30 January 2017 they were granted permanent residency. They then applied for Canadian citizenship. On 22 December 2021 they were invited to take their citizenship test, which they did and passed, and in April 2022 they both attended the Canadian Citizen Oath Ceremony where they took the oath and signed the declaration form. They received their formal Certificate of Canadian Citizenship on 27 April 2022. It is noteworthy that at the time neither applied to retain their South African citizenship in terms of the South African Citizenship Act 88 of 1995. Although this was an issue that was raised by the Central Authority, and one I raised with the parties in the first case management meeting, I am of the view that it does not play a determinative role in the adjudication of this matter⁸ other than to be considered as a factor in determining whether Canada was CJ's habitual residence at the time of his retention in the RSA.

10] During the latter half of 2020, YR found out that she was pregnant. CJ was born in Canada on 20 July 2021. He is a Canadian citizen.

11] After CJ's birth, YR suffered from postpartum depression. She also suffered many postpartum complications: her milk production was not optimal and CJ had latching issues, which led to CJ being put on formula⁹. She had many concerns about CJ's sleep patterns and, medical advice notwithstanding, remained concerned. She was also concerned about CJ not achieving his developmental milestones, although the Canadian doctors saw no issues. In fact, all things considered, it appears that despite many assurances from the medical professionals in Canada, YR remained

⁷ Canada's second largest airline carrier

⁸ As at date hereof, the matter of Democratic Alliance v Minister of Home Affairs and Others 48418/2018 [2021] ZAGPPHC 500 has been heard by the Supreme Court of Appeal (SCA) but not yet decided, and YR has indicated that she intends to request that her RSA citizenship be reinstated

⁹ YR also complained that CJ's sucking reflex was weak

inconsolable, extremely concerned about CJ's health and developmental milestones, and severely depressed.

12] This, of course, had other repercussions: CR became very involved in CJ's daily care – he sterilized his bottles, fed him, bathed him, put him to sleep, changed his diapers and took him to his doctor's appointments. The parties also employed a carer for CJ, Kristen Castillo-Cogasi. She worked Mondays to Fridays from 08h00 until 17h00. She confirms all of the above. Everything points to CR being a very involved and loving parent in every sense of the word. This was also confirmed by Irma Schutte¹⁰ (Schutte) in her report.

13] CR has levelled many accusations against YR's parenting of CJ whilst they lived together and some accusations are quite serious: that she would not change CJ's diapers, that she refused to listen to medical professionals advice regarding CJ's welfare and care¹¹, that she wanted to give CJ up for adoption, that she threatened to stab CJ with a knife, that she wanted to leave CJ outside when he was crying too much.¹² This information is not stated because of a determination that must be made (at this stage) regarding primary care and residence, but simply serves as a frame of reference for YR's state of mind at the time and is also a preamble for the argument eventually presented by her that to order CJ's return would create the "intolerable situation" provided for in art 13. This is because, on her version, CR was an aggressive and somewhat emotionally and otherwise abusive husband – although she did admit to Schutte that CR was never abusive towards CJ, she said *"...there were physical confrontations between them in the presence of the minor child. She is extremely concerned about the impact of this on the minor child's functioning."*

14] It was unfortunate that, after CJ's birth, the strained relationship between the parties became even worse. One can but speculate as to the reasons,¹³ but the fact is that the parties decided to come to South Africa for a holiday. They would leave Calgary on 9 July 2022 and their return flight was booked for 23 July 2022. On 8 July

¹⁰ The social worker appointed by the *curatrix* to assist her in her investigation

¹¹ For example, how to regularize his sleep pattern and that a special "sleep diaper" be used

¹² In the freezing cold as it was winter and temperatures can go down to -5°

¹³ Irma Schutte states *"It is accepted that postpartum depression also exacerbated the possible problems in the marital relationship..."*

2022, CR noticed that YR had emptied out the content of her jewellery box and packed her orthodontic equipment, CJ's birth certificate and their marriage certificate. It is important to note that, on YR's own version, CR only found this out by "rifling" through her belongings prior to their departure – a clear indication that she had absolutely no intention of informing him of her decision until they were already in RSA. According to the submissions made on her behalf, it was thus clear that at the time she left Canada on 9 July 2022, she had no intention of returning. However, it was only after their arrival in South Africa that YR actually informed CR that she had no intention of returning with him on 23 July 2022. CR states that he informed YR that he did not consent to CJ remaining in RSA.

15] According to the *curatrix ad litem* (the *curatrix*), CR then consulted with an attorney in South Africa. On 19 July 2022, CR returned to Canada to consult with his legal representatives there. He then issued out process in the Court of the King's Bench of Alberta, Calgary under court file number FL01-38037. All I know is that those proceedings were unsuccessful, but as no judgment was attached to these papers I do not know why. I was informed by both counsel that the court in Alberta dismissed the application as it had no jurisdiction over CJ, and also because it was of the view that Hague proceedings were necessary. Whilst this may be so, it is disappointing that an important piece of the puzzle is missing.

