REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Case No: 47309/2024

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

10 SEPTEMBER 2024 _____

DATE SIGNATURE

In the matter between:

CENTRAL AUTHORITY FOR THE REPUBLIC OF SOUTH AFRICA FIRST APPLICANT

J[…] R[…] S[…] SECOND APPLICANT

And

K[…] D[…] Z[…]-S[…] RESPONDENT

Delivered: This judgment was delivered electronically by circulation to the parties' legal representatives and uploading on SAFLII.

JUDGMENT

MAHALELO, J:

[1] This is an application in terms of article 12 of Chapter III of the Hague Convention on the Civil Aspects of International Child Abduction,[1] incorporated in section 275 of the Children's Act.[2] The application concerns two minor girls, LS (aged 5), and MS (aged 1). The applicants seek the return of the minor children to H[…] Street […], 81377, Munich in Germany. The minor children came with their parents to South Africa on a two month holiday from 7 November 2023 until 11 January 2024 on the assumption that they would all return prior to LS returning to school. The second applicant had booked return flights for all of them. On 11 January 2024, the respondent refused to return the minor children to Germany. The second applicant had not consented to the children remaining in South Africa.

[2] The second applicant and the respondent were married to each other in a civil marriage on 10 January 2020 in Cape Town, which marriage still subsists. The second applicant has been exercising rights of custody as envisaged by article 3 of the Convention at the time the minor children were retained in South Africa.

[3] During their stay in Germany the couple had disagreements. The relationship between them was strained. It appears that after the birth of the children the respondent suffered from depression. The respondent also accused the second applicant of infidelity and emotional abuse. Whilst in South Africa, the relationship became even more strained. The respondent continued to accuse the second applicant of infidelity. The parties underwent counselling in an effort to resolve their differences, but it did not help. The respondent notified the second applicant that she would not be returning to Germany with the minor children on 11 January 2024 and wants a divorce. The second applicant offered to take the minor children with him to Germany but the respondent refused. She requested him to move her and the children's return flight tickets to 26 February 2024, as she intended to return to Germany to pack the rest of her and the children's belongings, whereafter she wanted to return permanently to South Africa. Sometime in January 2024, the respondent leased a property at L[…] Avenue, Lonehill and enrolled LS at the Waldorf School in Bryanston.

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[1] Hague Convention, Civil Aspects of International Child Abduction 1980 ('*the Convention*').
[2] 38 of 2005 ('*the Act*').

[4] On 31 January 2024, the second applicant returned to South Africa to convince the respondent to return the minor children to Germany, but the respondent declined. The second applicant returned to Germany alone on 26 February 2024.

[5] On 6 March 2024, the second applicant submitted a request for return application to the Central Authority in Germany in terms of article 16 of the Convention. The matter was referred to the Central Authority of South Africa for assistance.

[6] This application was originally launched as an urgent one during June 2024. The application did not proceed. It was removed and allocated to this Court for a hearing. The application is opposed by the respondent. Case management meetings were held, and timelines were set for the filing of affidavits. The parties agreed that the Family Advocate, Gauteng be appointed to conduct certain investigations. In addition, the second applicant appointed Dr Holtz, an Educational Psychologist to compile a report for the Court.

[7] The appointment of the Family Advocate was formalised by way of a court order granted by agreement between the parties. He was directed, inter alia, to investigate the best interests of the children with specific reference to whether returning the minor children to Germany would expose them to harm or otherwise place them in an intolerable situation. He provided a comprehensive report pursuant to his investigations. Dr Holtz also provided a comprehensive report pursuant to the assessment which she conducted with the parties and the minor children.

[8] On 15 September 2023, the respondent filed for divorce in South Africa and sought, inter alia, full custody of the minor children. The matter has not been finalised.

[9] In this application, the respondent raised two defenses why the court should not order the return of the minor children to Germany. The first is that Germany is not their habitual country of residence. The second is that there is grave risk that the return of the minor children will expose them to physical or psychological harm or otherwise place them in an intolerable situation.

Material Facts

[10] The background facts in the matter are not contentious. The second applicant was born in Germany and the respondent in South Africa. The parties met in Cape Town in 2015, whilst the second applicant was on a partly holiday and partly business trip. The parties started dating and were in a long-distance relationship. In 2016, the respondent resigned from her job and moved to Munich, Germany, and lived with the second applicant. In 2017, the parties moved back to South Africa for two years. In 2018, they moved into a two bedroomed apartment which they rented, which the second applicant eventually purchased in Cape Town.

