THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 748/11
Reportable

In the matter between:

KG **Appellant**

and

CB **First Respondent**

ESSEX COUNTY COUNCIL **Second Respondent**

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

Neutral Citation:	*KG v CB & others (748/11)* [2012] ZASCA 17 (22 March 2012)
Coram:	MTHIYANE DP, VAN HEERDEN & LEACH JJA, BORUCHOWITZ & PLASKET AJJA
Heard:	22 February 2012
Delivered:	22 March 2012
Summary*:*	Hague Convention on the Civil Aspects of International Child Abduction 1980 – child wrongfully removed to South Africa from the United Kingdom – application for return of child – meaning of 'rights of custody' in articles 3 and 5 of Convention – defence of consent to or acquiescence in removal of child in terms of art 13(1)(*a*) of Convention – 'safe harbour' defence in terms of art 13(1)(*b*) of Convention – terms of return order

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ORDER

On appeal from: South Gauteng High Court, Johannesburg (Satchwell J sitting as a court of first instance):

A The appeal is dismissed, with no order as to costs.

B The order of Satchwell J in the South Gauteng High Court dated 14 July 2010 is replaced by the following order:

‘1. It is ordered and directed that the minor child, T, be returned forthwith, but subject to the terms of this order, to the jurisdiction of the Central Authority for England and Wales.

2. In the event of KG (the mother) notifying the Office of the Family Advocate, Johannesburg (the family advocate) within one week of the date of issue of this order that she intends to accompany T on her return to the United Kingdom, the provisions of para 3 shall apply.

3. CB (the father) shall within one month of the date of issue of this order, institute proceedings and pursue them with due diligence to obtain an order of the appropriate judicial authority in the United Kingdom in the following terms:

3.1 Any warrant for the arrest of the mother will be withdrawn and will not be reinstated and the mother will not be subject to arrest or prosecution by reason of her removal of T from the United Kingdom on 14 February 2009 or for any past conduct relating to T. The father will not institute or cause to be instituted or support any legal proceedings or proceedings of any other nature in the United Kingdom for the arrest, prosecution or punishment of the mother or any member of her family, for any past conduct by the mother relating to T.

3.2 Unless otherwise ordered by the appropriate court in the United Kingdom:

3.2.1 The father is ordered to arrange, and pay for, suitable accommodation for the mother and T in the United Kingdom. The father shall provide proof to the satisfaction of the family advocate, prior to the departure of the mother and T from South Africa, of the nature and location of such accommodation and that such accommodation is available for the mother and T immediately upon their arrival in the United Kingdom. The Central Authority for England and Wales shall decide whether the accommodation thus arranged by the father is suitable for the needs of the mother and T, should there be any dispute between the parties in this regard, and the decision of the Central Authority for England and Wales shall be binding on the parties.

3.2.2 The father is ordered to pay the mother maintenance for herself and T from the date of T's arrival in the United Kingdom at the rate of £350 per month. The first pro rata payment shall be made to the mother on the day upon which she and T arrive in the United Kingdom and thereafter monthly in advance on the first day of every month. Should the mother receive state support, then the monthly amount thereof shall be deducted from the £350 per month payable by the father.

3.2.3 The father is ordered to pay any medical and dental expenses reasonably incurred by the mother in respect of T, such as are not covered by the National Health Service in the United Kingdom.

3.2.4 The father is ordered to pay for the reasonable costs of T's schooling and also the costs of her other reasonable educational and extra-mural requirements in the United Kingdom, such as are not provided by the State.

3.2.5 The father is ordered to purchase and pay for economy class air tickets, and if necessary, pay for rail and other travel, for the mother and T to travel by the most direct route from Johannesburg, South Africa, to Harlow, United Kingdom.

3.2.6 The father and the mother are ordered to co-operate fully with the family advocate, the Central Authority for England and Wales, the relevant court or courts in the United Kingdom, and any professionals who are approved by the Central Authority for England and Wales to conduct any assessment to determine what future residence and contact arrangements will be in the best interest of T.

3.2.7 The father is granted reasonable supervised contact with T, which contact shall be arranged without the necessity of direct contact between the father and the mother.

4. In the event of the mother giving the notice to the family advocate referred to in para 2 above, the order for the return of T shall be stayed until the appropriate court in the United Kingdom has made the order referred to in para 3 and, upon the family advocate being satisfied that such an order has been made, he or she shall notify the mother accordingly and ensure that the terms of para 1 are complied with.

5. In the event of the mother failing to notify the family advocate in terms of para 2 above of her willingness to accompany T on her return to the United Kingdom, it is to be accepted that the mother is not prepared to accompany T, in which event the family advocate is authorised to make such arrangements as may be necessary to ensure that T is safely returned to the custody of the Central Authority for England and Wales and to take such steps as are necessary to ensure that such arrangements are complied with.

6. Pending the return of T to the United Kingdom as provided for in this order, the mother shall not remove T on a permanent basis from the Province of Gauteng and, until then, she shall keep the family advocate informed of her physical address and contact telephone numbers.

7. Pending the return of T to the United Kingdom, the father is to have reasonable telephone access to T.

8. There is no order as to costs.'

C The family advocate is directed to seek the assistance of the Central Authority for England and Wales in order to ensure that the terms of this order are complied with as soon as possible.

D In the event of the mother notifying the family advocate, in terms of para B.2 above, that she is willing to accompany T to the United Kingdom, the family advocate shall forthwith give notice thereof to the registrar of the South Gauteng High Court, to the Central Authority for England and Wales, and to the father.

E In the event of the appropriate court in the United Kingdom failing or refusing to make the order referred to in para B.3 above, the family advocate and/or the father is given leave to approach this court for a variation of this order.

F No order as to costs is made in respect of either the mother's application to this court for condonation of the late lodging of the record, or the mother's application to this court for reinstatement of the appeal.

G A copy of this order shall forthwith be transmitted by the family advocate to the Central Authority for England and Wales.

JUDGMENT

VAN HEERDEN JA (MTHIYANE DP, LEACH JA, BORUCHOWITZ & PLASKET AJJA concurring):

Introduction

[1] At the heart of this appeal is a little girl, T, who is presently five years and ten months old. On 14 February 2009, T was removed by her mother, KG, from the United Kingdom, where she had been resident from birth, and taken to South Africa. This was done without the knowledge or consent of either the first respondent, T's father (CB), or the second respondent, the Essex County Council (the Council).[1] Six months later, in August 2009, an application was brought to the South Gauteng High Court for the return of T to the United Kingdom under the Hague Convention on the Civil Aspects of International Child Abduction 1980 (the Convention). The applicants were CB, the Council and the third respondent, the Chief Family Advocate of South Africa, in her capacity as the Central Authority for the Republic of South Africa (the Central Authority). This application succeeded in the high court, which ordered the immediate return of T to the United Kingdom. This appeal against that order serves before us with the leave of the high court. For reasons which I shall set out below, the second respondent, the Council, played no part either in the court below or before this court.

[1] The local authority of the area in which KG, T and CB were living at that stage

Factual matrix

[2] T was born to KG and CB on 12 May 2006 in Harlow, England. Her parents have never been married to each other. When T was approximately one year and four months old, her parents separated. It would appear that T hereafter resided with CB for a period of time, although KG, who was living with a certain DC in an apartment in the same building as CB, continued to care for T. On 5 November 2007, after CB had moved address without telling KG and allegedly left T in a stranger's care, KG collected T from her nursery and T lived with KB from that date.

