

IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Reportable: YES/NO
Of Interest to other Judges: YES/NO
Circulate to Magistrates: YES/NO
CASE No.:2452/2024

In the matter between:

THE FAMILY ADVOCATE, WELKOM

APPLICANT

And

C[...] M[...] C[...]

FIRST RESPONDENT

C[...] C[...]

SECOND RESPONDENT

Judgment by: VAN RHYN J

Heard on: 6 JUNE 2024

Delivered on: 28 JUNE 2024

[1] This is an application brought by the Family Advocate Welkom (the “Family Advocate”) in terms of the provisions of the Hague Convention on the Civil Aspects of International Child Abduction¹(the “Convention”), for an order directing the immediate return of a minor girl, born on 23 June 2015, referred to as A or the child, to the care and the custody of C[...] C[...], who was cited as the second respondent. The second respondent is the father of A (the “Father”).

[2] The application was issued on 3 May 2024 and initially brought on an ex parte basis by way of urgency. On 9 May 2024 an order in terms of Part A of the notice of motion was granted. Condonation was granted for the non-compliance with the provisions of

¹ Act 72 of 1996.

the Uniform Rules of Court and the application was heard as one of urgency. The first respondent, the mother of A, is C[...] M[...] C[...], (the “Mother”). The Mother was interdicted and restrained from removing A from the Free State Province pending finalisation of Part B of the notice of motion and she had to surrender the passport(s) of A to the Family Advocate. The Department of Home affairs had to be informed of the order to prevent the re-issue of a passport to A. The return date for the hearing of Part B was set for 6 June 2024.

- [3] The Family Advocate seeks relief in this application in terms of art 12 of the Convention. The application is opposed by the Mother. The founding affidavit is deposed to by Sonnette Visser (“Visser”), the Family Advocate duly appointed in terms of the Mediation in Certain Divorces Act². Visser has been duly authorised on 6 February 2024 by the Central Authority: International Child Abduction to bring this application. The Father lodged a request for the return of the child to Limassol, Cyprus on 24 November 2023 in terms of the provisions of the Convention. A copy of the request by the Father is appended to the founding affidavit. Visser also deposed to the replying affidavit. The Father did not depose to an affidavit in support of the application or to dispute any of the averments made by the Mother.
- [4] It is alleged that A accompanied the Mother to South Africa on 23 June 2023 for a short visit in terms of an arrangement between the Father and the Mother. Return flight tickets were purchased with the return of the child and her mother scheduled for 31 August 2023. Both A and the Mother are still in South African, presently residing at Sasolburg. The Family Advocate avers that the Mother confirmed the arrangement to return to Cyprus with A and indicated on 8 April 2024 that she is willing to return to Cyprus with the child. It is furthermore alleged that A was habitually resident in Cyprus immediately prior to the breach of the Father’s custody or access rights by the unlawful retention of the child in South Africa by the Mother.
- [5] The parties were initially married in 2001 and later divorced. The Father and the Mother were re-married in community of property at Vanderbijlpark on 30 September

² Act 24 of 1987.

2013. Divorce proceedings were instituted by the Mother at Sasolburg as well as by the Father in Cyprus. No particulars were provided by the Family Advocate regarding who instigated the divorce proceedings first or what the current marital status of the parties are. The Family Advocate avers that it is not in dispute that the Father has guardianship and primary care of A. Subsequent to the holiday at her maternal grandmother's residence at Vaalpark, Sasolburg, A would return to the communal home where the Father resides.

- [6] A was born in South Africa on 2[...] J[...] 2015 and is currently 9 years old. A has two siblings, a sister born on 1[...] N[...] 2004, currently 19 years old and a sister born on 1[...] O[...] 2009, currently 14 years old. The couple moved to Cyprus during 2022. On 28 February 2022, the child was enrolled at F[...] S[...] at Cyprus which she attended prior to their visit to South Africa.

- [7] The Mother opposes the relief sought by the Family Advocate on the basis that she has not retained A in South Africa as envisaged in the Convention (or at all) and that the Convention is accordingly not applicable. According to the Mother it was agreed between the parties that A will reside with her in South Africa. She relies on the contents of WhatsApp messages sent between the parties in this regard. The Mother contends that there is no evidence before this court to determine that the habitual residence of A was in fact in Cyprus. The parties moved to Cyprus where they resided for approximately a year. She concedes that she, on 8 April 2023, indicated to the father that she and A will return to Cyprus, however, at that stage she was still in Cyprus and it was approximately three months before she and the child left for South Africa.