[11] On 1 July 2019, their first daughter LS was born in South Africa. The following year, on 10 January 2020 the parties were married to each other in Cape Town. They extended their stay in South Africa. According to the second applicant, though he does not deny that they went back to Germany because his mother was sick, the intention had always been to return to Germany permanently and only visit South Africa. The respondent denies this and states that they returned to Germany only because the second applicant's mother was sick. In March 2020 and while in South Africa, the lockdown was implemented due to the COVID-19 epidemic. This delayed their return to Germany. During August 2021, the respondent was awarded a spousal visa and residence permit for Germany. In July 2022, the parties together with LS moved back to Germany. LS commenced kindergarten in Munich on 1 September 2022.

[12] The parties' second daughter MS was born in Munich on 18 July 2023. She attained German citizenship and thereafter her birth was registered in South Africa, and she attained South African citizenship as well.

The Issues

[13] Against this backdrop, the primary issues to be determined are as follows: (i) whether Germany is the minor children's habitual residence immediately prior to the alleged retention; and (ii) whether the children would be exposed to grave risk and/or

psychological harm and/or be placed in an intolerable situation as envisaged by article 13 (b) of the Convention, should they be returned. It was uncontested that if the exception under article 13 (b) of the Convention was not established, the retention of the minor children in South Africa would be unlawful.

[14] Prior to addressing the issues on a factual basis, it is first necessary to sketch the legal framework within which that exercise must be undertaken.

The Convention and the Law

[15] In *Sonderup v Tondelli and Another,*[3] the Constitutional Court explained the purpose of the Convention as:

> " [seeking] to ensure that custody issues are determined by the court in the best position to do so by reason of the relationship between its jurisdiction and the child. That Court will have access to the facts relevant to the determination of custody."[4]

[16] The recognition of the child's interests as paramount when applications in terms of the Convention are considered is echoed in the Act. Chapter 17 of the Act is dedicated to give effect to the Convention and to combat parental child abduction. Section 275 domesticates the Convention as law in the Republic with the important proviso that the Convention's provisions are subject to the provisions of the Act. The importance and relevance of this proviso is that in determining this application, this Court remains statutorily obliged in terms of s 6 to, amongst others:

> "(6) (2)(a) respect, protect, promote and fulfil the child's rights set out in the Bill of Rights, the best interests of the child standard set out in section 7 and the rights and principles set out in this Act, subject to any lawful limitation;
>
> (b) respect the child's inherent dignity;

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[3] [2000] ZACC 26; 2001 (1) SA 1171 (CC); 2001 (2) BCLR 152 (CC) ('*Sonderup*').
[4] *Id* at para 30.

(c) treat the child fairly and equitably."

[17] The Convention provides for an internationally agreed mechanism for dealing with the global phenomenon of child abduction. With limited exceptions, it provides for the prompt return of an abducted child to their home country.[5]

[18] When an application for the return of a child is considered in terms of article 12 of the Convention, a court is obliged to keep in mind the jurisdictional prerequisites in article 3. In terms of article 3, the removal or retention of a child is to be considered wrongful where:
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(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident in the other state; 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.

[19] Article 12 of the Convention provides that:

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

[20] In article 13 the Convention sets out the defenses available to the abducting parent who is opposed to the return of the child. It reads as follows:

"Notwithstanding the provisions of the preceding Article [Article 12], the judicial or administrative authority of the requested State is not bound to order

[5] See in this regard *Ad Hoc Central Authority, South Africa and Another v Koch N.O. and Another* [2023] ZACC 37; 2024 (3) SA 249 (CC); 2024 (2) BCLR 147 (CC) ('*Koch*').

the return of the child if the person, institution or other body which opposes its return establishes that:

(a) the person, institution, or other body having care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal and retention, or

(b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation."

[21] The child's return may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.[6]

[22] The onus of securing the return of a child in terms of the Convention rests on the applicant to prove that the child was habitually resident in the requesting State prior to its wrongful removal or retention. Therefore, the onus of resisting the return of the children in terms of article 13 of the Convention rests on the respondent. In both instances the respective parties must prove the relevant elements on a balance of probabilities.[7]

[23] Regarding what the onus entails, Van Heerden AJA in *Pennello v Pennello (Chief Family Advocate as Amicus Curiae)*[8] held:

"There is nothing in the wording of art 13 of the Convention or in the analysis of this wording by either the Constitutional Court in *Sonderup* or this Court in *Smith* to suggest that the person resisting an order for the return of a child under the Convention by relying on the art 13*(b)* defence does not bear the usual civil *onus* of proof, as it is understood in our law, in that regard, viz that