[3] Following a number of disputes between the parents, KB refused contact between T and CB. This led to an application by CB to the Harlow County Court in November 2007, in which CB claimed residence[2] and defined contact[3] orders in respect of T, as well as an order prohibiting KG from removing T from the jurisdiction of the court. On 12 December 2007, KG filed a counter-application for a residence order in respect of T.

[4] On 18 December 2007, an interim contact order was made by the Harlow County Court granting to CB supervised contact with T. This contact was ultimately exercised at the Freshwaters Contact Centre. KG had also made allegations that CB had sexually abused his daughter from a previous marriage, as also his sister, and that he viewed child pornography on the Internet. The court thus ordered KG to file a witness statement from

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[2] Under the United Kingdom Children Act 1989, a 'residence order' means an order settling the arrangements to be made as to the person which whom the child is to live (see s 8(1)).

[3] A 'contact order' means 'an order requiring the person with whom a child lives, or is to live, to allow the child to visit or stay with the person named in the order, or for that person and the child otherwise to have contact with each other' (see s 8(1) of the United Kingdom Children Act). A 'defined contact order' contains directions and/or conditions about how it is to be carried into effect (eg, that the contact between the parent and the child must be supervised) (see s 11(7)).

herself and from CB's sister, setting out the allegations on which she relied. The matter was postponed to 31 January 2008 when the court was to consider whether a fact finding enquiry would be necessary. Meanwhile, T's passport was to be lodged with her mother's solicitors.

[5] On 31 January 2008, KG was granted an interim residence order in respect of T. On 23 May 2008, the CAFCASS[4] officer's report was filed with the court, recommending that a fact finding hearing take place. Thereafter, on 2 June 2008, KG was given permission by the court to take T out of the jurisdiction of the court to South Africa for a holiday.

[6] In July 2008, DC assaulted KG. He was arrested and remanded in custody until 8 December 2008. In the meantime, on 31 July 2008, upon it appearing to the court that the concerns of risk (physical, sexual and emotional) expressed by KG against CB were not substantiated by any of the professionals involved in the case or by the court, a fact finding hearing was scheduled to take place on 11 August 2008. This hearing was adjourned as KG was in South Africa at the time.

[7] On 31 October 2008, the court ordered a consolidation of CB's application for residence and contact and KG's application (brought on 28 October 2008) for an order permitting her to remove T from the jurisdiction of the court to reside permanently in South Africa.

[8] On 8 December 2008, a nine months' suspended jail sentence was imposed on DC who was also ordered to attend alcohol treatment and a domestic violence programme. The pre-sentence report assessed him as posing a medium risk of harm to KG and future partners. The report also

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[4] CAFCASS stands for Children and Family Court Advisory and Support Service.

stated that, should DC resume his relationship with KG, or reside with a new partner, then the level of risk would be deemed to increase, especially if DC continued his pattern of alcohol abuse. Shortly hereafter, KG resumed her relationship with DC on his release from prison and, it would seem, was again physically abused by him in February 2009. These events gave rise to concerns for T's safety on the part of the Council. Thus, on 10 February 2009, the Chelmsford County Court made an interim care order[5] to the effect that T be placed in the care of the Council. This order was to expire on 7 April 2009. At the same time, KG was ordered to file an updating position statement dealing with her domestic circumstances and her proposed move to South Africa, while CB was ordered to file a statement in relation to his application for a residence order. The return date of these proceedings was 16 March 2009.

[9] On 14 February 2009, KG took T to South Africa. She did so without notice to or the consent of either CB or the Council. On 16 March 2009, the Chelmsford County Court noted[6] that KG had left the jurisdiction with T on 14 February 2009, without notifying any of the parties or her solicitor and also that KG was 'no longer pursuing the allegation that CB abused his daughter' from his previous marriage. The court then ordered that –

'[t]he Applicant father and the Local Authority shall jointly make an application forthwith to the International Child Abduction and Contact Unit for the purposes of the repatriation as soon as possible of [T]'.

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[5] In terms of s 33(1) of the United Kingdom Children Act 1989, '[w]here a care order is made with respect to a child it shall be the duty of the local authority designated by the order to receive the child into their care and to keep him in their care while the order remains in force.' A court may only make a care order in terms of s 31(2) if it is satisfied – '*(a)* that the child concerned is suffering, or is likely to suffer, significant harm; and *(b)* that the harm, or likelihood of harm, is attributable to – (i) the care given to the child, or likely to be given to him if the order were not made, not being what it would be reasonable to expect a parent to give to him; or (ii) the child's being beyond parental control.'

[6] In the preamble to the order made on that date.

[10] On 17 March and 20 March 2009, respectively, CB and the Council applied to the International Child Abduction and Contact Unit (ICACU) – the Central Authority for England and Wales – for the return of T to the United Kingdom. As stated in para 1 above, the three respondents then launched a Hague Convention return application on 13 August 2009 in South Africa (the so-called 'requested state', the United Kingdom being the 'requesting state'). By the time the matter was argued before Satchwell J in the South Gauteng High Court in March and June 2010, the interim care order granted to the Council had expired (in April 2009) and the Council had not sought another such order. The third respondent, the Central Authority, was informed by its United Kingdom counterpart that the removal of T from the United Kingdom had obviated the need to protect T from the dangerous domestic environment that was a cause of concern to the County Court and the Council and which was the basis for the interim care order. In the circumstances, the Council had no further interest in the proceedings for T's return.[7] The Council thus abandoned its prayer for the relief claimed in the return application.

[11] On 14 July 2010, Satchwell J handed down her judgment in this matter in the court below, ordering the immediate return of T to the United Kingdom and directing that –

'[i]f counsel are unable to agree (within ten days of handing down of this order . . . on the form of the order to give effect to that immediate return . . . then the court will receive further submissions (preferably in writing) to be received on or before 6 August 2010 so that the court can rule thereon without the expense of a further oral hearing.'

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[7] On 7 April 2009, the Chelmsford County Court noted that the Council had been discharged from its undertaking, given on 16 March 2009, to issue an application for an interim care order in respect of T by 3 April 2009; that the South African social worker had been requested by the Council to continue to monitor T's welfare and T and KG's whereabouts and to advise the Council forthwith of any change in T's whereabouts; and that the Council had assured the court that it would assess T's welfare forthwith upon being advised of T's return to the jurisdiction.

As will be discussed below, counsel for the parties were not able to agree on the form of the order to give effect to T's immediate return and no further submissions were made to the court on or before 6 August 2010.

[12] On 14 October 2010, Satchwell J granted KG leave to appeal to this court. The Notice of Appeal was lodged on 11 November 2010. KG's appeal lapsed on 11 March 2011 due to non-lodging of the appeal record. Prior to the appeal lapsing, KG did not seek an extension of the period for the lodging of the record as contemplated in SCA rule 8(2). On 28 March 2011, the Registrar of this court notified the parties that KG's appeal had lapsed as a result of her failure to lodge the appeal record. The appellant's legal representatives hereafter informed the respondents' legal representatives that the appellant nevertheless intended to pursue the appeal and that the reason for the failure to have lodged the appeal record was their inability to obtain the transcript of proceedings before Satchwell J from the duly appointed transcribers. On 16 May 2011, the appellant's legal representatives wrote to the respondents' legal representatives confirming that they were experiencing much difficulty in obtaining the transcript of the hearing and requesting the respondents' legal representatives to 'consent to the late filing of the transcripts'. This request was refused.

