

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

(1)	<u>NOT</u> REPORTABLE
(2)	<u>NOT</u> OF INTEREST TO OTHER JUDGES

CASE NO: 2023-077002

DATE: 10 FEBRUARY 2025

In the matter between:

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

A K

and

C M

First Applicant

Second Applicant

Respondent

Neutral Citation: *The Central Authority of the RSA v C M (2023-077002) [2025]*
ZAGPJHC --- (10 February 2025)

Coram: Adams J

Heard: 27 September 2024 – ‘virtually’ as a videoconference on *Microsoft Teams*.

Delivered: 10 February 2025 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 15:00 on 10 February 2025.

Summary: *The Hague Convention on the Civil Aspects of International Child Abduction* (the Hague Convention) – Article 12 jurisdictional requirements not established by the left-behind parent – there was no wrongful removal of the child from her ‘habitual residence’ – whether a defence to the application for the return of the child to Israel was established as envisaged in Article 12 and Article 13(b) – Article 13(b) defence established by the abducting parent – the minor child would be exposed to a grave risk of physical and psychological harm or be placed in an intolerable situation –
Application dismissed.

ORDER

- (1) The applicants' application is dismissed.
 - (2) Each party shall bear her / his own costs.
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JUDGMENT

Adams J:

[1]. The second applicant is the father of a minor girl child ('the minor child') born on 29 April 2019. She is five years and nine months old at present. With the assistance of the first applicant, the Central Authority of the Republic of South Africa (the Central Authority), the second applicant applies in these opposed proceedings in terms of the Hague Convention on the Civil Aspects of International Child Abduction (the Hague Convention), for an order directing the respondent, the mother of the child, to return her to Israel.

[2]. It is the case of the second applicant that the minor child should be returned to her country of 'habitual residence' in Eilat, Israel, from where she was on 31 March 2021 unlawfully removed to South Africa and wrongfully retained by her mother, the respondent. The respondent opposes the application on the basis that the removal of the minor child from Israel was not wrongful as the second applicant had consented in writing to such removal. Moreover, so the respondent contends, the minor child would be exposed to a grave risk of physical and psychological harm or be placed in an intolerable situation, as envisaged by article 13(b) of the Hague Convention, if this court were to order her return to Israel. In that regard, the respondent relied heavily on the report of the duly appointed *curator ad litem* for and on behalf of the minor child, Ms Young.

[3]. At issue in this opposed application is whether factually the second applicant had consented to the relocation to South Africa of the respondent with

the minor child. Furthermore, the question to be considered by this court is whether the respondent has discharged the onus that rests upon her in terms of Article 13(b) to prove that the minor child would be exposed to a grave risk or be placed in an intolerable situation if the court ordered her return to Israel.

[4]. The foregoing issues are to be decided against the factual backdrop of the matter. In that regard, the important, salient facts are by and large common cause and I set those out in the paragraphs which follow. I also deal with all of the factual disputes between the parties.

[5]. However, before dealing with the facts in the matter it may be apposite at this point to have a brief overview of the applicable legal framework to place in context the issues which require adjudication.

[6]. Article 12(1) of the Hague Convention provides as follows:

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

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

[8]. In a very recent judgment in *N M v Central Authority for the Republic of South Africa and Another*¹, the Supreme Court of Appeal, relying on *Ad Hoc Central Authority, South Africa and Another v Koch NO and Another*², reaffirmed the well-established law in applications under the Hague Convention as stated some two decades ago in *Sonderup v Tondelli and Another*³. In the latter judgment the Constitutional Court held as follows:

‘A South African court seized with an application under the Convention is obliged to place in the balance the desirability, in the interests of the child, of the appropriate court retaining its jurisdiction, on the one hand, and the likelihood of undermining the best interests of the child by ordering her or his return to the jurisdiction of that court. As appears below, the court ordering the return of a child under the Convention would be able to impose substantial conditions designed to mitigate the interim prejudice to such child caused by a court-ordered return. The ameliorative effect of Article 13, an appropriate application of the Convention by the court, and the ability to shape a protective order, ensure a limitation that is narrowly tailored to achieve the important purposes of the Convention. It goes no further than is necessary to achieve this objective, and the means employed by the Convention are proportional to the ends it seeks to attain.’

[9]. According to *N M v The Central Authority of the Republic of South Africa and Another* (supra), the following key aspects may be extracted from the Constitutional Court’s interpretation in *Koch* of Article 13(b):

- ‘(a) The prompt return of the child: The judgment confirms that the Convention proceeds on the basis that the best interests of a child who has been unlawfully abducted from one jurisdiction are ordinarily served by requiring the return of the child to that jurisdiction so that the law can take its course. As the Constitutional Court put it: “The prompt return of the child lies at the heart of the Convention’s entire scheme”.
- (b) Grave risk threshold: The Court emphasised that the threshold for invoking Article 13(b) is high. It is not sufficient to demonstrate that the child would face some level

¹ *N M v Central Authority for the Republic of South Africa and Another* 2024 JDR 5313 (SCA).

