OFFICE OF THE CHIEF JUSTICE
REPUBLIC OF SOUTH AFRICA
HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 19685/2015
Date of Hearing: 11 November 2018
Date of Judgment: 13 February 2018

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

....
DATE SIGNATURE

In the matter between:

THE CENTRAL AUTHORITY FOR THE REPUBLIC OF SOUTH AFRICA Applicant

and

Y O Respondent

JUDGMENT

MASHILE J:

[1] This application concerns the return of a minor child, a seven and half year

old J O, ("**J**") to the jurisdiction of the Central Authority of the Republic of Ireland. J's father, **Je O** ("**J**"), is an Irish citizen and his mother is the Respondent who was born in South Africa. The application was launched on 29 May 2015 and is brought in terms of Article 8 of the Convention on the Civil Aspects of International Child Abduction adopted at the Hague in 1980 ("the Convention") read with the Children's Act, No. 38 of 2005 ("the Children's Act"). The provisions of the Convention are, in terms of section 275 of the Children's Act, subject to those of the Children's Act.

[2] Section 278(3) of the Children's Act provides that the Court dealing with a Hague application must afford the minor child the opportunity to raise an objection to be returned. In doing so, the Court must give weight to the objection taken into account the age and maturity of the minor child. Section 279 of the Children's Act requires that the minor child be represented by a legal representative in all Hague applications.

[3] In compliance with Section 279 of the Children's Act as aforesaid, the Applicant caused **Advocate T Eichner-Visser** ("**Advocate Eichner**") to be appointed as *curatrix ad litem* on 27 September 2016. As such, she has stepped into the shoes of **J** and has since compiled a report on 22 March 2017 wherein she describes the wishes and objections of J. Her report will be discussed later in this judgment.

[4] This Court notes the inexplicable inordinate delays in complying with the prescribed time frames. Firstly, **Je** filed his request with the Central Authority of Ireland on 23 July 2014 but the application was only launched on 29 May 2015. In this regard, I note that the application was therefore launched a month or so before the expiration of the 12 month period prescribe under Article 12 of the Convention.

[5] Once the proceedings had commenced, there were then further gratuitous delays. The Respondent was given 5 days within which to file her opposing affidavit and the Applicant was to file its replying affidavit within 5 days following receipt of the opposing affidavit. The Respondent filed her answering affidavit out of time on 17 June 2015 and even worse, the Applicant only filed its replying affidavit on 25 May 2016, almost 12 months later. I am aware that the parties engaged in various attempts to settle the matter to no avail. It should suffice to state that after two pre-trial conferences, this Court ultimately heard the matter on 11 November 2017.

[6] This of course makes mockery of the fact that these matters must be resolved within 6 weeks from the date of commencement of proceedings. It took 2 and half years before this matter could come before this Court. The significance of a speedy resolution of proceedings of this nature was underscored by **Van Heerden JA** who remarked as follows in *KG v Cb and Others (748/11) [2012] ZASCA 17 (22 March 2012)* about delays in these **Hague** matters:

"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 children1 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.'"*

[7] The background facts are that **J** was born at Our Lady of Lourdes, Drogheda, in Ireland on or about 21 May 2010. The Respondent was born in South Africa and in 2002 she moved to Ireland where she met Je. In 2009 The Respondent and **Je** married in Krugersdorp, South Africa and **J** was born of that marital relationship. **Je** has three children from a previous relationship, namely **M O** aged 16, **A O** aged 14 and **D O** aged 11. According to **Je**, **J**'s half siblings spent about three nights a week at the minor child's home and as such they have developed a strong loving bond as a family.

[8] The marital relationship between **Je** and the Respondent came under a strain. According to the Respondent the stress in their relationship was **Je**'s abuse of alcohol and drugs, which is not specifically denied by **Je**. He admits that their marital relationship was undergoing difficulties and that he therefore indulged in drinking. Insofar as drugs are concerned, he states that both he and the Respondent took recreational drugs especially cocaine during the early days of their marriage and that he had since stopped. In consequence of the tension in their marital relationship, in November 2013 they agreed that the Respondent and **J** could visit South Africa for eight weeks whereafter they would return to Ireland.

[9] When the Respondent and **J** returned in January 2014, she lived for a week with **Je** during which she was essentially packing their belongings in order to move out of the matrimonial home. From February 2014, with the assistance of financial grants from Government and maintenance of Euros 60 from **Je**, she moved to […], Abbey Toad, Navan, Co Meath. **Je**, on the other hand, moved to […], Boyne Road Navan, CO Meath where he still lives.

