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

JUDGMENT

Case no: 2026-034707

In the matter between:

THE AD HOC CENTRAL AUTHORITY FOR THE REPUBLIC OF SOUTH AFRICA (AS DELEGATED ITO S277 OF ACT 38 OF 2005)	**First Applicant**
L[...] G[...] M[...]	**Second Applicant**

and

L[...] C[...] C[...]	**Respondent**

Coram: **JUSTICE J CLOETE**

Heard: 14 MAY 2026, supplementary note delivered on 1 JUNE 2026

Delivered: 10 JUNE 2026

Summary: *Retention of minor child in South Africa in breach of agreement – proper approach to reception and evaluation of evidence in disputes under the Hague Convention on the Civil Aspects of International Child Abduction-*

whether respondent's defences under art 13(a) and (b) established- conditions of return order

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ORDER

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1. The minor child, H[...] M[...] M[...] (born on 6 June 2021), shall be returned to Australia, subject to the terms of this order, in accordance with Article 12 of the Hague Convention on the Civil Aspects of International Child Abduction, read with Chapter 17 of the Children's Act 38 of 2005.

2. The second applicant is granted leave and authorisation, insofar as may be necessary, to remove the minor child from the Republic of South Africa (RSA) and accompany him back to Australia, being the minor child's country of habitual residence immediately prior to his wrongful retention in RSA by the respondent on 23 April 2025.

3. The second applicant shall not remove the minor child in accordance with paragraph 2 above prior to Monday 13 July 2026, in order for the minor child to be prepared for his return in a sensitive and responsible manner by the respondent.

4. In the event of the respondent electing to accompany the minor child to Australia, the second applicant shall fund the cost of the respondent's economy flight (in addition to the economy flights in respect of paragraph 2 above) and the following further conditions shall apply:

   4.1 The second applicant shall fund the cost of a return economy flight for an adult of the respondent's choice to accompany her to Australia;

4.2 The second applicant shall procure rental accommodation for the respondent of a nature similar to that of the residence of the second applicant in Australia, and shall bear the cost of such accommodation in full for a period of 6 (six) months, subject to the court in Australia extending this period or varying the terms hereof;

4.3 The second applicant shall be solely responsible for the maintenance of the minor child, including but not limited to his education and related expenses and a cash contribution of $400 per month to the respondent until such time as the issue of the minor child's maintenance is determined by the court in Australia;

4.4 The second applicant shall be solely responsible for the costs of the mother's mental health care with a professional(s) of her choice to the extent that it is not covered by the benefits offered by the Australian government, unless the court in Australia orders otherwise;

4.5 The second applicant shall, to the extent necessary, ensure that the respondent is provided with a reliable motor vehicle for her use for a period of 6 (six) months, subject to the court in Australia extending this period or varying the terms hereof;

4.6 Within 7 (seven) days of the respondent's return the second applicant shall refer the care and contact arrangements for the period that the minor child remains in Australia to the Family Court for mediation and/or determination, unless the second applicant and the respondent agree otherwise; and

4.7 The second applicant shall not institute any civil or criminal proceedings, or support any civil or criminal proceedings that

might be instituted against the mother by the Australian authorities, arising from her wrongful retention of the minor child in South Africa.

5. A copy of this order shall forthwith be transmitted by the first applicant to the Australian Central Authority, accompanied by a written request for its assistance in order to ensure that the terms hereof are complied with.

6. There is no order as to costs.

JUDGMENT

Cloete J:

Introduction

[1] This is an opposed application brought in terms of the Hague Convention on the Civil Aspects of International Child Abduction (Convention)[1]. The first applicant is the Ad Hoc Central Authority for the Republic of South Africa (AHCA) delegated as such under s 277 of the Children's Act 38 of 2005 (Children's Act).[2] The second applicant (the father) and the respondent (the mother) are the biological parents of a minor child, a son H, who was born in Australia on 6 June 2021.

[2] The minor child was legally represented at the hearing by Ms Bartman in accordance with s 279 of the Children's Act. I express my gratitude to

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1 Incorporated as Schedule 2 to the Children's Act 38 of 2005 by virtue of Chapter 17 thereof.
2 fn 1 above.

her for the assistance given. Since the AHCA and the father made common cause in the relief sought, I will refer to them collectively as 'the father' unless otherwise indicated. I will also where appropriate refer to the father and the mother as 'the parties'.

[3] More particularly, the application is brought in terms of art 12 of the Convention which in relevant part reads as follows:

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

[4] Article 3 of the Convention provides (again in relevant part) as follows:

"The … retention of a child is to be considered wrongful where -

(a) it is in breach of rights of custody…under the law of the State in which the child was habitually resident immediately before the …retention; and

(b) at the time of …retention those rights were actually exercised."

[5] It is common cause, or at least not seriously disputed, that (a) the mother's retention of H in South Africa was in breach of the father's rights of custody in Australia; (b) H was habitually resident in Australia immediately before the retention; and (c) at the time of the retention the father was actually exercising his rights of custody.

[6] The father (who would otherwise bear the onus to establish this) has accordingly met the jurisdictional requirements of art 3. The mother has raised two defences in her answering affidavit, as follows:

"11. I state that the applicant *(the father)* consented, ex post facto, to H not returning to Australia and to him residing permanently, with me in SA. He provided such consent on 24 April 2025 and on a number of occasions thereafter. This is set out

below. Accordingly, and as of 24 April 2025, H has been habitually resident in SA. This is the first leg on which I found my opposition to the application.

12. In the event that it is found that the applicant did not consent to H not returning to Australia and to him residing permanently, with me in SA, then the second leg on which I found my opposition is that I have a defence in terms of Article 13(b) of the Convention which I similarly detail more fully below."

[7] The mother thus raises *ex post facto* consent under art 13(a) as her primary defence, and one under art 13(b) as her alternative defence. The father maintains that both lack merit. It is common cause that the mother bears the onus of proving the defences raised by her. The relevant portion of art 13 is as follows:

"Notwithstanding the provisions of the preceding Article *(i.e. art 12),* the judicial ...authority of the requested State is not bound to order the return of the child if the person…which opposes its return establishes that –

(a) the person…had consented or subsequently acquiesced in the …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…"

Approach to the evidence on the disputed issues

[8] Prior to the Constitutional Court decision in *Koch*[3] the approach of our courts was as set out by the Supreme Court of Appeal in *Penello*[4], namely that in Convention cases the so-called *Plascon-Evans* rule[5] applied, meaning that where disputes of fact arise in application (motion) proceedings, a final order may only be granted if the facts alleged in the respondent's affidavit, together with those alleged in the applicant's affidavit that have been admitted by the respondent, justify such an order.

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3 *Ad Hoc Central Authority v Koch NO* 2024 (3) SA 249 (CC), delivered on 27 November 2023.

4 *Penello v Penello (Chief Family Advocate as Amicus Curiae)* 2004 (3) SA 117 (SCA).

5 *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

The only exception is where the respondent's allegations are so far-fetched or improbable that they fall to be rejected on the papers as they stand.

