



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

Case number no: A129/2025

In the matter between:

**THE AD HOC CENTRAL AUTHORITY FOR THE REPUBLIC
OF SOUTH AFRICA [AS DELEGATED IN TERMS OF
SECTION 277 OF ACT 38 OF 2005]**

First Appellant

M[...] W[...] L[...]

Second Appellant

and

D[...] L[...] M[...]

Respondent

Coram : Kusevitsky, J *et* Nziweni, J *et* Njokweni, AJ

Heard : 10 March 2026

Delivered : 15 May 2026

Summary : Children – Abduction – Habitual residence – Return of child to Germany — While parental intent serves as a significant starting point, it must be balanced against the objective realities of the child's daily life - Court's primary mandate is to identify the child's centre of gravity - the specific family and social environment in which the child's life developed immediately preceding the alleged

removal — the court must assess the 'functional reality' of the children's daily existence in the new environment.

ORDER

1. The appeal is upheld;
2. The court a quo's order is set aside and replaced with the following order:
 1. The minor children of the second appellant and the respondent, L[...] J[...] L[...] born 28 November 2013, and L[...] P[...] L[...] born 19 June 2015, are to be returned forthwith, subject to the terms of this Order, to the Federal Republic of Germany ("Germany") being their habitual place of residence in accordance with the provisions of Article 12 of the Convention, read with the provisions of the Children's Act 38 of 2005.
 2. In the event that the respondent elects to accompany the minor children on their return to Germany pursuant to paragraph 3, she shall notify the first and second appellant in writing within 5 court days of the date of issue of the Court's order that she intends to do so.
 3. In the event that the respondent notifies the first and second appellants that she intends to accompany the minor children on their return to Germany as contemplated in paragraph 2 above;
 - 3.1. The first appellant shall forthwith give notice thereof to the Registrar of this court and to the Central Authority for Germany; and
 - 3.2. The second appellant shall forthwith purchase and pay for economy class air tickets, and if necessary, pay for other travel for the respondent and the minor children to travel from Cape Town, South Africa, to Germany.
 4. In the event of respondent failing to indicate her intention to return to Germany with the minor children as contemplated in paragraph 3 above, it is to be accepted that the respondent is not prepared to accompany

the minor children, in which event the second appellant is granted leave and authorisation to remove the minor children from the Republic of South Africa and to accompany the minor children back to Germany and the second appellant shall bear the costs of the minor children's economy class air tickets to return to Germany.

5. A copy of this Court's order shall forthwith be transmitted by the first appellant to the central authority for Germany.

6. Each party to pay its own costs.

JUDGMENT DELIVERED ELECTRONICALLY

Nziweni, J

Introduction

[1] This appeal finds its genesis in the determination of the habitual residence of the children. In this appeal, the appellants [the father of the children and the ad hoc central authority] seek an order setting aside the finding of the court a quo dated 19 June 2024, that dismissed the application that was sought by the Central Authority for an order for the return of the children to Germany.

[2] The court a quo found that the appellants failed to discharge the onus of establishing the jurisdictional fact of habitual residence of the children in Germany for the purposes of article 3 of the Hague Convention.

[3] The evidence in this matter reveals that the second appellant and the mother ("the parties") were never married to each other; instead, were in a domestic relationship [cohabitation] for 15 years. The parties have two minor children, the first born (born in 2013, in South Africa) and their last-born son (born in Germany in 2015).

[4] The second appellant ("the father") is a German citizen. On the other hand, the respondent (the mother) is a South African citizen. In or about March 2020, the

parties took a decision to leave South Africa for Germany with their children. The parties moved for reasons related to the father's employment.

[5] According to the mother, Covid-19 forced the parties to leave South Africa, not knowing they would not be able to return. The mother further maintained that it was never the plan to stay in Germany permanently. Before the parties moved to Germany, they resided in Cape Town, for a period of about 15 years.

[6] The minor children, who hold dual citizenship, were enrolled in school in Germany. Following the parties' separation in August 2022, they transitioned to a shared residency arrangement, with the children alternating between their father and mother on a weekly basis.

[7] It is necessary to sketch the events forming the background to the dispute. Before addressing the issues involved in this matter, I give a brief factual synopsis of the situation, indicating where the factual differences between the parties lie. This narrative is drawn from the court a quo's judgment, the affidavits and documents produced by the parties.