[10] On 25 February 2014, **Je** and the Respondent entered into a mediated agreement. Among other things, the mediated agreement provides:

10.1 The Respondent and Je are the joint guardians of **J**;

10.2 The Respondent and **Je** granted reciprocal consent to each other to take J out of the country for holiday purposes only;

10.3 All decisions concerning **J**'s health, education and welfare would be made jointly;

10.4 The Respondent and **Je** had a fortnightly parenting arrangement and they agreed to give each other adequate notice if there were to be any changes;

10.5 **J** would be brought up as a born again **Christian** and would attend Educate Together School;

10.6 The Respondent and **J** would spend four weeks in South Africa during the summer holidays.

[11] Her weekly expenses were **R527.15** and her income per week was **241.80**. The shortfall was covered by her parents in South Africa who transferred funds to her account in Ireland. From the beginning of May 2014, her weekly income rose to **338.00** but her weekly expenses stayed at **R527.15**. Her parents continued to fill the gap to ensure her survival. That said, I should add that Je questions these claims as he states that the Respondent engaged in transitory jobs and that some of the expenses appear embellished. In the midst of all these financial difficulties, she received news of her mother's illness as a result of which her parents advised her that they could not afford to continue supporting her financially.

[12] Seeing that she would face financial difficulties if she was to remain in Ireland without the assistance of her parents, the Respondent travelled to South Africa with J on 13 June 2014 having sought and got **Je**'s consent that the travel

was for holiday purposes only As per the agreement,. **Je** anticipated that the Respondent and **J** would return after the agreed period of four weeks. **J**'s removal from Ireland was for that reason lawful. The four week period within which the Respondent should have returned **J** to Ireland came and went. To the extent that the Respondent did not obtain **Je**'s consent or that he did not acquiesce to **J**'s retention in South Africa, her action is wrongful as envisaged in Article 3 of the Convention.

[13] The Respondent and **J** have not returned to Ireland. They should have returned to Ireland on or about 14 July 2014. The Respondent has wrongfully retained **J** in South Africa. **Je** never consented nor acquiesced to the retention of the minor child in South Africa. Upon realising that the Respondent has wrongfully retained **J** in South Africa, **Je** requested the assistance of the Central Authority in Ireland. He submitted his statutory application on or about 23 July 2014.

[14] In terms of Article 7(c) and 10 of the Convention **Ms Christina Van Eeden**, the Family Advocate and the deponent to the founding affidavit, consulted with the Respondent in an attempt to secure the voluntary return of J. She states that she was not successful in securing the voluntary return of **J**.

[15] On 1 September 2014, the Respondent pointed out that she was willing to return to Ireland with **J** subject to certain provisions to safeguard his return.

The Respondent has since withdrawn this qualified offer on the basis that there has been a long delay and that **Je** was not prepared to comply with some of the stipulated conditions meant to safeguard **J**'s return to Ireland. The conditions as set out in the Respondent's letter of 1 September 2014 were the following:

15.1 **Je** must provide proof that he has arranged and paid for suitable accommodation for the Respondent and **J**;

15.2 **Je** must confirm that he has not yet taken any legal action against the Respondent and must furthermore undertake that he will not do so in future;

15.3 **Je** would pay for the return flights for the Respondent and **J** in full;

15.4 **Je** would provide proof that he has withdrawn all legal actions from government and/or any other sources against the Respondent regarding this application to ensure that she would not be taken into custody upon her arrival in Ireland;

15.5 **J** would not be taken from the Respondent upon arrival in Ireland and that the primary residence of **J** would still vest in the;

15.6 **Je** would sign an undertaking to:

15.6.1 Refrain from any domestic act of violence, which includes, but not be limited to verbal, emotional and psychological abuse towards the Respondent and **J**;

15.6.2 Refrain from his harassing means;

15.6.3 Refrain from any conduct of intimidation towards the Respondent and **J**;

15.6.4 Refrain from contacting the Respondent other than for reasons relating to **J**;

15.6.5 **Je** would not leave J in the care of his other minor children without the supervision of a reasonable adult;

15.6.6 **Je** would return the Respondent's motor vehicle to her upon her arrival in Ireland

15.6.7 The Respondent's personal belongings which were removed from her previous rental apartment by **Je** be returned to her on her arrival in Ireland;

15.6.8 The mediation agreement entered into between **Je** and the Respondent on 21 February 2014 would stay in force until the formal divorce settlement is in place.