[13] On 21 September 2011, the respondents applied to the South Gauteng High Court for an order giving effect to the order made by Satchwell J.[8] As Satchwell J was not available, the matter was heard on 4 October by Meyer J who *mero motu* raised the issue of legal representation of T, as contemplated in s 279 of the Children's Act 38 of 2005 (the

[8] See para 11 above.

Children's Act).[9] Meyer J ordered that a *curator ad litem* be appointed to represent T's interests and postponed the matter to 11 October 2011 for the curator to be appointed. Mr Johan van Schalkwyk from Legal Aid South Africa was thereafter appointed. In his report dated 17 October 2011, Mr van Schalkwyk recommended that T not be returned to the United Kingdom until such time as the appeal be finalised and 'the cloud surrounding the allegations of molestation [be] cleared.' Mr van Schalkwyk also filed a supplementary report, commenting on the draft terms of T's return compiled by respondents' legal representatives.

[14] On 21 October 2011, following representations to the court that the condonation application and the appeal record had been lodged with this court, Meyer J gave a judgment ordering that the proceedings before him be suspended until final determination of the appeal. This notwithstanding, the appeal record and the condonation application had *not* in fact been properly filed in this court. In the result, the respondents requested Meyer J on 11 November 2011 to enrol the matter to determine the terms for T's return to the United Kingdom.

[15] Before the matter was re-enrolled before Meyer J, the appellant served on the respondents the application for condonation of the late lodging of the appeal record and for the reinstatement of the appeal. As far as I can ascertain, these applications and the appeal record were only lodged with the Registrar of this court on 15 November 2011.

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[9] Section 279 of the Children's Act, which came into operation on 1 April 2010, provides that '[a] legal representative must represent the child, subject to s 55, in all applications in terms of the Hague Convention on International Child Abduction.' In addition, s 278(3) of the Children's Act provides as follows: 'The court must, in considering an application in terms of this Chapter [Chapter 17, headed 'Child Abduction'] for the return of a child, afford that child the opportunity to raise an objection to being returned and in so doing must give due weight to that objection, taking into account the age and maturity of the child.'

[16] At the commencement of the proceedings before this court, counsel for the respondents indicated that the respondents did not oppose the appellant's applications for reinstatement of the appeal and for condonation of the late lodging of the record. Accordingly, these applications were granted by this court. Counsel for the appellant submitted that this court should not order the appellant to pay the costs of these applications. She pointed out that the legal representatives of the appellant were acting on a *pro bono* basis, having been appointed by Satchwell J to assist the appellant as the latter had no funds to litigate. According to counsel, the lengthy delay in lodging the record could not be laid at the door of the appellant, as her legal representatives had believed in good faith that the transcript of proceedings before the high court was necessary to assist this court in its deliberations. Counsel for the respondents indicated that she did not seek the costs of the condonation and reinstatement applications and that she would leave the matter of these costs in the hands of this court.

[17] The curator ad litem also appeared before this court. I express the court's gratitude to him, as well as to the appellant's attorneys and counsel who acted *pro bono*.

The applicability of the Convention

[18] The Convention was incorporated into South African law by the Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996, which came into operation on 1 October 1997. With effect from 1 April 2010, this Act was repealed by the Children's Act, Chapter 17 (ss 274 to 280) of which deals with child abduction. Section 275 provides that the Convention, the whole of which forms Schedule 2 to the Act, 'is in force in the Republic and its provisions are law in the Republic, subject to the provisions of this Act'.

[19] The primary purpose of the Convention is to secure the prompt return (usually to the country of their habitual residence) of children wrongfully removed to or retained in any Contracting State, viz to restore the *status quo ante* the wrongful removal or retention as expeditiously as possible, so that custody and similar issues in respect of the child can be adjudicated upon by the courts of the state of the child's habitual residence. The Convention is predicated on the assumption that the abduction of a child will generally be prejudicial to his or her welfare and that, in the vast majority of cases, it will be in the best interests of the child to return him or her to the state of habitual residence. The underlying premise is that the authorities best placed to resolve the merits of a custody dispute are the courts of the child's habitual residence and not the courts of the state to which the child has been removed or in which the child is being retained.[10]

[20] Article 8 of the Convention provides that any person, institution or other body who claims that a child has been removed 'in breach of custody rights' may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child. In terms of art 7*(f)*, one of the obligations imposed upon Central Authorities is to 'initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child'.

[21] According to art 3 of the Convention –

'The removal or the retention of a child is to be considered wrongful where –

(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the

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[10] See *Penello v Penello (Chief Family Advocate as amicus curiae)* 2004 (3) SA 117 (SCA) para 25 and the authorities there cited.

child was habitually resident immediately before the removal or retention; and

(b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in subparagraph *(a)* above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.'

[22] 'Rights of custody' are defined in art 5 of the Convention as including 'rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence'.

[23] It is common cause that T was habitually resident in England at the time of her removal to South Africa. The appellant contended, however, that CB did not have 'rights of custody' in respect of T within the meaning of the Convention and that the respondents thus had no *locus standi* to bring the return application.

[24] In *Re P (abduction: custody rights)* [11] Ward LJ set out the Convention approach to 'custody rights' as follows –[12]

'(1) [T]he Convention requires the court to give the expression "rights of custody" an autonomous interpretation;

(2) the reference in art 3 to "rights of custody attributed to a person under the law" of the child's habitual residence is not a choice of law rule of that State in the sense that if the domestic law (still less the conflict-of-laws rule) does not characterise the right as a right of custody, then it will not be such a right for Hague Convention purposes;

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[11] [2004] 2 FCR 698 (CA).

[12] Para 60.

(3) the task of the court is to establish the rights of the parents under the law of that State and then to consider whether those rights are rights of custody for Hague Convention purposes;
(4) in considering whether those rights are rights of custody, the court is entitled and bound to give a purposive and effective interpretation to the Convention. . . .'

[25] A similar approach was adopted by the Constitutional Court in *Sonderup v Tondelli*,[13] where the court (per Goldstone J) stated that –

'The Convention defines "rights of custody" to "include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence". In applying the Convention "rights of custody" must be determined according to this definition [ie the definition in art 5] independent of the meaning given to the concept of "custody" by the domestic law of the child's habitual residence. As L'Heureux-Dubé correctly pointed out [in *W(V) v S(D) (*1996) 134 DLR (4th) 481 at 496]:

"[H]owever, although the Convention adopts an original definition of 'rights of custody', the question of who *holds* the . . . 'right to determine the child's place of residence' within the meaning of the Convention is in principle determined in accordance with the law of the State of the child's habitual place of residence . . . . ' " (Emphasis added.)

[26] Despite some initial uncertainty, there is now much authority from a number of Contracting State jurisdictions which establishes that, for the purposes of the Convention, a parent's (or other person's) right to prevent the removal of a child from the relevant jurisdiction, or at least to withhold consent to such removal, is a right to determine where the child is to live and hence falls within the ambit of the concept of 'rights of custody' in arts 3 and 5 of the Convention. Thus, a custodian parent who removes the child from the state of the child's habitual residence or allows a third party to do so without the consent of the other parent (or the leave of the court)

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[13] 2001 (1) SA 1171 (CC) para 11.

commits a breach of 'rights of custody' of the other parent within the meaning of the Convention and hence a 'wrongful removal'.[14]

[27] In terms of s 4(1)*(a)* of the United Kingdom Children Act 1989, as amended by the Adoption and Children Act 2003 –

'(1) Where a child's father and mother were not married to each other at the time of his birth the father shall acquire parental responsibility for the child if –

(a) he becomes registered as the child's father under any of the enactments specified in subsection (1A).'