[6] Article 20 of the Convention.
[7] See *Senior Family Advocate, Cape Town and Another v Houtman* 2004 (6) SA 274 (C) ('*Houtman*') at paras 6 and 15; see also *Smith v Smith* [2001] ZASCA 19; 2001 (3) SA 845 (SCA) at 851A.
[8] [2003] ZASCA 147; [2004] 1 All SA 32 (SCA); 2004 (3) SA 117 (SCA) ('*Pennello*').

he or she is required to prove the various elements of the particular art 13*(b)* defence on a preponderance of probabilities."[9]

[24] She proceeded to explain the underlying reasoning for this position:

"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 thus that the authorities best placed to resolve the merits of a custody dispute are the courts of the state 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]

[25] In *Sonderup* Goldstone J made the point that 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".[11]

[26] To further concretise this point, article 19 of the Convention provides that a "decision under this Convention concerning the return of a child shall not be taken to be a determination on the merits of any custody issue".

[27] Goldstone J proceeded to consider the question of the harm that an abducted child may suffer as a result of an order that they be returned to the jurisdiction of their habitual residence. He held:

"A matrimonial dispute almost always has an adverse effect on children of the marriage. Where a dispute includes a contest over custody, that harm is likely to be aggravated. The law seeks to provide a means of resolving such disputes through decisions premised on the best interests of the child. Parents have a responsibility to their children to allow the law to take its course and not to attempt to resolve the dispute by resorting to self-help. Any

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[9] *Id* at para 38.
[10] *Id* at para 25.
[11] *Sonderup* above, n 3 at para 30.

attempt to do that inevitably increases the tension between the parents and that ordinarily adds to the suffering of the children. The Convention recognises this. It proceeds on the basis that the best interests of a child who has been removed from the jurisdiction of a Court in the circumstances contemplated by the Convention are ordinarily served by requiring the child to be returned to that jurisdiction so that the law can take its course. It makes provision, however, in art 13 for exceptional cases where this will not be the case.

An art 13 enquiry is directed to the risk that the child may be harmed by a Court-ordered return. The risk must be a grave one. It must expose the child to 'physical or psychological harm or otherwise place the child in an intolerable situation'. The words 'otherwise place the child in an intolerable situation' indicate that the harm that is contemplated by the section is harm of a serious nature. I do not consider it appropriate in the present case to attempt any further definition of the harm, nor to consider whether in the light of the provisions of our Constitution, our Courts should follow the stringent tests set by Courts in other countries." [12]

[28] On the question of harm, the court in *Pennello*[13] cited with approval the dictum of Ward LJ in *Re C (Abduction: Grave Risk of Psychological Harm)* [1999] 1 FLR 1145 (CA) at 1154:

"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*."* [14]

[12] *Id* at paras 43-44.
[13] *Pennello* above, n 8.
[14] *Id* at para 34.

[29] The court also commented on the approach adopted by the Constitutional Court to the question of harm in *Sonderup* stating:

> "Despite the litany of alleged incidents of physical and mental abuse of the mother by the 'left-behind' father on which counsel for the former relied in argument before the Constitutional Court in the *Sonderup* case, as well as the report of a South African clinical psychologist to the effect (inter alia) that the continuation of the status quo in Canada would have a 'severely compromising effect on the healthy psychological development' of the child in question, the Court held that the harm to which the child would allegedly be subjected by a court-ordered return was not harm of the serious nature contemplated by art 13, but rather –
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> > " in the main harm which is the natural consequence of her removal from the jurisdiction of the Courts of British Columbia, a Court-ordered return, and a contested custody dispute in which the temperature has been raised by the mother's unlawful action. That is harm which all children who are subject to abduction and Court-ordered return are likely to suffer, and which the Convention contemplates and takes into account in the remedy that it provides'." [15]

[30] On whether the age of the child matters, the court went on:

> "While the age of the child in question may well, in certain circumstances, be *one* of the factors relevant to the determination of whether a court-ordered return would expose the child to a grave risk of physical or psychological harm or otherwise place the child in an intolerable situation, there is no basis to differentiate *in principle* on the basis of age, or to be swayed by some kind of 'tender years' principle in the application of the Convention."[16]

Is Germany the habitual residence of the minor children?

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[15] *Id* at para 30.
[16] *Id* at para 52.

[31] In terms of article 4 the Convention shall apply to “any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights occurred”.

