

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No. 068777/25

(1) REPORTABLE: **NO**

(2) OF INTEREST TO OTHER JUDGES: **NO**

(3) REVISED: **YES**

DATE: **25 September 2025**

SIGNATURE

In the matter between:

Applicant

S.... T...

and

N... P... S...

THE CHIEF FAMILY ADVOCATE

First Respondent

Second Respondent

NEUKIRCHER J:

1] On 15 May 2025 the applicant (ST) launched an urgent application in this court

for the return of his son (MMT) to Turino, Italy. The application is brought in terms of the provisions of The Hague Convention on the Civil Aspects of International Child Abduction (the Convention). Although the application is opposed by the first respondent (NPS)¹, the parties agreed to interim relief pending the final adjudication of the application, and on 3 June 2025 an order was made in which ST was granted interim contact to MMT pending the finalisation of the application. Ms Fitzroy was also appointed as MMT's legal representative:²

“3.1 To investigate the best interests of the minor child in relation to this application, including the child's views and wishes if ascertainable.”

2] The application was set down for hearing on 9 and 10 September 2025. A case management meeting was held on 13 September 2025 to ensure that the application would be ripe for hearing. Time periods were set for the filing of further affidavits, the heads of argument and Ms Fitzroy's report.

3] By the time the matter proceeded on the date of set down, all the affidavits and reports had been filed. However, NPS's argument was that, as Ms Fitzroy had not appointed an expert to assess MMT, his voice and views were not properly before the court – this despite the fact that she had been appointed as his legal representative. The argument was that this meant that MMT's objection to his return to Italy was not properly articulated and the application should not be finalised until

¹ The child's mother

² Her function, according to the order is “akin to that of a *curator ad litem*”

such time as this was done. For the reasons that will become apparent, I do not agree.

4] I pause to mention two further aspects:

- a) although the Chief Family Advocate is a party to the proceedings as the second respondent in this application³, there was unfortunately no appearance by them⁴;
- b) Article 11 of the Convention provides for a decision to be made within a period of 6 weeks of commencement of the proceedings. But this is not always practical or possible. In my view, this is recognised in Regulation 23 of the Children's Act 38 of 2005 (the Children's Act), which provides:
“(1) Proceedings for the return of a child under the Hague Convention must be completed within six weeks from the date on which judicial proceedings were instituted in a High Court, except where exceptional circumstances make this impossible.”⁵

5] The application was initiated on 27 May 2025 and the interim order was made, by agreement, on 3 June 2025. That order makes provision for the filing of certain processes within specified time periods and the application was set down for

³ Section 276 of the Children's Act 38 of 2005 provides that for purposes of the Convention, the “Central Authority” means the Chief Family Advocate and the Chief Family Advocate must perform the functions assigned by the Convention to Central Authorities

⁴ *CAR v The Central Authority of the RSA and Another* [2024] ZASCA 103 where the court noted the obligations in terms of the Convention and its concern with the non-appearance of the Central Authority before it, which deprived it of important information including issues involving whether the Central Authority of the other contracting country would be willing to enforce or, at least assist, the parent to apply for a mirror order complementing the order this court would make

⁵ The Practice Directives of the Gauteng Division do not make provision for time periods within which the parties are to file affidavits and reports. Instead, it is left to the allocated judge to determine the hearing bearing in mind the period set out in Article 11 of the Convention as read with Regulation 23 of the Children's Act

hearing as soon as my duty roster permitted. From initiation to date of hearing, a period of three-and-a-half months had lapsed.

6] I have already stated that Ms Fitzroy was appointed as MMT's legal representative in this matter. This was done in terms of s279 of the Children's Act which reads:

"A legal representative must represent the child, subject to section 55, in all applications in terms of the Hague Convention of International Child Abduction."

7] Section 55⁶ of the Children's Act resorts under the chapter that regulates the Children's Court, its establishment, procedures and processes. Although Ms Fitzroy is not appointed in terms of s55, she is appointed by agreement between the parties.

8] The objects of the Convention are:

"(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 other Contracting States."

9] With these objectives in mind, the Convention then provides:

"Article 12

⁶ "(1) Where a child involved in a matter before the children's court is not represented by a legal representative, and the court is of the opinion that it would be in the best interests of the child to have legal representation, the court must refer the matter to Legal Aid South Africa referred to in section 2 of the Legal Aid South Africa Act, 2014."

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.

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.

Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

Article 13

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.”

Common cause

10] It is common cause before me that:

- a) MMT was habitually resident in Turino, Italy;
- b) MMT was unlawfully retained in South Africa without ST’s consent and in breach of his custody rights;
- c) MMT’s return to Italy is peremptory unless NPS establishes a defence under Article 13 of the Convention;
- d) NPS’s argument is that:
 - (i) there is a grave risk that MMT’s return would expose him to a psychological⁷ harm or place him in an intolerable circumstance; and
 - (ii) MMT has voiced an objection to his return to Italy.

11] NPS also argues that a court may refuse to order MMT’s return in terms of Article 20 of the Convention which states:

“The return of the child under the provision of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.”

12] It is not in dispute that given that it is admitted that MMT’s habitual residence prior to his retention was Italy, that ST’s has rights of established custody in Italy, that he did not consent to or subsequently acquiesce in the MMT’s retention in South

⁷ It not being alleged that there is a physical harm element in his return

Africa, the *onus* rests on NPS to establish the Article 13 defences on a balance of probabilities⁸.

Background

13] The parties met in the USA in 2003 whilst pursuing post-graduate studies. At that stage, NPS was living in South Africa. ST relocated to South Africa in 2007 and the parties were married in a traditional celebration on 23 March 2007. Shortly thereafter, and for reasons which are not relevant to the determination of the application, the parties were divorced⁹ and then married again on 26 October 2007. At this time, NPS was working in South Africa and ST in Kigali, Rwanda.

14] ST moved to Pretoria in October 2007 after he was transferred to South Africa.

15] Two children were born of the parties' marriage:

- a) MAT (a daughter) was born on 4 August 2008). She is now 17 years old; and
- b) MMT (a son) was born on 9 July 2013. He is now 12 years old.

16] MAT resides in Italy. This being so, she is not the subject-matter of this application. Even were she to have been wrongly retained in South Africa, the Convention would not apply to her as Article 4 provides that "the Convention shall cease to apply when a child attains the age of 16 years."

⁸ *Ad Hoc Central Authority, South Africa and Another v Koch NO and Another* (Koch) 2024 (3) SA 249 (CC) at par 158

⁹ It was not, however, because of an irretrievable breakdown of the marriage relationship. It appears (and this is according to NPS) that there was an issue with the initial marriage being recognised in Italy

17] Both children hold dual Italian and South African citizenship, as does NPS by virtue of her marriage to ST. She has also retained her South Africa citizenship.

18] In December 2022, both parties and the children permanently relocated to Turino, Italy. They did not sell the matrimonial home in South Africa and instead, retained it and their movable property in Pretoria. It appears that NPS has a large family in South Africa¹⁰ and she and MMT have visited South Africa on at least three occasions since the family's relocation to Italy in 2022.