[16] In his letter dated 29 September 2014, Je refused to undertake to provide accommodation for the Respondent and **J** on their arrival in Ireland and would not undertake to pay for the return flight of the Respondent stating that she had to see to that payment on her own. He further stated that he and the Respondent needed to revisit the mediation agreement which they had concluded prior to her departure to South Africa in June 2014. **Je**'s letter mentioned nothing about payment of maintenance to **J** and the Respondent

on their arrival in Ireland.

[17] However, in his replying affidavit he acceded to virtually all the conditions albeit that his financial ability to perform remain suspect, a fact that leaves the Respondent understandably apprehensive. The Respondent has pointed out that Je is currently unemployed and he has admitted this. If this is so the question is how will he afford to look after J and the Respondent when they get to Ireland?

[18] By way of allaying the Respondent's fears, **Je** has undertaken to make an amount of **1 000.00 Euros** available to the Respondent and **J** on their arrival in Ireland. In addition, he hopes to be compensated handsomely for his motor vehicle accident the proceeds of which he will also utilise to take care of the financial needs of the Respondent, **J** and his other children. The Respondent contends that both the **1 000.00 Euros** and the accident related payment will ultimately dissipate leaving her and **J** vulnerable. If that happens, she will be in no different position from that which prevailed prior to her eventual departure to South Africa. That will indubitably expose **J** to psychological harm and place him in an intolerable situation.

[19] It is manifest that the facts described above require this Court to determine whether or not the retention of J in South Africa by the Respondent is wrongful. The question of the wrongfulness or otherwise of his retention cannot be

considered without providing answers to the following questions:

19.1 Should this Court intransigently adhere to Article 12 of the Convention?

19.2 Has **J** settled in this country such that it will be undesirable to return him to his habitual residence?

19.3 Will the granting of an order for the return of **J** to Ireland expose him to physical or psychological harm or put him in an intolerable situation?

[20] Contending that proceedings for the return of J commenced before the expiry of a period of 12 months, the Applicant places significant reliance on article 12 of the Convention for the return of **J** to his habitual residence, the Republic of Ireland. Article 12 stipulates that in those circumstances where a child has been wrongfully removed or retained for a period less than a year when proceedings commence before a judicial or administrative authority, it is mandatory for a Court to order the return of the minor child forthwith. The return of the child can still be so ordered in instances where a period longer than a year lapsed unless it is demonstrated that the child is now settled in the new environment.

[21] To sustain its contention above, the Applicant necessarily had to deny claims by the Respondent that while the proceedings indeed commenced within 12 months, **J** has now settled in his new environment thus making it objectionable to return him to his habitual residence. In addition, the Applicant

fervently asserted that, contrary to what the Respondent would let this Court believe, **J** will not be exposed to physical or psychological harm if the order for his return is granted, or otherwise place him in an intolerable situation as provided for under Article 13(1) (b) of the Convention.

[22] *Article 3 of the Convention* describes what wrongful removal or retention is:

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 under the law of the State in which the child was habitually resident immediately before the removal or retention; and

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

[23] The Court in *KG v CB and Others supra* was giving effect to the provisions of *Article 3 of the Convention* when it upheld the judgment of this Court per **Satchwell J** to return the child after a stay of 1 year and 5 months in the Republic of South Africa. Like in the case in *casu*, the proceedings commenced prior to the expiry of 12 months. The only apparent difference with the instant case though is that **J** was older when he came to this country and that he has been living here for over three years.

[24] *Article 1 of the Convention* describes the major objectives of the Convention as follows:

24.1. To secure the prompt return of children wrongfully removed to or retained in any Contracting State; and

24.2 To ensure that rights of custody and of access under the law of one Contracting State are effectively respected in other Contracting State.

[25] *At paragraph 19 of KG v CB supra*, the Supreme Court of Appeal elaborated on those two objectives of the Convention in the following terms:

> *"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 the custody and similar issues in respect of the child can be adjudicated by the courts of the state of the child's habitual residence. The Convention is premised on his 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 authority's best placed to resolve the merits of a custody dispute are the courts of the state to which the child has been abducted".*

[26] *Article 5 of the Hague convention* defines 'rights of custody' and 'rights of access' as follows:

(a) 'rights of custody' shall 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;

(b) 'rights of access' shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

[27] The parties are agreed on the following:

27.1 The minor child was habitually resident in Ireland prior to retention in South Africa;

27.2 The father had custody rights in respect of J as noted in the mediated agreement which the parties concluded on 25 February 2014;

27.3 **Je** did not consent to the minor child remaining in South Africa.