[32] The second applicant’s case was that immediately before their departure to South Africa on 7 November 2023, the minor children were habitually resident at H[…] Street […], Munich, Germany where they are all registered. The property is a three bedroomed house. It is leased from 2022 and the lease is unrestricted as it is commonplace in Munich to lease property for very long. LS School and friends live nearby. This according to the second applicant this is confirmed by the fact that while in Germany he had assisted the respondent to convert her South African driver’s licence to a German driver’s licence. He also enlisted the respondent and the children on his German medical aid scheme. The German government contributes R5000 per month per child towards medical aid in an effort to assist in raising the children. His family resides 45 minutes away from their apartment and they are able to offer support with the children if needed

[33] .The apartment in Cape Town was rented out as the intention was not to stay in Germany permanently. The agreement was to keep it as an investment to generate extra income. The second applicant had even put it up for sale but did not get the right offer to purchase. LS was enrolled in Waldorf House for Children in Germany in July 2022 and she started kindergarten there in September 2022. MS was born in Munich and attained German citizenship. The minor children have been living with the second applicant and the respondent as a family. The second applicant interacted with the children on a daily basis. Twice in 2022, he remained alone with the children for three weeks on each occasion in the absence of the respondent.

[34] The respondent on the other hand submitted that the parties rented an apartment in Germany. The lease is soon expiring. In South Africa, the parties own a house in Cape Town. The respondent and the minor children are currently staying in Cape Town. The second applicant has access to the house and the minor children. LS was born in South Africa. The parties moved to Germany when this minor child was 2 1/2 years old. MS stayed in Germany for 1 1/2 years. LS came back to South

Africa in October 2023. She again spent eight months in South Africa. All in all, LS spent three years in South Africa, therefore the habitual residence of the minor children is South Africa, not Germany. According to the respondent, the parties together with the children went to Germany temporarily because the second applicant's mother was sick. Their intentions were always to remain in South Africa permanently hence they bought a house in Cape Town.

[35] With reference to habitual residence, Opperman J found in *Central Authority for the Republic of South Africa v LC*[17] that:

> "[56] The Hague Convention does not define 'habitual residence'. Brigitte Clark summarises the approach accurately as follows:
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> > '[H]abitual residence should not be given a special technical definition, but should remain a question of fact to be decided with reference to the facts of each individual case. Habitual residence may be acquired by voluntarily assuming residence in a country for a settled purpose. It may be lost when a person leaves that country with the settled intention not to return…. There is a significant difference between ceasing to be habitually resident in a country and acquiring habitual residence in a new country. A person can lose habitual residence in 'a single day' when he or she leaves with the settled intention not to return. However, habitual residence cannot be acquired in a day. An appreciable period of time and a settled intention will be necessary to enable him or her to become habitually resident'."

[36] Referencing *Houtman,* Opperman J explained the position thus:

> "[63] Three basic models of determining habitual residence of a child have developed from judicial interpretation of judicial residence, namely the dependency model, the parental-rights model and the child-centered model. In terms of the dependency model, a child acquires the habitual residence of

[17] 2021 (2) SA 471 (GJ).

his or her custodians whether or not the child independently satisfies the criteria for acquisition of habitual residence in that country. The parental-rights model proposes that habitual residence should be determined by the parent who has the right to determine where the child lives, irrespective of where the child actually lives. Where both parents have the right to determine where the child should live, neither may change the child's habitual residence without the consent of the other. In terms of the child-centered model, the habitual residence of a child depends on the child's connections or intentions and the child's habitual residence is defined as the place where the child has been physically present for an amount of time sufficient to form social, cultural, linguistic and other connections. South African courts have adopted a hybrid of the models in determining habitual residence of children. It appears to be based upon the life experiences of the child and the intentions of the parents of the dependent child. The life experiences of the child include enquiries into whether the child has established a stable territorial link or whether the child has a factual connection to the state and knows something culturally, socially and linguistically. With very young children the habitual residence of the child is usually that of the custodian parent."

[37] In the respondent's answering affidavit to the second applicant's supporting affidavit, the respondent admitted that Germany is the minor children's country of habitual residence. I need not deal with this aspect any further but for the sake of completeness, all the evidence in this case points to Germany being the country where the two minor children were habitually resident prior to their retention in South Africa.

[38] The parties travelled to South Africa with the minor children on 7 November 2023. The purpose of the trip was for a holiday and for the respondent to visit her family in South Africa. Prior to the parties departing for South Africa, it was their intention to return to Munich with the minor children on 11 January 2024. Accordingly, the second applicant purchased return air tickets for all of them in anticipation of that return.