19] It is common cause that NPS voiced a desire to return to South Africa. In particular, she expressed this in November/December 2024 and, according to ST, he
“...indicated that while it could be a future possibility, MAT's ongoing treatment and recovery in Italy were the immediate priority. MMT needed to complete his current school year, separating the siblings was not an option...”

20] Unfortunately, the parties' marriage did not survive the relocation to Italy. It is apparent from the affidavits that the parties had been experiencing marital difficulties prior to their relocation, but once in Italy their relationship soured even more. In late 2023 they decided to pursue a divorce. Each retained their own legal representative and they were in the midst of settlement negotiations when NPS wrongfully retained MMT in South Africa¹¹.

¹⁰ She states that “I came from a polygamous family. My father was married to three wives and had 18 children in total...I am the youngest of 5 children born with my father to my mother.”

¹¹ They came to South Africa ostensibly on a week-long vacation and NPS refused to return on the agreed upon date

21] Added to their marital issues, it appears that their eldest daughter, MAT, suffers from severe mental health issues to the extent that she is on medication and requires frequent and extended periods of hospitalisation. A detailed account of MAT's health issues is not necessary. Suffice it to state that NPS uses this, in addition to several other accusations that she places at ST's door, to argue that the siblings do not share a close bond and therefore it would neither be a hardship nor sever the sibling bond were MMT to remain in South Africa without his sister.

22] Most of NPS's 225-page answering affidavit is spent repetitively detailing ST's abusive behaviour from the time they met in 2003 and, anecdotally, long before that to the present date. According to her, his constant serious alcohol abuse, financial abuse towards her, racist and patriarchal behaviour¹² towards her and the children, his clear favouritism of MAT and his verbal abuse of her were constant and emblematic of their failed relationship and of his abusive and controlling nature.

23] Added to this was the controlling nature and interference by her mother-in-law and it all resulted in the mental breakdown of MAT and her own breakdown which manifested itself in skin break-outs on her elbow, blackouts and frequent headaches and her constantly being ill "because of stress". I interpose here to state that there is no medical evidence to support the latter allegations.

24] I do not intend to detail NPS's allegations chapter and verse. Nor do I intend to detail each and every complaint. Instead, I intend to deal with those that lend the most weight to NPS's Article 13(b) defence.

¹² Which includes allegations that the Italy and particularly the Italian justice system is patriarchal and racist and unlikely to favour her

25] Ms Fitzroy has filed a comprehensive report in which she has detailed the discussions and consultations she had with various persons and experts, as well as with MMT. None of the allegations levelled by NPS against ST in these proceedings were either corroborated or confirmed by any of the sources¹³ she spoke to.

The Article 13(b) defence

26] It is common cause that once it has been established by the leave behind parent

that the child has been unlawfully retained in the contracting country, that this was done without his consent and that he has established rights of custody in the leave behind country, the *onus* rests upon the parent who unlawfully retained the child to prove, on a balance of probabilities¹⁴, that 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.”

27] It is also common cause that the requirements set by the Convention have been met by ST and that it is for NPS to establish the defences under Article 13(b) as well as the defence that MMT objects to his return and that he is of an age and degree of maturity where it is appropriate that this court takes into account his views.

¹³ And I exclude MMT from this for reasons that are set out later in this judgment

¹⁴ The *Plascon-Evans* rule is not conducive to a determination of factual disputes in Convention proceedings. A determination made must be based on an overall assessment of all the evidential material placed before the court. *NM V Central Authority RSA* (1078/2024) [2024] ZASCA 178 (19 December 2024) para 17(i)

28] In *Ad Hoc Central Authority, South Africa and Another v Koch NO and Another*¹⁵ (Koch) Majiedt J explained the concepts of ‘grave risk’ and “intolerable circumstance” as follows:

“[158] The art 13(b) defence plainly lies at the heart of this case. The aunt had to prove on a balance of probabilities that there is a grave risk that E’s return to the UK would expose her to physical or psychological harm or otherwise place the child in an intolerable situation. In *G v D* the Court cited *Re E (Children)*, where the UK Supreme Court set out the principles applicable in art 13(b) defences. These are...

(a) ...

(b) ...

(c) 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’. Although ‘grave’ characterises the risk rather than the harm, there is in ordinary language a link between the two.

(d) The words ‘physical or psychological harm’ are not qualified, but do gain colour from the alternative ‘or otherwise’ placed ‘in an intolerable situation’. ‘Intolerable’ is strong word, but, when applied to a child, must mean ‘a situation which this particular child in these circumstances should not be expected to tolerate.’ “

29] It is with this in mind that NPS’s Article 13(b) defence must be assessed.

The Police Investigation

30] On 16 January 2025 NPS filed a complaint with the Office of General Prevention and Public Aid in Turino, Italy. The “subject” is described as “Report of ST Behaviour” and it lists NPS’s complaints in respect of events that occurred between August 2023 and 16 January 2025. In my view this complaint is relevant to the Article

¹⁵ Supra para 153

13(b) defences raised by NPS in opposing the return of MMT to Italy. The complaint states:

“...Specifically, the person constantly humiliates me, makes me feel like a useless woman, insults me using words like ‘you disgust me’, and says I am not capable to taking care of our children...

Following our constant arguments, he often shouts, especially when he’s drinking, and continuously threatens to take the children away from me in an intimidating manner.

Because of this stressful situation, our older daughter MAT, on several occasions, inflicted **self-harm by cutting her arms using a razor blade...**

ST abuses alcohol and was advised to seek help from **SERT** (addiction services), which he has not done.

I did not call the police immediately, but I went directly to the hospital. He doesn’t beat me, but during arguments he sometimes becomes violent and pushes me. This has happened to the children as well on some occasions.

At the moment, I am not asking to be placed in a protected shelter with my child. However, the man has taken away all my bank cards and given me one with a spending limit. I cannot make any transactions freely. For any need, I have to ask him, and this situation makes me feel **deeply humiliated**.

Currently, I cannot access any psychological support because I do not have the **financial means**. I contacted the ASL (local health authority)...but was unable to communicate due to **language barriers**.” (emphasis provided)

31] ST states that these allegations have not been raised by NPS at all during the parties’ divorce proceedings in Italy. In fact, ST states in his replying affidavit:

“25. I was also not aware of this report until I received her answering affidavit.

Crucially, as confirmed by my Italian lawyer, ASF, the First Respondent’s own

Italian layers were never informed of any allegations of abuse during out extensive divorce negotiations, nor were they aware of her intention to relocate to South Africa...”