16] Be that as it may, it appears that CR approached the Requesting Central Authority, in Canada on 24 July 2022 for assistance. This was a day after YR and CJ were to have boarded the flight back to Canada. Unfortunately, and for reasons not known, the Alberta Justice and Solicitor General only sent the required request to the Central Authority South Africa¹⁴ on 15 November 2022 which is more than 4 months later. The present application was issued out of this court on 20 December 2022 and set down for hearing on 24 January 2023 in the Urgent Court. The matter was then, and in accordance with the Directives of this Division, allocated to me. By then, 6 months had passed since CJ's retention. I immediately convened a case management meeting where I issued certain directives and appointed Adv Retief as the *curatrix* for

¹⁴ Being the Chief Family Advocate, South Africa

CJ¹⁵. Subsequently, several case management meetings were held to direct the proper flow of proceedings and to sort out other issues such as contact between CR and CJ. Unfortunately, the initial date of hearing that was set for late March 2023 had to be postponed because Schutte's report was delayed¹⁶ and the original timelines that had been set as regards filing of the *curatrix*'s final report and the parties heads of argument had to be re-visited. The matter was eventually heard on 4 May 2023.

17] Whilst it is not desirable that applications of this nature be delayed, sometimes it is inevitable and unavoidable if justice is to be done to the matter as a whole. It is also so that, given that a court may sometimes require the intervention of experts to assist in making decisions, the time line of 6 weeks as set out in Article 11 may prove to be unrealistic. This is one of those matters.

18] The role played by the *curatrix* has been invaluable. She worked quickly and efficiently in assisting to bring this matter to finality as soon as possible. This court expresses thanks and appreciation for the work done.

19] As stated, certain issues were raised in this matter that require determination. I intend to deal with each separately.

The purpose of the convention

20] In the minority judgment in **LD v Central Authority (South Africa) and Another**,¹⁷ Mocumie J set out the purpose of the Convention

"...the provisions of the Convention's main purpose are 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

¹⁵ Her mandate was

"3.1 to represent the minor child (**born 20 July 2021**) (**CJ**) in these Hague Convention proceedings, and all other proceedings which may stem from these proceedings;
3.2 to urgently report on **CJ**'s personal circumstances both in South Africa and in Canada, comment on the effect of relocation on **CJ**, and on any other factor that she is of the view should be taken into account for purposes of the present application;
3.3 to provide this court with a report on to the outcome of her investigation, as a matter of urgency'

¹⁶ This is because CJ and YR fell ill and their appointments had to be rescheduled which delayed the finalisation of both Schutte's and the *curatrix*'s reports

¹⁷ 2022 (3) SA 96 (SCA)

abducted child.¹⁸ Also, that art 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.”

21] As RSA is a signatory to the Convention, it must apply the provisions of the Convention and ensure the swift return of a child removed from the contracting state, unless the exceptions set out in art 13 have been established.

HABITUAL RESIDENCE

22] Article 3 of the Convention provides as follows:

“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*
- (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] Given the argument raised by YR, art 4 is also relevant. It states:

“The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years.”

24] The argument by the applicants is premised on the fact that the parties clearly intended to permanently leave RSA during 2015. This is because they purchased a one-way ticket to Canada; they purchased property, lived and worked in Canada and they applied for, and were eventually granted, Canadian citizenship. In fact, the argument goes further: according to social media posts by YR, she regularly

¹⁸

In *Pennello v Pennello* (Chief Family Advocate as Amicus Curiae) 2004 (3) SA 117 (SCA) at para [25]: “... 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.”

expressed her disdain for RSA and expressed her relief to be Canada. In one Facebook post, dated 4 December 2019 she comments “South Africa¹⁹ a sick place!!!! Don’t go there!!!!”.

25] YR’s argument is an interesting one: the argument is that the habitual residence is determined at the date of retention. In order to determine this one must look to the three basic models of determining habitual residence - the dependency model, the parental rights model and the child centred model:

“[63] ... 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. The parental rights model proposes that habitual residence should be determined by the parent who has the right to determine where the child lives, irrespective of where the child actually lives. Where both parents have the right to determine where the child should live, neither may change the child’s habitual residence without the consent of the other. In terms of the child-centred model, the habitual residence of a child depends on the child’s connections or intentions and the child’s habitual residence is defined as the place where the child has been physically present for an amount of time sufficient to form social, cultural, linguistic and other connections. South African Courts have adopted a hybrid of the models in determining habitual residence of children. It appears to be based upon the life experiences of the child and the intentions of the parents of the dependant child. The life experiences of the child include enquiries into whether the child has established a stable territorial link or whether the child has a factual connection to the state and knows something culturally, socially and linguistically. With very young children the habitual residence of the child is usually that of the custodian parent.”²⁰

26] YR argues that prior to the parties leaving Canada, it was clear that their relationship had broken down and that it was very clear that, when she left Canada,

¹⁹ She posted a RSA flag but didn’t use the words South Africa. The reference however is unmistakeable.

