



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

JUDGMENT

Reportable / ~~Not Reportable~~

Case no: 2026-105403

In the matter between:

S C

Applicant / Respondent

and

L J H

Respondent / Applicant

and

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

Second Respondent

(as delegated in terms of section 277 of act 38 of 2005)

In re: The unlawful abduction of minor children:

A J H

H C H

B R H

Coram: Honourable Justice HM Slingers

Heard: 21 July 2026

Delivered: 31 July 2026

ORDER

- (i) the application for leave to appeal is dismissed with costs, which costs shall be on scale C;
- (ii) in the application brought in terms of s18(3), the following orders are made:
 - (a) in respect of the execution order, the applicant may take steps in accordance with paragraph (vi) and (vii) of such order, to travel to South Africa for the purpose of securing the children's return to Australia with him;
 - (b) the respondent is directed to ensure that the children have access to their mobile phones at all times, and that they have the necessary sim cards, data and / or access to WIFI in order for the applicant to have unfettered and unmonitored contact with them on a Wednesday, Friday and Sunday between 15h30 and 16h30 (South African Time); and
 - (c) the costs of the section 18(3) application shall be borne by respondent, SC on scale C.

JUDGMENT

Introduction

- [1] On 29 June 2026 the court handed down judgment in the main application in terms whereof the parties' minor children were to be returned to Australia. On 01 July 2026 the first respondent launched an application for leave to appeal and on 6 July 2026 the applicant launched an application in terms of section 18(3) of the Superior Court's Act, Act 10 of 2013. The two applications were heard together and stand to be determined.
- [2] For ease of convenience, I will refer to the parties as they were cited in the main application.
- [3] Both Ms Jansen and Ms Alves made submissions to the court during the application for leave to appeal and the section 18(3) application. The court is indebted to them for their assistance and input.
- [4] I deal firstly with the application for leave to appeal.

The test for granting leave to appeal

- [5] Section 17(1)(a) of the Superior Courts Act provides that leave to appeal may only be granted if the appeal would have reasonable prospects of success or if there is some other compelling reason why leave to appeal should be granted.¹ The application for leave to appeal must show that there is a measure of certainty that another court will differ from the judgment in respect of which leave to appeal is being sought.²

¹ Section 17(1)(a)

² *Mont Chevaux Trust v Goosen* 2014 JDR 2325 (LCC)

[6] In *Ramakatsa and Others v African National Congress and Another*³ the Supreme Court of Appeal stated that the test of reasonable prospects of success

‘postulates a dispassionate decision based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In other words, the appellants ... need to convince this Court on proper grounds that they have prospects of success on appeal. Those prospects of success must not be remote, but there must exist a reasonable chance of succeeding. A sound rational basis for the conclusion that there are prospects of success must be shown to exist.’

[7] Furthermore, in determining whether or not there are other compelling reasons why leave to appeal should be granted, the prospects of success remain relevant in deciding whether to grant leave or to refuse same and often are decisive.⁴

[8] The respondent seeks leave to appeal on both the prospects of success, and any other compelling reason why leave to appeal should be granted.

The grounds of appeal

[9] The respondent cites 23 individual grounds and 2 overarching grounds of appeal. As conceded by the respondent’s counsel during the hearing of the applications, various grounds of appeal are repeated.

³ *Ramakatsa and Others v African National Congress and Another* (Case No. 724/2019) [2021] ZASCA 31 (31 March 2021)

⁴ *Minister of Justice and Constitutional Development and Others v Southern Africa Litigation Centre and Others* 2016 (3) SA 317 (SCA)

- [10] The respondent grouped and addressed various grounds of appeal together in her heads of argument. I mimic her approach in this judgment which will serve to avoid addressing grounds of appeal that are repeated.
- [11] I deal firstly with the overarching grounds of appeal which are that the court erred in placing a decisive weight upon the objects of the Convention and the principle that an abducting parent should not benefit from the consequences of removal to the exclusion of a child- centred assessment of the grave risk to, and the best interests of the children (**'the overarching grounds'**).
- [12] In determining an application for the return of children under the Convention, the court is obliged to consider the objectives and the requirements thereof. On the contrary, a failure to consider the objectives and the requirements of the Convention would amount to a misdirection. Inherent in the objectives of the Convention is the best interests of the children principle which the court duly considered.
- [13] The factual circumstances of and the role of the respondent in the abduction of the minor children to South Africa are relevant factors and cannot be ignored or wished away. However, these factors were not considered in isolation nor were they afforded more relevance than the other factors considered by the court.
- [14] Although the respondent cited the overarching grounds in the application for leave to appeal, they were not addressed in the written nor oral argument presented. Therefore, the respondent's reasoning underpinning these grounds for leave to appeal are unknown. However, as self-standing grounds of appeal, they have no merit.
- [15] I deal now with the first nine (9) grounds of appeal, as grouped by the respondent.