32] A confirmatory affidavit, duly apostilled, has been provided by ASF who is a member of the Bar Association of Attorneys of Biela, Italy, and ST’s attorney in Italy. She states, *inter alia*, the following:

- “4. I handled the negotiations on behalf of ST regarding his divorce in Italy from NPS...
5. I confirm that during the course of these extensive and in-depth negotiations, neither NPS nor her lawyers...have ever raised, mentioned or averred any accusation of domestic abuse, violence or ill treatment on the part of ST.
6. I furthermore confirm that the negotiations regarding the consensual divorce have not been finalised in Italy, mainly due to financial reasons...
7. Based on my professional discussions with [NPS’s attorney] I can furthermore confirm that he was not aware that NPS had ever filed a complaint with the police, nor submitted a sworn affidavit containing accusations of abuse on the part of ST.
8. In fact, confirmation that no accusations of abuse by the husband towards the wife had ever been made,...on the 9th of April 2025¹⁶, in the offices of [NPS’s attorney], a meeting was held between the couple in the presence of their respective lawyers, during which extensive discussions took place regarding the possible resolutions of the consensual divorce, and NPS never once mentioned violence or abuse by her husband, nor mentioned him abusing alcoholic beverages, and the only aspect on which both spouses agreed was that MAT...would be placed in the care of her father, and MMT would

¹⁶ A mere week before she and MMT left for South Africa on vacation until 25 April 2025

continue to live in Turino in two separate homes, which ST undertook to find in close proximity to each other, so that the latter could live for half of the week with his father and the other half with his mother..." (my emphasis)

33] It is not for this court to pre-determine the outcome of the police investigation, which I am given to understand is ongoing, and thus the fact of the complaint is accepted simply for what it is: a complaint made by NPS against ST which has yet to be finalised. It does not rise to the level of proven allegations merely because it has been filed. But it is a factor to be considered with adjudicating the Article 13(b) defence.

Alcohol abuse

34] NPS has, in minute detail, chronicled ST's alleged abuse of alcohol which includes driving under the influence, being so under the influence that he did not know where he was, falling whilst carrying a child, disguising alcohol in a green golf bottle and pretending that it was Coke, being so drunk that he broke a glass shelf in their house whilst reaching for alcohol, being severely intoxicated around the children, and generally being emotionally and verbally abusive towards her whilst under the influence and otherwise.

35] Whilst ST does not deny that he partakes in alcohol socially, he denies that he abuses it. He alleges that NPS also drinks socially. He conceded to Ms Fitzroy that "at some point he did drink 'more' but he currently has completely stopped drinking."

36] On 19 August 2025 Ms Fitzroy asked ST to take a carbohydrate deficient transferrin and liver function test. The results, dated 22 August 2025, are attached to her report and state:

“...the tests dated 19 August 2025¹⁷ are normal and these tests do not indicate that ST is a regular consumer of alcohol.”

37] It is unsurprising that NPS contests the outcome and probative value of these tests, but she is not an expert on this issue and there is no report from any expert to refute the test results.

38] MMT has questioned his father’s truthfulness regarding the alcohol abuse. He recounted to Ms Fitzroy that his sister questioned ST about the content of a plastic bottle he kept in his motor vehicle which ST insisted contained Coke. But when she opened it, MAT discovered it contained alcohol.¹⁸ Ms Fitzroy asked MMT whether his sister told him this and he stated “No, but I think it was beer.” Ms Fitzroy then states:

“The undersigned sought clarification by asking, ‘How do you know there was alcohol in it?’ To which MMT responded, “Because my mom told me when we were on a walk when I was 11.”

39] Ms Fitzroy consulted with Mrs S who worked as a live-in helper to the family between 2014 and 27 May 2024. She continued to work in their Pretoria home after the family relocated to Italy. She cared for MMT since was 7 months old until the relocation.

¹⁷ ie the same date they were requested

¹⁸ NPS says that MMT was wrong when he says it was MAT who discovered this. She states that it was MMT himself who found the Coke bottle

40] Ms Fitzroy states:

- a) “When MMT experienced challenges while completing his homework with his mother, Mrs S would frequently intervene, helping to calm him down and provide the support needed for him to finish his assignments successfully”;
- b) that MMT had “a good relationship with his father and a very close bond. The children would sometimes prefer to be with their father and she assumed it was because he travelled a lot and they missed him when he was away from home.”
- c) that Mrs S confirmed that both parents consume alcohol but she never saw them intoxicated;
- d) that Mrs S stated that “as long as the children stay with their father the children will be safe” but she was not prepared to elaborate;
- e) that Mrs S stated that the two children were “very close” and that MMT “is very concerned about his sister”. (my emphasis)

41] Both ST and Ms Fitzroy point out that Mrs S is reluctant to become involved in the legal proceedings. Ms Fitzroy states:

“Mrs S was very hesitant to consult with the undersigned and was willing to provide limited information since she is fearful of the possible consequences of providing her views in this matter.”

42] This is also borne out by the WhatsApp messages exchanged between ST and Mrs S that are attached to the founding affidavit where, in one, she states:

“I know she loves going out and then what about the child. Do you think you can take him? To me the kids are better off with you even if you are travelling with your work...”

43] I do not mention this to voice an opinion on which of the parents should be granted primary care and residence – that is not a decision a court hearing a Convention application has authority to make.¹⁹ Instead, it rather provides a balance to the serious allegations of alcohol and other abuse levelled by NPS to support her Article 13(b) defence.

44] In my view, at present there is no evidence to support NPS's allegations: the blood alcohol test is negative; MMT's observations are not his own but rather those of his sister and are also those that NPS told him a year ago; Mrs S's view expressed in her WhatsApp messages and to Ms Fitzroy also demonstrate the contrary. But even more importantly, ST's excessive alcohol consumption has not been raised at any stage during the ongoing divorce proceedings.

45] Dr Berra, who is MMT's psychologist in Italy and who has been seeing him regularly for therapy since May 2023, also informed Ms Fitzroy that MMT was unable to recall or describe any instance related to his father's drinking or any associated incidents.

46] Thus, even were I to accept that these allegations to have been true in the past, they do not appear to ring true now.

Economic abuse

¹⁹ Koch (supra) para 165

47] NPS alleges that ST has exposed her and the children to serious economic abuse and hardship:

- a) she alleges that he has confiscated her \$5 000 credit card and has reduced the debit order on his card from €4 000 to €1 500 whilst she is in South Africa “totally disregarding our needs, such as medical emergencies, that may arise”;
- b) in her answering affidavit NPS appears to contradict this time line:
 - (i) she states that the financial abuse started in February 2023 when she voiced an intent to separate;
 - (ii) in July 2024, ST reduced her debit card allowance from €4 000 to €1 500;
 - (iii) ST refused to apply for her for spousal dependency support from the World Health Organisation (WHO) after they moved to Italy which left her vulnerable;
 - (iv) he withheld money from her even though she was unemployed.

48] But NPS contradicts herself as is clear from par 47(b)(ii) *supra*. Also, insofar as par 47(b)(iii) *supra* is concerned, ST has attached the children’s Italian Health Care cards to his affidavit. Insofar as the WHO spousal dependency support is concerned, an email from the WHO dated 22 March 2022 clearly states that it rejected the application because NPS was working at the time and her earnings exceed the limit. This was later revised and a certificate from the WHO dated 4 December 2024 states that NPS:

“...is currently a participant in the World Health Organisation (WHO), Staff Health Insurance (SHI) covers the reimbursement of the major portion of medical expenses related to accident or illness, within the limits laid down and the SHI Rules.”