- [8] According to the Mother the marriage relationship between the parties had deteriorated even further during the months preceding their departure from Cyprus. The parties did not live together while in Cyprus. The Father lived with his mother at Limassol and the Mother and the children resided at Anafotia. The two towns are approximately 54 kilometres apart. It is furthermore denied that the Mother and A are of Cyprian nationality. They are both of South African nationality.

- [9] The Mother denies that it was her intention to come to South Africa only for a short visit. It is contended that the parties were already considering divorce proceedings during May 2023 and she contemplated to remain in South Africa with A. Alternatively, the parties agreed that the mother would visit South Africa to consider her position and would then make a decision to either return to Cyprus or remain in South Africa. The fact that return flight tickets were booked was in the event that the Mother changed her mind to return to Cyprus. The Father provided written approval for the child to visit South Africa.
- [10] In the replying affidavit Visser confirmed that she obtained information from the Mother during February 2023 that the parties were not residing together prior to her departure to South Africa and confirmed the version of the Mother. Initially the Father would only come to stay with the Mother and children during weekends. However, subsequent to an argument between the parties during May 2023, the Mother removed the Father's personal belongings and they did not stay together as husband and wife. This information was not contained in the founding affidavit.
- [11] On 9 May 2024 the court authorised the Legal Aid Board South Africa, Free State Office to appoint a legal representative for A to represent her in these proceedings. The legal representative for the child was ordered to advise the court by means of a written report regarding her best interests subject to the provisions of the Children's Act and the Convention. On 22 May 2024 a written report compiled by Annerie Nieuwenhuis ("Nieuwenhuis"), dated 14 May 2024, was delivered and filed at court.
- [12] In this report by Nieuwenhuis it is stated that an interview was conducted with the child regarding the matter and her circumstances. A is currently in Grade 3 at K[...], a private school at Vanderbijlpark and is performing well at school. A copy of the school results for the first term of 2024 is appended to the report. Nieuwenhuis confirmed that A is residing with her mother and her maternal grandmother at Vaalpark, Sasolburg. According to A she accompanied her family to Cyprus in 2022 and she

was under the impression that they were only there on vacation. While at Cyprus she learned that they would start a new life there. According to the child they were only in Cyprus for a year before she and her mother returned to South Africa to visit her grandmother.

[13] Nieuwenhuis reported that A indicated to her that she did not want to return to Cyprus as she has been residing in South Africa all her life and she regards Vaalpark, Sasolburg to be her home. She provided details why she did not want to return to Cyprus to Nieuwenhuis which will be dealt with hereunder.

[14] The expeditious return of children who have been wrongfully abducted from their place of habitual residence is governed by the Convention.³ It is an international agreement to which SA acceded on 8 July 1997. The Convention was first incorporated into our domestic law by way of the Hague Convention of Civil Aspects of Intentional Child Abduction Act but was later repealed. The Convention was thereafter incorporated into the Children's Act.⁴ Section 276(1) of the Children's Act⁵ provides that the 'Central Authority' –

(a) in relation to the Republic, means the Chief Family Advocate appointed by the Minister of Justice and Constitutional Development in terms of the Mediation in Certain Divorce Matters Act; or

(b) in relation to a convention country, means a person or office designated for such convention country under Article 6 of the Hague Convention on International Child Abduction.”

[15] The objective and the purpose of the Convention are found in its preamble and in Article 1. Article 1 of the Convention provides:

“The objects of the present Convention are –

³ Pennello v Pennello (Chief Family Advocate as amicus curiae) 2004 (3) SA 117 (SCA) at [25]

⁴ In terms of section 275 of the Children's Act the provisions of the Convention are law in the Republic “subject to the provisions of this Act”.

⁵ Act 38 of 2005.

- (a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and
- (b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.”

[16] The Convention only applies if the Central Authority can illustrate that the children have been wrongfully removed or retained. It must be proved that:

16.1 the child(ren) were habitually resident in the requesting State immediately before the removal or retention;

16.2 that the removal or retention of the children was wrongful in that it constituted a breach of custody rights of the left- behind parent; and

16.3 that the left- behind parent was actually exercising these rights at the time of the wrongful removal or retention or would have exercised such rights but for the removal or retention⁶.

In terms of the relevant portion of article 12 of the Convention, if such requirements are met and if the application is brought within a year from the date of the removal or retention, the return of the children is peremptory, save for certain narrow exceptions, contained in articles 12(2), 13(a), 13(b) or 20 of the Convention.