Section 4(1A)*(a)* provides that the enactments referred to in subsec (1)*(a)* include paragraphs *(a), (b)* and *(c)* of s 10(1) and of s 10A(1) of the Births and Deaths Registration Act 1953. In terms of s 4(2A), a person who has acquired parental responsibility under subsec 4(1) ceases to have that responsibility only if the court so orders.

[28] Section 10(1)*(a)* of the 1953 Act, as amended, in turn provides that –

'Notwithstanding anything in the foregoing provisions of this Act, in the case of a child whose father and mother were not married to each other at the time of his birth, no person shall as father of the child be required to give information concerning the birth of the child, and the registrar shall not enter in the register the name of any person as father of the child except –

(a) at the joint request of the mother and the person stating himself to be the father of the child (in which case that person shall sign the register together with the mother).'[15]

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[14] See Van Heerden et al (eds) *Boberg's Law of Persons and the Family* 2ed (1999) 580-581 and the other authorities there cited. See also Carina du Toit 'The Hague Convention on the Civil Aspects of International Child Abduction' in Trynie Boezaart (ed) *Child Law in South Africa* (2009) 351 at 358-359.

[15] See *A v H (Registrar General for England and Wales & another intervening)* [2009] 4 All ER 641 (FD) para 26: 'Thus, for a valid registration, what was required in this instance under s 10(1)*(a)* [of the 1953 Act], was for the father and mother to attend together at the registry, and for both to ask for the father to be named as the father of the child. In addition the father had to state that he was the father of the child. Finally both of them had to sign the register. These details show that the registrar's task is to record details of the father on the birth certificate based just on the information that is given.'

Parental responsibility is defined in s 3(1) of the Children Act as meaning 'all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property'.

[29] At the time of T's removal from the United Kingdom, there was an interim residence order in KG's favour. In this regard, s 13(1) of the Children Act provides that –

'(1) Where a residence order is in force with respect to a child, no person may –

. . . .

(b) remove him from the United Kingdom;

without either the written consent of every person who has parental responsibility for the child or the leave of the court.'

[30] Furthermore, in terms of s 1 of the United Kingdom Child Abduction Act 1984 –

'(1) Subject to sections (5) and (8) below, a person connected with a child under the age of sixteen commits an offence if he takes or sends the child out of the United Kingdom without the appropriate consent.

(2) A person is connected with a child for the purposes of this section if –

. . . .

(b) in the case of a child whose parents were not married to each other at the time of his birth, there are reasonable grounds for believing that he is the father of the child

. . . .

(3) In this section, "the appropriate consent", in relation to a child, means –

(a) the consent of each of the following –

. . . .

(ii) the child's father, if he had parental responsibility for him.'

[31] T's birth was registered on 12 June 2006. Attached to CB's application to ICACU (which was in turn annexed to the founding affidavit) was a document purporting to be a certified copy of an entry pursuant to the Births and Deaths Registration Act 1953, ie a certified copy of T's original birth registration. The document is a form with the contents

typed on it. At the bottom of the form appear in typescript the words ‘certified to be a true copy of an entry in a register in my custody’. This is followed by an original signature of the ‘Deputy Superintendent Registrar’ and the date 17 March 2009 in handwriting. The form reflects CB as T’s father and KG as T’s mother. The ‘informant’ is reflected as being the father and mother of T, and both CB and KG certify under their signatures that ‘the particulars entered above are true to the best of my knowledge and belief’. The form reflects that it was also signed by ‘LR Gardner Deputy Registrar’.

[32] Before us, counsel for the appellant sought to attack the authenticity of this document, contending that it was not a ‘proper’ certified copy. There is, however, nothing in the appellant’s affidavits which disputes that the information contained in the document is correct, viz that CB and KG did *not* jointly register T’s birth in the manner reflected in the document. Thus, like Satchwell J, I am satisfied that the document is indeed a certified copy of the original entry and that the information contained therein is true and correct. Even if, as submitted by counsel for the appellant, the latter only received the ‘birth certificate’ upon receipt of the replying affidavit deposed to by CB (to which this document was again annexed), there was no application by the appellant to strike out this document and the paragraph of the replying affidavit referring to it, nor was there any application to file a further affidavit dealing with this document.

[33] In light of the legal position set out above, CB has parental responsibility for T and KG therefore required his written consent to remove T from the United Kingdom. In addition, by removing T from the United Kingdom without CB’s consent, KG committed a criminal offence. In view hereof, CB had ‘rights of custody’ within the meaning of arts 3 and 5 of the Convention. KG’s removal of T from the United Kingdom

constituted a breach of such rights of custody and was therefore wrongful under the Convention.[16]

[34] As indicated above, art 3 of the Convention requires that, at the time of removal or retention, the 'left-behind' parent must have actually been exercising his or her rights of custody or would have exercised them but for the removal or retention.[17] In this case, it is clear that CB satisfied this provision. Not only was he exercising defined rights of contact in respect of T, but he had also, in November 2007, applied to the Harlow County Court for an order prohibiting KG from removing T from the jurisdiction of the court. In addition, before taking T to South Africa for a holiday in the second half of 2008, KG had to obtain the permission of the court to do so. It cannot be doubted that, if CB had been given advance warning of the removal of T from the United Kingdom, he would not have consented to such removal and would have exercised his veto right to prevent KG from removing the child. The same applies to the Council.

Defences raised by the appellant under the Convention

Settlement of the child in her new environment

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[16] In addition, KG's removal of T from the United Kingdom was in breach of the interim care order granted to the Council on 10 February 2009. This order contains, in bold typescript, two 'warnings', the first being that '[w]while a Care Order is in force, no person may . . . remove the child from the United Kingdom without the written consent of every person with parental responsibility for the children or the leave of the court' (see, in this regard, s 33(7)*(b)* of the United Kingdom Children Act). The second warning was to the effect that '[i]t may be a criminal offence under the Child Abduction Act to remove the child(ren) from the United Kingdom without the leave of the court'. Section 33(3) of the United Kingdom Children Act provides that – '(3) While a care order is in force with respect to a child, the local authority designated by the order shall – *(a)* have parental responsibility for the child'. Thus, in accordance with the law as set out above, the Council also had 'the right to determine the child's place of residence' in terms of art 5 of the Convention and , accordingly, had rights of custody for the purposes of art 3 of the Convention. KG's removal of T from the United Kingdom was therefore not only wrongful in respect of CB, but also wrongful in relation to the Council.

[17] So too, art 13(1)*(a)* of the Convention stipulates that the judicial or administrative authority of the requested state is not bound to order the return of the child if the person opposing the child's return establishes that the person having the care of the person of the child was not actually exercising his or her custody rights at the time of removal or retention.