49] Thus, not only does NPS receive support of at least, on her own version, €1 500 per month, but she is in fact covered by the WHO program and she is now employed in South Africa.

50] There is also no evidence that whilst they lived in Italy, MMT was not fully emotionally supported by ST, nor that his education was not covered in full by his father, nor that any medical treatment for him and MAT was not paid for by ST – in fact, the contrary evidence has been provided by ST.

51] At present, and even though MMT is enrolled at Crawford College in Pretoria²⁰, he remains enrolled at WINS²¹ in Italy which is paid for by ST. Save for PE, Art, Music and Design all other courses have continued for MMT online whilst he has been in South Africa and MMT has successfully passed his end-of-year WINS examinations.²²

52] Thus, the economic abuse element of the Article 13(b) defence is without merit.

Racism and patriarchy

²⁰ Without ST's consent

²¹ World International School

²² Which were scheduled from 26 May 2025 to 6 June 2025

53] This issue was not argued at the hearing but is rather dealt with as the court was informed that the fact that argument is not made on a particular issue does mean that NPS has abandoned it.

54] NPS accuses ST, Italian society and the Italian legal system of racism and patriarchy. She argues that she and MMT have been constant victims of both subtle and overt conduct and that to return him to Italy would be detrimental to his well-being.

55] According to NPS, MMT has experienced racism in Italy. The incidents of racism include:

- a) a schoolmate asking him if he was coloured;
- b) that he experienced that “people looked at him differently because he was brown”;
- c) that MMT “believes Applicant shouted and pointed fingers at me (being NPS) because I am brown”.

56] She states that she has also experienced racism in Italy inter alia that:

- a) “...[I]ack of integration in Italy is a known fact, ranging from soccer fans calling a soccer star a Monkey. I was not necessarily called monkey, but I was reduced to a nameless, faceless object, I was referred to as ‘lady’ by the Applicant’s lawyer...while the Applicant was called Mr T. I was reduced to being a maid and a singer by the Applicant...
- b) she has been accused of being an unfit mother due to her cultural values;
- c) the applicant believes his culture is superior to hers. Interestingly however, she states that at a meeting with one of MAT’s doctors “the

Applicant tried to argue that my cultural way of raising children is unaffectionate, a claim that one of the doctors disputed, stating that his culture might also not be appropriate.” This is a clear indication to the contrary of NPS’s broad and sweeping assertions;

- d) she struggled to learn Italian as she associated it with a person who was “constantly” abusing her and she was expected to learn Italian nonetheless;
- e) “the justice system is patriarchal and racist, and unlikely to favour me.”

57] Whilst it may be so that the above is the subjective view of NPS, at issue is whether MMT has been exposed to this alleged racism and behaviour. If so, the question would then be whether his return would expose him to this again and whether that would constitute a grave risk of psychological harm or would place him in an intolerable situation.

58] MMT expressed to Ms Fitzroy “... I have to admit the people here are way different from Italian people. And even in conversation we said²³ that Spanish and Italian people are really racist. Especially racist to people like me and my mom.”

59] Ms Fitzroy states:

“99. MMT explained that the people inside of his school in Italy are very nice people and they’re not racist. He enjoyed school but he enjoys Crawford better. He explains that there’s nicer people in South Africa and less bullies.”

²³ He and his mother

60] In my view, the answer lies in the view of Dr Berra. She informed Ms Fitzroy that MMT had never reported any racism directed towards him in Italy. Given that MMT has consulted with Dr Berra for over 2 years, and that he has a good relationship with her and trusts her²⁴ it is highly unlikely that, had he experienced any racism or bullying, this would not have come up in his therapy sessions.

61] Importantly, he also informed Ms Fitzroy that the people in his school are not racist and, according to her, from her discussions with him, there is no indication that MMT understands the concept of racism.

62] This being so, I cannot find that MMT has been exposed to racism and it appears his “experiences” and understanding of the concept are informed by what NPS has told him. This being so, I cannot find that his return to Italy would expose him to any grave risk or intolerable circumstance.

The grandparents

63] NPS describes the relationship between ST and his mother as “dysfunctional”. She goes to pains to describe their volatile relationship and has detailed events and instances which lead one to assume that ST’s mother is controlling and interfering in their marriage, dismissive of NPS and incapable of properly caring for MMT were he to be left in his care which he frequently has been in the past²⁵.

64] This notwithstanding, Ms Fitzroy states:

²⁴ Which is admitted by NPS

²⁵ Because of ST’s extensive travelling, which NPS states will simply continue

“111. The minor child explained that his paternal grandfather is “Very chilled, a kind person and he’s a simple person. Even though he needs help getting out of bed²⁶, yeah, because he’s really old, but he’s a very nice person.” He complains that his grandmother constantly kisses him but he loves her. He said “I love her. It’s just, she doesn’t have to kiss me, She’s annoying me a little bit. Also, she hasn’t told me yet, but my mom says that my grandma had a beef with my mom. I think she’s been a racist and fighting with my mom. That’s why my mom is never coming back to their house.” (my emphasis)

65] In my view, the complaints that NPS has about the grandparents cannot be elevated to circumstances where his return to Italy would pose any grave risk or intolerable circumstance. Whilst it may be so that NPS has a fraught relationship with the grandmother, it appears that MMT has a good and loving relationship with both of them.

MMT’s relationship with MAT

66] It is clear from all the affidavits and reports filed that MAT is emotionally very fragile and has been for many years. At present, she is institutionalised and receiving treatment in Turino and so her care (for the moment) is ongoing and monitored by professionals, including social services. ST visits her regularly and pays for her care. Part of ST’s objection to the family relocating to South Africa is that MAT cannot be moved right now. He also argues that it is not in the interests of the siblings to be separated as they share a close bond.

²⁶ Both grandparents are elderly

67] NPS denies that the latter is still the case. She alleges that because of ST's conduct towards MAT the relationship between the siblings is fractured. This includes that he allowed MAT to do as she pleases, allowed her to vape, gives her whatever gifts she wants, allows her access to sharp objects²⁷, and in general gives in to her every whim, whilst he is stricter with MMT.

68] She states that MAT has not called MMT once since their arrival in South Africa and

"I had sent her pictures of her brother cooking scrambled eggs on Mother's Day. Her response was 'Oh cute'. She did not even ask me to pass on the greetings."

69] She also denies that ST facilitates calls between the siblings as he alleges.

70] In fact, NPS alleges that:

- a) MAT "play[s] out her drama to get what she wants";
- b) the "visible bond that once existed between the siblings vanished, and the Applicant continued to fuel our son's resentment towards his sister through his favoritism treatment of her...";
- c) MMT resents MAT;
- d) MMT started asking if MAT was faking her sickness.