[17] The objective is to give effect to the paramount importance of the interests of children in matters relating to their custody. The purpose of returning the child is to enable the courts of the country of habitual residence, rather than the courts of the country to which the child has been wrongfully removed to, to decide matters of custody and other rights. The wrongfulness of the removal or retention of a child is accordingly determined with reference to the applicable custody laws. The rights of custody with which the Convention is concerned are defined to include rights to the care of the

⁶ Articles 3(a) and 3(b) of the Convention.

child and the right to determine the child's place of residence.⁷ A child that is wrongfully removed or retained is considered to be an abducted child, who is subject to the provisions of the Convention.

- [18] Article 3 thus sets out the jurisdictional prerequisites which an applicant is required to establish before a court may consider whether the removal or retention of a child is to be considered wrongful. In **Smith v Smith**⁸ the court held as follow regarding the onus for purposes of an application terms of the provisions of the Convention:

"It is apparent from the foregoing that a party seeking the return of a child under the Convention is obliged to establish that the child was habitually resident in the country from which it was removed immediately before the removal or the retention and that the removal or retention was otherwise wrongful in terms of Article 3. Once this has been established the onus is on the party resisting the order to establish one or other of the defences referred to in Article 13(a) and (b) or that the circumstances are such that a refusal would be justified having regard to the provisions of Article 20."

- [19] The Mother raised a point *in limine* in her answering affidavit that the Family Advocate had erroneously cited the Father as the second respondent and should have cited him as the second applicant. The Father is the person who applied for the return of A to Cyprus and the applicant does not have the necessary *locus standi* to act spontaneously, alternatively without the explicit instructions from the Father. Therefore, so the argument goes, the Father should have been cited as either the first or as the second applicant.

- [20] Mrs Boonzaaier, counsel on behalf of the applicant, argued that Article 7 imposes numerous powers and responsibilities on Central Authorities who are bound to promote co-operation amongst themselves in order to secure the prompt return of children and achieve the objectives of the Convention. In South Africa the Central Authority is obliged to initiate proceedings for the return of a child under the

⁷ Article 5(a) of the Convention.

⁸ 2001 (3) SA 845 (SCA) at [11].

Convention. In terms of Regulation 17 (the regulations issued under section 75 and 280 of the Children's Act) an application for assistance made by an applicant to the Chief Family Advocate must, unless the contrary is proved, be deemed to constitute authorisation by the applicant for the Chief Family Advocate to exercise any power and perform any duty conferred or imposed on him or her under the Convention and to appear on the applicant's behalf in any proceedings that may be necessary under the Convention. With reference to **Central Authority v H**⁹ Mrs Boonzaaier contended that it was not necessary for the Father to be cited as either the first or the second applicant.

- [21] I agree with the argument on behalf of the applicant that the non- joinder of the Father as a co-applicant is not fatal to the application. However, due to the opposition of this application by the Mother and the issues raised that the Father lived in another town and exercised limited access to A and agreed that A will be attending school and residing in South Africa from July 2023 onwards, provides difficulties, which without evidence to the contrary, are challenging for the Family Advocate being the applicant.
- [22] Appended to the founding affidavit and marked Annexure "B" is the request for the return of the child submitted by the Father. Apart from the details of the Father and Mother, it is stated that A was born at Vanderbijlpark, South Africa on 23 June 2015 and that her nationality is Cypriot. At part 6 of the form, the date and circumstances of wrongful removal or retention of the child had to be completed by the Father. He was obliged to provide brief details of events leading up to the removal or retention of the child. The Father stated as follows:

"C[...] M[...] C[...] went on holiday with my daughter A[...] C[...] on the 23/06/2023 and had to return on 31/8/2023 and failed to return to Cyprus with my daughter."

⁹ 2008 (1) SA 49 (SCA).

- [23] At paragraph 6(b) the factual or legal grounds justifying the request for the return of the child(ren) had to be completed by the Father. Evidence of rights of custody with respect to the child(ren) had to be presented by the Father. The Father did not submit any factual or legal grounds justifying the request for the return of A and did not lay any evidence pertaining to his rights regarding custody or access in respect of A as required by the Convention. He submitted the request for the return of the child without completing the said paragraph.
- [24] At paragraph 6(c) which contains the proposed arrangements for the return of the child(ren), the applicant is requested to indicate whether he or she is prepared to travel to the country to which the child(ren) has been taken, both to attend the court hearing if necessary and to collect the child(ren) should the application be successful or indicate any other person who would do so on his or her behalf. The Father left this section blank.
- [25] Appended to the founding affidavit is a similar form with the heading “Republic of South Africa, Form 10 Application for the return of a child wrongfully removed/detained in terms of the Hague Convention on the Civil Aspects of International Child Abduction”. It appears to be the South African version of the same *pro forma* application. Similarly, page 5 thereof, where the applicant had to set out evidence that he or she had rights of custody in respect of the child and was exercising those rights at the time of the removal, was not completed by the Father.
- [26] Part 7 of the application, which deals with civil court proceedings that have been concluded or are in progress, has not been completed by the Father. The application was by the Father either on 21 or on 26 October 2023 at Limassol. Due to the poor quality of the copy the exact date is hard to decipher. The South African version of the application was undersigned by the Father on 24 November 2023. On the South African version of the application the Father indicated that he is prepared to travel to the country to which the child has been taken, both to attend the court hearing if necessary, and to collect the child should the application be successful. He furthermore indicated that he requests an application to be made at court for an order