- [16] The respondent incorrectly states that the whole of the judgement's reasoning in respect of AJH is contained in a single paragraph which rests on the '*best interests of the child principle*.' The paragraph identified by the respondent sets out the conclusion pertaining to AJH.⁵ This is a misunderstanding of the judgment. The judgement itself addresses *inter alia* AJH's relationship with his parents, his attitude towards both his parents, the shared contact regime to which he was subjected, his social life and schooling and took into consideration his views. All these factors were relevant to and determinative of the best interests of the child principle.
- [17] During the court's engagement with AJH and from the papers itself, it was evident that the views expressed by AJH revolved around the respondent's interests and not his. Therefore, while AJH's views were considered, they were not decisive.
- [18] While AJH's return was not made in terms of the Hague Convention, the principles underpinning the Hague Convention remained a relevant factor and were considered by the court.
- [19] The respondent acknowledges that the judgement states that the Order by Mr Justice Cohen was merely a factor. However, she goes on to argue that this does not accord with the judgment itself. Furthermore, if the judgment only dealt with the Order by Mr Justice Cohen as a factor, it would mean that the return of AJH was entirely reliant on the best interests' assessment which was based on limited information before the court. As set out in paragraphs 17 and 18 above, sufficient information was placed before the court to make this determination.

⁵ Paragraph 83 of the judgment.

- [20] I turn now to grounds 10 to 18 of the application for leave to appeal. The respondent argues that the court failed to apply the decision of the SCA in *L D v Central Authority (RSA) and Another*⁶ in terms of which the separation of the children from their primary carer and the consequent break-up of the family unit could itself constitute a grave risk of psychological harm or an intolerable situation within the meaning of Article 13(b) and that the conduct of the abducting parent is irrelevant to that inquiry as the focus should be on the best interests of the children. The respondent's reliance on the case of *LD* is misconstrued. The minor child in that matter had been residing in South Africa for more than 3 years and was 4 years old when she was abducted to South Africa. At the time of the hearing of the matter the minor child had been living as part of the family unit with her mother, stepfather and step sibling for more than three years and the minor child's return would have resulted in her being separated from the only family unit she knew. The facts in the present matter are clearly distinguishable from those in *LD*.
- [21] During the argument, the respondent's counsel conceded that as the respondent remained adamant that she would not be returning to Australia the grounds of appeal directed at the protective-measures inquiry were not applicable. Consequently, I will not address these in this judgement.
- [22] The respondent argues that the court erred in '*treating the grave risk relied upon as the product of impermissible self-help... in circumstances where ... a defence under Article 13(b) may be established even in the absence of an objective risk where the primary carer's return would subject her to anxieties of such intensity as to destabilise her parenting to the point that the children's*

⁶ *LD v Central Authority (RSA) and Another* [2022] ZASCA 6

situation becomes intolerable' and in ignoring the judgment of *Re S (A Child)*⁷.

- [23] Therefore, the respondent relies on the case of *In Re S (A Child)* to argue that a primary carer's anxieties about return may found a defence in terms of Article 13(b) where the effect of the anxieties would create an intolerable situation on the child.
- [24] In *Re S (A Child)* the parents' marriage was characterised by domestic violence and the mother (the abductee parent) placed medical and psychological evidence before the court. Furthermore, a psychiatrist was appointed during the Convention proceedings to conduct an evaluation of the mother's psychiatric and psychological condition at that time, the psychiatric or psychological impact on the mother of a return to Australia and what, if any protective measures would be required to safeguard the mother's mental health in the event of a return to Australia.
- [25] The respondent admits that she did not produce objective evidence of her mental state but argues that the respondent presented evidence that she was assaulted in 2020 and that the respondent was being investigated for murder. These factors were comprehensively dealt with in the judgment. On the papers filed on record, the respondent did not establish a defence in terms of Article 13(b) and did not establish the nature and existence of any anxieties she suffers from nor how and/or if these would bear on her parental role to such an extent that it would create an intolerable situation for the children. The respondent told the court that she was fearful and that she was assaulted in 2020 by the applicant. This was considered, as was the fact that

⁷ *S (A Child) (Abduction: Rights of Custody)* [2012] UKSC 10

the respondent and the applicant had a shared care regime for a period of 3 years and that in 2025 the respondent told the applicant that he was the best father to their children. On the evidence presented, the 2020 assault and the allegations of the respondent being investigated for murder failed to assist the respondent to discharge her onus.