² *Ad Hoc Central Authority, South Africa and Another v Koch No and Another* 2024 (3) SA 249 (CC).

³ *Sonderup v Tondelli and Another* 2001 (1) SA 1171 (CC).

of harm or discomfort upon return; rather, the risk must be 'grave,' meaning serious or severe.

- (c) Nature of harm: The Court considered the nature of the harm that the child might face if returned to their country of habitual residence. This included an assessment of the psychological impact on the child of being separated from her primary attachment figure and the environment in which she had become settled in South Africa. In making reference to *Sonderup*, the Court reiterated that "[t]he harm must be grave".
- (d) In considering an Article 13(b) defence, evidence of the child's attachment to one parent should not be overemphasised. To do so misapplies the test in Hague Convention proceedings. The attachment factor does not belong in the Article 13(b) inquiry, it is a test utilised for custody and care proceedings.
- (e) There must be clear and compelling evidence of the grave risk of harm or other intolerability which should be measured as substantial.
- (f) Source of harm: The Court noted that, under Article 13(b), the source of the risk of harm is irrelevant. What matters is the existence of a grave risk to the child, regardless of whether this risk arises from the circumstances in the country to which the child is to be returned or from the process of removal itself.
- (g) Balancing act: The Court balanced the grave risk of harm against the objectives of the Hague Convention. It recognised that while protecting children from harm is paramount, this must be balanced against the Convention's goals of deterring child abduction and ensuring the prompt return of abducted children to their habitual residence for custody disputes to be resolved.
- (h) Context-specific analysis: The Court's interpretation underscored that the application of Article 13(b) must be tailored to the specific circumstances of each case. It involves a careful, fact-specific inquiry into the potential harm to the child in the context of the particular case.
- (i) Determination of factual disputes and the analysis of evidence: The application of the *Plascon-Evans* rule is not conducive to a determination of factual disputes in Convention proceedings for several reasons. Since, it is not open to an applicant in Convention proceedings to choose the procedural form of the proceedings, he or she will be imperilled by factual disputes irresolvable on the papers. Convention proceedings are summary in nature. The body of evidence placed before the court in proceedings under the Convention may consist of a hotchpotch of different types

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

- (j) Expert evidence, even if uncontradicted, remains an opinion that must be scrutinised by a court to determine its value.
- (k) Nature of the inquiry: A Hague Convention inquiry involves a two-stage process in which the long- and short-term interests of the child must be balanced. The latter interests, with which the inquiry is primarily concerned, centre around jurisdictional issues. The long-term interests involve custody and care issues. These are best determined by the court having jurisdiction over the child. The aim of the Convention is to facilitate the child's prompt return to that jurisdiction to enable it to make the necessary determination regarding long-term custody and care. The two inquiries should not be conflated.
- (l) Caution should be exercised when the abducting parent relies on the time that has elapsed since the child has been in South Africa as a factor in establishing an Article 13(b) defence. It may undermine the primary objective of the Convention and could become a strategic tool to evade its objectives.'

[10]. That then brings me back to the facts in the matter and the application to those facts of the foregoing legal principles.

[11]. The second applicant and the respondent were involved in a relationship from which relationship the minor child was born.

[12]. The respondent denies that her removal of the minor child from Israel was wrongful. She contends that the child was removed with the knowledge and consent of the second applicant. In that regard, the respondent's case is that during November 2020 both she and the second applicant attended with the child at the District Government Office in Eilat to apply for a passport for the child. The respondent also avers that the second applicant signed the requisite parental consent letter required by the Department of Home Affairs in South Africa, at the respondent's request to enable her to remove the minor child from Israel to South Africa. The second applicant provided the respondent with a photocopy of his identity document which she attached to the parental consent letter for the purposes of removing the minor child from Israel to South Africa.

[13]. I accept, as more probable, the version of the respondent. She clearly told him that she was returning to South Africa to live with her family. He had visited South Africa with her in 2016 when he stayed with her at her family home (which is the very same address that the respondent resides at with the minor child). The address where the respondent would be residing was on the parental consent form which the second applicant signed electronically and which the respondent sent to him via *WhatsApp* and to which the second applicant responded with a thumb's up emoji.

[14]. For this reason alone the application should fail. The simple point is that all of the jurisdictional facts required in order to invoke the obligatory provisions of Article 12 are not present in this matter. Moreover, more than a year had passed since the date of the removal of the minor child from Israel (30 March 2021) to the date on which these proceedings were instituted (2 August 2023).