that the Mother should meet any additional costs incurred for the return of A which would include the air fares.

- [27] During argument it was placed on record that Visser contacted the Mother subsequent to receiving the instructions to initiate the proceedings for the return of A in an endeavour to reach a settlement agreement. On 27 February 2024 the Mother indicated to Visser that she and the Father have reached an agreement regarding their permanent stay of A and herself in South Africa. Accordingly, it was necessary for the Family Advocate to investigate whether a court order obtained by either party provided for such an arrangement in respect of A.
- [28] In the replying affidavit Visser averred that the Father issued summons for an order of divorce on 23 June 2023. According to the Mother she received correspondence via e-mail from, what appears to be an attorney representing the Father in Cyprus, to inform her that the Father has indeed instituted divorce proceedings.
- [29] On 17 July 2023 the attorney, who initially, acted on behalf of the Mother, Mcloughlin Porter Incorporated, addressed a letter to the Fathers attorney in which the abnormalities and inconsistencies contained in the document, which purports to be an application to court to institute divorce action, were addressed. The document did not contain a certificate from a commissioner or notary neither from the Consulate in Greece to confirm the authenticity of the document. Furthermore, the document did not contain a statement of claim or prayer with the result that the Mother was unable to respond to the document. The document appears to be in Greek, a language which the Mother and A are not conversant with.
- [30] Evidently the parties were *ad idem* that the marriage had broken down irretrievably and during settlement negotiations conducted on 4 September 2023, the issue of maintenance for a period of 24 months in respect of the Mother was discussed. In correspondence from the Mother's attorney dated 4 September 2023 to the Fatehr's attorney, the following regarding the primary care and residence of A was recorded:

“There are two minor children born from the marriage between the parties, the youngest of which is A (8 years) and she has elected to reside with the mother in South Africa. It is further agreed upon the parties that the Applicant has consented to paying all school expenditure and liabilities, including those of a private school. Further to the above, the Respondent requires from the Applicant an additional contribution of R5000 per month toward the expenses of the minor child.

The Applicant is further aware that both the minor child and the Respondent need chronic medical support and the Respondent will attend to procuring medical aid, but will require the Applicant to contribute to the dependant medical aid contribution.

SCHOOLING

In order for the Respondent to register the minor child to attend schooling, the Respondent requires from the Applicant to obtain an attendance certificate from the school attended by the minor child in Cyprus.

PARENTING & RESPONSIBILITIES

The minor child A shall remain in the primary care of the Respondent in South Africa. The parties shall at all times retain parental rights and responsibilities as envisioned in section 16 of the Children’s Act, 2005.”

- [31] The Mother appended correspondence from the Father’s attorney, Vardakos Attorneys, Vereeniging dated 21 February 2024 to her answering affidavit which, apart from proposals regarding the division of the joint estate, also included a demand that A shall return to Cyprus and the Father shall then provide for her financially.

- [32] On behalf of the Family Advocate it was argued that during the discussions between Visser and the Mother on 27 February 2024, the Mother indicated that she will be willing to return to Cyprus with A, but that she does not have the finances to purchase any flight tickets. Visser contacted the Father who, per email dated 29 March 2024,

indicated that he is willing to pay for the flight tickets for the Mother and A to return to Cyprus and also for the Mother then to fly back to South Africa. The Mother however insisted to consult with her legal advisor prior to agreeing to return to Cyprus.