²⁰ Central Authority for the Central Republic of South Africa and Another v LC 2021 (2) SA 471 (GJ)

her intention was not to return but rather to remain in RSA. This being so, she says that Canada was no longer her habitual residence. As a child acquires his domicile through his parents, this left CJ's domicile up in the air as each of his parents now intended to reside in a different country. The argument went further: that CJ is too young to form an intention to reside anywhere and his "residence" is confined to his house. This is not by choice, but rather because of his age. Furthermore, and because he is so young, he has no cultural, linguistic or social ties to Canada and he certainly has no territorial links to that country.

27] This argument then tandems with the argument that art 12 specifically provides that:

"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. "

28] This argument is based on the fact that CJ has now spent almost half of his life in South Africa, he has strong family bonds with his grandparents, he has developed linguistic skills and is starting to speak Afrikaans, his development has normalised, his allergies addressed, he has been enrolled in a day-care where he has made friends, his cousin attends the same pre-school²¹ and YR's bond and attachment with CJ has grown stronger because her postpartum depression has been addressed. Thus, he has established social, cultural, linguistic and territorial links to the RSA.

29] But this argument is not sustainable: under art 12(1)²², where a period of less than one year has elapsed from the date of wrongful removal or retention, *"the authority concerned shall order the return of the child forthwith"* and the only exceptions are those set out in art 13.²³ Article 12(2) applies to proceedings that have been commenced after the expiration of a year. In terms of this, the court "shall" also order the return of the child *"unless it is demonstrated that the child is now settled in its new environment."* But the issue of whether the child is settled in its new

²¹ Thus there are other family ties here

²² Although Article 12 is not divided into subsections, there are 3 distinct paragraphs which I shall refer to as (1), (2) and (3) in order to avoid any confusion

²³ Which I will discuss later

environment is, in my view, only triggered when the proceedings have commenced after a period of a year. And even then, and even though more than a year may have passed, this would simply be a factor to be considered by the court.²⁴

30] The argument is, in any event, unsustainable as the date of CJ's unlawful removal and retention occurred, at best for YR, 10 July 2022 (and at worst prior to leaving Canada) and these proceedings were initiated by CR within weeks. In **Central Authority v H**²⁵ the following passage from *In Re D (A Child)* was referred to with approval:

"In a recent decision of the House of Lords in Re D (A child) Baroness Hale of Richmond expressed the view that the object of the Convention 'is negated in a case such as this where the return application is not determined by the requested State until the child has been here [in the United Kingdom] for more than three years.' She pointed out, however, that:

'Article 12 of the Convention caters for delay in making the application for return. If an application is launched more than 12 months after the wrongful removal or retention, the child is nevertheless to be returned "unless it demonstrated that the child is now settled in its new environment". The choice of the date of application rather than the date of decision is deliberate: the left behind parent should not suffer for the failings of the competent authorities . . . It is not possible, therefore, to argue that cases such as this fall outside the Convention altogether.'"

31] I am of the view that the art 12(2) defence is not available to YR in this matter, as the application was launched within a period of one year.

32] Article 5 of the Convention 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."

²⁴ See for example *Central Authority v H* 2008 (1) SA 49 (SCA), where the child had been in South Africa for four years after removal and the court nonetheless ordered his return to the Netherlands; *KG v CB* 2012 (4) SA 136 (SCA) where a similar situation occurred and the court ordered that the child be returned to the United Kingdom despite having lived in South Africa for 4 years;

²⁵ 2008 (1) SA 49 (SCA) at par 30

33] The Family Law Act of Alberta S.A. 2005 c.F4.5 subsections 19, 20 and 21 determine who is the guardian of a child and the powers, responsibilities and entitlements of guardianship. According to those, it is clear that CR had a right of custody in the Province of Alberta, Canada at the time CJ was retained. This is according to an affidavit of KM Berlin, a barrister and solicitor licensed to practice in the Province of Alberta, Canada which was provided by the Central Authority in terms of Article 5 – nothing to controvert this evidence was put up by YR.

34] I must point out that the argument regarding CJ's domicile²⁶ is not a good one as, according to the Convention, it is not a matter of domicile that informs a court's decision, but rather one of habitual residence. Domicile is determined by choice and, according to the Domicile Act 3 of 1992:

"(2) A domicile of choice shall be acquired by a person when he is lawfully present at a particular place and has the intention to settle there for an indefinite period."