[35] Counsel for the appellant purported to rely on art 12 of the Convention in contending that T was 'fully settled' in South Africa and that the court was therefore not obliged to order T's return. This is a misreading of art 12. Article 12(1) provides that, where the removal or retention of the child is indeed wrongful and where *less* than one year has elapsed from the date of such removal or retention, then, subject to certain exceptions, the court concerned is *obliged* to order the return of the child forthwith. It is only where the proceedings have been commenced after the expiration of the period of one year that, in terms of art 12(2), the court has a discretion whether to order the child's return. In such a case, the court 'shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment'.[18]

[36] In this case, CB launched proceedings for the return of T on 13 August 2009, ie six months after T's removal from the United Kingdom. Accordingly, art 12(2) does not apply. As will be discussed below, the fact of T's settlement in South Africa may play a role in the defence raised by KG to T's return in terms of art 13(1)*(b)* of the Convention, which will be discussed fully below.

Consent or acquiescence

[37] The appellant also raised the defence of consent or acquiescence under art 13(1)*(a)* of the Convention, in terms of which the court is not bound to order the return of the child (in other words, it has a discretion in this regard) if the person (or institution or other body) who opposes the return establishes that –

[18] See Van Heerden et al *op cit* 582-583 and the authorities there cited. See also Carina du Toit *op cit* 361-362.

'*(a)* the person . . . having the care of the person of the child . . . had consented to or acquiesced in the removal or retention.'

[38] The burden of proof is on the abducting parent and he or she must prove the elements of the defence on a preponderance of probabilities.[19] The consent or acquiescence referred to in art 13(1)*(a)* involves an informed consent to or acquiescence in the breach of the wronged party's rights. That does not mean that either consent or acquiescence 'requires full knowledge of the precise nature of those rights and every detail of the guilty party's conduct . . . What he or she should know is at least that the removal or retention of the child is unlawful under the Convention and that he or she is afforded a remedy against such unlawful conduct.'[20]

[39] As was pointed out by Hale J in *Re K (Abduction: Consent)*,[21] 'the issue of consent is a very important matter [that] . . . "needs to be proved on the 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".'[22] In that case, Hale J expressly approved the following view expressed by Holman J in *Re C (Abduction: Consent)* – [23]

'If it is clear, viewing a parent's words and actions as a whole and his state of knowledge of what is planned by the other parent, that he does consent to what is planned, then in my judgement that is sufficient to satisfy the requirements of Art 13. It

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[19] *Penello v Penello (Chief Family Advocate as amicus curiae)* 2004 (2) SA 117 (SCA) para 38.

[20] *Smith v Smith* 2001 (3) SA 845 (SCA) paras 16-17.

[21] [1997] 2 FLR 212 (FD) at 217.

[22] See further *Re P (Abduction: Consent)* [2004] 2 FLR 1057 (CA) para 33.

[23] [1996] 1 FLR 414 (FD) at 419.

is not necessary that there is an express statement that "I consent". In my judgment it is possible to infer consent from conduct.'[24]

[40] As regards acquiescence, this court, in *Smith v Smith*,[25] agreed with the approach followed by the House of Lords in the case of *Re H and others (Minors) (Abduction: Acquiescence)*.[26] In that case, Lord Brown-Wilkinson held that –

'Acquiescence is a question of the actual subjective intention of the wronged parent, not of the outside world's perception of his intentions . . . 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. 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.'[27]

[41] In my view, KG has not succeeded in proving either consent or acquiescence on the part of CB. As set out above, after the alleged wrongful removal of T on 14 February 2009, CB wasted little time in approaching the Central Authority for England and Wales for its assistance in securing T's return to the United Kingdom. It would seem that CB learnt of T's removal to South Africa on 16 March 2009. By 17 March 2009, he

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[24] See *Central Authority v H* 2008 (1) SA 49 (SCA) paras 16-20, in which case this court found that the abducting mother had not proved the defence of consent on which she relied. See also *Re A (Abduction: Habitual Residence: Consent)* [2006] 2 FLR 1 (FD) paras 70-88.

[25] 2001 (3) SA 845 (SCA) paras 18-19. In this case, the court found that the abducting mother had indeed discharged the burden of proving that the 'left-behind' father had acquiesced to the wrongful retention of his children in South Africa. This was also the case in *Senior Family Advocate, Cape Town v Houtman* 2004 (6) SA 274 (C).

[26] [1997] 2 All ER 225 (HL) at 235e-g.

[27] See also *Senior Family Advocate, Cape Town v Houtman* 2004 (6) SA 274 (C) paras 15-17; *Family Advocate, Cape Town v EM* 2009 (5) SA 420 (C) paras 36-39.

had completed his application to such Central Authority (ICACU) for T's return. Although the return proceedings were launched in South Africa only on 13 August 2009, there is no indication whatsoever that CB was in any way responsible for this delay. CB has persisted in opposing KG's appeal to this court against the judgment of Satchwell J, notwithstanding the appellant's lengthy delay in lodging the appeal record. This conduct is entirely inconsistent with the notion that CB had consented to or acquiesced in T's permanent removal to South Africa.

Grave risk of harm / intolerable position

[42] In terms of art 13(1)*(b)* of the Convention, the court is not bound to order the return of the abducted child if the person opposing the return establishes that –

'*(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.'

[43] The appellant contended that there was indeed a grave risk that T's return to the United Kingdom would expose her to physical or psychological harm or otherwise place her in an intolerable situation. In support of this contention, the appellant alleged that T is 'fully settled' in South Africa; that she 'has no recollection, independent or otherwise' of living in the United Kingdom; that she is now a 'fully-fledged' South African child, enrolled in school and able to speak English and Afrikaans; that she is surrounded by family and friends in South Africa, is involved in activities such as ballet, swimming and 'monkeynastics', as well as other activities at church and at school; that 'her entire life is in the Republic of South Africa and [she] has a quality of life that she could never have in the United Kingdom'.

[44] The appellant pointed to the fact that she has secure accommodation and a permanent job in South Africa, as opposed to the United Kingdom where she has no home and no employment and where she and T would be

dependent on state welfare. She contended that there is a chance that, should she return to the United Kingdom, she will be arrested and prosecuted for child abduction. The appellant also alleged that, because of the allegations against CB of sexual abuse and interest in child pornography, as well as the physical violence to which she had been subjected by DC, there was a real risk that she and/or T would suffer sexual and/or physical abuse should they return to the United Kingdom. CB denied that that there was any risk of T or KG suffering abuse of any kind upon their return to the United Kingdom, let alone 'a grave risk' of physical or psychological harm. Moreover, CB contended that T would not be placed in 'an intolerable situation' upon such return. According to CB, KG would not be arrested for child abduction; the English court would be very loath to separate T from her mother, and the Council would only intervene if KG decided to reunite with DC. He alleged that there was no doubt that accommodation would be found for T and KG and stated that he would not seek to disrupt their relationship in any way.

[45] Relying on s 28(2) of the Constitution[28] and s 9 of the Children's Act,[29] counsel for the appellant submitted that it was in T's best interests not to be returned to the United Kingdom and that T's best interests were of 'paramount importance'.

[46] In *Sonderup v Tondelli*,[30] the Constitutional Court stated[31] that –

'The Convention itself envisages two different processes – the evaluation of the best interests of children in determining custody matters, which primarily concerns long-

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[28]Section 28(2) of the Constitution provides that '[a] child's best interests are of paramount importance in every matter concerning the child'.

[29] See fn 38 below.