71] But this fractured sibling relationship is not borne out in the conversations between MMT and Ms Fitzroy where he told her he misses MAT and she states that "...when I enquired whether he and his sister used to have a good relationship, he

²⁷ He gave her access to a razor and she tried to commit suicide

immediately stopped me and corrected me stating that 'I still have a very good relationship with my sister'."

72] According to Dr Berra:

"132. MMT maintained a very strong bond with his sister, frequently mentioning her during therapy sessions. He openly recognised that their bond was unique and expressed his eagerness for her to return home."

73] Given MMT's unequivocal statement to Ms Fitzroy, as well as Dr Berra's opinion, I cannot find that the siblings have a fractured relationship nor that MMT harbours any resentment towards his sister. Given the objective evidence, this ground does not meet the threshold required by Article 13(b).

ST's abusive behaviour

74] It is clear that the parties' relationship was a volatile one. In fact, so much so that MMT informed Ms Fitzroy "that the circumstances in Italy in their family home has become unbearable". He stated "I mean, usually they don't fight, but it is pretty common for a fight to happen over simple things and it is usually him that starts it..."

75] Ms Fitzroy also states:

"88. The minor child started to list all his father's wrongdoings spontaneously and whenever the undersigned requested him to elaborate, he responded: 'I will explain later' or 'I think that is all I have to talk about'."

In other words, he could not mention one event of physical or emotional abuse directed towards him.

76] It appears that the allegations of abuse are those directed towards NPS and there is no proof that ST has acted in an abusive manner towards MMT.

77] In any event, were I to order MMT to return to Italy, he would not be exposed to the frequent occurrence of the parties' volatile relationship as:

- a) I was informed by Mr Haskins²⁸ at the outset, that even were this court to order MMT to return to Italy, NPS would not return with him;
- b) Ms Fitzroy informed me that she had also, that morning, had a discussion with NPS who had confirmed this to her;
- c) even were NPS to return to Italy, the parties would not reside together as ST had, during the divorce negotiations, undertaken to provide NPS with alternative accommodation. This tender is repeated in a draft order handed up to me during argument by Mr Nel²⁹.

78] NPS's stance notwithstanding, she is still entitled to change her mind. It is also not for this court to determine whether or not the financial support tendered by ST is reasonable – the point is that there is a tender and that MMT will not be exposed to the parties' volatile relationship on an ongoing basis as they will no longer be residing together.

79] But even were this not to be so, I am still of the view that the facts do not bear out the alleged emotional abuse as:

- a) NPS has left MAT in Italy alone in ST's care despite MAT's extremely fragile emotional state;

²⁸ Who acts for NPS

²⁹ Who acts for ST

- b) she has informed MAT that she has no intention of returning to Italy;
- c) it is common cause that when MAT is discharged from the care facility, she will be discharged into ST's care – this is the same person whom NPS alleges is an emotionally abusive person who is unsuited to care for their children;
- d) in the divorce negotiations, she was willing to grant primary care and residence of MAT to ST and to share residency of MMT with him.

80] Thus, her version is contradictory and does not support the Article 13(b) defence raised on this ground.

The child's objection

81] Over and above the Article 13(b) defences raised by NPS, she alleges that MMT has voiced an objection to his return – this is for all the reasons already raised by her *supra*.

82] In *Central Authority of the RSA and Another v B*³⁰, Meyer J stated:

“Even though the part of art 13 which relates to the child's objection to being returned is not separately numbered, it is separate from paras (a) and (b) and constitutes a separate defence.

83] He thus concluded³¹ that it is therefore unnecessary to conclude that the child's objection must “import [...] a requirement to establish a grave risk that the return of

³⁰ 2012 (2) SA 296 (GSJ) para 6

³¹ In line with the dictum of Balcombe LJ in *Re S (A Minor) (Abduction: Custody Rights)* [1993] Fam 242 at 250

the child would expose her to psychological harm, or otherwise place her in an intolerable situation.”

84] Mr Haskins argues that, when considering not just the Article 13(b) defences but also the child’s objection, a court is obliged to take into account the provisions of the Children’s Act and in particular s10 which states:

“Every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration.”

85] But one must also take into account the provisions of s278(3) of the Children’s Act, which reside under Chapter 17 of the Children’s Act specifically dealing with the application of The Hague Convention and the abduction of children, and which reads as follows:

“(3) The court must, in considering an application in terms of this Chapter for the return of the child, afford that child an opportunity to raise an objection to being returned and in so doing must give due weight to that objection, taking into account the age and maturity of the child.”

86] In my view, s10 of the Children’s Act is not dissonant with s278(3) of the Children’s Act and, specifically, Article 13 of the Convention which specifically provides that a court may refuse to order the return of a 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.”

87] He also argues that it is necessary for a court to consider the best interests of

the child as was done in *Central Authority v MV (Intervening)*³² and *Central Authority of the RSA and Another v B*³³.

88] Although *Sonderup v Tondelli and Another*³⁴ was decided 14 years ago, and prior to the enactment of the Children's Act, the Constitutional Court found that Art 12 of the Convention was consistent with s28(2)³⁵ of the Constitution. In *Central Authority for the RSA and Another v LC*³⁶ the court found that the

“...argument that the Children's Act alters this position is, in my view, unfounded and has been found to be wrong.³⁷ There is no inconsistency or need for one to trump the other – they complement each other.”

89] In fact, when considering the three provisions³⁸ side-by-side they both speak to

the court taking into account the child's views if the child is of sufficient age and maturity. The court, in applying s28(2) of the Constitution as well as s10, s278(3) and s279 of the Children's Act and Article 13 of the Convention, provides a platform in which the child is given an opportunity to voice its views and objections. In this way, the court applies the 'best interests' principle.

90] In my view, there are no hard and fast rules to apply in this consideration. Each case would depend on its own facts. Two of those factors are already given voice in the sections: they are the age of the child and the level of his/her maturity.

³² 2011 (2) SA 428 (GNP) para 28

³³ *Supra* par 7

³⁴ 2001 (1) SA 11171 (CC)

³⁵ “A child's best interests are of paramount importance in every matter concerning the child”

³⁶ 2021 (2) SA 471 (G) at par 105

³⁷ *Central Authority of the RSA v JW 2013 JDR 1117 (GNP) par 19; KG v CB and Others 2012 (4) SA 136 (SCA)*

³⁸ Ie s10, s278(3) and Article 13

Some other factors to be considered would be, for example, whether the child has been influenced by either parent, whether the parent who has wrongfully retained the child has alienated him/her from the leave behind parent; whether the child's views find substantiation in the facts and any expert report that may have been filed³⁹ and the findings and recommendations of the child's appointed legal representative or *curator ad litem*. Ultimately, each case must be decided on its own facts. What may be afforded more weight in one matter, may not necessarily be afforded the same weight in another.

91] *In casu* it is common cause that, even prior to his retention in South Africa, and whilst in Italy, MMT had voiced a desire to return to South Africa. He informed Ms Fitzroy that he wants to stay in South Africa

“98. ...Because it's just a place where I belong and since I was born here. Its not only because the people here are very nice. I have to admit, the people here are way different to the Italian people. And even in a conversation we said, that Spanish and Italian people are really racist. Especially racist to people like me and my mom.”