Condonation

[8] The starting point, of course, is the appellants' application for condonation. This Court hereby grants condonation for the late prosecution of this appeal, of course, having been satisfied that the interests of justice necessitate such an indulgence. Additionally, we find that the appellants have demonstrated good cause for the delay and that the respondent will suffer no prejudice as a result.

Factual background

[9] Around 25 February 2023, the mother returned to South Africa to visit her ailing father. On 30 March 2023, the father and the children returned to South Africa. The father was in possession of a written consent signed by the mother, granting him permission to travel with the children to South Africa. The consent given by the mother stated amongst others, the following:

“ . . . I hereby give consent that their father, M [. . .] L [. . .], may travel with our children to South Africa and back. They would leave March and return April. . . .”
Emphasis added.

[10] The father and the minor children were in possession of return air tickets to Germany and were scheduled to depart South Africa on 20 April 2023. While in South Africa, the parties continued to implement the established alternating weekly care and contact schedule.

[11] On 19 April 2023, the mother communicated her intention to the father that the minor children must remain in South Africa until the end of the 2024 academic year, effectively delaying their scheduled return to Germany. Because of the mother's change of mind regarding the return of the children to Germany, the father did not depart as scheduled on 20 April 2023, but instead left on 01 May 2023.

[12] Equally clear from the record is that it is common cause between the parties that the delay in the father's departure was a direct result of the father's attempts to negotiate with the mother.

[13] At this stage of the negotiations, the mother maintained that the children had integrated successfully into the South African school system and contended that an immediate return to Germany, as originally planned, would be detrimental. On 01 May 2023, the father returned to Germany without the children. He subsequently travelled back to South Africa in June, July, September, and October 2023 to maintain contact. During this period, the mother persisted in her refusal to allow the children to return to Germany with the father.

[14] In light of the mother's persistent refusal to permit the children's return to Germany, on 25 October 2023, the father launched an application in the court a quo for their return to Germany.

[15] The relief that was sought in Part B included an order for the immediate return of the minor children to Germany, as their country of habitual residence in accordance with the provisions of Article 12 of the Hague Convention, read with the provisions of the Children's Act 38 of 2005.

[16] In the circumstances of a case such as this one, it is, however, significant to note that the issue to be determined herein [this appeal] is quite straightforward.

The issue

[17] The issue to be determined by this Court is whether the court a quo erred in finding that the father failed to prove that the children were not habitually resident in Germany for the purposes of Article 3 of the Hague Convention. Put otherwise, the question is whether there was a wrongful removal of the children.

[18] The evidence presented establishes the following facts, which are either common cause between the parties or have not been seriously disputed, that:

- 18.1 the children lived in Germany from April 2020 until 30 March 2023;
- 18.2 the minor children hold dual citizenship and were enrolled in schools in Germany prior to both the parties' separation in August 2022 and their subsequent departure from the jurisdiction.
- 18.3 the children travelled with their father to South Africa with a return air ticket to Germany with a scheduled departure date of 20 April 2023;
- 18.4 upon the conclusion of the academic term in Germany, the mother formed the unilateral decision to remain in South Africa with the minor children, contrary to the prior agreement between the parties.
- 18.5 the mother communicated that the children would not return as planned and would instead remain in South Africa and she withdrew her consent for the children to return to Germany.
- 18.6 pursuant to the laws of Germany, both parties were vested with joint rights of custody regarding the minor children at all material times, whilst in Germany;
- 18.7 the written consent executed by the mother, which facilitated the children's travel to South Africa with their father, explicitly provided that the children were to return to Germany;
- 18.8 the minor children were actively enrolled and attending school in Germany at the time of the mother's departure for South Africa; their subsequent travel to South Africa occurred once the German schools had closed for the holidays.

- 18.9 within weeks of her return to South Africa, the mother was of the view that it would be of great benefit for the children and her to remain in South Africa.
- 18.10 the mother holds the view that the father failed to convince her to change her mind concerning her decision to make South Africa her permanent home.
- 18.11 the report by the children's legal representative reveals that neither child had any preference towards South Africa or Germany as being their country of choice.

The Court a quo finding

[19] The court a quo correctly identified and took into account the relevant statutory framework and legal principles applicable to the matter. The learned judge a quo stated the following as far as whether habitual residence was established:

“[25] There is a factual dispute on the papers about whether there was a mutual intention to relocate permanently to Germany. Given the factual matrix put forward by the mother, much of which is undisputed by the father, and the absence of any other objective evidence by the father to support his version of a permanent move to Germany, this is not a case where this court can safely reject the mother's version as *‘so far-fetched and clearly untenable that it can be confidently be said . . . that it is demonstrably and clearly unworthy of credence’*.