[30] 2001 (1) SA 1171 (CC).

[31] Paras 28-30.

term best interests, and the interplay of the long-term and short-term best interests of children in jurisdictional matters. The Convention clearly recognises and safeguards the paramountcy of the best interests of children in resolving custody matters. It is so recorded in the preamble which affirms that the State parties who are signatories to it, and by implication those who subsequently ratify it, are "[f]irmly convinced that the interests of children are of paramount importance in matters relating to their custody". . . .

What, then, of the short-term best interests of children in jurisdictional proceedings under the Convention? One can envisage cases where, notwithstanding that a child's long-term interests will be protected by the custody procedures in the country of the child's habitual residence, the child's short-term best interests may not be met by immediate return. In such cases, the Convention might require those short-term best interests to be overridden. I shall assume, without deciding, that this argument is valid. To that extent, therefore, the Act might be inconsistent with the provisions of s 28(2) of the Constitution which provide an expansive guarantee that a child's best interests are paramount in every matter concerning the child. I shall proceed therefore to consider whether such an inconsistency is justifiable under s 36 of the Constitution, which requires a proportionality analysis and weighing up of the relevant factors.

. . . The purpose of the Convention is important. It is to ensure, save in the exceptional cases provided for in art 13 (and possibly in art 20), that the best interests of a child whose custody is in dispute should be considered by the appropriate court. It would be quite contrary to the intention and terms of the Convention were a court hearing an application under the Convention to allow the proceedings to be converted into a custody application.'

[47] In concluding that the Act incorporating the Convention is consistent with the South African Constitution, Goldstone J pointed out[32] that –

'(T)he court ordering the return of a child under the Convention would be able to impose substantial conditions designed to mitigate the interim prejudice to such child caused by a court ordered return. The ameliorative effect of art 13, an appropriate

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[32] Paras 35-36.

application of the Convention by the court, and the ability to shape a protective order, ensure a limitation that is narrowly tailored to achieve the important purposes of the Convention. It goes no further than is necessary to achieve this objective, and the means employed by the Convention are proportional to the ends it seeks to attain.'

[48] The Supreme Court of the United Kingdom[33] has, in a very recent case, followed an approach similar to that adopted by the Constitutional Court in *Sonderup v Tondelli.* In *Re E (Children) (Wrongful Removal: Exceptions to Return)*[34] Lady Hale and Lord Wilson SCJJ (giving the judgment of the court) held[35] that –

'There is no provision expressly requiring the court hearing a Hague Convention case to make the best interests of the child its primary consideration; still less can we accept the argument . . . that s 1(1) of the 1989 Act [the United Kingdom Children Act 1989] applies so as to make them the paramount consideration. These are not proceedings in which the upbringing of the child is in issue. They are proceedings about where the child should be when that issue is decided, whether by agreement or in legal proceedings between the parents or in any other way.

On the other hand, the fact that the best interests of the child are not expressly made a primary consideration in Hague Convention proceedings, does not mean that they are not at the forefront of the whole exercise. The preamble to the convention declares that that the signatory states are "Firmly convinced that the interests of children are of paramount importance in matters relating to their custody", and "Desiring to protect children internationally from the harmful effects of their wrongful removal or retention". This objective is, of course, also for the benefit of children generally: the aim of the convention is as much to deter people from wrongfully abducting children as it is to serve the best interests of the children who have been abducted. But it also aims to serve the best interests of the individual child. It does so by making certain rebuttable assumptions about what will best achieve this . . . .

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[33] Formerly the House of Lords.

[34] [2011] 4 All ER 517 (SC).

[35] Paras 13-18.

Nowhere does the convention state that its objective is to serve the best interests of the adult person, institution or other body whose custody rights have been infringed by the abduction (although this is sometimes how it may appear to the abducting parent). The premise is that there is a left behind person who also has a legitimate interest in the future welfare of the child: without the existence of such a person the removal is not wrongful. The assumption then is that if there is a dispute about any aspect of the future upbringing of the child the interests of the child should be of paramount importance in resolving that dispute. Unilateral action should not be permitted to pre-empt or delay that resolution, Hence the next assumption is that the best interests of the child will be served by a prompt return to the country where she is habitually resident . . . .

Those assumptions may be rebutted, albeit in a limited range of circumstances, but all of them inspired by the best interests of the child. Thus the requested state may decline to order the return of the child if proceedings were begun more than a year after her removal and she is now settled in her new environment (art 12); or if the person left behind had consented to or acquiesced in the removal or retention or was not exercising his rights at the time (art 13*(a)*);[36] or if the child objects to being returned and has exercised an age and maturity at which it is appropriate to take account of her views (art 13); or, of course, if "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' (art 13*(b)*).[37] These are all situations in which the general underlying assumptions about what will best serve the interests of the child may not be valid . . .

We conclude, therefore, that . . . the Hague Convention . . . [has] been devised with the best interests of children generally, and of the individual children involved in such proceedings, as a primary consideration.'[38]

[49] Returning to the question as to whether KG proved the existence of 'a grave risk that [T's] return would expose the child to physical or psychological harm or otherwise place the child in an intolerable

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[36] I call this art 13(1)*(a)*. Both versions are correct.

[37] I refer to this as art 13(1)*(b)*. Again, both versions are correct.

[38] The same approach must be followed in regard to section 9 of the Children's Act, in terms of which '[i]n all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance, must be applied'. Unlike most of the provisions of the Act (which took effect from 1 April 2010), this section came into operation on 1 July 2007.

situation,[39] it is necessary to consider how courts have approached this so-called art 13(1)*(b)* defence. As was discussed in *Pennello v Pennello*,[40] courts in other Contracting States have given a restrictive interpretation to art 13(1)*(b)*, by and large resisting 'efforts to convert art 13(1)*(b)* into a substitution for a best interests determination'.[41] In the words of Ward LJ in *Re C (Abduction: Grave Risk of Psychological Harm)* – [42]

'There is, therefore, an established line of authority that the court should require clear and compelling evidence of the grave risk of harm or other intolerability which must be measured as substantial, not trivial, and of a severity which is much more than is inherent in the inevitable disruption, uncertainty and anxiety which follows an unwelcome return to the jurisdiction of the court of habitual residence.'[43]

[50] In both *Sonderup v Tondelli* [44] and *Pennello v Pennello* [45] the question whether South African courts should follow the stringent tests set by courts in other countries was left open. I am of the view that the correct approach is that adopted by the United Kingdom Supreme Court is *Re E (Children) (Wrongful Removal: Exceptions to Return).*[46] In that case, the court held[47] that –

' . . . [T]here is no need for the article [art 13(1)*(b)*] to be "narrowly construed'. By its very terms, it is of restricted application. The words of art 13 are quite plain and need no further elaboration or "gloss".

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[39] See para 44 above.

[40] 2004 (3) SA 117 (SCA) paras 32-34.

[41] Linda Silberman 'Hague Convention on International Child Abduction: A Brief Overview and Case Law Analysis' (1994) 28 *Fam LO* 9 at 27.

[42] [1999] 1 FLR 1145 (CA) at 1154A-B.

[43] See further in this regard Van Heerden et al *op cit* 586-589.

[44] 2001 (1) SA 1171 (CC) para 44.

[45] 2004 (3) SA 117 (SCA) para 35.

[46] [2011] 4 All ER 517 (SC).

[47] Paras 31-34.