- [33] Thereafter the Mother declined to return with A to Cyprus which necessitated the urgent application. The reason for urgency was evidently as a result of the fact that since the Family Advocate obtained the instructions during the beginning of February 2024 to bring the application for the return of A to Cyprus, approximately 3 months passed during which endeavours to settle the matter amicably, failed. Having regard to the provisions of Regulation 17 and the objective of the Convention, it became extremely urgent for the Family Advocate to issue the application before one year expired since the alleged retention of A. Regulation 17 provides as follows:

- “(1) If a child has been wrongfully removed to the Republic or retained in the Republic, the Central Authority of the Republic must—
- (a) upon receipt of the documents from the other country's Central Authority, study the application; and
 - (b) within 10 days after the child has been located, bring an application to the High Court on behalf of the parent or person with parental rights and responsibilities from whom the child has been wrongfully removed, to have the child returned to his or her place of habitual residence.
- (2) An application for assistance made by an applicant to the Chief Family Advocate must, unless the contrary is proved, be deemed to constitute authorisation by the applicant for the Chief Family Advocate or a Family Advocate to exercise any power and perform any duty conferred or imposed on him or her under the Hague Convention, and to appear on the applicant's behalf in any proceedings that may be necessary under the Hague Convention.” (my underlining)

- [34] Article 12(1) requires contracting states to provide a process which will result in the mandatory return of an abducted child to the country of habitual residence whenever an application is made within a period of less than one year following the removal of a child. The primary rule is therefore that if, following the wrongful removal or retention of a child, the application for return is made within twelve months, an order for return must forthwith be made. In this regard it is important to have regard to the fact that the Mother and A left Cyprus on 23 June 2023. The Father only submitted the initial

application or request for the return of A to Cyprus on 21 October 2023, and the South African version of the same request on 24 November 2023. From February 2024 until 3 May 2024 the matter was studied by the Family Advocate and attempts to obtain the voluntary return of A was embarked upon.

[35] On 9 May 2024 the urgent application was enrolled for hearing by the Family Advocate. On the said date the interim order was granted on an *ex parte* basis and the application was postponed to 6 June 2024 to provide an opportunity for the legal representative on behalf of A to file a report and for the Mother to file her answering affidavit. Thereafter the replying affidavit deposed to by Visser was filed. The opposed application was thus heard approximately 16 days before the expiration of the one-year period since A left Cyprus with her mother.

[36] Article 12(2) of the Convention recognises that where a lengthy period has passed (twelve months) and the child has settled in his or her new environment, the return of the child to the country of habitual residence may no longer be in the child's best interest. It accordingly provides for exceptions to the mandatory return of a child. Article 12(2) provides as follows:

"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."

[37] Further exceptions to Article 12(1) are found in Article 13. Article 13 provides as follows:

"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.

[38] The court 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 his or her views. The court 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. In the matter at hand no information, apart from what is stated by the Mother and the child, regarding the social background and the circumstances relevant to their time spent in Cyprus, was placed on record. Therefore, in some circumstances it might not be appropriate to order the return of a child. It gives the court of the requested state the power not to return an abducted child if the person opposing the return establishes one of the grounds which Article 13 specifies.

[39] The prompt return of a child wrongfully removed to or retained in any contracting State is the primary purpose of the Convention. In terms of the provisions of Regulation 17, the Family Advocate must bring an application for the return of a child within 10 days after such a child's location has been established. Expeditious return generally results in less disruption for children and more certainty for parents. Expeditiousness is therefore essential at all stages of the Convention process. According to the Family Advocate the instructions to bring the application was received during February 2024. At that stage the precise location of the child was provided by the Father in his application form. The Mother and A resided with the maternal grandmother at Vaalpark, Sasolburg. The Family Advocate did not issue the application within the period stipulated in Regulation 17.

[40] Furthermore, the Father and the Mother corresponded with by way of WhatsApp messages prior to and subsequent to her departure from Cyprus. Copies of these

WhatsApp messages were provided to Visser by the Mother. From these messages it can be ascertained that marital problems existed between the parties prior to the Mother and child's departure from Cyprus. On 3 July 2023 the Mother confirmed a previous message that she does not want to reconcile with the Father. She insisted on a divorce. The message reads as follows:

"I'm still want this divorce. What happened between us was too much for me. You broke me. My kids blame me. I don't know why A said that to her teacher, but she said the same to me that she is not going back. I've decided to stay in South Africa with A. There is nothing for us in Cyprus. So we must start to discuss what's gonna happen. You can get full custody of M and I want full custody of A so that we don't need permission from each other every time we need to fly or go somewhere. We can do this ourselves and don't need to get lawyers that will cost money.

[41] The following day, 4 July 2023, the Father enquired regarding A's schooling. The mother replied that she will only be able to arrange for A to attend school at Emanuel once the school starts after the holidays. She also requested the Father to provide her with a transfer letter from the school that A was attending at Cyprus. Apparently the Father's sister was involved at the said school and would be able to provide the necessary documentation for A to be enrolled at a school in South Africa. On 27 July 2023 the mother informed the father that she is enrolling A at a private school at Vereeniging. The Father pleaded with her to return to Cyprus with A.