[9] In *Koch* this approach was rejected, and a different one was held to apply. In the minority judgment Van Zyl AJ stated:

"[72] I am unable to agree with this approach to evidence in Convention proceedings. Convention proceedings are designed to provide a speedy resolution of disputes over abducted children. As proclaimed in Article 1, the aim of the Convention is to secure the prompt return of children removed from their country of habitual residence, and to restore the status quo ante (the situation that prevailed before [the abduction]) so that the custody and other issues that underlie the removal of a child can be decided by the courts of that country. Article 11 further expressly directs the relevant authorities to act expeditiously…

[73] The nature of the proceedings under the Convention, and the manner in which the court hearing the matter decides to receive and assess the evidence placed before it, must inevitably be dictated by the aforementioned objectives of the Convention and the legislation that incorporates it into our domestic law. Proceedings under the Convention are clearly designed with the object of providing an expeditious outcome. The compulsory procedure for initiating proceedings is by way of an application to the High Court. It is not open to SA's Central Authority to choose the procedural form of the proceedings under the Convention, Also, neither the Children's Act nor the Regulations[6] are prescriptive as to how the court should receive evidence…

[76] In addition to the prompt response required by the Convention and the Regulations, the AHCA , as the applicant in proceedings under the Convention in this country, is likely to find itself at an evidential disadvantage, since the person from whom the child was taken will be resident in another country, often on a different continent. These considerations militate against strict rules on the adducing of evidence. The body of evidence placed before the court in proceedings under the Convention may accordingly consist of a hotchpotch of different types of material.

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6 Regulations relating to Children's Courts and International Child Abduction, GN R250 GG 33067, 31 March 2010.

This is not conducive to a determination of factual disputes by applying the *Plascon-Evans* rule.

[77] On the contrary, Article 13 itself makes the application of the *Plascon-Evans* principle inimical to a determination of a defence raised in terms thereof. The use of the word "shall" in the Article obliges the court tasked with making such a determination, to "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". Such evidence is bound to be factual in nature, and the obligation placed on the court to take it into account in making a decision is inconsistent with the process of fact selection that is inherent to the *Plascon-Evans* rule.

[78] There are two further considerations that militate against applying ordinary motion principles to Convention proceedings. The first is that, as a general rule, competing factual versions on affidavit cannot, in ordinary motion proceedings, properly be determined on a consideration of the probabilities. The second is that, otherwise than with applications under the Uniform Rules, it is not open to an applicant in Convention proceedings to choose the procedural form of the proceedings. By applying *Plascon-Evans,* the applicant, that is, the AHCA and by extension the person from whose custody the child has been taken, will accordingly find themselves at "peril" not by reason of their own choice…"

[10] In the majority judgment in *Koch*, penned by Majiedt J, this was emphatically confirmed:

"[217] The first judgment correctly enumerates the flaws in the judgment of the Supreme Court of Appeal *(i.e in the same case).* To recap they are:

(a) First, that Court erred in its approach to the correct application of Article 13(b) by applying the principles in *Plascon-Evans* to its evaluation of the evidence. In doing so, the Court impermissibly decided the matter solely on the evidence adduced by the aunt *(who had retained the child after the mother had passed away).* It completely disregarded the evidence of the applicant on crucial matters…"

[11] The majority also crisply summed up what is to be avoided by courts in Convention proceedings:

> "[218] … the Supreme Court of Appeal appears to have erred in its conflation of the two inquiries of what was referred to in *Sonderup* as the long term interests of the child, including determination of custody matters, and the short-term interests of the child, which concern jurisdictional matters. That Court seems to me to have conflated the assessment of the short-term jurisdictional question of which court is better placed to deliberate on issues of care, custody and guardianship and the longer term question that concerns an assessment of the best custodial arrangement for the child… What is required is a determination of whether the Article 13(b) defence holds good in the face of an Article 12 mandatory return…"

[12] The reference to art 13(b) in the passages I have just quoted was to the specific defence raised in *Koch.* But this does not detract from the broader underlying principle of the correct approach to the determination of evidence on disputed issues in Convention proceedings, as is clear from both the minority and the majority judgments.

Common cause facts relevant to this application

[13] The father was born in Australia in 1985, and it has always been his country of residence. The mother was born in South Africa in 1997. The parties met in 2018 while travelling in Vietnam. Thereafter they returned to their respective home countries, but remained in regular contact, meeting up again for a holiday together in Thailand, again during 2018. It was at that point that they discussed the possibility of the mother travelling to Melbourne, Australia where the father resides.

[14] The parties entered into a committed relationship in November 2018. After the mother travelled to Vietnam in December 2018/January 2019 she entered Australia on a three-month holiday visa. Upon expiry thereof, she applied for and was granted a student visa, and later,

permanent residency status by way of a permanent partner visa due to her relationship with the father. She continued to live in Australia until the events in 2025 which ultimately gave rise to this application.

[15] As previously stated, H was born in Australia on 6 June 2021. With the father's consent, the mother travelled with H to Cape Town, South Africa where her parents reside from 11 November 2021 until 18 January 2022. On 23 June 2022, the maternal grandmother travelled to Australia and stayed with the parties for approximately 11 weeks. On 8 September 2022, with the father's consent, the mother and H accompanied her to South Africa. In November 2022, the father joined them here, whereafter the parties and H returned to Australia on 11 December 2022. The mother and H also travelled to South Africa and stayed with her parents from 4 March 2023 until 5 April 2023.

[16] The parties separated in October 2023. They implemented what appears to be an informal, amicable shared care arrangement for H, although exactly how it was implemented is the subject of some dispute. For present purposes, nothing turns on this. On 30 November 2023, and again with the father's consent, the mother travelled to South Africa with H and returned to Australia on 1 January 2024. Thereafter the shared care arrangement continued until the mother returned to the former common home with H in June/July 2024. H attended a day care facility four days a week from 2023 until the end of 2024. He was enrolled at the end of 2024 to attend this facility five days a week from April 2025 until the end of that year.

[17] In late December 2024, the mother's parents travelled to Melbourne for a visit. According to the father, it was during their stay that the parties decided that they would not be reconciling and that the mother would

again move from the former common home. According to the mother, it was already apparent a month after she had returned to the former common home that the parties' relationship could not be saved, and the only reason she stayed was because she could not afford suitable alternative accommodation.

[18] In January 2025, the mother and her parents proposed that she return to South Africa with H for three months. The father gave written consent for this travel for the period 22 January 2025 to 22 April 2025. The mother confirmed in her answering affidavit that it was her intention to return to Australia as agreed. The mother and H travelled to South Africa on 22 January 2025. On 21 March 2025, the maternal grandparents informed the father on a Teams call that the mother did not intend to return to Australia with H as agreed, as it would not be good for her mental health. The mother has a history of anxiety and depression. I deal more fully with this when evaluating her art 13(b) defence later in this judgment.