First, it is clear that the burden of proof lies with the "person, institution or other body" which opposes the child's return. It is for them to produce evidence to substantiate one of the exceptions. There is nothing to indicate that the standard of proof is other than the ordinary balance of probabilities . . . .

Second, the risk to the child must be "grave". It is not enough, as it is in other contexts such as asylum, that the risk must be "real". It must have reached such a standard of seriousness as to be classified as "grave". Although "grave" characterises the risk rather than the harm, there is in ordinary language a link between the two. Thus a relatively low risk of death or really serious injury might properly be qualified as "grave" while a higher level of risk might be required for other less serious forms of harm.

Third, the words "physical or psychological harm" are not qualified. However, they do gain colour from the alternative "or *otherwise*" placed "in an intolerable situation". As was said in *Re D* [2007] 1 All ER 783 at [52], " '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.' " Those words were carefully considered and can be applied just as sensibly to physical or psychological harm as to any other situation. Every child had to put up with a certain amount of rough and tumble, discomfort and distress. It is part of growing up. But there are some things which it is not reasonable to expect a child to tolerate . . . .'

[51] It must be remembered that a return order under the convention is an order for the return of the child to the Contracting State from which he or she was abducted, and *not* to the 'left-behind' parent. The child is not, *by virtue of a return order*, removed from the care of one parent, or remanded to the care of the other parent. The situation which the child will face on return depends crucially on the protective measures which the court can put into place to ensure that the child will not have to face a harmful situation when he or she returns to the country of habitual residence.

[52] The curator ad litem stated that he had been appointed on 11 October 2011 to report on T's personal circumstances; comment on her level of maturity and her ability to comprehend the proceedings; comment on the effect of relocation on T, and on any other factor that should be taken into account. In his report, he mentioned that, because of time and

logistical restraints, he had been unable to investigate and report on CB's circumstances. His report deals with his interview with T, the circumstances of KG and her immediate family based in Johannesburg, and his conversation with one of T's pre-school teachers. In addition, the report covers his 'face value evaluation' of the minor child's views, her immediate circumstances and her day to day activities and interactions. From his conversation with T, he concluded that she was not mentally, physically or academically advanced and that she was not yet of an age and maturity that it is appropriate to take accounts of her views. It appeared to him that T was happy and at peace in her present environment and that she was at an important stage in her personal development in that (inter alia) she would be starting school this year. He noted that there was a very strong bond between T and her mother and that CB had for a number of years had too little personal contact with T as to have developed a real relationship with T or to have insights into her needs. CB had also not contributed in any meaningful way towards T's maintenance. The curator was of the view that, while the ongoing litigation was not having a negative impact on T's well-being (as she was blissfully unaware of it), it needed to be brought to finality. Any steps to relocate T would, in his view, 'carry two automatic, and most undesirable, consequences', namely –

'The minor child will react negatively, possibly retreat and become traumatised and influence her personal development and/or
[CB] will be bound to be the subject of further litigation, when [KG] refuses to abide by the order.'

[53] The curator ad litem's report concluded as follows:

'Having regard to the substantial lapse of time since [CB] has had a meaningful relationship with the child, as well as the fact that [CB] has little or no insight into the child's emotional and physical needs, it is submitted that execution of the order for relocation would be contrary to the best interests of the child.'

[54] The allegations of sexual impropriety made by KG against CB were found to have been unsubstantiated. In any event, the social welfare authorities and courts of the United Kingdom will certainly be able to deal with such allegations effectively, as the Harlow County Court did before the removal of the child by ordering that CB's contact with T should be supervised. Moreover, the fact finding hearing ordered by the Chelmsford County Court is still pending and will no doubt take place should T be returned to the United Kingdom. Moreover, as indicated above, on 7 April 2009, the Council assured the Chelmsford County Court that it would assess T's welfare forthwith upon being advised of T's return to the jurisdiction. T still has a guardian ad litem in the United Kingdom whose task it is to protect her interests. The Central Authority and the curator ad litem can liaise with T's guardian ad litem and with the former's counterpart in the United Kingdom to ensure that the court proceedings pending there (ie CB's application for residence and contact and KG's application for an order permitting her to remove T from the United Kingdom to reside permanently in South Africa) are finalised as soon as possible. The curator ad litem acknowledged that, should this court order T's return to the United Kingdom, one of his principal obligations would be to play a role in determining what the appropriate conditions for such return should be.

[55] As regards the alleged threat of physical violence posed by DC, KG herself states that this violence was never directed against T. Moreover, KG can avoid any risk of harm from DC to herself or T by not resuming a relationship of any kind with him. On KG's own evidence, she has parted ways with DC and has no intention of returning to him.

[56] As indicated above, KG stated that, should she and T have to return to the United Kingdom, she would have no home and no employment there, as opposed to South Africa where she and T have secure

accommodation and she has a permanent job. In this regard, CB is prepared to undertake that he will procure accommodation for KG and T and to pay for such accommodation 'if necessary'. This court can ensure that this 'undertaking' forms part of any return order made by it and that the obligation to pay for accommodation is not conditional. CB is also prepared to pay maintenance for T upon her return to the United Kingdom. While there is quite a significant difference between the amount of maintenance which CB is prepared to pay and that which KG regards as appropriate, any return order can be formulated so as to ensure the best possible protection of T's needs, whilst not subjecting CB to excessive financial demands. Furthermore, as T would be going to school, KG should be able to secure part-time employment which would enable her to contribute towards her own and T's financial needs. There is also State support for T which KG was receiving prior to her departure for South Africa.

[57] What makes this case so difficult is the lapse of time since T's removal to South Africa. There is nothing before us to explain the delay of five months between the completion by CB of the application to ICACU (the Central Authority for the United Kingdom and Wales) in March 2009 and the institution of the return application in August 2009. There is also nothing to explain why it took seven months before the matter was heard in the South Gauteng High Court (in March 2010, thereafter in June 2010), nor why there was a further delay of three months between the delivery of the judgment of the high court (July 2010) and the granting of leave to appeal to this court (October 2010). As pointed out above, although the Notice of Appeal to this court was lodged on 11 November 2010, the appeal record was not lodged until 15 November 2011 – more than eight months after the appeal had lapsed and more than a year after the lodging of the Notice of Appeal. This last-mentioned delay is attributable to the inability of the appellant's attorneys to obtain a transcript of the

proceedings before Satchwell J. As these were motion proceedings, it is difficult to see why this transcript was required. As pointed out by Meyer J, '[i]nsofar as parts of the recorded proceedings[48] ought to be included in the record of the proceedings to be lodged with the Registrar of the Supreme Court of Appeal, no attempts have been made to reconstruct the record and to reach agreement thereon. The rest of the record is in the form of an application and the judgment of Satchwell J is a written one that she handed down.'

[58] These delays are totally unacceptable, especially in the context of proceedings under the Convention. The primary object of the Convention is to secure the *speedy* return of children removed to or retained in any Contracting State, to restore the *status quo ante* the wrongful removal or retention as expeditiously as possible so that custody and similar issues in respect of the child can be adjudicated on by the courts of the country from which the child was removed. Not only is this explicitly stated in art 1 of the Convention, but art 11 expressly enjoins the relevant authorities to 'act expeditiously in proceedings for the return of children' and provides that –

'If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay.'