92] Ms Fitzroy explained that although MMT enjoyed his Italian school “he enjoys Crawford better” as “there's nicer people in South Africa and less bullies.”

93] Interestingly, no specific bullying incident has been mentioned in the myriad of accusations made by NPS, nor did MMT complain of bullying to Dr Berra. No incident is mentioned by Ms Fitzroy.

³⁹ See for example *Koch (supra)* ; *Re S (A Child) (Abduction: Article 13(b) [2025] EWCA Civ 119*

94] And as part of his objection he states that were he to be returned to Italy he would feel

“106.Disappointed, sad, unhappy and really mad. I’m not going to change into the person I was, but I am definitely not going to be happy there. First of all, because I’m being taken away from my mom. And I don’t even know what he is going to do with me at that point because all he was doing was just to prove that my mom was a bad person and to prove that she was not a good parent.”

95] He was of the view that his dad is a “bad father” and that he would be scared to return to Italy because

“115. ...With this guy, the options for him is infinite. For what he can do to you, he has chased my mom, except for chasing my mom he has done nothing else. Shouting at me to go on a trip. When I’m alone with my father I feel fine. But that’s if I go to Italy, but I want to stay here.”

96] MMT is 12 years old, but his age alone does not determine whether this court must give preferential weight to his views. In addition, the court must look at his level of maturity.

97] Dr Berra expressed the view that not only was MMT emotionally immature, but she never got the impression that he had a bad relationship with his father: she saw them together on many occasions where the interaction was “spontaneous and playful” and he was happy in Italy. He also told Dr Berra that he is happier about the easier workload at school in South Africa.

98] Mr Haskins has submitted that it was necessary for Ms Fitzroy to obtain an expert's opinion on this issue⁴⁰. Whilst it is so that in her interim report she did express this view, in her final report she explained why she deemed it necessary: firstly, to obtain an expert's assessment and report in such a short period of time proved to be infeasible; secondly, she incorporated the views of Dr Berra (a psychologist) with whom MMT has a good relationship and who is able to give expert insight into MMT's emotional state and level of maturity; thirdly, she incorporated Mrs S views and lastly those of MMT.

99] I agree with Ms Fitzroy that it is unnecessary to obtain another expert's views on this issue. Ms Fitzroy has voiced concerns that NPS's conduct may well constitute parental alienation and that there is a possibly enmeshed relationship between mother and child. Whilst I take note of her concerns, I make no finding in this regard and my conclusions are not based on this.

100] I also take into account the following:

- a) it is not in dispute that an incident occurred on Sunday 3 August 2025 at 19h05 where MMT sent a series of messages to ST in which he inter alia stated:

"Papa, Mamy is not acting ok";

"Call me now! Papa! Papa! Papa! Call me now!"
- b) what precisely occurred is in dispute, but what is very clear is that MMT's first thought was to call his father for emotional support,

⁴⁰ In *Re S (A Child) (Abduction: Article 13(b))* [2025] EWCA Civ 1119 a report was obtained from a Consultant Forensic Psychiatrist who had assessed the mother and reported on her mental health concerns were she to return to the leave behind country with the child

reassurance and comfort – this is the same person he labels as ‘a bad father’;

c) Ms Fitzroy states:

“158. The undersigned expresses reservations regarding the authenticity of the minor child’s stated preference to remain in South Africa. Upon careful consideration, it appears that the child’s sentiments may not be entirely independent. Instead, there is evidence to suggest that the minor child’s perspective has been shaped by significant maternal influence. Furthermore, the nature of the relationship between the minor child and his mother may be characterised by enmeshment, raising concerns about the degree of autonomy present in the child’s expressed wishes.

159. MMT currently aligns himself with his mother. The undersigned is concerned about the information shared by the first respondent...”;

d) she also states:

“166. The removal of the minor child from his familiar environment, including Italy and his school, has disrupted his sense of security and stability. This upheaval may influence his overall emotional and psychological well-being.”;

e) it also appears, and this from his registered class and mathematics teacher at Crawford, that MMT struggles with concentration and focus “and that he is spaced out, staring outside the window”. According to her, he has one friend (R) who is his close friend, but she has not seen him with anyone else. He does not socialise with the other children and he is quiet and reserved;

f) lastly, Dr Berra informed Ms Fitzroy that:

“127. Since MMT has been in South Africa, he has been very avoidant in therapy and he is not sharing spontaneously what’s going on as in the past. He is very alert and when she enquired about it, he said that it is because he is online. It has been Dr Berra’s impression that MMT is controlled by his mother since MMT keeps on looking around whilst talking to her during virtual consultations. When he responds, it also appears as if he has been coached. Dr Berra is unable to confirm whether NPS is present when he has his sessions.”

101] In my view there are too many contradictions in MMT’s expressed views and it appears from the evidence set out *supra* that much of what he perceives to be true is not actually formed by his own experiences, but rather those of his mother. He can also not provide any rationale for his views towards ST. Dr Berra and Ms Fitzroy are both of the view that MMT is immature for his age, and given all this, whilst I do take into account that MMT has expressed that he does not wish to return to Italy, I am of the view that his objection cannot carry the day. In my view, there is nothing to indicate that his return to Italy would not be in his best interests, and it is for that court to determine which of the parties is most suited to be awarded primary care and residence in MMT’s best interests.

The Article 20 argument

102] No case has been made out on NPS’s papers that supports a defence under Article 20 of the Convention. There is no argument or allegation that relates to an infringement of MMT’s rights and fundamental freedoms or that they would not be protected were his return ordered. In fact, all the facts point to the contrary: ongoing

therapy, contact with MAT and his grandparents, support from ST overseen by social services and the Central Authority and his continued education, all point to the protection of MMT's rights and freedoms.

The disruptive consequences of a return to Italy

103] In *Sonderup*, the court stated:

“[43] A matrimonial dispute almost always has an adverse effect on children of the marriage. Where a dispute includes a contest over custody, that harm is likely to be aggravated. The law seeks to provide a means of resolving such disputes through decisions premised on the best interests of the child. Parents have a responsibility to their children to allow the law to take its course and not to attempt to resolve the dispute by resorting to self-help. Any attempt to do that inevitably increases the tension between the parents and that ordinarily adds to the suffering of the children. The Convention recognises this. It proceeds on the basis that the best interests of a child who has been removed from the jurisdiction of a court in the circumstances contemplated by the Convention are ordinarily served by requiring the child to be returned to that jurisdiction so that the law can take its course. It makes provision, however, in Article 13 for exceptional cases where this will not be the case.”

104] This view was endorsed in 2024 by the Constitutional Court majority in *Koch*⁴¹ where Majiedt J stated:

“The harm the aunt⁴² must prove extends beyond the harm that flows naturally from a court-ordered return.”