[26] Cut to its core, the father's belatedly constructed case of habitual, as opposed to permanent residence in Germany is squarely underpinned on a finding in his favour of a mutual intention to relocate permanently there, since all of the other evidence such as registered residential addresses and attendance at local schools does not, on its own, establish the children's habitual residence in the particular circumstances. Another factor militating against a finding in favour of the father on habitual residence is the absence of any evidence that steps were taken to secure permanent residence for the mother, and the ex post factor explanation by the father (in supplementary note after argument) as to how this might be achieved is unhelpful, since this explanation emerged for the first time after a 3 year period in Germany and more than a year after the mother returned to South Africa and thereafter retained the children here.

[27] As I see it the father has also quoted the mother's use of the words *‘indefinitely’* and *‘create a new life’* out of context. *‘Indefinite’* is defined in the Chambers Twentieth Century Dictionary as *‘without clearly marked outlines or limits; not precise; undetermined; not fixed in number’*. The mother also prefaced this word with

‘temporarily and’, which lends support for an interpretation that the stay in Germany was intended to be of temporary, albeit uncertain, duration. Moreover, the mother explained in her answering papers that the idea to *‘create a new life’* only came about as a result of the realisation that the temporary stay was becoming one of being *‘stuck there indefinitely’*. It seems to me that any sensible, resourceful person would have adopted the attitude she did, namely, to obtain a fixed term contract of employment to earn an income to support the family, thus making the best of their circumstances at that time. This does not necessarily imply a shift of intention to one of habitual residence.” Underlining added.

[20] For the above reasons, among others, the court a quo found that the children were rightfully removed from Germany to South Africa.

Parties’ submissions

[21] It is argued in the father’s [appellants’] heads of argument that the court a quo’s decision that habitual residence was not established appears to stem from the inability of the parents to agree whether the relocation to Germany was permanent or not. It is further asserted on behalf of the father that the court a quo found that the evidence of a registered address and attendance at school does not, on its own, establish the children’s habitual residence.

[22] Accordingly, it is submitted by the father that the court a quo failed to consider the close ties that had been cultivated during the children’s stay in Germany, which are also germane to the consideration of the habitual residence.

[23] It is the mother’s contention that the court a quo was correct to find that the appellants had failed to discharge the onus of establishing the jurisdictional prerequisite. Additionally, the mother contends that the father’s case as pleaded in the founding affidavit was predicated on an allegation that the parties had permanently relocated from South Africa to Germany. The mother further argues that her assertions are supported by objective facts.

[24] According to the mother, during the hearing before the court a quo, the father sought to shift his case in the replying affidavit from one based on permanent

relocation to one based on habitual residence without a finding of permanent relocation.

[25] As I have already mentioned, it is evident from the proceedings in the court a quo that the children's habitual residence was a point of contention, specifically whether Germany remained their habitual place of residence at the time of the alleged wrongful retention.

Evaluation

a. Removal of the children

[26] As previously noted, the mother states in her answering affidavit that the principal reason for the father delaying his flight to Germany was his various attempts to convince her to reverse her decision to make South Africa her home. At the outset, it should be pointed out that I find this averment to be highly illuminating and to constitute an inadvertent admission. At the same time, in the circumstances of this case, it serves as a direct admission of several key legal points.

[27] Firstly, it confirms that the mother took a unilateral decision to change the children's residence. It also serves to confirm that the father never consented to the children staying in South Africa after 20 April 2023.

[28] Additionally, it reinforces the fact that the children's presence in South Africa was intended to be temporary, and their continued stay is a direct result of a refusal to adhere to the original return plan.

[29] It is critical to note that the Hague Convention prioritises the right to determine the children's place of residence. Hence, I am quite alive to the fact that the inquiry before the court a quo was limited to the jurisdictional issue of habitual residence and does not entail a determination of the merits regarding custody, parenting time, or parental responsibilities.

[30] More specifically, Article 3 of the Hague Convention focuses specifically on establishing the legal wrongfulness of a child's removal or retention.

[31] Article 3 provides as follows:

'The removal or the retention of a child is to be considered wrongful where-- (a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and (b) At the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention. The rights of custody mentioned in sub-paragraph (a) above may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.'