[59] So too, in the *Regulations relating to children's courts and international child abduction, 2010*, published under s 280 of the Children's Act,[49] reg 23 stipulates that '[p]roceedings for the return of a

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[48] If any.

[49] GN R250 in *GG* 33067 of 31 March 2010, with effect from 1 April 2010.

child under the Hague Convention must be completed within six weeks from the date on which judicial proceedings were instituted in a High Court, except where exceptional circumstances make this impossible'. Several of the high courts have issued practice directions to the same effect.

[60] As a result of these highly regrettable delays, T is now five years and ten months old and has spent more than half of her young life in South Africa. As indicated above, according to the report of the curator ad litem, T has not attained an age and maturity at which it is appropriate for the court to take account of her views. She is totally unaware of this litigation, for which credit must be given to KG. As is borne out by the report of the curator ad litem, T has become settled in this country. She has little recollection of her father and of living in the United Kingdom. She is in Grade 0 at school, involved in extra-curricular activities and surrounded by family and friends. It will be difficult for her to have to return to the United Kingdom. That said, I do not think that KG has succeeded in showing that such return will expose T to a *grave* risk of physical or psychological harm or otherwise place her in an *intolerable* situation. It is clear from the report of the curator ad litem that KG is a loving and competent mother and that T is more attached to her than she is to any place or other person. There is no doubt that KG will return to the United Kingdom with T should the court order T's return. This, coupled with the protective measures which we will put in place to govern T's return, should serve to insulate T against harm. To refuse the return application in these circumstances will, in my view, undermine the objects of the Convention and create an unfortunate precedent. It follows that the appeal must fail.

Costs

[61] In the words of King J in *McCall v McCall*,[50] in this case 'both parties have, contesting this case, acted in what they believe to be the best interests of their child. There is no winner and loser. There are two concerned parents.' In my view, the fairest course would be to make no order as to costs, including the costs of the applications for condonation and reinstatement of the appeal.

Order

[62] The following order is made:

A The appeal is dismissed, with no order as to costs.

B The order of Satchwell J in the South Gauteng High Court dated 14 July 2010 is replaced by the following order:

'1. It is ordered and directed that the minor child, T, be returned forthwith, but subject to the terms of this order, to the jurisdiction of the Central Authority for England and Wales.

2. In the event of KG (the mother) notifying the Office of the Family Advocate, Johannesburg (the family advocate) within one week of the date of issue of this order that she intends to accompany T on her return to the United Kingdom, the provisions of para 3 shall apply.

3. CB (the father) shall within one month of the date of issue of this order, institute proceedings and pursue them with due diligence to obtain an order of the appropriate judicial authority in the United Kingdom in the following terms:

3.1 Any warrant for the arrest of the mother will be withdrawn and will not be reinstated and the mother will not be subject to

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[50] 1994 (3) SA 201 (C) at 209C.

arrest or prosecution by reason of her removal of T from the United Kingdom on 14 February 2009 or for any past conduct relating to T. The father will not institute or cause to be instituted or support any legal proceedings or proceedings of any other nature in the United Kingdom for the arrest, prosecution or punishment of the mother or any member of her family, for any past conduct by the mother relating to T.

3.2 Unless otherwise ordered by the appropriate court in the United Kingdom:

3.2.1 The father is ordered to arrange, and pay for, suitable accommodation for the mother and T in the United Kingdom. The father shall provide proof to the satisfaction of the family advocate, prior to the departure of the mother and T from South Africa, of the nature and location of such accommodation and that such accommodation is available for the mother and T immediately upon their arrival in the United Kingdom. The Central Authority for England and Wales shall decide whether the accommodation thus arranged by the father is suitable for the needs of the mother and T, should there be any dispute between the parties in this regard, and the decision of the Central Authority for England and Wales shall be binding on the parties.

3.2.2 The father is ordered to pay the mother maintenance for herself and T from the date of T's arrival in the United Kingdom at the rate of £350 per month. The first pro rata payment shall be made to the mother on the day upon which she and T arrive in the United Kingdom and thereafter monthly in advance on the first day of every month. Should the mother receive state support, then the monthly amount thereof shall be deducted from the £350 per month payable by the father.

3.2.3 The father is ordered to pay any medical and dental expenses reasonably incurred by the mother in respect of T, such as are not covered by the National Health Service in the United Kingdom.

3.2.4 The father is ordered to pay for the reasonable costs of T's schooling and also the costs of her other reasonable educational and extra-mural requirements in the United Kingdom, such as are not provided by the State.

3.2.5 The father is ordered to purchase and pay for economy class air tickets, and if necessary, pay for rail and other travel, for the mother and T to travel by the most direct route from Johannesburg, South Africa, to Harlow, United Kingdom.

3.2.6 The father and the mother are ordered to co-operate fully with the family advocate, the Central Authority for England and Wales, the relevant court or courts in the United Kingdom, and any professionals who are approved by the Central Authority for England and Wales to conduct any assessment to determine what future residence and contact arrangements will be in the best interest of T.

3.2.7 The father is granted reasonable supervised contact with T, which contact shall be arranged without the necessity of direct contact between the father and the mother.

4. In the event of the mother giving the notice to the family advocate referred to in para 2 above, the order for the return of T shall be stayed until the appropriate court in the United Kingdom has made the order referred to in para 3 and, upon the family advocate being satisfied that such an order has been made, he or she shall notify the mother accordingly and ensure that the terms of para 1 are complied with.

5. In the event of the mother failing to notify the family advocate in terms of para 2 above of her willingness to accompany T on her return to the United Kingdom, it is to be accepted that the mother is not prepared to accompany T, in which event the family advocate is authorised to make such arrangements as may be necessary to ensure that T is safely returned to the custody of the Central Authority for England and Wales and to take such steps as are necessary to ensure that such arrangements are complied with.

6. Pending the return of T to the United Kingdom as provided for in this order, the mother shall not remove T on a permanent basis from the Province of Gauteng and, until then, she shall keep the family advocate informed of her physical address and contact telephone numbers.

7. Pending the return of T to the United Kingdom, the father is to have reasonable telephone access to T.

8. There is no order as to costs.'

C The family advocate is directed to seek the assistance of the Central Authority for England and Wales in order to ensure that the terms of this order are complied with as soon as possible.

D In the event of the mother notifying the family advocate, in terms of para B.2 above, that she is willing to accompany T to the United Kingdom, the family advocate shall forthwith give notice thereof to the registrar of the South Gauteng High Court, to the Central Authority for England and Wales, and to the father.

E In the event of the appropriate court in the United Kingdom failing or refusing to make the order referred to in para B.3 above, the family advocate and/or the father is given leave to approach this court for a variation of this order.

F No order as to costs is made in respect of either the mother's application to this court for condonation of the late lodging of the record, or the mother's application to this court for reinstatement of the appeal.

G A copy of this order shall forthwith be transmitted by the family advocate to the Central Authority for England and Wales.

B J VAN HEERDEN
JUDGE OF APPEAL

APPEARANCES:

APPELLANT:	A WILLCOCK
	Instructed by Schumann Van den Heever & Slabbert Inc, Kempton Park
	AP Pretorius & Partners, Bloemfontein
RESPONDENTS:	M S BALOYI
	Instructed by The State Attorney, Johannesburg
CURATOR AD LITEM:	J VAN SCHALKWYK
	Instructed by Johannesburg Justice Centre
	Bloemfontein Justice Centre