[42] On 4 July 2023 the Mother indicated to the Father that he should sell one of their motor vehicles and some of their household items to provide her with money to purchase a motor vehicle to transport A to school. She furthermore indicated that he should try to utilise the two return air tickets in order to purchase flight tickets for the other daughter, M[...], who wanted to come and visit the Mother and grandmother. The Father's response was that he would sell the Nissan and that their immovable property located at Sasolburg had to be put up for sale. He again requested information regarding the school which A would be attending. The Mother indicated that she hates Cyprus and will not be returning to Cyprus.

[43] From the contents of the numerous WhatsApp messages it is evident that the Father must have realised by at least 4 July 2023, approximately 10 days after the Mother and A departed for South Africa, that they would not be returning to Cyprus. Yet he did not file the request for the return of A until 21 October 2023, being a period of approximately 109 days later. Similarly, the Family Advocate ought to have realised that the Mother did not intend to return to Cyprus and notwithstanding the clear stance of the Mother, the Family Advocate waited until 3 May 2024 to file the urgent *ex parte* application. To my mind this is a typical example of self-created urgency. Clearly the primary objective of the Convention to secure the prompt return of a child wrongfully retained from a country where they habitually reside and to ensure that rights of custody and access to the child are effectively respected had been nullified by the failure to act by the Father and the Family Advocate.

[44] A further concern is the failure of the Father to provide evidence that he had rights of custody in respect of A and that he was actually exercising those rights at the time when A left Cyprus during June 2023. According to the Mother, A did not want to see or speak to her father for some time prior to their departure from Cyprus as a result of an incident between the Father and the Mother during May 2023. A explained to Nieuwenhuis why she did not want to return to Cyprus. The incidents were recorded in the report filed by Nieuwenhuis as follows:

“12.1 She mentioned an incident when her parents had a fight where the father threw a beer can against the wall and her parents were screaming. According to the minor child, this was not a regular occurrence in the home. This made her scared.

12.2 She also mentioned that before they left to South Africa, her father came to greet her and wanted to give her a hug and she did not want to, and he slammed the door with his fist.

12.3 According to the minor child her father also shoved/bumped her mother against the car and now she has back pain and cannot walk for long.

12.4 There was also an incident when the child allegedly had lice and when her father was told about it he said she was lying and he was screaming at her grandmother.

12.5 The child mentioned that her father drinks and started to smoke, but no information was provided that it is excessive drinking. He was even drinking before they moved.”

[45] One of the defences raised by the Mother is that Family Advocate was willing to accept that, should she and A agree to return to Cyprus, the Mother would be sent back to South Africa as agreed between Visser and the Father. The Mother states that the return of A to the Father will place the child in completely untenable and unacceptable circumstances and would create an otherwise intolerable situation for A as envisaged in the exception found in Article 13(b).

[46] During argument, Mrs Boonzaaier placed on record that the Family Advocate did their level best to obtain information from the Father for purposes of drafting the papers. Appended to the replying affidavit is a copy of an email sent by the Office of the Chief Family Advocate, Pretoria to the government officials in Cyprus, requesting an affidavit deposed to by the Father (as applicant) and containing the following information:

“Subject: RE HAGUE CONVENTION 1980 – NEW APPLICATION FOR THE RETURN OF MINOR A

Good day.

We hereby request the following information:

1.affidavit in support of the application explaining:

- When did the parents and the child migrated to Cyprus?
- Did the applicant give consent or not, for the removal of the child?

ALTERNATIVELY What was the agreement at the time the mother took the daughter to South Africa?

- Was the applicant (father) exercising the parental responsibilities and rights at the time of the removal?
- Is the applicant having contact with the child? If so when was the last time the applicant had contact with the child? How often does contact take place? Is the contact through calls or text messages or emails or video calls? (We are also requesting evidence to support this)