[19] During the same call the maternal grandparents informed the father that H's three-month visa could be extended without his consent and that he should come to South Africa to discuss the long-term arrangements for H's care as well as his living arrangements. The father responded that his consent was for three months only and that he needed time to process this sudden news. He states that he was shocked and said very little else during that call.

Defence of *ex post facto* consent under art 13(a)

[20] There were a number of communications between the parties following the announcement of 21 March 2025. I will endeavour to summarise those which are directly relevant to the mother's pleaded defence of *ex*

post facto consent. It is necessary to deal with certain communications prior to 24 April 2025 (when she maintains the father first furnished that consent) because it contextualises the consent upon which she relies.

[21] On 22 March 2025, the father sent the mother a message in which he stated that he was extremely anxious and felt blindsided. While acknowledging that the situation was complicated and challenging for them both, he made it clear that he would like them to stick to the three-month agreement. He continued: "I want you to be assured that I will do everything possible for you to feel comfortable when you return and to keep in mind that this is a temporary thing whilst we both work together and find a common ground and solution that is right for H".

[22] The mother responded that she understood, but that she wanted the father to travel to South Africa for this purpose. Significantly, and despite the father's reference to 'this is a temporary thing' the mother did not attempt to persuade the court that this was some sort of consent on the part of the father for her to remain in South Africa with H in the long term.

[23] The father was not prepared to travel to South Africa. On 9 April 2025 he informed the mother that he was expecting H to return to Australia on 22 April 2025, and that "further extension for H to remain abroad is non-negotiable. Temporary accommodation is available for you until a more suitable solution can be found". The mother's response was to ask what the proposed temporary accommodation would entail. The father did not reply.

[24] On 16 or 17 April 2025 the mother sent a message to the father, which essentially dealt with why she wished to remain in South Africa in the long term, while suggesting a counsellor or therapist to assist the parties in working out how to move forward. The father replied that while he

remained open to this option, he was not prepared to agree to H remaining in South Africa beyond 22 April 2025. He also stated that "I have received advice that H needs to be home as per the agreement. If not, the next step is to allow AUS/SA authorities to intervene. I hope it doesn't have to come to this as it would make future travel more difficult…".

[25] During a telephone call on 24 April 2025, which the mother recorded without the father's knowledge, he repeated that H remained in South Africa without his consent. When he asked the mother if she had booked flights for their return, she repeated that he should travel to South Africa instead to work things out. He again refused to travel to South Africa, and told her that if she did not make arrangements for H's return in the next few days, he would 'file for abduction'. Their discussion became heated. Eventually he said the following:

> "Because I do not need to go over there *(i.e. South Africa).* If you had the decency to have a conversation with me the last three months, you can understand that I am not trying *(for you*) to come back here inevitably. You can come back like two months. I need to see H, he needs to come home. I need to spend time with him and he can go back with you. I cannot leave Australia yet… [a]nd it should be on my terms for me to move to another country as well…[n]ot because you want to go home. I am not asking you to stay here. I need to see H. I am not going there…[y]ou have got all your stuff here as well, that needs to go. If you are not going to stay in Australia you need to do it. Need to come back."

[26] The mother's response in that telephone call was that she would speak to the maternal grandmother about 'getting that done' and would thereafter revert. When pushed to commit to a timeframe the mother asked for 'a little bit of time' and stated "nothing is booked right now so I cannot tell you but I will let you know as soon as possible". The father did not accept this and said "Look, you cannot go over there and not come back. You have taken H away from me" to which the mother replied "Okay".

[27] The father's version of this call is that he sought to persuade the mother to return with H to Australia so that an agreement could be reached on the long term arrangements for H through mediation and, failing agreement, pending the outcome of an application by the mother to the court in Australia for permission to remove H permanently to South Africa.

[28] On 26 April 2025, the mother's attorney addressed a letter to the father. The pertinent part of that letter is as follows:

"3. We understand that our client has conveyed to you that she is finding it incredibly difficult to cope with life in Australia which in turn has a negative impact on H. She has also made you aware that there is a significant difference in her wellbeing and her parenting while in South Africa and with the strong support system here. She is very concerned about what would happen if she were forced to return to Australia, particularly the impact on H.

4. We are instructed that when this was conveyed to you by our client your initial response was to nevertheless insist that she return with H to Australia.

5. We are instructed however that during a telephone conversation…yesterday you indicated that you wanted her to return H to Australia for two months in order for you to have contact with him whereafter you would allow H and our client to return to South Africa."

[29] I will accept that the conversation referred to was mistakenly stated to have occurred on 25 April and not 24 April 2025. It would seem that the mother did not inform her attorney of the full contents of the conversation relied upon, and nor did she disclose to her attorney what the father had conveyed to her earlier on 22 March 2025, which had been conditional in similar vein. Be that as it may, the father responded two days later on 28 April 2025 in the following manner:

"Thank you for your correspondence.

As you are aware, H and *(the mother)* travelled to South Africa in January of this year for an agreed duration of three months. This time has now lapsed and H has overstayed the consent of the travel agreement. H needs to return to Australia as soon as possible, this is non-negotiable.

Appropriate accommodation for H and 50/50 care should be adhered to as this has proven to be a successful arrangement in the past. If *(the mother)* does not wish to reside in the common home I will make the necessary arrangements.

Upon the return of H and *(the mother)* mediation can be arranged in Australia to resolve and agree to a long term solution. If a solution cannot be agreed within the 2 month period of return, I will consider *(the mother)* to return to South Africa for a short duration until an agreement has been made.

Please acknowledge and respond within 7 days, after this time I will proceed to file an application to the Hague Convention."

[30] The mother's attorney did not respond. On 15 May 2025 the mother sent the father a message in which she wrote, amongst other things, that "[y]ou mentioned us going back to Aus for a month and then H and I returning to Cape Town. What did you have in mind with this? How would that work?" It will immediately be apparent that on the mother's own version in this message, she was under no illusion that on 24 April 2025 the father had not consented, nor had he acquiesced, to H remaining permanently in South Africa with her. This is not explained in her affidavit.

[31] The parties spoke again on 18 May 2025. Again, the mother recorded their conversation without the father's knowledge. The mother expressed her fear that if she travelled to Australia, the father would not allow her to leave again with H. She even asked him to put something in writing that he consented to their return to this country. This too is inconsistent with

her reliance in these proceedings on the father having furnished his ex post facto consent (or acquiescence) on 24 April 2025 for H to remain permanently in South Africa.

[32] During the same conversation the father repeated that the mother had breached their three month agreement. When the mother expressed her fear referred to above, the father told her in no uncertain terms that "the proper process is *(for)* you *(to)* file for a relocation for H. That is the proper process if you want to go through that. Instead of doing what *(you)* have done, which is not right."

[33] The mother responded that H was much better in South Africa, but that the father did not understand this. He replied: "[i]f that is the case…then we discuss and talk about *(it)*. But you have taken him away. You have not come back. And that is not right. You cannot just walk away, you need to come back. He is my child . And I did not agree for this. I agreed for you to go over there for a holiday. So you have got two options – you come back for a month. We work s…t out or I file for abduction and then you really would not be going anywhere. Because as soon as they bring him back, I am only doing what is right. But I have given you plenty of time."