[28] Principally and as I have mentioned earlier in this judgment, the Respondent, invokes the defences referred to in Article 13(1)(b) of the Convention which are to the effect that a court is not bound to order the return of an abducted child if the person opposing the return shows that there is a grave risk that his or her return would expose the child to physical and psychological harm or otherwise place the child in an intolerable situation. In the second place, J has expressly asked **Advocate Eichner** and **Ms Henig** not to be returned to Ireland.

[29] The defences mentioned in Article 13(1)(b) in particular that **J** will be exposed to physical and psychological harm are inextricably bound with settlement in

a new environment. In other words, if returning him to Ireland will involve 'uprooting' him from an environment to which he has become accustomed then the implication that he has settled in South Africa is inexorable. The idea of Article 12 is therefore that a minor child can still be returned to his habitual residence after 12 months unless it is established that he has settled in his new environment. If he has so settled in his new environment then it will be undesirable to return him to the requesting State.

[30] This explains why courts have held that delays in the resolution of proceedings might result in the minor child declared settled in the State requested to return him. Thus, in *Family Advocate v R (2004/2012) [2013] ZAECPEHC 10 (15 February 2013)* the court refused to return the minor child notwithstanding that the proceedings were commenced 11 months and 10 days, within the 12 months envisaged in Article 12 of the Convention. Although Article 12 of the Convention stipulates that it is mandatory to return a child if proceedings were commenced within 12 months, the court considered the late resolution of the matter into account when deciding whether to return the child or not.

[31] The basis of the dismissal of the application was primarily that the minor child had settled in his new environment and the court took his wishes not to be returned to the Requesting State as per *Section 278 of the Children's act into consideration*. In this regard the reports of **Advocate Eichner** and the social worker, **Ms Leonie Colyn Henig** ("**Ms Henig**"), which I shall discuss below

are significant.

[32] While it is common cause that **J** was habitually residing in the Requesting State, Ireland, immediately before the retention and that **Je** exercised his rights of custody at the time of the retention and that now but for the retention he cannot exert them, the Respondent denies that her retention of **J** is wrongful and maintains that it is legally excusable in terms of the provisions of the Convention, in particular the defences referred to in Article 13(1)(b).

[33] I turn to consider whether the Court should be rigorous in its observance and application of Article 12 of the Convention or not. It is obvious that the application of Article 12 was never intended to be strict as it posits the existence of circumstances that could constitute legal justification for the retention. Moreover, Article 13(1)(b) of the Convention postulates other legal excuses to retain - returning the child will make him vulnerable to physical or psychological harm or place him in an intolerable situation.

[34] In the *Family Advocate v R* matter *supra*, circumstances were such that even though the proceedings had commenced within 12 months, it was undesirable to return the minor child because he had become settled. The instant case is not different from the *Family Advocate v R* matter *supra* insofar as it commenced within 12 months but the resolution of the matter was only two and half years later. In the matter *of Central Authority for the Republic of*

South Africa v B (2011/21074) (7December 2011) the court stated:

> *"[17] **K** has settled well and to move him back to Australia now would be a disruption in his life, physically and emotionally. The assumption of the Hague Convention is that the return of a child to a foreign jurisdiction, if concluded within a very short time, will not ordinarily cause irreparable harm to the child. The longer the delay, the greater the potential for harm to the child. Per **Kerby J**, in De L v Director–General, NSW Department of Community Services (1996) 187 CLR 640. I also agree with the following dictum by **Wall J** in In re L (A Minor) (Abduction: Jurisdiction) (Fam D) [2002] 1 WLR 3208, para [65]:*
>
> > *'In my judgment, although the Convention lays down a 12-month period before which it can be said that a child is "settled in its new environment" under article 12, I am of the view that once the door is open to discretion (as it is here) delay in the resolution of the proceedings is a factor which can properly be taken into account in deciding whether or not a child should be returned.'"*

[35] As alluded to earlier, **Advocate Eichner**, as the *curatrix ad litem*, represented the interests of **J** in these proceedings. Her report forms part of the documentary evidence that was placed before this Court. She understood her mandate as having been:

> *"authorised to investigate any matter related to the application; to interview the minor child, to interview any other relevant person in the matter, to investigate the full familial and social background of the minor child, to obtain records related to the minor child from any*

institution and to conduct any other enquiries I deem necessary related to the application."