- [47] Mrs Boonzaaier's reply to the question what the response from the Father entailed was that the Father did not provide the Family Advocate with the information and no affidavit was received from the Father. That explains why the Family Advocate decided to cite the Father as a second respondent and not as the second applicant. No confirmatory affidavit was available in terms whereof he supported the application by the Family Advocate.
- [48] Counsel on behalf of the Mother, Ms Ngubeni, referred to the averments in the founding affidavit deposed to by Visser, that she had in her possession the documents pertaining to the matter which included the application for the return of A and she had interaction with the Mother's, Mr Grant. This ties in with the concession made by Mrs Boonzaaier that the Father did not provide further information apart from the paucity of information contained in his application for the return of the child.
- [49] It appears that, apart from the two sentences contained in the application completed by the Father, the Family Advocate obtained the major part of the information pertaining to this application from the contents of the WhatsApp messages provided to Visser by the Mother as well as from the discussions with the Mother's attorney and with the Mother herself. The founding affidavit consists of 19 pages and the annexures thereto are a further 51 pages. The annexures, *inter alia*, includes the application by the Father with annexures, the marriage certificate of the parties as well as the summons and particulars of claim of the divorce proceedings issued by the Mother at the Regional Court, Sasolburg.
- [50] The replying affidavit consists of 17 pages and annexures consisting of 90 pages, mostly copies of the WhatsApp messages sent between the parties). In motion proceedings the affidavits constitute both the pleadings and the evidence and the issues and averments in support of the parties' cases should appear clearly therefrom.¹⁰ It is trite that the applicant in application proceedings must make out his/her case in the founding affidavit. The founding and supporting affidavits must

¹⁰ Minister of Land Affairs and Agriculture v D & F Wevell Trust 2008 (2) SA 184 (SCA) at 200D.

contain sufficient facts in itself upon which a court may find in the applicant's favour. An applicant must stand or fall by his/her founding affidavit.¹¹ The purpose of the replying affidavit is to rebut any averments made in the answering affidavit.

[51] Hearsay evidence is excluded in principle because it is normally unreliable. It is unreliable because the person who witnessed the facts, in this matter the Father, does not, himself, tell the court by way of an affidavit that he had been exercising his custody rights in respect of A at the time of her departure to South Africa. The Father did not explain why he waited from 4 July 2023 until 21 October 2023 before he submitted the request for A's return to Cyprus. The attorney acting on behalf of the Father filed a notice to abide with the decision of the court on 27 May 2024. The said notice to abide was delivered and filed subsequent to the filing of the Mother's answering affidavit.

[52] The Mother denies that she and A had been habitually residing at Cyprus. The Mother denies that A has been retained in South Africa wrongfully. In her answering affidavit, the Mother referred to the WhatsApp messages between herself and the Father as confirmation for the allegation that the parties did not live together as a nucleus family and that the Mother acted as the custodial parent. The allegation in the founding affidavit that it is undisputed that the Father has primary care over A is thus placed in dispute by the Mother and is supported by the following WhatsApp message sent between the parties on 9 May 2023 prior to the Mother and A's departure for South Africa:

" Father: Can I get A after school and drop her at the village I won't come in I just want to say sorry to her I got to get M[...] so I am there.

Mother: No. she does not want to see you at the moment. Relax she will forgive you. Give her time She told me that if you pick her up she will tell her teacher she don't want to go with you and to call me.

¹¹ Director of Hospital Services v Mistry 1979 (1) SA 626 (AD) at 635H – 636D.

- [53] From the replying affidavit it furthermore appears that the Family Advocate was aware of the fact that the Father agreed that the Mother utilised the money refunded in respect of the return flight airfares to Cyprus to pay for certain expenditures and that he “allowed” her to enrol the child at a school in South Africa. The Family Advocate disputes the allegations by the Mother as set out in her answering affidavit, yet no confirmatory affidavit deposed to by the Father has been appended to either the founding affidavit nor the replying affidavit.
- [54] Proceedings under the Convention are brought on application and disputes of fact on the affidavits are dealt with according to the rule set out in **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd**¹², approved and considered in more depth in **Wightman t/a JW Construction v Headfour (Pty) Ltd and Another**¹³. The papers are replete with factual disputes in relation to the fundamental issues. The Mother put up a detailed version in response to the averments made by the Family Advocate. The version presented by the Mother cannot in my view be rejected as palpably false or untenable¹⁴. Ms Ngubeni argued that if the disputes of fact were irresolvable, the Family Advocate has failed to discharge the onus and the application fell to be dismissed. The question to be answered is whether Family Advocate, with the evidence at the disposal of the court, has made out a case to be entitled to the relief that it seeks.
- [55] Mrs Boonzaaier indicated that the Family Advocate has not been able to ascertain whether the court at Cyprus granted a divorce order or not. The contents of the email dated 31 January 2024 from the Father’s attorney reads as follows:

“Dear Mr Grant.

¹² 1984 (3) SA 623 (A) at 634E-635C. Pennello v Pennello (supra) at [41].

¹³ 2008 (3) SA 371 (SCA).