[34] The mother's version of the communications of 15 and 18 May 2025 is that the father, having "previously consented to H residing permanently in South Africa", was refusing to commit to a definite unconditional return here if she travelled with H to Australia for a brief period. It was this refusal, she maintains, that made her fearful that he would block their return to this country.

[35] While it is correct that during the conversation of 18 May 2025 the father also said that "I did not say I would not let you leave (Australia)" if she returned there with H, on her own version she had doubts about the veracity of this 'assurance'. This cannot, in my view, translate into *ex post facto* consent or acquiescence. It was by its very nature conditional; and that condition was never fulfilled because the mother subsequently failed to return to Australia with H at all.

[36] During a further telephone conversation on 22 May 2025 (again recorded by the mother without the father's knowledge) the same theme about a definite commitment to a return to South Africa continued. The mother herself stated: "[w]hat do you, okay what do you need? Tell me what you need in writing and I am happy to look at that … I really honestly am. Then we can move forward. We can sort out the mediation, we can start planning that. We can book something so that the time we get there, there is something booked". If the mother truly believed that the father had unconditionally consented or acquiesced to H's permanent relocation to South Africa, what is unanswered by her is why she was nonetheless still willing to attend mediation, which on neither party's version was limited to aspects other than H's long term country of residence.

[37] The mother's averment that it was only when she did not agree to return to Australia on the father's terms that he threatened an application under the Convention, fails to withstand scrutiny. Already on 16 or 17 April 2025, the father told her that unless H returned to Australia on the scheduled date of 22 April 2025, he might have to act on advice received to invoke the assistance of the Australian/South African authorities. On 24 April 2025 he made it clear, before suggesting a brief return for the stated purpose of resolving H's long term care arrangements, that if H was not returned in the next few days, he would "file for abduction". And again, on 28 April 2025, he informed her attorney that failing a response

to the same proposal within seven days, he would bring an application under the Convention.

[38] In the same conversation of 22 May 2025, the father yet again repeated that what was not negotiable was a return to Australia, whether in the short or long term. The following exchange ensued:

"*Father:* ' I am telling you legally what you are doing now is illegal. I did not consent for you to stay and overstay. But if anybody is doing any wrong it is you, right now'.

Mother: I disagree but let us just leave it at that.

Father; How do you disagree ? How do you disagree with that ?

Mother: Because I know this is the best place for *...[intervenes]*

Father: You actually have no leg to stand on right now.

Mother: I know this is the best place for H, for having support *(for)* me mentally *...[intervenes]*

Father: Regardless of that, there was no consent given *...[intervenes]*

Mother: For me I do not base *...[intervenes]*

Father: To stay in South Africa*...[intervenes]*

Mother: Okay. Anyway, send me, please send me, what I want from you is what your plan, what in your mind what you want best. Say it is we come back for a month, after that month, while we there let us get the parenting plan put in order. Let us work that out together and then moving forward we can come back to South Africa after that month in Australia and then we continue with, and honestly I am not trying to take H away from you, I want to, I want to make it so H has you in his life…"

[39] What is clear from this exchange is that, contrary to what the mother now asserts, even she understood that the return to Australia was not for a brief, unconditional visit. Moreover, if the father had consented *ex post facto* or acquiesced to H remaining permanently in South Africa, it is difficult to understand why she had not simply reminded him of this instead. The fact that she rather advanced a different reason for wishing to remain here speaks volumes. This is fortified by the following exchange later in that conversation:

"*Father:* And at the moment you, you have taken him away from his father, without consent. So regardless of what we might bring…*[intervenes]*

Mother: Because I do not feel safe and comfortable coming back to Australia. I do not, I do not want to be in Australia."

[40] I accept that the father did go on to offer, again in the same exchange, that H could spend time alone in Australia with him if the mother did not want to travel there, and that he could thereafter bring him back to the mother if she wished. I also accept that the father said that he would not take H away from the mother. But this is not the point. It is rather whether, as pleaded by the mother, the father expressly consented or acquiesced, on 24 April 2025, and on more than one occasion thereafter, to H's permanent retention by the mother in South Africa.

[41] The waters do become muddied however when regard is had to the father's email to the mother later on the same day (22 May 2025). In that email the father reiterated that H needed to return to Australia "as soon as possible due to his travel consent having lapsed for more than 30 days". He went on to say that he was open to an agreement regarding H's return to South Africa thereafter and proposed conditions in respect of contact and the like following such return.

[42] According to the father, his intention with this email was to secure the mother's return to Australia where they could then negotiate the long term arrangements for H. He did this to reassure the mother in writing, as she had previously wanted, since without such an assurance he was afraid that she would refuse to return. At the time it was sent, it was his understanding that the contents constituted informal and preliminary negotiations only. The mother denies this to be the case and maintains that the father's explanation is implausible.

[43] I believe that the answer to this lies in the following. On 26 May 2025, after the mother asked for time to consider the proposal, the father told her in a message that she was at liberty to do so, but that H had to return to Australia, and she needed to provide him with "a date and his return". The father also stated that :

"You are not in a position *(to)* keep H there until something has been agreed to.

I don't think you quite understand or see this as a concern but keeping a child overseas without parental consent is illegal. I have given you more than enough opportunities to do the right thing.

I want to see my son.

I will be filing abduction on the 28th of May."

[44] On 27 May 2025, the mother's attorneys wrote to the father. It was contended therein that the father had not responded to their letter of 26 April 2025 (which was incorrect). It was also contended that what was 'clear' from the subsequent direct communications between the parties, was that it had been agreed that H would reside with the mother in South Africa in the long term since it was in his 'best interests' to do so. Other aspects pertained to what should happen as a result of that so-called agreement.

[45] The father's Australian attorney responded to this letter on 30 May 2025. It was made clear therein that the father had not consented to the mother relocating to South Africa with H, or retaining him permanently here, and that she was required to approach the Australian court for permission to do so, if this remained her intention should the family dispute resolution process following her return to that country fail. Demand was made for the mother to return H to Australia by no later than 19 June 2025, and it

was placed on record that the father would take action under the Convention if needs be. On 13 June 2025, in a reply from her attorneys, the mother persisted with her stance that an agreement had been reached.

[46] H was still not returned to Australia, and the father contacted the Australian Central Authority (ACA) to commence steps for a return application under the Convention. The ACA referred him to the International Social Service Australia (ISS) who gave provided him with advice. He commenced with the drafting of his application. The application was submitted to the ACA on 18 August 2025. The application was approved by the ACA and forwarded to the AHCA, which was authorised to proceed with it on 3 November 2025. A meeting was held on 18 December 2025 in an attempt to settle the matter. This was unsuccessful, as a consequence of which a timetable for the exchange of papers was agreed upon for the current application, which was launched on 16 February 2026.