⁴¹ At para 159

⁴² In this case it is NPS

105] *In casu*, there is no suggestion or evidence to show that there is a grave risk (or any risk at all) to MMT's psychological health were he to return to Italy. There is also no mention of any other South African family member with whom he has formed a close attachment that he would lose; there is no suggestion that he has formed attachments with any other classmate than Richard; nor is there a suggestion that his schooling would suffer were he to return to Italy.

106] In fact, the contrary appears to be true: he will return to a home he has known since 2022; to his sister with whom he has "a very close relationship"⁴³; a school he likes and grandparents he loves⁴⁴. He has successfully passed his WINS end-of-year examinations and there is no indication that his schooling would be disrupted. And he would continue therapy with Dr Berra with whom NPS states that he has formed a "relationship of trust" and "which has allowed him to openly express his feelings, emotions and fears."⁴⁵

107] Insofar as the police investigation into NPS's complaint is concerned, that investigation would continue and, as pointed out by Ms Fitzroy, social services are already involved with the family. In fact, NPS herself states that on 7 April 2025 there was a meeting with social services and the doctors looking after MAT.

108] Given all of this, I cannot find that there is any risk to MMT's return, and certainly not one that establishes the high bar required for a successful Article 13(b) defence⁴⁶ or child's objection:

⁴³ His words

⁴⁴ His words

⁴⁵ According to NPS

⁴⁶ *Koch* at para 161

“[161] Article 13(b) sets a high threshold. In *Re C (Abduction: Grave Risk of Psychological Harm)* Ward LJ held:

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

109] Put differently

“[A] certain degree of harm is inherent in the court-ordered return of a child to their habitual residence, but that is not the harm or intolerability envisaged by art 13(b),... that harm or intolerability extends beyond the inherent harm referred to above and is required to be both substantial and severe.”⁴⁷

110] Insofar as NPS complaints relate to issues that will inform the question of primary care and residence, it is not for this court to express any view on that, whether *prima facie* or otherwise - nor do I. The sole consideration was whether those were of sufficient gravity to rise to test posed by Article 13 – they do not.

111] Mr Haskins has requested that NPS be given a ‘*spatium deliberandi*’ period despite her instruction to him that she would not return to Italy. It is unnecessary to specifically do so as the order will provide for a period within which NPS must notify

⁴⁷ *NM v Central Authority for the RSA and Another* (1078/24) [2024] ZASCA 178 (19 December 2024) para 24 quoting *LD v Central Authority of the RSA and Another* 2022 (3) SA 96 (SCA) para 29

the second respondent and ST's attorney of her decision whether or not she will return with MMT to Italy.

112] Ms Fitzroy has recommended that measures be put in place immediately upon MMT's arrival in Italy and therapy from Dr Berra must be available to him. She has also strongly advocated that were NPS not to return to Italy, MMT should not travel as an unaccompanied minor, but that ST must accompany him on the flight back to Italy. Mr Nel informed me that his instructions were that ST would come to South Africa to fetch MMT and accompany him back to Italy. I agree that this is necessary in order to minimise any further disruptions that will flow from this court-ordered return.

113] Given all the above and the fact that the social services are already monitoring the family, I am of the view that it is unnecessary to order further interventions, and none were suggested by Ms Fitzroy.

Costs

114] Mr Haskins argues that although NPS admittedly retained MMT unlawfully, she genuinely believes that his objection should prevail. This is even more so because he voiced a desire to return to South Africa when the parties were living in Italy. He argues that, as a result, each party should pay his/her own costs.

115] Mr Nel argues that an attorney and client costs order should be granted against NPS as it is the only just order to be made. He argues that it is clear that

NPS acted in “profound” bad faith. He argues that this is clear from her 225 page answering affidavit which was unnecessary and which failed to refute any objective evidence put up by ST. He also submits that her true motives are clear as, in her 42-page supplementary affidavit, she states:

“32.4 `Finally, should this Court nevertheless find it appropriate to order MMT’s return to Italy, I place it on record that I choose to remain in South Africa. This fact must be weighed carefully in determining MMT’s best interest, as forcing his return would further destabilise him emotionally and psychologically as stated in the curator’s report.”⁴⁸

116] It is certainly NPS’s right to choose to remain in South Africa. But that does not mean that MMT must remain with her. Insofar as her allegations are concerned, I have already dealt with them *supra*.

117] It is so that, ultimately, costs rest within the discretion of the court which must be exercised judicially. I am disinclined to order each party to pay his/her own costs. *In casu*, NPS has filed 3 affidavits totalling approximately 300 pages. Her account of issues is unnecessarily repetitive and replete with wild allegations⁴⁹ that are made based on pure conjecture and are without support.

118] Whilst Mr Haskins did not rely on NPS’s more controversial allegations during his argument, I was informed that he was not abandoning arguments contained in

⁴⁸ In *NM v Central Authority RSA* at para 22, it was stated that a parent’s “uncompromising and unexplained recalcitrance can never constitute a justifiable basis for establishing an Article 13(b) defence” and “the refusal of a parent to accompany a child is what gives rise to the risk, not the return itself. [...] the parent who unlawfully retained [the child] should not be permitted to rely on the consequence of that removal to create a risk of harm on [his/her] return”

⁴⁹ For example, that she was used as an “egg donor” and an “incubator” and that Italians are racist and patriarchal

his heads of argument. Inasmuch as those highlight the salient points of the opposition to the applicant's relief, they are founded in the papers which must be taken into account as, at no stage, were any of the allegations made withdrawn or abandoned.

119] I also take into account that much of NPS's argument relates to issues of ultimate primary care and residence. The opposition to the application leads one to the indelible impression that this court is being called upon to make a *prima facie* finding on those issues in order to substantiate a refusal of the application – but, as stated *supra*, that is not the function of this court.

120] Whilst I am of the view that costs should follow the result, I am not of a mind to grant punitive costs against NPS. I take into account that she has raised (at the very least) an arguable point that relates to MMT's objection to his return. That is an important issue that required adjudication by this court. Whilst I do frown upon the manner in which she has chosen to voice her Article 13(b) defences, MMT's objection was raised by her. It is for this reason that I am of the view that punitive costs should not be granted against her. Insofar as the scale of costs is concerned, I am of the view that the application is an important one to the parties, the issue is not a simple one and that papers are lengthy. It is also not lost on me that NPS, despite her allegations of impecuniosity, has engaged the services of senior counsel. It is for these reasons that costs on Scale C are awarded.

The draft order

121] I have already mentioned that Mr Nel handed up a proposed draft order. I have carefully perused it. There are several issues vis-à-vis its terms:

- a) the draft makes provision for MMT to be returned to Italy and to live in the family home in Turino. In light of NPS's continued insistence that she will not return to Italy, it is important that MMT has stability, and a home that he has lived in since 2002 will provide a familiar environment to which to return;
- b) ST is to fetch MMT in South Africa and accompany him to Italy;
- c) the draft makes provision for NPS to be dropped off at the check-in counter at OR Tambo Airport not less than 3 hours before the departure of the flight. I am of the view that this is not in MMT's interests. In my view ST must fetch MMT from the MMT's Pretoria address no less than 4 hours before the scheduled departure of the flight;
- d) for purposes of travel and making travel arrangements, NPS's attorneys of record will be ordered to hand MMT's original passport and travel documents to ST's attorney of record on/before 29 September 2025;
- e) the contact to be given to NPS, should she remain in South Africa and until such time as the court in Italy makes a decision vis-à-vis custody and contact will be daily video and/or voice calls between 17h00-18h00 SAST;
- f) ST is to continue to take MMT to therapy with Dr Berra, or any other professional person she deems necessary until she (or they) deem it unnecessary.