¹⁴ JW Wightman (Pty) Ltd v Headfour (Pty) Ltd 2008 (3) SA 371(SCA)

We confirm that the marriage was dissolved by the Family Court of Limassol in Cyprus on 12 December 2023. We confirm that we shall forward the divorce order once we receive same.”

- [56] It is therefore not common cause that the parties are still married as stated by the Family Advocate in the founding affidavit. Applying these principles to the facts it is not possible to determine habitual residence based on the common intention of the parents. The Father decided not to depose to an affidavit and provide the court with information in this regard. Due to the Father’s failure to provide evidence regarding his rights of custody in respect of A and failure to oppose the version presented by the Mother, I am of the view that the Family Advocate has failed to make out a case for the return of A to Cyprus. The Family Advocate has furthermore not disputed any of the issues raised during the interview between Nieuwenhuis and A. Neither did the Father.
- [57] Undertakings or conditions have a particular position in applications of this nature. Undertakings ameliorate the hardships that a child might experience by a court-ordered return. Undertakings protect the child’s short term best interests by providing for necessities such as housing, maintenance, schooling and medication until a final determination is made regarding the custody by the court in the country of habitual residence. This is of particular importance in matters where the abducting parent is and has always been the primary care-giver of the child, as in the matter at hand.
- [58] At the hearing of this matter the Family Advocate submitted a draft order which also contained an undertaking in terms of which it be, *inter alia*, ordered, in the event of the Mother consenting to accompany A to Cyprus, that the Father shall pay maintenance to the Mother and A in the amount of 250 Euros upon her arrival in Cyprus as well as any medical and dental expenses in respect of the Mother and A. The Father shall furthermore pay for rented accommodation for the Mother and A during their stay in Cyprus for a period of six months. The Father is to be ordered to purchase and pay for economy class air tickets and if necessary pay for rail and other travel expenses for the Mother and A in respect of the journey to Cyprus.

- [59] In the event of the Mother not agreeing to accompany A to Cyprus the Family Advocate is to be authorised to make arrangements as may be necessary to ensure that A is safely returned to the custody of the Central Authority for Cyprus and to take such steps as are necessary to ensure that such arrangements are complied with. In this regard I agree with the remarks made by Van Oosten J in **Central Authority v B**¹⁵ that the undertakings presented by the Family Advocate are wholly inadequate to ensure the compliance with any orders granted in this regard. This leaves this court in the extremely difficult position that there is absolutely no reason to place any reliance upon such undertaking. There is no indication that the Father has agreed to pay maintenance in respect of the child. He has in fact complained that he is suffering from financial constraints in numerous of his WhatsApp messages to the Mother.
- [60] The Mother constantly referred the Father to his obligation to maintain her and the child even though they are residing with the maternal grandmother in South Africa. I have not been provided with any information of a firm undertaking by the Father that he will indeed comply with the undertaking provided by the Family Advocate apart from the notice to abide by the decision of this court filed by his attorney on 27 May 2024, which occurred before the undertakings, as contained in a draft order, was submitted by Mrs Boonzaaier on behalf of the Family Advocate.
- [61] I cannot find that the Father actually exercised any custody rights at the time when A left for South Africa. The wrongfulness of the retention of the child cannot be determined when the Father failed to provide any evidence pertaining to the applicable custody laws. In the event that I am wrong in respect of these findings, having regard to the facts presented by the Mother, the Father evidently consented or subsequently acquiesced in the retention of A by the Mother. I am satisfied that A has now settled in South Africa. Both the Mother and the child has indicated that she does not want to return to Cyprus without her mother and does not regard Cyprus as

¹⁵ 2009 (1) SA 624 at 635D – 636A.

her habitual residence. For these reasons I conclude that, in the circumstances of this case, I should exercise my discretion to refuse an order for her return to Cyprus.

[62] In the result make the following order:

1. The application is dismissed.

2. The applicant shall pay the costs of the application on scale B.

I VAN RHYN
JUDGE OF THE HIGH COURT,
FREE STATE DIVISION, BLOEMFONTEIN

On behalf of the Applicant:

ADV. S BOONZAAIER

Instructed by:

STATE ATTORNEY
BLOEMFONTEIN

On behalf of the First Respondent:
NGUBENI

ADV. T

Instructed by:

MAYET ATTORNEYS
BLOEMFONTEIN

On behalf of the Second Respondent:

no appearance

Instructed by:

VARDAKOS ATTORNEYS
BLOEMFONTEIN

On behalf of the minor child:
GEYER

MR W

Instructed by:

LEGAL AID SOUTH AFRICA
BLOEMFONTEIN