[32] Of course, Article 3 establishes a dual requirement for establishing wrongful removal, formulated as a two-pronged test:

- (a) Breach of Custody Rights: The removal or retention must violate the rights of custody attributed to a person, institution, or other body under the law of the State where the child was habitually resident immediately prior to the removal.
- (b) Actual Exercise of Rights: At the time of the removal or retention, those custody rights must have been actually exercised (either jointly or alone) or would have been so exercised but for the removal or retention.

[33] In *MB v LC and Another* 2024 JDR 0874 (WCC), para 8, the following is stated:

"Article 3 thus sets out the jurisdictional prerequisites which an applicant is required to establish before a court may consider whether the removal or retention of a child is to be considered wrongful. These are : (a) the child was habitually resident in the other State; (b) the removal or retention constitutes a breach of custody rights; and (c) the applicant was actually exercising such rights (either jointly or alone) at the time of removal or retention or would have exercised such rights but for the removal or retention."

[34] The parties' messages on the WhatsApp platform show the following:

"22.04.23, . . . -M[...] [father]: What about Hugo (sic) s communion next Sunday, L[...] (sic) s first school field trip in June, the 1-week circus project at school in Kroneberg?"

The children's life is in Kroneberg for now. Must they miss all of this? Is that fair towards them? I don't (sic) think so. Moving the habitual residency must be well planned and prepared D[...]. For the children as well as for the adults.

23.04.23, 11: 01 – D[...]: GER: For what it's worth, know that my decision to stay in SA was not premeditated.

I honestly did not plan this in advance.

However, it is happening.

23.04.23, 11: 50 – M[...]: FYI: I will have to return soon to Germany for work which keeps me busy til (sic) end of May. If you don't allow me to see L & P there is no point staying in CT anyways.

12.05.23, . . . D[...]: GER: Have you thought about me? And my life in Germany?

I am sorry for the drastic steps. I told you, it was not premeditated stay in SA. I just realised that week (near 19 April) how stuck and F... I am in Germany.

And I have no protection from the law, no protection from you, nor your family. I am on my own. Yes I have friends, but I am not referring to them. Can you imagine being stuck and at the mercy of your ex!"

[35] In *Central Authority for the Republic of South Africa v MV and Another* (1396/2024) [2025] ZASCA 197(18 December 2025), the following was stated in para 53:

'The retention of the minor child, L in South Africa was a decision taken by Ms MV alone without the consent of Mr VL. She wanted to be closer to her family, that had at that point in time indicated that it was not returning to Italy but was going to remain in South Africa. Her other reason was that Mr VL was not committing to marriage. She retained the child without consulting Mr VL, as the father of the child, who had custodial rights. 26 She decided unilaterally to retain the child in South Africa. Ms MV has failed to offer a satisfactory explanation to dispel the presumption of wrongful retention of the minor child.'

[36] Similarly, in the instant case, the father had to have proven the following before the court a quo, in order to succeed with his application:

- a. The children were habitually resident in Germany at the time of removal; and
- b. The father was exercising rights of care and contact at the time of removal.

[37] In the circumstances of this case, I am satisfied that the father did prove with clear and convincing evidence that he was exercising rights at the time of the removal.

b. Determination of habitual residence

[38] It is of course, nonetheless the case that the inquiry of habitual residence presents a fundamental challenge in Hague Convention cases, as the Convention does not provide a technical legal definition for the word 'habitual residence'.

[39] At the heart of this matter lies a critical question: what were the precise motives and logistical factors that necessitated the children's relocation to Germany?

[40] Acknowledging the reality of modern family life, the court must recognise that many families maintain deep ties to multiple jurisdictions. In an increasingly mobile society, a child's life may be meaningfully situated across more than one country, making a fact-intensive inquiry even more critical and difficult. This fact-based exercise seeks to determine the child's centre of gravity.

[41] Consequently, as correctly pointed out by the court a quo, the father was required to provide the court a quo with a comprehensive account of the children's lives in Germany. Another way of looking at it is that this inquiry must be holistic and exhaustive, transcending any single metric. I agree with the court a quo that evidence such as registered residential addresses and attendance at local schools do not, on their own, establish the children's habitual residence.

[42] For instance, the court a quo could not determine residence based solely on citizenship, and attendance of local schools as that would ignore the functional reality of their daily existence. Instead, a case-by-case fact intensive analysis is required to determine the child's habitual residence.