[26] The respondent avers that the court erred in failing to weigh the vulnerabilities of HCH and BRH and their respective diagnosis and the heightened importance of stability and the presence of their primary attachment figure in its assessment of grave risk and intolerability under Article 13(b). This argument fails to consider that the children were subject to a shared care regime in terms whereof they were regularly placed in the sole care of the respondent in terms of the shared care regime.

[27] The argument is also premised incorrectly on AJH remaining in South Africa while BRH and HCH are returned to Australia.

[28] In respect of the costs order, it is trite that costs are within the discretion of the court. It has not been shown that the discretion was incorrectly exercised nor established a basis on which that discretion should be interfered with.

[29] In respect of another compelling reason, the respondent states that the appeal raises discrete questions of law. These questions are:

- (i) the reconciliation of *LD* with *NM* and *Koch* on whether separation from a primary carer who cannot safely return may itself constitute a grave risk; and
- (j) whether, and upon what enquiry, a court may order the summary return of a child to whom the Hague Convention, by virtue of Article 4, does not apply.

- [30] Any legal question can only be answered within a factual matrix. In the present matter the respondent has not presented any facts on which another court would come to a different conclusion in respect of the return of all the children to Australia or in finding that the respondent failed to establish a defence in terms of Article 13(b).
- [31] After duly considering the grounds of appeal against the test for granting leave to appeal, I am not convinced that the respondent has shown any prospects of success that another court would come to a different conclusion on this aspect. Furthermore, the respondent has not shown that there are any other compelling reasons why leave to appeal should be granted.
- [32] Therefore, the application for leave to appeal is dismissed with costs, which costs shall be on scale C.

The s18(3) application

- [33] The applicant seeks an order:
- (i) in terms of section 18(3) of the Superior Court's Act 10 of 2013, that the provisions of the order of the court, delivered on 29 June 2026, shall be executed forthwith and pending the outcome of such applications for leave to appeal/ petitions for leave to appeal and/or such appeal processes as may take place before the South African courts in respect of the order of 29 June 2026 (**'the order'**);
 - (ii) directing that, in respect of the execution of the order, the applicant may take steps in accordance with paragraph (vi) and (vii) of such order, to travel to South Africa for the purpose of securing the children's return to Australia with him;

- (iii) pending the children's return to Australia, the respondent is interdicted and restrained from removing the minor children from the geographical jurisdiction the Western Cape High Court for any reason without the authorisation of this Court; and
- (iv) the respondent is directed to ensure that the children have access to their mobile phones at all times, and that they have the necessary, sim-cards, data and / or access to WiFi in order for the applicant to have unfettered and unmonitored contact with them on a Wednesday, Friday and Sunday between 15h30 and 16h30 (South African time).

[34] During the hearing of the applications, the parties were invited to address the court on whether it may still entertain the section 18(3) application in the event that the application for leave to appeal be dismissed. The parties were also afforded an opportunity to place an additional note on this issue.⁸

The jurisdictional issue

[35] In *Ntlemeza v Helen Suzman Foundation and Another*⁹ the Supreme Court of Appeal determined that a court could grant an execution order, notwithstanding the dismissal of an application for leave to appeal. The Supreme Court of Appeal found that the dismissal of an application for leave to appeal prior to a decision on the execution application did not remove the jurisdictional underpinning for an execution order.

[36] Therefore, notwithstanding the dismissal of the application for leave to appeal, the s18(3) application remains to be determined by this court.

⁸ Section 18(3) of the Superior Court's Act provides that:

⁹ 2017 (5) SA 402 (SCA)

Urgency

- [37] The respondent challenges the urgency of the application. The s18(3) application pertains to the implementation of a Hague Convention return order of three minor children. It is common cause that matters of these nature must be determined expeditiously. It is trite that any matter involving children are also inherently urgent¹⁰. These factors, in my view, render the application inherently urgent.