[36] While her instructions were somewhat broader than what I have cited above, she confesses that she has only been able to investigate the personal circumstances of **J**, his frame of mind and his wishes as described in the Children's Act. Consequently her investigation focused on those issues alone. As I understand, her report is therefore mainly intended to show how well-adjusted **J** has become living in South Africa and that it will therefore be undesirable to return him to Ireland.

[37] According to her report she reached that conclusion after consultation with the Respondent, **Je** *via Skype*, the head master of Kenmare Laerskool, **Mr Immelman**, **J**'s class teacher, **Ms Rina Botha**, the school Psychologist, **Ms Jeanette Seronio**, social Worker, **Ms Henig**, **J**'s grandmother **M B**, grandfather **Mr B** at their home, which is also the home of the Respondent and **J**, and the Hague Convention.

[38] She visited **J** at his home and observed how he interacted with his grandparents. She noted that he liked being around them and that they too found fun in having him. They related to her how well he has integrated and blended with his environment and friends in the area. She could not find a different account of **J** when she an **Ms Henig** visited his school. The head master, class teacher and psychologist, all sang his praises and remarked at

how well-adjusted he had become among his school mates and generally with the school atmosphere. He has never been referred to the psychologist, not even once.

[39] Apart from the above and conscious that **J** is still of tender age and that his views should be approached as such, he has nonetheless expressed a view that he does not wish to return to Ireland. His wish not to be returned to Ireland does not exclude his love for his father and his half siblings in Ireland. **Ms Henig** states in her report that **J** communicates with them *via skipe* from time to time and that he visibly appears filled with exhilaration when he talks to them.

[40] The opinion expressed by **Ms Henig**, with whom **Advocate Eichner** agrees, that '*uprooting*' **J** from South Africa could be traumatic and that returning him to Ireland is undesirable in that he may become exposed to psychological harm cannot be viewed lightly. The report of **Ms Henig** is also part of the evidentiary material with which this Court is saddled.

[41] Having considered the outcome of her consultations with the various parties mentioned above including **Ms Henig** and taken into account the views of **J**, **Advocate Eichner** found as follows:

> "63. **J** is very happy in South Africa living with the Respondent. **J** is settled and I believe very strongly that moving him from this environment would

be very detrimental to his wellbeing.

64. I agree with **COLYN SCHUTTE** under the heading "Conclusion" at paragraph 7 of his report, that separating **J** from his biological mother and returning him to Ireland would undoubtedly expose him to severe psychological trauma and that **J** would find himself in an intolerable situation.

65. I further find that **J** has a very loving relationship with **Mr O** and that this relationship must, at all costs, be maintained. This includes the relationship with his three half siblings."

[42] Those findings led her to recommend that **J** should remain in South Africa with the Respondent but must continue to have meaningful and regular contact with Je and his three half siblings in Ireland.

[43] In a separate report, **Ms Henig** recommends no differently from **Advocate Eichner**, after consulting and visiting the same institutions and persons respectively when she states:

> *"**J** should be allowed to remain living with his mother in South Africa. To take him away from the school he loves, from his grandparents to whom he has become securely attached and to uproot him from his very comfortable home environment which he has become accustomed to, would be traumatic for him and it would be deleterious to his emotional well being.*
>
> ***J** should maintain regular Skype and or Face Time contact with his father and with his three half siblings.*

***J** should have holiday contact with his father at least once a year."*

[44] Understanding his mandate to have been to conduct a clinical assessment of **J**, determine his specific 'situatedness', compile a report for court purposes and lodge such report with the legal representative of the Respondent, **Mr Colyn Schutte** ("**Mr Schutte**"), the educational psychologist, had clinical interview, clinical history and screening of the Respondent. He carried out a further clinical interview with J and performed an Interaction analysis of J and the Respondent. He also conducted a psychometric assessment of **J** and interpreted the data.

[45] The information that he elicited from the above led him to conclude that **J** is in a pedagogical state of emergency primarily caused by his specific situation of parents undergoing divorce. The dynamics themselves of such a process are potentially overwhelming to any child and actually cause the unfavourable psychodynamics with which **J** presents. The Respondent, who is the primary care giver, source of security and support does not regard Ireland as a viable option for her to make a living and raise her child.