[43] Further and significantly, the mother's reliance on the parties' 'chosen domicile' in the Western Cape and the acquisition of a property in Muizenberg in 2017 is legally misplaced. The Hague Convention inquiry is not focused on the historical origins of the parents' relationship or their property portfolio, which may signify domicile. But rather on the children's habitual residence.

[44] Importantly, any historical connection to South Africa was superseded by the parties' subsequent and deliberate relocation to Germany in 2020. As established by the mother's own admission, she 'gave up' her life in South Africa to establish a foundation in Germany, a foundation that became the children's functional reality for nearly three years.

[45] Additionally, while parental intent serves as a significant starting point, it must be balanced against the objective realities of the child's daily life. Therefore, the court's primary mandate is to identify the child's centre of gravity; the specific family and social environment in which the child's life developed immediately preceding the alleged removal.

[46] Hence, I respectfully find that the court a quo erred in attaching undue weight when it stated the following:

“Another factor militating against a finding in favour of the father on habitual residence is the absence of any evidence that steps were taken to secure permanent residence for the mother...”

In the result, I am not convinced that in relation to other pertinent considerations, the absence of evidence related to steps taken to secure permanent residence for the mother was a relevant factor to be taken into account.

[47] In these circumstances, to ascertain the child's centre of gravity, the court must move beyond a cursory review and evaluate three distinct categories of links and circumstances: I am of the view that the inquiry begins by examining the children's original stability. This involves weighing their citizenship (a) and legal identity, alongside the established family and friend connections (b) that anchored their lives prior to relocation.

[48] Finally, the court must assess the 'functional reality' of the children's daily existence in the new environment. This is a holistic evaluation of their schooling (c), extracurricular activities (d), and healthcare (e), which demonstrate the degree of their social and physical integration. The court must also consider the children's

ongoing communications with friends and family (f) and evidence from other affiants (g) to determine if a new social nucleus has formed.

[49] The court must also consider the return to South Africa in March 2023 as a baseline for their habitual residence before the current dispute arose.

[50] It is the father's assertion that the parties permanently relocated from South Africa to Germany in March 2020. This permanency is expressly, albeit inadvertently, supported by the mother's own answering affidavit in paragraph 13, where she states that in order to relocate, she had to give up all [her] family relations, social relations and [her] employment because she "considered [the] relationship above everything else.

[51] This averment by the mother is legally significant; as it confirms that the move was not a transient experiment, but a deliberate and total severance of the parties' ties to South Africa in favour of a new, settled foundation in Germany. Consequently, the mother's secondary assertion [that was accepted by the court a quo] that the move was temporary because they "took very few items such as clothing" is a superficial metric that fails to hold water. Surely, the physical transport of furniture is irrelevant when weighed against the objective reality that the mother abandoned her career and social foundation in South Africa to establish a new, settled life in Germany, a life that persisted for nearly three years.

[52] This is further reinforced by the mother's assertion in paragraph 41 of the answering affidavit when she states the following:

"Due to being stuck in Germany, the house of M[...] in Muizenberg was put up for rent, and all our belongings were sold or given away. The next logical step was to remain in Germany and create a new life." (Emphasis added).

[53] In essence, the mother admits that Germany had become the family's habitual residence. With the greatest of respect to the court a quo, the mother's claim that the family only remained in Germany because they felt 'stuck' is contradicted by the deliberate, objective steps taken by the parties to entrench their lives there [in Germany].

[54] In *Central Authority for the Republic of South Africa v MV and Another*, supra, the Supreme Court of Appeal, observed the following at paras 63-66:

“The arguments on behalf of Ms MV seem to be that she had no intention of residing in Switzerland permanently. That view only came to the fore after she had retained the child in South Africa. Her actions of even looking for a crèche for the minor child, L and intending to return to Switzerland by booking air tickets in November 2022 do not support that argument. She had spent almost two years in Switzerland. In any event, that argument is flawed for two reasons. First, it goes against the definition of habitual residence that Swiss laws accord to that term. Article 20(b) of PILA refers to habitual residence as ‘has their habitual residence in the state where they live for a certain period of time, even if this period is of limited duration from the outset’. Second, if it is accepted that according to the dependency model, a child acquires the habitual residence of his or her custodians whether or not the child independently satisfies the criteria for acquisition of habitual residence in that country, then it would make no sense to contend that although the minor child, L was residing with his parents in Switzerland, his habitual residence (alone) was in Italy.