Ms Fitzroy

122] Lastly, Ms Fitzroy has been of invaluable assistance to this court in reaching a decision on some very difficult issues in a very short time frame. She is thanked for her efforts.

The order

The following order is made:

1. The first respondent is ordered to forthwith return MMT to the jurisdiction of the Central Authority for the Republic of Italy, and specifically to Turino, Italy within one month of date of this order.
2. Pending the return of MMT to the Republic of Italy as provided for in this order, the first respondent shall not, without the prior written consent of the Central Authority for the Republic of South Africa (CASA), remove MMT from the Province of Gauteng and shall keep CASA and the applicant's attorney of record informed of her and MMT's physical address and contact details.
3. To give effect to the order in paragraph 1 above:
 - 3.1 the applicant's attorneys are authorised and directed to make all necessary arrangements for MMT's travel from South Africa to Turino, Italy, including the booking of flights;
 - 3.2 the first respondent's attorneys of record are ordered to hand over MMT's original passport and travel documents to the applicant's attorney of record by no later than Monday 29 September 2025 at 10h00;

- 3.3 the first respondent is directed to notify CASA and the applicant's attorneys of record in writing on or before 16h00 on 1 October 2025 whether she intends to personally accompany MMT on his return to Italy. In the event that she does, she is granted leave and authorisation, insofar as may be necessary, to remove MMT from South Africa and accompany him on his return to Italy;
- 3.4 in the event that the first respondent fails to notify CASA and the applicant's attorney of record, or notifies them that she does not intend to accompany MMT, the applicant is authorised to make such arrangements as are necessary to ensure that MMT is safely returned to Italy with him;
- 3.5 the first respondent is ordered to ensure that the minor child and his luggage are ready, at the residence at 2[...] W[...] Street, Erasmusrand, Pretoria, to accompany the applicant to the airport no less than 4 hours prior to the scheduled departure to Italy;
- 3.6 the applicant's attorneys shall give the first respondent's attorneys at least 72 hours' notice of the scheduled departure time;
- 3.7 the applicant shall bear all reasonable costs associated with the travel arrangements of this order for MMT, and the first respondent if she elects to return to Italy;
- 3.8 the first respondent is directed to co-operate fully and timeously with the applicant's attorneys and/or CASA to facilitate MMT's departure (and that of first respondent if necessary), including signing all necessary travel documentation required to facilitate MMT's travel and ensuring that he (and the first respondent personally) is available for

any required administrative processes (such as visa applications or passport renewals) if necessary within 48 hours of the receipt of such a request;

3.9 in the event that the first respondent refuses or fails to provide any necessary or required travel documents to ensure MMT's return to Italy in the time period stated above, her consent is waived for that purpose;

3.10 the applicant is ordered to personally accompany MMT on the flight for his return to Italy.

4. The second respondent is directed to take all necessary steps within her power to facilitate MMT's return to Italy in accordance with the terms of this order, including but not limited to coordination with the Central Authority of Italy and assisting in overcoming any administrative obstacles to MMT's departure from South Africa.

5. Pending MMT's the physical return to the Republic of Italy in compliance with this order, the first respondent shall:

5.1 facilitate contact between the applicant and MMT which shall include daily video and/or voice calls from 17h00 until 18h00 SAST;

5.2 ensure and facilitate MMT's continued participation in the online remote schooling program offered by WINS;

5.3 ensure and facilitate MMT's continued participation in weekly online psychotherapy sessions with Dr Berra, and to cooperate with any arrangements necessary to ensure that the sessions take place. The applicant shall remain liable for the costs of these sessions.

6. The applicant is ordered, upon MMT's return to the Republic of Italy, to:

- 6.1 report to the Italian Central Authority on a monthly basis (or such period as determined by them) regarding MMT's well-being until such time as a court in Italy has finalised the issues of the custody and contact rights of the parties;
- 6.2 cover all costs associated with MMT's continued therapy with Dr Berra or any other person recommended by her for such period as she/they recommend;
- 6.3 arrange, at his cost, for any additional support services recommended by the Central Authority in Italy to assist MMT with his reintegration;
- 6.4 facilitate regular video and telephone contact with MMT's friends and extended family in South Africa, as well as with the first respondent should she remain in South Africa;
- 6.5 continue to provide for all MMT's reasonable maintenance needs in Italy, including but not limited to all costs associated with his schooling at the World International School of Torino (WINS) and all of his medical and dental expenses and his general daily needs and reasonable requirements.

7. Should the first respondent elect to return to Italy with MMT, and pending any further or different order from a competent court in Italy:

- 7.1 MMT will reside at Via M[...] V[...] 1[...], 10123 Turino, Italy;

- 7.2 the applicant will provide the first respondent with a once-off payment of €10 000 to secure and furnish her own suitable, separate accommodation;
 - 7.3 the applicant will provide the first respondent with monthly financial support of €2 800 for her rental, maintenance and living expenses for at least one year, or such other period as is determined by a court in Italy;
 - 7.4 the applicant will ensure that the first respondent will remain on the Italian Health Coverage and the applicant will cover the cost of any additional reasonable medical costs not covered by the Italian Health Coverage;
 - 7.5 the first respondent shall be entitled to have contact to MMT as agreed between the parties and/or their legal representatives or until a court has made a determination on custody and contact rights. Until such an agreement has been reached or an order made, the first respondent shall have the following contact to MMT:
 - 7.5.1 one weekday afternoon from after school until 18h00;
 - 7.5.2 alternative weekends from after school on a Friday until 18h00 on a Sunday.
 - 7.5.3 reasonable telephonic contact after school.
8. Either party shall be entitled to approach a competent court in Italy for the purpose of having this order recognised and enforced as a 'mirror order' in that jurisdiction, and for any subsequent variation thereof, pending the finalisation of the divorce proceedings between the parties.

9. A copy of this order shall be served by hand as well as by the Sheriff of this court on the second respondent.
10. The second respondent shall, upon receipt of the served order, immediately transmit same to the Central Authority for Italy.
11. The first respondent is ordered to pay the costs of both Part A and Part B of this application, including the costs of Ms Fitzroy, which costs are to be taxed in accordance with Scale C.

NEUKIRCHER J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

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 25 September 2025.

Appearances

For the appellant : Adv EJJ Nel
Instructed by : Burger Huyser Attorneys

For the respondent : Adv M Haskins SC
Instructed by : Shapiro & Ledwaba Linc
Matter heard on : 10 September 2025
Judgment date : 25 September 2025