[46] **Mr Schutte** maintains that separating him from the Respondent and returning him to Ireland will certainly expose him to 'severe psychological trauma and he will find himself in an intolerable situation.' **Mr Schutte** found that in consequence of **J**'s exposure to his 'parent's hostile divorce he anticipates

danger to himself and the Respondent, his primary source of security and care. **J** presents with freeflowing anxiety but has begun 'to adapt to his current situation and exists within an authentic pedagogical setup in which he has begun to stabilise.'

[47] **Mr Schutte** concludes that 'it can be realistically anticipated that removal from his mother will induce in **J** severe psychological trauma which could have a permanent and debilitating effect on him. Placing **J O** in any situation other than an authentic pedagogical situation will be fraught with danger. However loving and caring members of a family can be, mere placement of a child in their care does not automatically mean that the child will adapt and thrive. Therefore removal of a child from an existing and nurturing pedagogical situation will place such a child in an intolerable situation and will not be in his best interest.'

[48] The authors of these reports are impartial notwithstanding that they have been commissioned by the Applicant. I would have thought that they would have been more inclined to render advice that would be palatable to the party from whom the brief emanated, the Applicant. However, they maintained their independence regardless of who has briefed them. Their advice to this Court is unanimous – **J** has settled in South Africa and returning him to Ireland could expose him to psychological harm and even place him in an intolerable situation. It is their apparent display of independence in their reports that

convinces this Court that their advice must be correct.

[49] The Applicant did not really raise any argument in opposition to the assertion that **J** has settled in South Africa instead it persisted in its reliance on Article 12 of the Convention for his return. As it has been seen in the matter of *Family Advocate v R supra*, commencement of proceedings within 12 months, under appropriate circumstances, will not necessarily lead to an order for the return of the minor child to the Requesting State. In the circumstances, this Court unreservedly accepts that **J** has settled in South Africa as a result of his length of stay, his adoption of the South African ideals and customs. It will therefore be undesirable to return him to Ireland on that ground alone.

[50] That leaves this Court to reflect on the possibility of **J** becoming exposed to physical or psychological harm or be placed in an intolerable situation if returned to Ireland. This part requires reference to the history of the lives of J and the Respondent in Ireland. The periods can be divided into three categories:

50.1 During marriage in particular towards their separation;

50.2 The Respondent and J's return to Ireland in January 2014 after the eight week visit to South Africa; and

50.3 The Respondent and **J**'s permanent departure for South Africa in June 2014.

[51] If the contents of paragraph 12 of the answering affidavit, which the Applicant has not seriously challenged, are anything to explain the parties' relationship, it appears that their marriage was turbulent, **Je** drank excessively and the Respondent found this insufferable and not being in the best interest of **J**. That situation prompted her to desperately look for accommodation for her and J without success. As a result, the parties agreed that the Respondent and **J** could leave for South Africa to spend time with family for eight weeks and return thereafter, which they did.

[52] It is also apparent from the contents of paragraph 12 in particular, paragraph 12.3 that the parties were financially struggling throughout the marriage. The Respondent states that **Je** was the sole provider for J while she took care of accommodation and rent. She got assistance with clothing and other day to day expenses from her parents in South Africa. The air tickets for her and **J** were purchased by her parents and this is admitted by **Je**.

[53] When she returned to the matrimonial home in January 2014, the situation had not improved and was therefore still not conducive to live with **J**. After a week, she, her sister, who had accompanied her for emotional support, and **J** moved out to stay with her friend for three weeks. She applied and approximately three months later received financial assistance from the Department of Community, Social and Family Affairs but it was still not enough

for their maintenance in consequence of which her parents had to partially subsidise her for the rentals.

[54] The Respondent agrees that she accepted maintenance in the amount of **Euros 60.00** from **Je** at a time when she was somewhat still emotional about her separation and not realistic with the Irish living costs. She adds that the amount was not adequate as she and **J** remained financially vulnerable without support from her parents. Her weekly expenses amounted in all to **Euros 527.15 Cents** while she received income of **Euros 241.80 Cents** living her with a shortfall of **Euros 285.35 Cents** per week.