Section 18(3)

- [38] Section 18(3) provides that:
- ‘A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders.’*
- [39] In order to obtain the relief he seeks, the applicant would have to establish, on a balance of probabilities, the existence of exceptional circumstances that warrant the granting of the execution order; that he will suffer irreparable harm if the execution order is not granted and that the respondent will not suffer irreparable harm should the execution order be granted.

The requirements for section 18(3)

- [40] While the existence of exceptional circumstances is a jurisdictional requirement for the exercise of a court’s discretion in terms of section 18, the

¹⁰ Although the degrees of urgency may differ from case to case.

requirements for the relief are not separate, distinct, and self-standing requirements that should be approached in a compartmentalised fashion.¹¹

[41] It is trite that the inquiry into whether or not exceptional circumstances exist is a factual and case specific inquiry.¹²

[42] It is the applicant's case that the requirement of exceptional circumstances are met as a result of the fact that the children have a very small window within which they may return to Australia and within which they are able to fully resume their lives as it were before they were removed from Australia. Given the short period they have been in South Africa, the children are at this stage, able to return to their schools and grades with their classmates and resume friendships and relationships which have not at this stage been too affected by the children's removal to South Africa.

[43] Furthermore, HCH will be able to resume / return to his known and familiar therapist. The court was also informed that HCH has also been approved for approximately R191 111,45 National Disability Insurance Scheme Funding for 12 months from 16 June 2026 to 15 June 2027. Thus, a delayed return to Australia may result in HCH forfeiting this benefit.

[44] The applicant readily conceded that he will not suffer irreparable harm. However, as correctly highlighted by the applicant this matter concerns the children. Therefore, the court should consider whether they will suffer irreparable harm if the execution order is not granted.

[45] The Convention records that it is not in children's best interests to be wrongfully removed from their country of habitual residence and that it is in their best interests to be returned without undue delay. This would

¹¹ *Tyte Security Services CC v Western Cape Provincial Government and Others* 2024 (6) SA 175 (SCA)

¹² *Norwich Union Life Insurance Society v Dobbs* 1912 AD 395 as quoted in *Tyte*

undoubtedly apply to the return of BRH and HCC. Similarly, the overarching principle applicable to the Convention would also apply to AJH, even though his return is not ordered in terms of the Convention.

[46] It is noteworthy that there has been a change in the children's attitude towards returning to Australia after the Convention judgement was handed down. Prior to judgment, although the children expressed not wanting to be separated from the respondent, none of them objected to returning to Australia. Post the judgement, the children have become adamant and steadfast that they will not return to Australia. AJH has gone so far as to depose to an affidavit wherein states that he will not return to Australia notwithstanding any court order directing him to do so. It is noteworthy that Esna Bruwer (**'Bruwer'**) in her addendum to the Voice of the Child Report (**'addendum'**) records that AJH speaks to his father 3 times a week. There does not seem to be a breakdown in his relationship with his father notwithstanding a hardening of his approach not to return to Australia. This is consistent with Bruwer's recordal in her addendum recorded that AJH's refusal to remain in South Africa should be seen as his wish not to be separated from his mother, rather than as a rejection of his father.

[47] In respect of HCH, Bruwer reported that he believes that they (the children) won't be able to talk with the respondent should they be returned to Australia as the applicant will restrict their mother's access to them. This concern is not borne out by the record.

[48] Bruwer summarises the position in respect of HCH as:

'HCH's account remains broadly consistent with the themes recorded in the Report – Loyalty toward his father alongside a clear preference to remain with his mother – but reflects, since the Report, a more explicit and firmly stated

position regarding what he believes will occur if the children are returned, particularly his fear of losing contact with his mother, and a clear statement of intended non-compliance with a return order.'

[49] Thus, post judgment the children have become more intent on not returning to Australia, notwithstanding any court order. The longer they remain in South Africa, the more entrenched this behaviour and intent would become. It is apparent from both AJH and HCH that they do not consider any court order binding on them. The children's loyalty to the respondent may intensify and transform into hostility towards any further court processes, and to the applicant as a result thereof.

[50] The opportunity of the applicant and the children restoring their relationship diminishes with each day they remain in South Africa. This cannot be ignored when considering the irreparable harm, they are likely to suffer.