[15]. It is also the case on behalf of the respondent that, if returned to Israel, the minor child would be exposed to a grave risk or be placed in an intolerable situation. In that regard, the report by the *curator as litem* is, in my view, instructive.

[16]. The minor child has been residing in South Africa since 31 March 2021 – therefore, for a period of just under four years. The Hague application was issued by the first applicant on 2 August 2023, almost two and a half years after the respondent and the minor child arrived in South Africa. It is not mandatory for a court to order the return of a child where it is established that the court proceedings are commenced after a period of one year from the date of the wrongful removal or retention of the child and where the child is now settled in the new country. Article 12, in the relevant part, reads 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 the new environment.’

[17]. During the period from March 2021 to date, the minor child has been living in South Africa, and, as per the findings of the *curator ad litem*, she has settled into her life, home and new environment in Johannesburg. She resides with the respondent and her parents and she attends *Yeshiva College Nursery School*. She only speaks English, is settled and has made good friends, she is happy and thriving and has no recollection of her life in Israel.

[18]. On the basis of the foregoing, I am of the view that I should exercise my discretion in favour of not ordering the return of the minor child to Israel.

[19]. I am also of the view that the defences envisaged in article 13(b) is also available to the respondent. I concluded, again on the basis of the findings by the *curator ad litem* that there is a grave risk that the minor child's return to Israel would expose her to physical or psychological harm or otherwise place her in an intolerable situation. I say so because, as contended on behalf of the respondent, the minor child will be separated from her mother, who has been her primary caregiver since the time of her birth both in Israel and in South Africa. By all accounts, the respondent is the child's primary attachment figure and the source of her emotional stability and security. It would be extremely detrimental to the child if she were removed from her mother's care and deprived of the love, affection and security.

[20]. The respondent herself cannot return to Israel as she has no tertiary education and the last job that she had before the child was born was working at the duty-free store at the airport. For the most part the respondent worked the nightshift and would return home from work after midnight. She was unable to cope financially after the minor child was born and approached a welfare organization, *Revacha*, to obtain social support and obtain financial assistance.

[21]. The simple point being that, because of her financial distress whilst in Israel, the respondent, if she is required to return to Israel, would be financially imperilled, as she was before. It also didn't help that the second applicant refused

to assist her with maintenance. When he did pay towards the maintenance of the child, it was sporadically and he paid such amounts as he determined unilaterally.

[22]. The foregoing undoubtedly translates into a high risk of the psychological and physical harm to the child, as well as an intolerable situation for her. What is more is that the minor child has no relationship with the second applicant. She is unable to communicate with him as her only language is English, whereas the second applicant's first language is Russian, and he is also conversant in Hebrew. In the circumstances, if she is returned to Israel and placed in the care of the second applicant, the minor child will not only be in a foreign country and an unfamiliar environment, but she will be unable to communicate with her caregiver or other members of his family, all of whom speak predominantly Russian and/or Hebrew.

[23]. The minor child will be placed in an intolerable situation. About that there can be little doubt. The *curator ad litem*, who conducted a thorough investigation and produced for the court a comprehensive report on 26 June 2024, concluded that the minor child has settled into her new environment given that more than three years have passed since her removal from Israel. She also concluded that the child has made friends, is used to her school, attends extra mural activities, has a settled routine, a stable home and cannot imagine her life without her grandparents.

[24]. Importantly, so the *curator ad litem* opines, the minor child would have to learn a new language and will have to form new relationships in the absence of a support structure apart from her mother and in a foreign country. She will be unable to communicate with her peers at school and the culmination of all these factors will make the situation highly stressful and intolerable for her. Accordingly, it would be detrimental for her to be returned to Israel.

[25]. I reiterate that, in my view, the minor child will suffer physical or psychological harm or be exposed to an intolerable situation should she be returned to Israel. Moreover, I find that there are no conceivable protective

measures or a package of protective measures that would ameliorate or mitigate the obvious grave risk of return to Israel.

[26]. The applicants' application falls to be dismissed.

[27]. Finally, as regards costs, I am of the considered view that it is fair that each party should pay their own costs.

Order

[28]. In the result, the order which I grant is as follows: -

- (1) The applicants' application is dismissed.
- (2) Each party shall bear her/his own costs of this opposed application.

L R ADAMS
Judge of the High Court
Gauteng Division, Johannesburg

HEARD ON:	27 September 2024
JUDGMENT DATE:	10 February 2025
FOR THE FIRST AND SECOND APPLICANTS:	A Mofokeng
INSTRUCTED BY:	The State Attorney, Johannesburg
FOR THE RESPONDENT:	L Segal SC
INSTRUCTED BY:	Alexandra Budin Attorneys Inc, Viewcrest, Johannesburg
CURATOR AD LITEM:	C Young