35] In terms of s 2 of the Domicile Act:

"(1) A person not capable of acquiring a domicile of choice as contemplated in section 1 shall be domiciled at the place with which he is most closely connected.

(2) If, in the normal course of events, a child has his home with his parents or with one of them, it shall be presumed, unless the contrary is shown, that the parental home concerned is the child's domicile..."

36] Habitual residence, however is decided by reference to the facts of each individual case, and

"... may be acquired by voluntarily assuming residence in a country for a settled purpose. It may be lost when a person leaves that country with a settled intention not to return... There is a significant difference between ceasing to be habitually resident in a country and acquiring habitual residence in a new country. A person can lose habitual residence in "a single day" when he or she leaves with the settled intention not to return. However, habitual residence cannot be acquired in a day. An appreciable period of time and a settled

²⁶ At par 26 supra

*intention will be necessary to enable him or her to become habitually resident'...*²⁷

37] YR is correct when she argues that CJ was too young to form an intent of residence on his own. But that is why his habitual residence must be determined by the facts of this matter and this must be done on a balance of probabilities. In my view, YR's argument is artificial for the following reasons:

- (a) the parties left the RSA on a one-way ticket; they bought a house in Canada and paid a mortgage, YR bought a practice, registered for malpractice insurance, and joined an orthodontics firm – she gave no notice to terminate any of these when she left Canada for RSA;
- (b) the parties made a conscious decision to apply for Canadian citizenship for which they had to write an exam and take a citizenship oath – this YR clearly did willingly;
- (c) YR's argument that she purchased a return ticket for the July 2022 visit out of fear for physical and verbal reprisal from CR should she refuse, simply rings hollow;
- (d) it is very clear from these papers that at the time the parties left Canada, CR was in fact CJ's primary caregiver for no other reason than because of YR's postpartum depression. This is confirmed by not only Ms Castillo-Cogasi, but also by Dr Kozak;
- (e) in any event, it is very clear from the evidence of Mr Berlin²⁸, that at the time of retention, CR had a "*right of custody*";
- (f) CJ's attachment is to his parents and not to a specific place because of his age, and their attachment to a place is informed by the aforementioned facts.

38] Given the facts as set out supra, I find that CJ's habitual residence at the time of his retention was Canada.

Acquiescence

²⁷ Central Authority v LC (supra) at par 56, with reference to Brigitte Clark, Family Law Service, Division P6 – Child Abduction

²⁸ Par 33 supra

39] This argument then segues into the argument that in any event by returning alone to Canada on 14 July 2022, CR has acquiesced to CJ's retention in South Africa. Insofar as there is a dispute on these papers as to this issue, it must be determined with regard to the age-old Plascon-Evans rule.²⁹

40] In expanding on her argument, YR states that at all times she has been CJ's primary caregiver, that she had evinced the intention to return to RSA since the end of 2021, that CR was well aware of the fact that she had no intention of returning to Canada on 23 July 2022 and that she intended to settle in RSA and take over her mother's orthodontic practices in Alberton and Pretoria, that despite this CR willingly and knowingly left RSA and left CJ in her care on 19 July 2022, and lastly that he has shown little interest in CJ since then.

41] In **Senior Family Advocate, Cape Town and Another v Houtman**,³⁰ Erasmus J endorsed the fact that "[a]cquiescence is the question of the actual subjective intention of the wronged parent, not of the outside world's perception of his intentions". It is therefore necessary for the Court to examine the "outward conduct" of the wronged parent in order to determine the "subjective intention" of the wronged parent – this is a question of fact for the Judge to determine considering all the circumstances of the case, the burden of proof being on the abducting parent.

42] In my view, and based on the facts of this matter, YR's argument on this issue is unsustainable: firstly, it was very clear to her at all times prior to their departure from Canada - and after she informed him that she had no intention of returning with him on 23 July 2022 - that CR did not consent to CJ remaining in RSA; secondly, CR's intent in returning to Canada was twofold: (a) to initiate the proceedings in the court in Calgary and (b) to initiate proceedings under the Convention. The latter was done the day after YR and CJ were to have left the RSA to return home. If anything, his swift actions to ensure the return of CJ to Canada leave one in no doubt of the absence of his acquiescence.

²⁹ Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634E – 635C;
³⁰ Pennello v Pennello and Another at para 39-40
 2004 (6) SA 274 (C) at para 17

43] Thus none of his conduct as set out supra can in any way be construed as abandoning CJ or acquiescing to his remaining with YR in the RSA and, as a result, CJ's retention is wrongful as meant in art 3 and CR's custody rights have been breached.