[47] There are a plethora of domestic and international judgments which deal with the meaning of consent under the Convention. For present purposes it is only necessary to refer to the Supreme Court of Appeal decision in *KG v GB*.[7] which sets out the established South African legal position:

"[38] …The consent or acquiescence referred to in art 13 (a) involves an informed consent to or acquiescence in the breach of the wronged party's rights…

[39] As was pointed out by Hale J in *Re K (Abduction: Consent),* 'the issue of consent is a very important matter [that] … "needs to be proved on a balance of probabilities , but the evidence in support of it needs to be clear and cogent [because] …(i)f the court is left uncertain, then the 'defence' under art 13 (a) fails" [and] it is [furthermore] obvious that consent must be real…positive and …unequivocal'…"

7 *KG v GB* 2012 (4) SA 136 (SCA).

[48] Applied to the facts in the present matter, I am unable to find that the father's so-called consent falls into any of the aforementioned categories. It was not real, positive and unequivocal, and this court is thus left, at best for the mother, uncertain. Not only that, but as set out earlier, on the mother's own version she was at all material times uncertain as well. The interpretation which the mother sought to place on the father's communications, and equally importantly her own, in these proceedings, fails to pass muster.

[49] Turning now to the related defence of acquiescence, which is possibly the more accurate defence, given that consent, for purposes of the Convention, implies something in advance of a retention. This was dealt with, again by the Supreme Court of Appeal, in *Smith*[8] as follows:

"[**18**] In several decisions of the Court of Appeal in England a distinction was drawn between active and passive acquiescence. In the case of the former the uncommunicated subjective intention of the wronged parent was normally regarded as irrelevant while in the latter the subjective intention was regarded as relevant. This distinction was rejected by the House of Lords in *Re H and others (minors) (abduction : acquiescence)* [1997] 2 All ER 225 (HL). Lord Browne-Wilkinson considered that art 13 looked to the subjective state of mind of the wronged parent and that accordingly the true inquiry was simply whether he had in fact consented to the continued presence of the children in the jurisdiction to which they had been removed or had been retained. At 235 e the learned law lord said:

"In my judgment, therefore, in the ordinary case the court has to determine whether in all the circumstances of the case the wronged parent has, in fact, gone along with the wrongful abduction. Acquiescence is a question of the actual subjective intention of the wronged parent, not of the outside world's perception of his intentions."

And continued (at 235 g):

"In the process of this fact-finding operation, the judge, as a matter of ordinary judicial common sense, is likely to attach more weight to the express words or conduct of the wronged parent than to his subsequent evidence as to his state of mind.

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8 *Smith v Smith* 2001 (3) SA 845 (SCA) paras 18 and 19.

In reaching conclusions of fact, judges always, and rightly, pay more attention to outward conduct than to possibly self-serving evidence of undisclosed intentions. But in so doing the judge is finding the actual facts. He can infer the actual subjective intention from the outward and visible acts of the wronged parent. That is quite a different matter from imputing to the wronged parent an intention which he did not, in fact, possess."

I respectfully agree. Indeed, I can see no justification for importing into art 13 (a) a rule of thumb distinction which is not to be found in the words used.

[19] To the above approach, Lord Browne-Wilkinson added one qualification; that is the case where although the judge is satisfied that the wronged parent did not, in fact, acquiesce his outward conduct was such as to lead the abducting parent to believe that the wronged parent was not going to insist on the summary return of the child. This was because (at 236 f) -
"[n]o developed system of justice would permit the wronged parent in such circumstances to go back on the stance which he has, to the knowledge of the other parent, unequivocally adopted: to do so would be unjust.""

[50] On the facts of the present case, and for the same reasons in respect of the mother's defence of *ex post facto* consent, it would indeed be a stretch to find that the outward manifestation of the father's subjective intention was such as to reasonably cause the mother to believe that he had acquiesced in H's permanent retention by her in South Africa.

[51] It follows that the mother's art 13(a) defence must fail.

Defence of grave risk under art 13(b)

[52] The mother contends that H would be placed at grave risk of psychological harm, and/or placed in an intolerable situation, should a return be ordered. Although she would return with H, as his 'primary

carer' she will not be able to function mentally and emotionally if she is 'forced to again reside' in Australia, and this, she avers, will have a severe and deleterious impact on H as she will not be able to parent him effectively.

[53] As succinctly set out in the majority judgment in *Koch*[9], this court is not called upon in Convention proceedings to determine issues such as residence in the long term. This is something which is the exclusive purview of the Australian courts. All I am required to determine is whether the art 13(b) defence 'holds good in the face of an Article 12 mandatory return'.

[54] The mother seems to have misconstrued the true nature of the enquiry. For example, in her affidavit she states:

> "56. In the event of me having to live with H in Australia, I would have to find full-time employment there to be able to support myself and would of course have limited annual leave during which to travel home to SA. In addition, as H gets older and attends school, he will only be able to travel to SA during school holidays and when I am on leave. Accordingly, I will not be able to travel home to SA on a regular basis for support and care before having to return to Australia again."

[55] The mother states that for the past seven years, but particularly for the past almost five years since H was born, her mental and psychological well- being have been marked by severe anxiety and bouts of depression. During certain of those bouts, she has been suicidal. The only reason that she managed to parent H responsibly and provide him with love and care, despite her state of mind, was because she was able to spend regular periods of time in South Africa and enjoy the support of her family and/or have her mother with her in Australia.

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9 At para 218.

[56] Further, she states that she is "quite literally terrified" at the thought of having to live in Australia again. Medication, she says, is not sufficient to manage her anxiety and depression. She also needs to live in a supportive environment and in a country where she is able to generate an income with which to support herself and contribute to H's support, and to have a reasonable standard of living. She states further that H deserves to be parented by a physically and mentally healthy mother, something which she has not been able to achieve in Australia.

[57] The mother also relies on a report (albeit not confirmed under oath) dated 6 May 2025 by a consultant psychiatrist based in Melbourne, who for sake of privacy I will refer to as Dr M. He states that the mother was first referred to him for assessment by her general practitioner in August 2020. She reported a history of Obsessive-Compulsive Disorder (OCD) diagnosed in South Africa from quite a young age, with multiple symptoms including checking behaviours, catastrophising thoughts, as well as repetitive and ritualistic behaviours and intrusive and ego-dystonic thoughts, which worsened after moving to Australia and being disconnected from her family, as well as some difficulties around financial autonomy and a reportedly unsupportive relationship with the father.

[58] Dr M also diagnosed the mother with OCD of moderate to severe intensity and a specific phobia around flying. She was treated with appropriate medication and advised to continue therapy with a clinical psychologist. She was subsequently monitored over the following few months. After H's birth in 2021, the mother travelled to South Africa with her mother for a short period as she felt 'unsupported'. She continued with her medication and was "stable in her symptoms albeit with some residual anxiety". Dr M next saw the mother in the beginning of 2024, where she re-presented with a new referral. At that stage she

was stable and managing reasonably well, and continuing to take her medication, although she felt forced to remain in Australia despite the break-up with the father.