[64] To hold as such would go against the intention of the 1980 Hague Convention, which distinguishes the ‘habitual residence’ that is relevant for the purposes of Article 3, as being the one ‘prior to the removal or retention of the child’. Third, that contention would also go against the principles in Houtman¹⁷ where the court stated: ‘In practice, however, it is often impossible to make a distinction between the habitual residence of a young child and that of its custodians- it cannot reasonably be expected that a young child would have the capacity or intention to acquire a separate habitual residence.’

[65] The court further held: defining ‘habitual residence’: ‘The word ‘habitual ‘implies a stable territorial link; this may be achieved through length of stay or through evidence of a particularly close tie between the person and the place. A number of reported foreign judgments have established that a possible prerequisite for ‘habitual residence’ is some degree of ‘settled purpose’ or ‘intention’. A settled intention or settled purpose is clearly one which will not be temporary. However, it is not something to be searched for under a microscope. If it is there at all it will stand out clearly as a matter of general impression.”

[66] There was a ‘settled purpose’ that made Mr VL and Ms MV as the minor child, L’s parents to be in Switzerland. That settled purpose was Mr VL’s employment in Geneva. He had been working in Switzerland long before the minor child, L was born. Ms MV was staying with him even when he was in Lausanne. Ms MV was offered a job to provide English lessons to an Albanian diplomat in Geneva. Although

the minor child, L was born in Italy, the Italian Consulate General in Geneva wrote, on 15 December 2022, to Mr VL after he had made a report about the 'missing return of minor L...', that he must submit a repatriation request to Swiss authorities, recognized as the minor's place of residence before the minor's removal to South Africa.' The letter further provided instructions and contact details for the competent federal office in Switzerland. This then puts to bed the suggestion that the minor child, L's habitual residence was in Italy prior to his removal." Emphasis added and footnotes omitted.

[55] In this context, another significant factor in the present case is that the family home in Muizenberg was rented out to third parties and their [the parties] belongings were disposed of. It is not open to doubt that this act constitutes a formal abandonment of their previous residence in South Africa. One does not rent their primary residence to tenants if a return is imminent. Rather, this decision confirms a mutual and settled purpose to make Germany the family's primary and indefinite foundation, as admitted by the mother in the answering affidavit.

[56] As such, the evidence recited previously in paragraph 49 [the mother's concession in the answering affidavit that the next logical step was to remain in Germany and create a new life], supra, is a crucial point that when viewed together with other objective facts that exist in this matter, supports that Germany was the children's habitual residence.

[57] Equally clear from the record is that the mother's characterisation of the move as a temporary necessity due to the pandemic is belied and outweighed by overwhelming evidence of the family's subsequent actions. While the move may have begun during a period of global uncertainty, as interim; any 'provisional' nature of their stay disappeared in March 2021 when the mother secured employment at a German University. This decision, coupled with the children's ongoing schooling and the family's reliance on a local support network (the paternal grandmother), confirms that the stay morphed into a settled habitual residence. In these circumstances, a vague intent to return one day cannot override the objective reality of the children's lives. Put otherwise, after three years of schooling, employment, and social integration in Germany, the children's actual life outweighs any old plans to one day go back to South Africa.

[58] Therefore, the records of the Citizens Service reflect this settled reality, showing that the children resided at S[...] -Straße 3[...], Kronberg, from 01 May 2020 to 01 May 2021, and subsequently at J[...] Straße 1[...], Kronberg, from 01 May 2021 until their departure for South Africa on 30 March 2023.

[59] This residential stability is mirrored by the children's educational integration. School attendance certificates from Kronthal-Schule further confirm that both children were enrolled from August 2020 and August 2021, respectively. During this period, the father actively managed the children's welfare; specifically, he addressed one child's ADHD diagnosis by consulting with teachers and, upon medical advice, arranging play therapy. Notably, the school reported no academic concerns, indicating the child was well-supported within the German institutional framework.

[60] The mother's claim that the children only attended school because homeschooling is illegal in Germany is an admission that the family was governed by the laws of Germany. It is undisputably clear that one does not submit children to a compulsory national education system for three years unless one is habitually resident in that jurisdiction. In principle, the motive for enrolment is irrelevant; to that end, the functional reality is that the children were integrated into a German institutional structure, forming social bonds and educational roots that define their habitual residence.