The Article 13 defences

44] Article 13 provides:

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

- a. 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."

45] As has already been stated, the person raising the art 13 defences bears the usual civil onus of proof i.e. that he or she is required to prove the various elements of the particular art 13(b) defence on a preponderance of probabilities.³¹

46] I must preface the discussion on this issue with the following: much of the argument presented, more especially by YR, focused on the abusive relationship she

³¹ Sonderup v Tondelli and Another 2001 (1) SA 1171 (CC) at para [42]; Smith v Smith 2001 (3) SA 845 (SCA) at para 20; Pennello v Pennello and Another (supra)

had with CR after CJ's birth. Much of CR's argument to refute this issue focused on YR's emotional state and her alleged irrational behaviour. Collateral information from the friends and family was also of a nature as one would usually find in primary care and residence/contact applications under the Act. But it is not the function of this court to determine these issues. In **Pennello v Pennello and Another**³², Van Heerden AJA explained it as follows:

"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."

47] She also stated 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."*³³

Grave harm/ Intolerable situation

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

³² Pennello at para 25

³³ Penello v Penello supra at para 34 quoting Ward LJ in *Re C (Abduction: Grave Risk of Psychological Harm)*

49] The background to this is the following: CJ's birth was characterised by some trauma : during his delivery his heart rate was abnormal³⁴ and he had to be birthed vaginally with vacuum assistance. He was born with a nuchal cord which was brought over his head prior to his delivery of his anterior shoulder. According to the hospital records, he was examined after birth, was well, and he and YR were discharged the following day. CJ was then referred to Dr Landero for feeding concerns as well as concerns that CJ was not meeting his developmental milestones and required assistance. She referred CJ to a physiotherapist as CJ was not keen on solids but that, otherwise, she noted that CJ, at 6 months,³⁵ was in good health. The physiotherapist noted that there was a mild delay in CJ's ability to roll from belly to back but that, otherwise, he presented with appropriate gross motor skills. Kate MacDonald assisted CR with CJ's sleeping issues and feeding issues.

50] But the main conflict was with the parties' vastly differing parenting styles with CR parenting according to strict structure and YR's parenting skills more instinctive in nature. If YR is to be believed, she was subjected to verbal and physical abuse at the hands of CR; if CR is to be believed, YR's depression resulted in expressions of intention to harm CJ, abandon him and exacerbating his feeding and sleeping issues. All in all, it is clear that the marriage was one that was eventually characterised by enormous conflict between the parties and CJ, as a baby, was unfortunately in the middle.

51] Once in South Africa, CJ's medical issues were re-assessed³⁶:

- (a) according to Theresa Olivier,³⁷ CJ showed a marked delay of 3 - 4 months in receptive as well as expressive language development which she stated was an area of *"great concern and needs to be addressed as a matter of urgency"*. Two months later she reports that this development was now 2 months behind and that *"[h]is listening skills are also not on par. The fact that he was mostly exposed to English during his first year had an effect on his language development."*;

³⁴ Which the *curatrix* states (based on the Canadian medical records) could be a sign of foetal distress

³⁵ The Canadian medical records are only available until CJ was 6m old

³⁶ He was 13 months old at the time

³⁷ A speech therapist

- (b) Elna Beukes³⁸ found that CJ showed a delay in his sensory motor skills, fine motor and perceptual development, language development and his expression of independence³⁹;
- (c) Jana van Jaarsveld⁴⁰ expressed concerned that CJ did not closely resemble a typical boy of a similar age⁴¹, took no interest in his environment, did not explore nor try to interact with her.

52] Schutte has addressed these issues in her report and has noted improvement in these developmental delays.

53] Karen Adams is a clinical psychologist who assessed YR for purposes of this application at her request. This was not required either by the *curator ad litem*, nor by me as this matter does not involve an enquiry into CJ's best interests akin to the one a court would undertake when deciding on issues regarding primary care and residence. However, the assessment was done for purposes of the art 13 defence – the argument being that were this court to order CJ's return (and thus YR's as a result of that as she would not leave him), the effect of her return on her and thus CJ was an issue that had bearing on the intolerable circumstances defence.