[51] The court was informed that the respondent obtained an *ex-parte* domestic violence interdict in very sweeping terms on 24 June 2024 against the respondent. The court was informed that she obtained this order because she believed the applicant would be travelling to South Africa to fetch the children. The sweeping terms of the domestic violence interdict are such that it would, as it stands, prevent the applicant from being able to fetch the minor children should same be necessary. This does raise concern, especially when viewed with HCH's views that he believed his father would come and fetch the children, should the court order their return but that he would not comply if his father arrived to collect him. Similarly, AJH's states that he does not intend to obey any court order to return to Australia.

[52] The respondent obtained the domestic violence interdict after the hearing of the main application on 15 June 2026. The respondent had to have been

alive to the possibility that the court may order the return of the children. The timing of the respondent obtaining the family violence interdict and her reasons for doing so leads to the conclusion that it was done to prevent the applicant from fetching the children in South Africa.¹³

[53] It is apparent from the respondent's affidavit that she has been discussing the merits of these applications with AJH and that she has had insight into his discussions with both Ms Jansen and Ms Bruwer. This is concerning, especially as AJH has previously recorded that he feels as if he is in the middle of his parents and that he does not want to choose between them and that he has taken on the role of the respondent's protector.

[54] AJH presented an affidavit to the court wherein he again expressed his position that he will not be returning to Australia. The applicant (LJH), argues that the tone and contents of this affidavit does not reflect AJH's voice but that of the respondent, who in turn denies assisting AJH with the content of his affidavit. She does admit assisting with the formatting of the affidavit. I make no determination in respect of whether or not the contents of AJH's affidavit reflect his or the respondent's voice. However, the respondent was aware that she had previously been accused of unduly influencing the children. Her actions do nothing to dispel these concerns.

[55] In opposing the section 18(3) application, the respondent states that the children had all settled in and are stable in South Africa. However, she also states that AJH speaks daily with his girlfriend in Australia and that he remains in contact with his friends in Australia with whom he regularly games. These are not actions of someone settled in South Africa.

¹³ At the time of coming to South Africa the respondent had no similar protection order in Australia

- [56] It is noted that the respondent does not aver that she will suffer irreparable harm if the execution order is granted.
- [57] The respondent has provided input from their schools in respect of AJH and HCH.
- [58] In respect of AJH, it reports that he is progressing well and that he has settled in. However, during the main application AJH reported that he was dissatisfied with being placed in a grade lower than he would have been in Australia and that he would have preferred to be homeschooled. No explanation has been placed before the court for the difference in AJH's attitude nor what brought it about in the period between handing down the convention judgment and the application for leave to appeal.
- [59] In respect of HCH, the school reports that he has integrated into the school environment and adapted to both the school and the community. This is not consistent with Jansen's report filed in the main application in which HCH is reported as stating that he is '*pretty sure*' that he is failing all his exams because he does not understand a single thing. He also expressed the belief to Jansen that he still thought they would only be staying in South Africa for 3 months or less.
- [60] The respondent's application for leave to appeal was dismissed as there were no reasonable prospects of success.
- [61] After considering the facts and circumstances, I am satisfied that the cumulative effect of the poor merits of the application for leave to appeal, the change in the children's attitude to returning to Australia, the small window of opportunity to integrate into their lives pre-abduction and the apparent motivation of the respondent in obtaining the domestic violence interdict constitute exceptional circumstances. Save for the interdictory relief sought,

the applicant has made out a case for the relief he seeks. Consequently, I make the following orders:

- a. the application for leave to appeal is dismissed with costs, which costs shall be on scale C;
- b. in the application brought in terms of s18(3), the following orders are made:
 - (i) in respect of the execution order, the applicant may take steps in accordance with paragraph (vi) and (vii) of such order, to travel to South Africa for the purpose of securing the children's return to Australia with him;
 - (ii) the respondent is directed to ensure that the children have access to their mobile phones at all times, and that they have the necessary sim cards, data and / or access to WIFI in order for the applicant to have unfettered and unmonitored contact with them on a Wednesday, Friday and Sunday between 15h30 and 16h30 (South African Time); and
 - (iii) the costs of the section 18(3) application shall be borne by the respondent, SC on scale C.

H M Slingers
Judge of the High Court
31 July 2026

Appearances

For Appellant: Adv. Alma De Wet

Instructed by: Maurice Phillips Wisenberg Inc.

For the First Respondent: Adv. Janet McCurdie SC

Instructed by: Clarks Attorneys / Catto Neething Wiid Inc.

For the Second Respondent: Adv. Reeva Alves / Adv. FC Sader

For the Children: Adv. Janine Janssen