[55] The situation did not improve much after April 2014 during which time she received housing allowance. Her total income per week became **Euros 338.70 Cents** while her weekly expenses remained at **Euros R527.15 Cents**. Adding to all these financial woes was her parents' advice that they could no longer afford to bankroll her as they did previously as a result of her mother who had taken ill. This meant of course that there would be a large unfilled hole, which would spell disaster for her and **J** if they remained in Ireland.

[56] With no family and friends to support her both financially and emotionally in Ireland, she opted to leave for South Africa and to remain here permanently. The history therefore gives this depressing financial background in Ireland during living together with **Je** and post the separation. **Je** has admitted that

he is currently unemployed and referred to an amount of **Euros 1 000.00** which he will make available to the Respondent and **J** upon their arrival and that he was awaiting a generous settlement of his truck accident.

[57] The problem with his undertaking is that it is not sustainable because the amount of **Euros 1 000.00** is obviously exhaustible and the settlement remains a pie in the sky. Besides, it is not known how much it will be. These amounts, assuming of course that he receives a pay-out ultimately, will probably be sufficient temporarily but with time the situation will in most probabilities deteriorate and the Respondent and **J** will again face financial hardship in a country where she will have no family emotional support. It is hard not to think of those financial privations as exposure to physical and psychological harm and placement in an intolerable situation.

[58] It is evident from the exposition of the facts above that the Respondent and **J**'s lives, especially towards the parties' separation and subsequently, had turned into a financial nightmare. From February until June 2014 when she and J departed Ireland for South Africa she could not without assistance from her parents manage to live in Ireland. Ordering her and **J** to return to Ireland will be exposing them to a situation that prevailed prior to coming to South Africa Permanently and perhaps even worse because this time around they will be without the help of her parents.

[59] Lastly, with his tender age and state of maturity in mind, this Court is obliged

to carefully weigh **J**'s views and decide whether or not to incorporate his wishes into its judgment as required in terms of Section 278 of the Children's Act. The Children's Act is unambiguous that the child's wishes is one factor that may be considered depending on his/her age and maturity. **J** is now over 7 and half years old and was two months short of attaining age 7 at the time when **Advocate Eichner** and **Mr Henig** consulted with him. All the experts have already stated how matured and forthright he was when he expressed the view that he loved and missed his father and half siblings but that he did not wish to be returned to Ireland.

[60] I have already accepted the reports of the various experts unreservedly. Having interviewed and interacted with **J**, the opinions of the experts were that this Court must, in addition to all the other matters, seriously consider incorporating his wishes not to be returned to Ireland into its judgment. I have little difficulty to do so especially because Section 28(2) of the Constitution of the Republic of South Africa also enjoins this Court to make such decision with in mind the 'best interest of the minor child'. If it will be detrimental to 'uproot' **J** from his well-adjusted environment, South Africa, I consider it wise not to return him.

[61] One might be tempted to argue that **J** will be taken care of by his father and therefore that he will not be exposed. The point is that he will be living with his mother and her exposure to poverty in Ireland will impact directly on him.

Accordingly, for as long as **J** is inseparable from the Respondent, he will be vulnerable to psychological harm and the situation therefore intolerable. In the result I find:

61.1 **J** has settled in South Africa;

61.2 Uprooting him from South Africa will expose him to physical and psychological harm;

61.3 His return to Ireland will place him in an intolerable situation;

61.4 His wish not to be returned to Ireland is taken into account notwithstanding his tender age.

[62] Both parties have urged this Court to award costs against the other. I have considered their respective arguments and I am of the opinion that this is not an ideal case to award costs against the one or the other. Accordingly, I direct that there shall be no cost order.

[63] Against that background I make the following order:

1. **The application to return J to Ireland is dismissed;**

2. **Je shall exercise his rights of access to J as follows:**

   2.1 Via skype and telephone on any day of the week;

2.2 To visit J in South Africa at least for two weeks during the June/July or December/January school holidays;

2.3 While visiting South Africa, Je shall have the right to remove J from the care of the Respondent during which time he can visit anywhere with him provided it will be within the borders of South Africa;

2.4 Je will bear the costs of travelling to South Africa to visit J;

2.5 Je will also bear all the costs associated with his stay in South Africa while visiting J;

2.6 There is no order as to costs.

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BA MASHILE
Judge of the High Court of South Africa
Gauteng Local Division,
Johannesburg

APPEARANCES:

For the Plaintiff: **Adv. A Mofokeng**
Instructed by: State Attorney

For the Respondent: **Adv. I Delport**
Instructed by: Couzyn Hertzog & Horak