[59] He next saw the mother in November 2024 where she re-presented with significant distress. She reported that she had been financially unable to function due to the lack of support, and had returned to the father in order to care for H. She was miserable, said she had no life in Australia, and wanted to return to South Africa. Her relationship with the father was causing increased anxiety and distress. She also reported recurrent panic attacks despite her current treatment. Dr M changed her medication regime and "she settled on this over the following month with improved mood and no further panic attacks". Her dose was gradually increased at that stage, and she was functioning better and holding down a job.

[60] Dr M last saw the mother on 21 January 2025, when she consulted him along with the maternal grandmother. She was "much better in terms of mood and anxiety" and told him about the three month return visit to South Africa. He recommended this, i.e. that "she spend a bit of time with her family in South Africa as she was getting some support from them and that this would assist her mental health".

[61] Dr M's report was addressed to the mother's attorneys. He continued:

"In regards to your specific queries about her return to Australia:

9.1 Do you believe that a return to Australia would have a negative effect on *(her)* mental health?

If she was to return to Australia in the same circumstances as before without adequate social support, and continuing the dysfunctional relationship *(with the father)* I believe it would have a negative impact in terms of unsettling underlying mood and

anxiety difficulties, reducing her ability to look after her own needs , and a worsening of her mental health over time.

9.2 If so, what do you believe the potential impact for mental health would be if she was forced to return?

As I said previously, it would potentially cause her mental health to deteriorate as a result of lack of support and lack of stability, and increasing distress leading to poor self-care, increasing symptomatology and lack of response to current treatment.

9.3 In your opinion would *(the mother)* being forced to return to Australia negatively impact on her anxieties?

I've already answered this in the previous question as I feel it would negatively affect her social support.

In regards to questions 9.4 and 9.5 *(these questions do not appear from the report but appear to relate to her capacity to parent if a return was ordered)* I'm unable to comment about this as this is not my area of specialty. Generally I would say that a reduction or deterioration in mental health would affect the ability of anybody to function appropriately in any role.

As such, there may be some difficulties in her parenting, however I can't comment further than that.

Overall, I would summarise that she requires a significant amount of psychosocial support given a long history of mental illness and general distress.

I think it would be ideal if there is an arrangement in terms of her being able to spend time in Australia as well as return back to South Africa to be with her family from time to time if needed, if such an agreement could be arranged.

However, at this point in time, her returning here without a prospect of returning back to South Africa would probably not be in her best interest as far as her mental health treatment and stability are concerned."

[62] The report of Dr M is the only, reasonably 'current' professional independent report before this court, although I accept that it is now more than a year old. I would have expected the mother to provide, at least, an up to date report from a suitable professional in South Africa. I would also have expected her to disclose fully whether she is still taking medication and if she is receiving therapy for her mental health issues. However, none of this was disclosed by her, which puts this court in an invidious position.

[63] Apart from the mother's own subjective version, supported by the maternal grandmother who also deposed to an affidavit, one is thus left with the professional opinion of Dr M. Importantly, not even he goes so far as to say that the mother will be rendered non-functional if she returns to Australia (with H) for a relatively short period while the relocation or other process plays out in the Australian court. Similarly, and understandably, given this is not his stated field of expertise, Dr M cannot give a professional opinion on how a relatively short return to Australia would impact so negatively on the mother that it would place H at grave risk of psychological harm or otherwise put him in an intolerable situation.

[64] I emphasise that I do not minimise the importance of the mother's anxiety and related mental health issues. They are indeed relevant and concerning. But they need to be weighed into the mix along with all other relevant factors. These include the professional opinion of Dr M, the fact that the mother managed to hold down employment in Australia at a time when her anxiety levels were debilitating, and the absence of any indication (other than what follows) of her inability to be a loving, caring mother to H.

[65] The mother relies on two communications from the father as support for her version that she cannot cope without the support of her family, in particular her own mother. The first is during their conversation on 22 May 2025, when the father said to her that "I actually don't want you to be here with H because I feel like something might happen to him. I don't trust that you're responsible enough to look after him yourself – you are drinking over there – I know you are – and luckily for you - you have your parents to look after him when you are going out but if you were here I would be worrying too much". The second is the email sent later the same day when the father allegedly told the mother that: "I understand the well-being of H is the motive, the most important thing I believe is that he is in safe hands with your family".

[66] However, it is clear from the first communication that day that the father was concerned, not about the mother's ability to care for H due to her mental health issues, but because of her bouts of drinking alcohol. The mother admits that she has on occasion consumed too much alcohol. However, she states, she has neither historically misused alcohol nor does she currently do so or indeed any other such substance. She avers that she has always been a very responsible mother to H even when she has battled with her anxiety and depression.

[67] The second communication has been misquoted by the mother. What the father wrote was that "I understand the well-being of H is the most important thing. I believe he is in safe hands with your family, however removing H from his father should not have been overlooked and disregarded in such a way". This cannot, in my view, translate into what the mother contends is an acknowledgment by the father of a grave risk should H be ordered to return to Australia. I accept however that the father shared the maternal grandmother's concern that the mother "was not doing well and needed family support and medical care" during the

maternal grandparents' visit in late 2024/early 2025, when their relationship was in serious difficulty, but it is undisputed that it was for this reason that he agreed only to a three month visit to South Africa, and not to a permanent return to this country.

[68] In *Koch* the minority judgment stated:

"[62] The approach that Article 13(b) does not require elaboration beyond its terms must be endorsed. It is implied in the plain meaning of the words used in Article 13(b) that it sets a high threshold, and any other approach will be inconsistent with the language used and the objectives of the Convention. The level of the risk must be of a serious nature, and the words "otherwise place the child in an intolerable position" throw considerable light not only on the degree of seriousness of the risk of the harm, but also the harm itself, that the Convention has in mind. The word "otherwise" is indicative of a conclusion that the physical and emotional harm contemplated is harm to the degree that also amounts to an intolerable situation.

[63] The risk of harm that will meet the threshold in Article 13(b) will inevitably be determined by the facts of any particular case. As a general proposition, it may be said that the risk of harm must be of a severity which is more than is inherent in the inevitable disruption, uncertainty and anxiety which follows on an unwelcome return to the jurisdiction of the child's home country. It is important to make the observation that Article 13(b) does not require there to be certainty that harm will occur. What is required is persuasion by applying the legal standard of proof that there is a risk which warrants the qualitative description of a "grave risk" that the return will "expose" the child to harm. Whether the risk reaches that threshold must inevitably be determined on the facts of the case and by the nature of the projected harm….

[65] The answer to the concerns which underlie the notion that the exceptions must be given a restrictive interpretation must rather be found, as envisaged in *Sonderup*[10], in a balanced approach to the determination made in Article 13(b), and the correct application of the Convention. This requires the court to approach the enquiry in a manner that will give effect to the meaning of the language in the Article, the objectives of the Convention, the limited nature of the assessment the court is required

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10 *Sonderup v Tondelli* 2001 (1) SA 1171 (CC).

to make with regard to what the short-term best interests of a particular child are, the location of the burden of proof, and the summary nature of the proceedings.