54] Karen Adams concluded the following:

- (a) *"(YR) protocol revealed the presence of a strong need for affiliation and positive regard by others. To receive the attention and support she requires, she could resort to drastic and attention-seeking behaviour, as a result of which, she could at times be experienced as demanding";*
- (b) *"(YR) is unlikely to be willing to self-examine and may resort to erratic behaviour and spiral into despondency when experiencing distress. Under prolonged stress, (YR) may exhibit rash and stubborn behaviour, while becoming obstructive and derisive";*
- (c) *"She revealed a pronounced need for social contract, approval, recognition and nurturance. She likely enjoys relating to people, is lively, spontaneous, actively*

³⁸ An occupational therapist

³⁹ He did not give co-operation when being dressed and undressed, did not feed himself with a spoon – although he put food in his mouth with his hands- and was unaware of a full nappy

⁴⁰ An educational psychologist

⁴¹ He "was floppy and his movement was strained"

- involves in their lives, is generous, attentive, easy-going, co-operative and trusting, she is by nature submissive and dependent and is easily influenced.”;
- (d) “At present, and in a supportive environment, no symptoms suggest the presence of psychiatric disorder can be identified. Should (YR) be exposed to hostile environment, in which she feels criticised, inadequate, and unsupported, the resurgence of the symptoms of a major depression cannot be excluded.”
(my emphasis)

55] All of this is relevant as, in **Sonderup v Tondelli**⁴², Goldstone J stated”
 “[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.”

56] Given that s 28(2) of the Constitution reinforces the “best interests” principle, it is clear that this is a factor which must be weighed when considering the art 13 defences. In **Central Authority for the Republic of South Africa and Another v LC**⁴³ the principle was stated thus:

“[102] That is not to say that there can never be a debate about the best interests of the child. On the contrary, the exceptions create an opportunity to investigate the best interests of the individual child as follows:

‘First, once the abducting parent successfully raises an exception to return, the words “is not bound to order the return” and “may also refuse to order the return” . . . make it clear that the court retains a residual discretion to grant or refuse an order for the return of the child. Secondly, once a defence is raised and the court is exercising its discretion to refuse or order the return of the child, the court may conduct an investigation into the best interests of the individual child concerned.’

[103] It is within these parameters that a court must have regard to the best interests of the child.”

⁴² Supra at fn 34

⁴³ Supra

57] The majority judgment of **LD v Central Authority (RSA) and Another**⁴⁴ emphasized that the test when an art 13 defence is raised:

“... may be summarized 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 as envisaged by art 14(b); (c) that harm or intolerability extends beyond the inherent harm referred to above and is required to be both substantial and severe.”

58] To this end, the court in **Koch NO and Another v Ad Hoc Central Authority, South Africa and Another**⁴⁵ and with reference to **G v D (Article 13(b): Absence of Protective Measures)**⁴⁶ set out the principles that, inter alia:

- (a) art 13(b) is to be narrowly construed as, by its very terms it is of restricted application;
- (b) the risk to the child must be “grave”. It is not enough for the risk to be “real”. It must have reached such a level of seriousness that it can be characterised as “grave” and that “grave” characterises the risk rather than the harm;
- (c) “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*”;
- (d) where the defence under Art 13(b) is said to be based on the anxieties of a respondent mother about a return with the child which are not based upon objective risk to her but are nevertheless of such intensity as to be likely, in the event of a return, to destabilise her parenting of the child to a point where the child’s situation would become intolerable, in principle, such anxieties can found the defence under Art 13(b).

59] In **LD v Central Authority (South Africa) and Another**⁴⁷ a mother’s “*agonising choices*” played a central part in the majority of the SCA upholding a Full Court’s decision to refuse to order the return of a child to Luxembourg. In endorsing the Full Court’s judgment, the majority court took into account “*...that a functioning family unit*

⁴⁴ 2022 (3) SA 96 (SCA) at para 29

⁴⁵ 2022 (6) SA 323 (SCA) at para 46

⁴⁶ [2020] EWHV 1476 (Fam) para 35

⁴⁷ Supra at para 36-39

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.”. It also took into account the mother’s “agonising choices” which is found “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.”. In conclusion, the majority court found that the impact on the minor child of being returned would go far beyond the normal hardship and dislocation that are associated with cases of this sort and “cannot but have a profound effect on E for the reasons cited above”. As a result, the court found that the mother had established that there is a grave risk that the minor child’s return would expose her to psychological harm or otherwise place her in an intolerable situation.”

60] Although the facts in **LD v Central Authority (RSA) and Another** are vastly different to those in this matter, both YR and the *curatrix* have used this majority ruling to argue that to force YR to return with CJ to Canada would compel her to make an ‘agonising choice’ – she would be compelled to return to a country where she was desperately unhappy, where she would have to live with CR in a situation where she was emotionally and physically abused and which exacerbated her emotional breakdown. This they argue will certainly have an impact on CJ, and that his exposure to his parents’ conflict will not be in his interests and will lead to an intolerable situation.

61] The *curatrix* states it thus:

“4.7 In circumstances where the Court orders that CJ is to return with his mother, CJ’s mother faces an “agonising choice” of leaving the nurturing environment of her immediate family to whom she has sought comfort and support to claw her way out of a depressive state, to return back without the prospect of employment into an environment which was intolerable in the first place, The factor of a parent’s agonising choice as described was a factor accepted by the Supreme Court of Appeal in **LD v Central Authority (RSA) and Another** in which the Court accepted Tuchten J’s factor in the Court below that a lis between the emotional

stress under which a mother will inevitably be placed in terms of the order of the Court, will have a harsh and negative impact on the child's sense of security and well-being, this being a grave risk...

