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**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: 2025-027753

In the matter between

J[...] R[...] S[...]

APPLICANT

AND

K[...] D[...] Z[...] -S[...]

FIRST RESPONDENT

AD-HOC CENTRAL AUTHORITY FOR RSA

SECOND RESPONDENT

Date of hearing: 06 March 2025

Date of Judgment: 10 March 2025 (to be delivered via email to the respective counsel)

JUDGMENT

THULARE J

[1] This is an opposed urgent application for the immediate implementation of an order of the Gauteng Local Division, Johannesburg issued on 10 September 2024 in terms of the Hague Convention on International Child Abduction (the Convention) and directing the first respondent to hand over the parties' two minor children aged under 6 (5 years 8 months) and under 2 years (1 year 8 months) old. The applicant being the father and first respondent being the mother are an estranged couple and biological parents of the children. The children hold dual South African and German nationality and had now expired German passports. The children were habitually resident in Germany.

[2] In early 2024 the mother refused to return to Germany with the children after a family holiday in South Africa and unlawfully retained the children in Johannesburg. In March 2024 the father approached the German Central Authority which led to the second respondent initiating proceedings in Johannesburg for the return of the children to Germany. The father was the second applicant in that application. The mother opposed the proceedings in Johannesburg. Before judgment in Johannesburg, the mother relocated with the children to Cape Town. The court in Johannesburg ordered the forthwith return of the children to Germany. Mahalelo J issued a written judgment in which the following order was made:

“Order

1. The minor children, LS and MS are to be returned forthwith to the jurisdiction of Germany, Munich in accordance with the provisions of article 12 of the Hague Convention on the Civil Aspects of International Child Abduction.
2. The Respondent is to hand over all the travel documents of the minor children to the first applicant forthwith.
3. The Sheriff of this Court is to forthwith search for and seize all the travel documents of the minor children, wherever they may be found and hand

same over to the first applicant, in the event the respondent fails to comply with prayer 2.

4. The respondent is to indicate to the applicants within 7 days of this order whether she intends to travel with the minor children to Germany.
5. In the event the respondent chooses to travel with the minor children and does not wish to stay with the second applicant and the children at their apartment, the second applicant is ordered to pay for the accommodation and all related costs for the respondent's stay in close proximity to the apartment in Germany.
6. In the event the respondent elects not to return to Germany with the minor children, the second applicant, or a representative of the Germany Central Authority, being a registered social worker, or an Advocate of the High Court, duly appointed by the Family Advocate, shall be entitled to remove the minor children from the borders of South Africa and travel to Germany with them.
7. The second applicant and the respondent shall agree on issues relating to the education of the children for which the second applicant will make payment of all costs inclusive of registration fees.
8. The second applicant shall secure, in consultation with the respondent and with the involvement of Child Services or Institutions of Germany and pay for, such objective and independent English speaking therapeutic support services as may be required by the minor children after their return to Germany, including, but not limited to, psychotherapy or such other appropriate counselling services as the minor children may require.
9. Either party may approach the Family Courts in Germany inter alia:

(a) For a variation of this order, and/or

(b) Making this order a mirror order of court in Munich.

10. No order as to costs is made.”

Applications for leave to appeal were dismissed by both the court in Johannesburg (served on 13 September 2024 and dismissed on 7 October 2024) and the Supreme Court of Appeal (the SCA) (served on 5 November 2024 and dismissed on 19 February 2025).

[3] The mother only exercised her election, as envisaged in the court order, on 25 February 2025, after her petition to the SCA was refused. She indicated that she wished to return to Germany with the children. It seems that she was initially under the impression that time did not start running immediately after the High Court made an order. She believed that she could only make her election after the appeal process was exhausted. Before this court, the mother conceded that her computation of time was wrong and that although the period was at times interrupted by her lodging of applications for leave to appeal, the period in which she was to exercise her election lapsed in-between the refusal of her High Court application for leave to appeal on 7 October 2024 and her petitioning the SCA on 5 November 2024, and did not start running after the SCA’s dismissal of her petition on 19 February 2025. This concession was correct.¹

[4] In the case like the present, where the children who were habitually resident in Germany were wrongfully retained in South Africa by their mother, the legal position is that South Africa has an obligation to secure the prompt return of such children wrongfully retained in South Africa, to Germany, and to ensure that rights of custody and of access of the father under the law of Germany are effectively respected in South

¹ *Minister of Finance v Sakeliga* 2022 (4) SA 401 (CC) at para 15 and 16.

Africa.² It may be so, that when the issues come before court, the best interests of the children point to the mother for purposes of their care as the appropriate parent. The court to make such determination, under the circumstances, is not a South African Court. It is the German courts.³

[5] The mother exhausted her appeal remedies and now accepted that the children must be returned to Germany. She indicated to the applicant, even before the application was lodged, that she also decided to exercise her election, though belatedly, to accompany the children. In fairness to the mother, she was not the only one who was under a wrong impression on the time computation. It seems that even the Family Advocate in Johannesburg was of the view that the mother was entitled to first exhaust her appeal remedies before she could make an election. The Family Advocate accepted the mother's notice to elect to accompany the children within 4 days of the petition being dismissed as following the Johannesburg High Court order. I accept that the mother made an honest mistake. I have my doubts that such honest mistake must have the consequence of treating her as someone who elected not to travel with the children to Germany at all.

[6] The mother has always, even in Germany, been the primary caregiver of the children. The children have not been in the father's care for over a year. The father has not indicated when he will be travelling back to Germany. The father applied for the children's passports on 3 March 2025, and on the same day, the mother also made an appointment for a visa, which was scheduled for the next day and was duly submitted on 4 March. The visa is issued generally within 15 business days. Having regard to the age of the children, The Family Advocate of Johannesburg has suggested, for all intents and purposes, that the parents' legal representatives should work together to ensure that the mother is supported to expedite her travel documents to enable her travel with the children, and that only in the event of undue delay will her office intervene for the father to solely take the children back to Germany. Considering that even a Social

² Article 1, Convention on the Civil Aspects of International Child Abduction.

³ *Sonderup v Tondelli and Another* 2001 (1) SA 1171 (CC) para 30.

Worker and a Family Advocate, as well as representative of the German Central Authority will all be strangers that may add to and not mitigate the anxiety and distress of the minor children, the approach of the Family Advocate is sound. The presence of the mother would help the psycho-social health of the children for the long travel. One can only hope that the parties, in the interests of the children, consider the views of the Family Advocate. It is easy for an adult to march into a child's residence with a court order in hand and a Sheriff in tow and walk out with children screaming, it is another to seek to build a relationship with the children and as a parent, enjoy the confidence and earn the smile and laughter of your kids looking forward to a long trip.

[7] For these reasons I make the following order:

(a) The matter is dealt with urgency.

(b) Paragraph 6 of the order of the High Court of South Africa (Gauteng Local Division, Johannesburg) to be implemented forthwith.

(c) No cost order made.

DM THULARE
HIGH COURT OF SOUTH AFRICA