[66] An integral part of the scope of the enquiry the court is required to conduct, in determining whether there is a grave risk of harm or an intolerable situation as contemplated in Article 13(b), is the presence or absence of ameliorative measures to ensure the child's safety upon return to their home country. Simply put, if the child can be sufficiently protected from grave harm when returned, then the child does not in fact face a "grave risk" of serious harm as contemplated by Article 13(b). This is consistent with the underlying premise of the Convention that the judicial and social authorities of the home country are in a position to provide the necessary protection and support in dealing with any eventuality that may arise from the return of the child."

[69] The majority judgment in *Koch* also summarised the following important principles[11] :

"…(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 a strong word but, when applied to a child, must mean "a situation which this particular child in these particular circumstances should not be expected to tolerate".

(e) Article 13(b) looks to the future … [w]here the risk is serious enough, the court will be concerned not only with the child's immediate future because the need for protection may persist.

(f) Where the defence under Article 13(b) is said to be based on the anxieties of a respondent mother about a return with the child, which are not based on objective risk to her but are nevertheless of such intensity to be likely, in the event of a return to destabilise her parenting of a child to a point where the child's situation would become intolerable, in principle, such anxieties can found the defence under Article 13(b)."

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[11] *Koch* at para 158.

[70] Having regard to these principles, viewed against the factual context set out in some detail above, and subject to the safeguards which I shall incorporate in the order that follows, I am compelled to find that the mother has failed to discharge the onus in respect of her alternative art 13(b) defence. The report of her own former treating psychiatrist, Dr M, is not sufficiently compelling. There is no current independent professional evidence to enable me to conclude that her anxiety is of such intensity that, if H is ordered to return to Australia (which on the undisputed facts will involve her simultaneous return) this would place H at grave risk or otherwise put him in an intolerable situation. Moreover, history has shown on the mother's own version that, despite her mental health issues and other social challenges in Australia, she was a caring, loving and responsible parent to H.

[71] I accept that this will be devastating to the mother who expresses terror at the thought of returning, but viewed in proper context, it is terror at the prospect of having to remain in Australia indefinitely and to parent H there in the long term, as supported by the opinion of Dr M. As I have been at pains to point out, this is one of the issues that is for the Australian court to determine in the relocation application which the mother shall have to bring in that country. There is simply insufficient evidence before me to refuse a return under the Convention on this basis.

[72] It follows that the art 13(b) defence must also fail.

The submissions of H's legal representative

[73] In her report, Ms Bartman correctly submitted that, given H's age, her role was more akin to that of a *curator ad litem.* I deal with the most pertinent aspects of her helpful report, as follows. H was brought to her chambers on 7 May 2026 by his mother and maternal grandmother. He

separated very easily from them. He was content for his mother to leave the room, and to remain with Ms Bartman on his own and speak to her, a stranger, for almost 40 minutes while playing with his toys.

[74] H is not aware of the current proceedings. He told her that he was going to see his dad on Tuesday (12 May 2026) and was excited about this. He expressed that he liked his home here and did not want to return to Australia but rather stay with 'granny'. He wanted his dad to also live in 'Africa' with him because he loves him and would like to see him every day.

[75] H appears to be content with his current living circumstances. However, Ms Bartman is of the view that he would be equally content to return to Australia if his mother told him they would be doing so. Although he has expressed a preference to stay in South Africa, as Ms Bartman correctly points out, children live in the moment and given his age and how long he has now been away from Australia, it would be unlikely for him to express a wish to move from a home in which he is settled and lives with people he loves. There was nothing conveyed to Ms Bartman by H which would cause her to positively say that a return to Australia would, or would not, be detrimental to him.

[76] What can be taken from Ms Bartman's report is that H is a robust, confident child whose parents, to their credit, have kept him from the conflict between them, and who has maintained a close and loving relationship with his father despite the geographical distance between them by way of face time contact facilitated by the mother. This indicates positives rather than negatives for a successful return, even if in the short term.

Undertakings and safeguards

[77] In his affidavit filed with the ACA, the father provided the following information. Since their separation, he had paid the mother $400 per month as child support. This amount was calculated based on their shared care arrangement and took into account his full payment of the childcare expenses during that period. His taxable income for the 2022-2023 financial year was $162 447 while the mother's was $10 000. Based on this assessment, the annual child support calculation for the period in question was payment to the mother of $9636.

[78] Under what he referred to as the 'financial agreement' following their earlier separation, the mother also received a total of $80 000 from him between 24 October 2023 and 18 April 2024. These payments included rent, 'rental bond' and various additional amounts requested by her. The father also covered private health insurance for the three of them at a cost of $328.89 per month.

[79] The father also stated that the mother has struggled with her mental health for many years, including prior to H's birth. He outlined the efforts made to assist her in getting support. Despite their separation, he is willing to support her in in managing her mental health should she return to Australia, recognising that her wellbeing is closely linked to H's stability and development. For example, he is able to facilitate flexible care arrangements to allow her time to attend appointments and focus on her health needs.

[80] In the same affidavit the father stated that on her return to Australia, the mother would have access to a comprehensive range of mental health services through both the public and private health systems. She would be eligible to obtain a Mental Health Treatment Plan from a general practitioner, enabling her to receive Medicare-subsidised sessions with a

psychologist or other allied health professional. Psychiatric consultations are also subsidised under Medicare (which is the Australian public health care system) and public community mental health services offer support, assessment, treatment and case management at no cost. Annexed to his affidavit was a copy of the Australian Government's Better Access Resource Initiative in support thereof.

[81] In the same affidavit the father gave the following undertakings should the court order H's return, namely that:

"77.1 He will not commence nor support any proceedings in Australia, whether civil or criminal, which could result in the imprisonment or punishment of the mother in respect of any matters arising out of her wrongful retention of H in South Africa ;

77.2 He will make the necessary arrangements to cover the cost of H's return, if necessary, which he understands may include covering any costs associated with an accompanying adult . He is also willing and able to travel to South Africa to collect H and return with him to Australia;

77.3 He will provide reasonable additional financial support to the mother as may be necessary to facilitate a smooth transition back to Australia;

77.4 He will act as guarantor for the mother should she be unable to secure a rental property due to 'lack of financial documentation' and provide up to three months rental assistance in her securing suitable accommodation;

77.5 He will support H financially, physically and emotionally (I deal further with the issue of child support below);

77.6 Upon his return, H will be promptly re-enrolled in appropriate schooling (he is eligible for free or low-cost public education) and he will support H's participation in extra-curricular and community activities to promote continuity and stability in his life; and

77.7 He will facilitate and encourage H's relationship with the mother and her family, and take all reasonable steps to safeguard his well-being and emotional stability during the transition period following his return."

[82] In that affidavit the father also confirmed that as a permanent resident of Australia, the mother has full access to Medicare, as does H. In addition to mental health care dealt with separately above, this includes subsidised medical and dental services, the Pharmaceutical Benefits Scheme, free public hospital treatment, free or subsidised consultations with general practitioners and specialists and subsidised prescription medication.