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

4.9 *Depriving him is in conflict with CJ's right under Section 28(1)(b) of the Constitution, which I take to include the nurturing and support a child receives from its immediate family group and environment."*

62] Karen Adams reports

"At present, and in a supportive environment, no symptoms suggestive of(f) any psychiatric disorder could be identified. Should Dr Rous be exposed to a hostile environment, in which she feels criticised, inadequate, and unsupported, the resurgence of the symptoms of a Major Depression cannot be excluded."

63] Jana van Jaarsveld, the educational psychologist, states that:

"CJ is a small person, who already suffered trauma in an environment where he did not develop appropriately, was undernourished and had emotional needs ignored, because he had to learn to be 'self-sufficient'. He has now adapted in a new physical and social environment, Despite CJ's struggles his development delays, he bravely fought new attachments, adapted in a new school and home environment, and is just beginning to blossom, to become a happy child who probably feels loved, realising that he belongs. To put a child at risk by returning him to Canada where he will be exposed to the same circumstances which is possibly the root of his development delays will be emotionally and psychologically irresponsible."

64] The collateral information is not really of assistance: it is clear that YR was very unhappy in Canada – her postpartum depression and failing marriage were all factors

that combined to form a vicious circle and a spiralling pattern. There is no evidence to suggest how CJ was truly emotionally affected by all of this and no one has suggested that it is tied to conflict between his parents. It is also clear that YR is doing well in the RSA and Karen Adams confirms this. In fact, she confirms the absence of any psychometry in YR's results.

65] YR argues however that were CJ's return to be ordered, and therefore her return as well, the intolerable situation from which she fled would remain: the conflict between her and CR, the conflict would have an impact on CJ's development, they would have no support structure, they would have nowhere to live⁴⁸, and she has no employment in Canada.

66] There is absolutely nothing in Schutte's report to indicate any effect that the issues raised by the *curatrix* will have on CJ were I to order his return save that she states, as a general observation, and according to recognised literature⁴⁹, that toddlers (of 18 to 36 months) are sensitive to conflict between their caregivers and become distressed when their parents argue. However, she highlights none of the concerns mentioned by the *curatrix* or Jana van Jaarsveld. There is, however, as reason for this – her excuse is that the time constraints placed on her did not afford her the opportunity to conduct a proper art 13 investigation – I will deal with this aspect later.

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

⁴⁸ CR has offered to find alternative accommodation for 2 months were YR to return to Canada with CJ but after this period she states that she and CJ would have nowhere to live

⁴⁹ AFCC (2020:17)

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

69] The facts are that he experienced a traumatic birth which manifested itself in issues such as latching issues and sleeping issues. These were addressed in Canada. The Canadian doctors however, reported that he was developmentally doing well. However, two months after his arrival in the RSA, he was seen by 3 experts all of whom diagnosed him with developmental issues, some more serious than others. These are being addressed with him showing improvement some 6 months later. The fact that these issues were not picked up and therefore not addressed in Canada is cause for grave concern.

70] As Van Jaarsveld put it:

“To put a child at risk by returning him to Canada where he will be exposed to the same circumstances which is possibly the root of his development delays will be emotionally and psychologically irresponsible.”

71] This being so, I find that CJ's return would expose him to an intolerable situation.

Costs

72] YR has argued that a costs order should be granted against the applicants firstly because of the manner that the application was brought in contravention of the Directives pertaining to Convention matters in this Division⁵⁰, and secondly because of the manner in which CR has conducted himself throughout proceedings, failing/refusing to first engage in mediation efforts, failing to notify YR that he was back in South Africa and failing/refusing to engage with her attorneys at all despite their best efforts. He also refused to engage an expert to assess his psychological well-being as she did.

⁵⁰ It being set down in the Urgent Court instead of being brought to the attention of the DJP for immediate allocation

73] Firstly, I am of the view that a costs order against the Central Authority is wholly inappropriate: they are enjoined under the provisions of the Convention to act upon receipt of a request by the contracting country. There are certain obligations placed upon them by the Convention and in complying with those provisions, they acted wholly appropriately. The fact that certain Directives of this Division were not properly complied with does not make their conduct *mala fide* or worthy of sanction other than the fact that the lateness of the entire process is cause for concern.

74] Secondly, I am of the view that an order against CR is also wholly inappropriate in the circumstances of this case: he is the concerned father of a child who was unlawfully removed from his habitual residence. YR's conduct has left much to be desired as it is her conduct that has caused the present situation. To give her costs, even though the normal order is that costs follow the result, would in this case simply reward her for her bad behaviour – I am not of a mind to do that.