[61] The mother insists that the father's assertion that the duration of the children's stay in Germany is not a weighty consideration. In my view, the mother's contention in this regard is incorrect. It hardly needs citation of authorities that under the Hague Convention, a three-year stay [in terms of duration of the stay] is generally sufficient to prove that a child has established their habitual residence in that country. Obviously, that would not be the only consideration to be taken into account.

[62] Again, I consider another weighty and critical distinguishing feature of this case to be that a WhatsApp exchange between the mother and the father underscores the children's integration. In these messages, the father expressed concern regarding the children missing significant milestones in Kronberg, including a First Holy Communion, a school field trip, a week-long circus project, and a soccer-themed

birthday party. These communications highlight a life deeply rooted in a specific social and communal circle.

[63] The court a quo was tasked with assessing the functional reality of the children's daily existence through a holistic evaluation of their integration in Germany.

[64] It is not much of a stretch to imagine that, for the purposes of this inquiry, the court must scrutinise the 'how' and 'why' of the relocation. This also requires an analysis of contemporaneous communications and logistical arrangements, such as return airline tickets. Crucially, the court must weigh the mother's subsequent change of intention against the established plan for the children to return to Germany with the father. Thus, what is critical for the purposes of this case is to establish the shared intentions of both parties at the relevant time.

[65] This transitional analysis is further informed by the parents' separation in November 2022. Their separate living arrangements served as objective indicators that the move was a permanent shift in the family's foundation, rather than a transient arrangement. Notably, the mother and children remained in Germany for a significant period following the separation, maintaining the status quo.

[66] As previously mentioned, in the instant case, amongst others, the evidence of habitual residence is established by the children's long-term educational stability and the father's management of their healthcare. This level of parental and institutional care is highly relevant and demonstrates that Germany was not merely a place of transit, but the children's primary home.

[67] Beyond formal institutions, another important consideration that was relevant in the consideration of the children's habitual residence is that the children's social nucleus was firmly rooted in Kronberg's local activities and communal life. The WhatsApp communications from April and May 2023 serve as a definitive admission by the mother that the children's residence was established in Germany and that her decision to remain in South Africa was a unilateral, not an act planned by both the parties. By stating that she felt 'stuck' and was taking 'drastic steps' due to her own emotional dissatisfaction, she concedes that the retention was motivated by her subjective state rather than the children's best interests or a mutual agreement.

[68] Put another way, the mother's repeated assertions that her decision was 'not premeditated' and that she 'honestly did not plan this in advance' confirm that there was no shared parental intent to relocate the children to South Africa; rather, the trip was objectively intended to be temporary. Additionally, the WhatsApp messages reveal that the mother fails to dispute the functional reality raised by the father regarding the children's integration.

[69] On the facts of this matter, there is a glaring logical inconsistency in the mother's denial of Germany as the children's habitual residence. By her own version, she asserts that the father delayed his return to Germany specifically to convince her to change her decision to make South Africa her home. This argument is inherently self-defeating; one cannot 'change a decision' to make a place a home unless the previous status quo was settled elsewhere. Her version inadvertently admits that a conscious, unilateral pivot occurred only once they were all in South Africa, which confirms that, until that point, no mutual intention to relocate existed. This view is bolstered by the fact that if she had to decide to make South Africa her home, it implies that South Africa was not her home prior to that moment.

[70] Consequently, the narrative creates an oddity and a paradox around the fact that her [the mother's] version in this regard, effectively frames the stay in South Africa as a period of negotiation rather than an established habitual residence for the children. And in so doing, it reinforces the fact that Germany remained the children's primary, stable foundation.

[71] This inconsistency is compounded by the mother's assertion that any decision regarding the children's return to Germany would only be made at the end of the 2024 academic year. This "conditional return" is legally irreconcilable with her denial of wrongful retention. By framing a return to Germany as a 'future decision', she concedes that as of 2023, there was no mutual agreement to make South Africa the children's permanent home. Instead, she has unilaterally placed the children's lives on hold in a foreign jurisdiction. This is a transparent attempt to manufacture a settled status through the passage of time; the very strategy the Hague Convention was designed to prevent.

[72] Of course, I refuse to disrespect the mother by saying that she hoodwinked the father into bringing the children to South Africa on a pretext that they would be returning to Germany. However, these messages provide proof that the mother unilaterally converted a temporary visit into a permanent stay without the father's consent, thereby subverting the established status quo of the children's lives in Germany.