[83] In addition, says the father, the mother is eligible for certain government benefits, including the Family Tax Benefit and the Child Care Subsidy. Depending on her circumstances, the mother may also be eligible for other payments and supports, such as Rent Assistance, Parenting Payment, and access to government funded community services. The father annexed a printout from the Australian Department of Human Services website, which sets out the benefits available and brief eligibility requirements. The mother also has access to legal aid, again subject to eligibility.

[84] The further information provided by the father in the same affidavit is as follows. He is employed as an engineer, and his annual adjustable taxable income is now $ 191 969. He understands that, even in an equal care arrangement, child support will still be payable by him to the mother if there is a significant difference between their respective incomes. He undertakes to meet any such obligation in accordance with Australian child support laws. His income and financial position enable him to meet these obligations without difficulty, ensuring that H's needs are met in both households. He referred to an updated Services Australia child

support estimate dated 12 August 2025 which was allegedly annexed, although this was not included in the papers before me.

[85] In his replying affidavit in these proceedings, the father gave the following further undertakings:

> "81.1 He will give the mother additional funds to enable a friend or family member of her choosing to travel with her and H to Australia, in order to provide meaningful support to her during the transition period following her return; and
>
> 81.2 He has increased his offer of rental for the mother from three months to four (the reference to an increase to four weeks, not months, elsewhere in his replying affidavit was clearly an error), which he states is intended to provide her with adequate time to secure suitable employment and to obtain any applicable government or financial support to which she may be entitled."

[86] The mother did not deal at all with the tenders made by the father in his affidavit to the ACA, although it pre-dated these proceedings. I accept that, given the increased tender made in reply, she was, strictly speaking, deprived of the opportunity to deal with it, although given the new approach to evidence in Convention proceedings, she would have been permitted to file a further affidavit had she requested the opportunity to do so.

[87] The mother states that if the father's tender is to be understood as her being required to resume living with him under the same roof, this will indeed expose H to a grave risk of harm and/or place him in an intolerable situation, as there is simply no way that she could cope emotionally in such circumstances. I will accept this, as I also accept her rejection of the father's suggestion that H can move back to the former common home to live with him. The father's suggestion is unrealistic on this score, given how much time has passed since H left Australia on 22 January 2025.

[88] The mother appears to have adopted the stance that it is only required of the father to place evidence before the court about the resources and state benefits available to her in the event of H being ordered to return to Australia. The same applies to employment opportunities for her and what she considers to be the reasonable cost of maintaining herself, as well as a reasonable contribution to H's maintenance, which obviously includes the cost of rental accommodation.

[89] Her attitude throughout has been that the father must satisfy her, without more, that she will be well looked after financially should she return. This cannot be correct. This is an individual who, as a fact, lived in Australia for some six years before her return to South Africa in January 2025; who held down employment during that period; and who received benefits in respect of mental health care and the like provided by the Australian government. She clearly has this information at her disposal. Her election not to place any such information before the court, so that the father's tender could be evaluated against it, leaves me with no alternative but to rely solely on the father's evidence.

[90] The father has set out in some detail what those benefits and resources are. There is nothing before me to indicate that they are insufficient, save for a few tweaks and that in my view the father's offer in respect of rental accommodation should, out of caution, be extended to a period of six months. This is because the AHCA failed to place any information before me regarding how long the process is likely to take in the Australian court. I do take into account however the AHCA's advice that the mother is nonetheless at liberty to pursue any maintenance claims that she may have in the Australian court as well.

Costs

[91] During argument it was submitted on behalf of the mother that the AHCA should be ordered to pay the costs of this application in the event of the mother being successful. It was contended that the AHCA had not properly considered the mother's defences before launching these proceedings. I disagree that there is anything in the conduct of the AHCA which warrants any sort of costs order. It was clearly fulfilling its statutory mandate at the specific request of the ACA, and, even had the mother been successful, a costs order of this sort would have a chilling and deterrent effect on the AHCA in other Convention cases.

[92] The AHCA and the father sought costs in the event of the mother opposing this application. Similarly, the mother sought costs against them. In the exercise of my discretion, and given the nature of these proceedings, it is appropriate that that there be no order as to costs.

Order

[93] The following order is made:

1. The minor child, H[...] M[...] M[...] (born on 6 June 2021), shall be returned to Australia, subject to the terms of this order, in accordance with Article 12 of the Hague Convention on the Civil Aspects of International Child Abduction, read with Chapter 17 of the Children's Act 38 of 2005.

2. The second applicant is granted leave and authorisation, insofar as may be necessary, to remove the minor child from the Republic of

South Africa (RSA) and accompany him back to Australia, being the minor child's country of habitual residence immediately prior to his wrongful retention in RSA by the respondent on 23 April 2025.

3. The second applicant shall not remove the minor child in accordance with paragraph 2 above prior to Monday 13 July 2026, in order for the minor child to be prepared for his return in a sensitive and responsible manner by the respondent.

4. In the event of the respondent electing to accompany the minor child to Australia, the second applicant shall fund the cost of the respondent's economy flight (in addition to the economy flights in respect of paragraph 2 above) and the following further conditions shall apply:

   4.8 The second applicant shall fund the cost of a return economy flight for an adult of the respondent's choice to accompany her to Australia;

   4.9 The second applicant shall procure rental accommodation for the respondent of a nature similar to that of the residence of the second applicant in Australia, and shall bear the cost of such accommodation in full for a period of 6 (six) months, subject to the court in Australia extending this period or varying the terms hereof;

   4.10 The second applicant shall be solely responsible for the maintenance of the minor child, including but not limited to his education and related expenses and a cash contribution of $400 per month to the respondent until such time as the issue of the minor child's maintenance is determined by the court in Australia;

4.11 The second applicant shall be solely responsible for the costs of the mother's mental health care with a professional(s) of her choice to the extent that it is not covered by the benefits offered by the Australian government, unless the court in Australia orders otherwise;

4.12 The second applicant shall, to the extent necessary, ensure that the respondent is provided with a reliable motor vehicle for her use for a period of 6 (six) months, subject to the court in Australia extending this period or varying the terms hereof;

4.13 Within 7 (seven) days of the respondent's return the second applicant shall refer the care and contact arrangements for the period that the minor child remains in Australia to the Family Court for mediation and/or determination, unless the second applicant and the respondent agree otherwise; and

4.14 The second applicant shall not institute any civil or criminal proceedings, or support any civil or criminal proceedings that might be instituted against the mother by the Australian authorities, arising from her wrongful retention of the minor child in South Africa.

5. A copy of this order shall forthwith be transmitted by the first applicant to the Australian Central Authority, accompanied by a written request for its assistance in order to ensure that the terms hereof are complied with.

6. There is no order as to costs.

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J I CLOETE

JUDGE OF THE HIGH COURT

Appearances

For the applicants: Adv J Williams

Instructed by: State Attorney, Cape Town

For respondent: Adv J McCurdie SC

Instructed by: Catto Neethling Wiid Inc