The report of Irma Schutte

75] There is unfortunately one last aspect which I must highlight in this matter. I do so very reluctantly but must given the fact that I am of the view that the expert engaged by the *curatrix* has conducted herself in a less than desirable manner.

76] In **Schneider NO and Others v AA and Another**⁵¹ the role of an expert was stated to be, inter alia, to provide independent assistance to the court by way of objective, unbiased opinion in relation to matters within his expertise and he does so by stating the facts or assumptions upon which his opinion is based, and he should not omit to consider material facts which could detract from his concluded opinion. Importantly, if an expert opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one.⁵²

⁵¹ 2010 (5) SA 203 (WCC) at 211E-212A

⁵² Also, *AM and Another v MEC for Health*, Western Cape 2021 (3) SA 337 (SCA)

77] In this matter, the *curatrix* provided Schutte with instructions. According to the *curatrix*, this was to assess the attachment between CJ and his respective parents and to deal with the art 13 defences. Whilst Schutte certainly provided a full and comprehensive report regarding the attachment relationship with both parents, she failed to deal with the art 13 defences which, of course, are a very important part of the present proceedings. Instead, what Schutte does is provide two possible outcomes for this matter:

- (a) option 1 is where CJ remains in RSA with his mother and Schutte makes recommendations on how to maintain the attachment between him and his father;
- (b) option 2 is where CJ is ordered to return to Canada. Her exact recommendation is the following:

"Both parties indicated that if the minor child returns to Canada, the mother will accompany him. The father indicated that YR and CJ can reside in the house, and he will obtain alternative accommodation for a period of two months. Regular contact must be implemented, daily, where CR take(s) care of CJ and his physical and emotional needs. This includes feeding, bathing and sleep rituals. CR presents with the necessary parenting skills to take care of CJ"

78] What is notably absent from the report is any comment on the effect that a return to Canada will have on CJ and whether it would create a grave risk or intolerable circumstance such that it would motivate a court to refuse the application. When this issue was raised by the *curatrix* and when the *curatrix* criticised Schutte's recommendations,⁵³ that resulted in an affidavit and further report by the expert who sought to justify her actions, complain about the criticism levelled at her by the *curatrix*, complain that she felt that her professional integrity was attacked, and justify why she failed to complete her mandate. In particular, in the affidavit she filed she states:

"2.4 I confirm further that Adv Retief instructed me to proffer an opinion having regards to the Article 13 defences raised by the Respondent after having the liberty of the assessments. In confirm that I was unable to do so as a more extensive investigation is required and as a result of time

⁵³

And specifically the lack of motivation or possible impact of Option 2 on CJ

constraints and the unavailability of a psychological report⁵⁴ and evaluation of the Second Respondent it was not possible."

79] What Schutte then does is attack the *curatrix* in a manner which is completely unnecessary and, in the context of this matter, unacceptable. If the *curatrix* felt that Schutte's report was lacking, or that her analysis was flawed, she was duty bound to point this out to the court in the exercise of her duties as CJ's representative⁵⁵. She is not a rubber-stamp for Schutte's views. I find Schutte's conduct disappointing. I also find her conduct disappointing as, had she felt that she needed more time to conduct her assessment, I would have expected her to say so. I would also expect of her, as an expert, to state so if she felt that her mandate was too wide, or the time limits impossible to achieve – she did not. Her conduct falls far short of that expected of an expert.

80] At the end of the day "*...it is the duty of experts to furnish the court with the necessary criteria for testing the accuracy of their conclusions, so as to enable the Court to form its own independent judgment by the application of those criteria to the facts proved in evidence.*"⁵⁶

ORDER

81] Given the above, the order I make is the following:

The application for the return of the minor child in terms of The Hague Convention on the Civil Aspects of International Child Abduction, is dismissed.



**B NEUKIRCHER
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

⁵⁴ CR refused to be assessed by a psychologist

⁵⁵ In *Michael v Linksfield Clinic (Pty) Ltd* 2001 (3) SA 1188 (SCA), it was stated that "*What is required in the evaluation of such evidence is to determine whether and to what extent their opinions advanced are founded in logical reasoning.*"

⁵⁶ *Delpont NO v Die Padongelukfonds and Ander* 2002 JDR 0839 (T) at pg 24

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 29 May 2023.

Appearances:

First Applicant: Advocate KM Mokotedi
Instructed by the State Attorney

Respondent: Advocate R Ferreira
Instructed by Jarvis Jacobs Raubenheimer Inc

Legal Representative Advocate LA Retief
for minor

Date of hearing : 4 May 2023