[73] Most telling, however, is the mother's explicit statement that she "withdrew [her] consent for the children to return to Germany." As a matter of logic, this is a profound evidentiary admission. Legally and logically, one cannot "withdraw" consent unless a prior mutual agreement to return was already in place. This statement confirms that the children's presence in South Africa was understood by both parties to be temporary. By her own admission, the mother unilaterally terminated this shared arrangement, thereby establishing the precise moment of wrongful retention as defined by the Hague Convention.

[74] Ultimately, these factors illustrate a degree of integration that transcends mere presence, establishing Germany as the stable and primary environment in which the children's lives developed immediately preceding the dispute.

For instance, 'circus project' and 'soccer party' details are small but legally powerful; they show the children were part of a community in Germany. The children's attendance at school from 2020/2021 respectively and only leaving Germany again in 2023, during school holiday, evinces that their stay in Germany was long-term, rather than a transient visit.

[75] Furthermore, a critical evidentiary detail in this case is that the children held return air tickets to Germany. This strongly suggests that the children's trip to South Africa was intended to be temporary, reflecting the parents' original intent to maintain Germany as the home base of the children.

[76] While return air tickets are not definitive proof of habitual residence, they do serve as significant evidence of parental intent. Having resided in Germany for nearly three years, the children's enrolment in the German school system demonstrates a structured, permanent lifestyle. The duration of three years together

with the other factors strongly indicates that they had integrated into their environment.

[77] This established stability, coupled with documented emotional and social ties, is sufficient to prove that the children had established their habitual residence in Germany. The evidence establishes that these objective facts, viewed cumulatively, demonstrate that the children's presence in Germany possessed a settled purpose and a high degree of social integration, thereby proving habitual residence. Hence, I have great difficulty in seeing how in the circumstances it could be said that the father failed to discharge the onus of establishing the jurisdictional fact of habitual residence of the children in Germany for purposes of Article 3, and that consequently the Hague Convention does not apply.

[78] All of the above considered, I am satisfied that in the circumstances of this case, the first and second appellants [father] had succeeded in proving that the habitual residence of the children was Germany before their unlawful removal. As such, the appeal ought to succeed.

[79] In the result, I propose the following order:

79.1 The appeal is upheld;

79.2 The court a quo's order is set aside and replaced with the following order:

1. The minor children of the second appellant and the respondent, L[...] J[...] L[...] born 28 November 2013, and L[...] P[...] L[...] born 19 June 2015, are to be returned forthwith, subject to the terms of this Order, to the Federal Republic of Germany ("Germany") being their habitual place of residence in accordance with the provisions of Article 12 of the Convention, read with the provisions of the Children's Act 38 of 2005.
2. In the event that the respondent elects to accompany the minor children on their return to Germany pursuant to paragraph 3, she shall notify the first and second appellant in writing within 5 court days of the date of issue of the Court's order that she intends to do so.

3. In the event that the respondent notifies the first and second applicants that she intends to accompany the minor children on their return to Germany as contemplated in paragraph 2 above;
 - 3.1 The first appellant shall forthwith give notice thereof to the Registrar of this court and to the Central Authority for Germany; and
 - 3.2 The second appellant shall forthwith purchase and pay for economy class air tickets, and if necessary, pay for other travel for the respondent and the minor children to travel from Cape Town, South Africa, to Germany.
4. In the event of respondent failing to indicate her intention to return to Germany with the minor children as contemplated in paragraph 3 above, it is to be accepted that the respondent is not prepared to accompany the minor children, in which event the second appellant is granted leave and authorization to remove the minor children from the Republic of South Africa and to accompany the minor children back to Germany and the second appellant shall bear the costs of the minor children's economy class air tickets to return to Germany.
5. A copy of this Court's order shall forthwith be transmitted by the first appellant to the central authority for Germany.
6. Each party to pay its own costs.

CN NZIWENI
JUDGE OF THE HIGH COURT

I agree, and it is so ordered.

D KUSEVITSKY
JUDGE OF THE HIGH COURT

I agree.

P NJOKWENI
ACTING JUDGE OF THE HIGH COURT

Appearances:

Appearance for Appellants : Advocate J Williams

Instructed by : The State Attorney
Mr M Dyalivane

Appearance for Respondent : Mr T Dunn
TJC Dunn Attorneys