[39] At the time that the parties departed with the minor children for South Africa, the second applicant and the respondent shared parental responsibilities and rights, custody and residence of the minors as well as the responsibility and rights to make decisions in respect of the minor children. The second applicant exercised those rights and responsibilities in respect of the minor children together with the respondent. The second applicant did not consent to the children remaining in South Africa beyond 26 February 2024, which is the date to which the respondent and the children's return flight tickets were moved to at the request of the respondent.

[40] In the circumstances, the respondent, by virtue of her failing to return the minor children to Germany and remaining in South Africa together with the minor children post 26 February 2024, unlawfully retained the minor children in South Africa. In so doing, the respondent breached the second applicant's rights of custody exercised together with the respondent immediately prior to the respondent retaining the minor children in South Africa. The second applicant would have exercised his rights of custody absent the respondent's retention of the minor children in South Africa.

[41] The respondent's retention of the minor children in South Africa absent the second applicant's consent thereto violated the latter's rights to shared custody of the minor with the respondent and is unlawful. The question then is whether the minor children should be returned to their country of habitual residence.

[42] As already indicated the respondent raised the defence under article 13(b) of the Convention.

Article 13(b) defence

[43] The focus of the respondent's case is aimed at the exception in article 13(b) of the Convention in terms of which a court is not bound to order the return of the child if the person opposing the return establishes that:

> "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."

[44] The respondent's reasons and the factual basis for her allegation that the provisions of article 13(b) find application can be summarised as follows: The second applicant's work commitments prevent him from caring for the children. The second applicant cannot care for the children alone. The respondent did not receive the support she required to help care for the children while she was in Germany. Her mother is unemployed therefore while in South Africa she will be able to help and support her in taking care of the minor children. In Germany she felt isolated because the second applicant regarded his work as more important than helping her with the children. The load of household work was overwhelming and exacerbated by the fact that the second applicant refused to hire a nanny due to exorbitant costs involved. She was struggling to learn German and she felt disregarded and eventually fell into a depression. In Germany, she does not have close friends. In South Africa she has the benefit of being able to obtain employment in the entertainment industry, whereas in Germany she was unable to do so. Therefore, returning the minor children to Germany will destabilise her parenting of the minor children to a point where their situation would become intolerable.

[45] The suggestion that the second applicant cannot care for the children alone, or that his work somehow prevents him from doing so, is not supported by the evidence in this matter. The second applicant has plainly set out inter alia that he is able to work from home, that the children will have access to kindergarten and aftercare facilities if needed, and access to any therapeutic assistance they may require. It is undisputed that the second applicant remained alone with the minor children on two previous occasions for a period of three weeks while the respondent was travelling on work commitments. The second respondent has also indicated that whilst in Germany both him and the respondent will be able to care for the minor children. His family resides 45 minutes away from their apartment and they are able to offer support with the children if needed.

[46] The court in *Koch*[18] observed that in dealing with the scope of article 13(b), a court dealing with a return application is entitled in limited circumstances, to refuse to

[18] *Koch* above, n 5 at para 55.

order the return of that child. The focus is on the child and the issue is the risk of harm to the child in the event of their return.

[47] Of particular importance regarding the matter in *casu*, the court in *Koch* determined that the words "grave risk" in article 13(b) indicate that the exception is "forward looking" in that it requires the court to look at the future by focusing on the circumstances of the child upon their return and on whether those circumstances would expose the child to a grave risk as envisaged in article 13(b). The focus, in determining what constitutes a "grave risk" of "psychological harm" as contemplated by article 13(b), is on the harm that is likely to eventuate should the children be returned. The evidence must therefore be limited to psychological and emotional impact of returning a child to their habitual residence.[19]

[48] On the approach with article 13(b), the Court in *Koch* elaborated further that:

> "[62] The approach that Article 13(b) does not require elaboration beyond its terms must be endorsed. It is implied in the plain meaning of the words used in art 13(b), that it sets a high threshold and any other approach will be inconsistent with the language used and the objectives of the Convention. The level of the risk must be of a serious nature, and the words 'otherwise place the child in an intolerable position' through considerable light not only on the degree of seriousness of the risk of the harm, but also the harm itself, that the Convention has in mind. The word 'otherwise' is indicative of a conclusion that the physical and emotional harm contemplated is harm to the degree that also amounts to an intolerable situation.
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> [63] The risk of harm that will meet the threshold of in art 13(b) will inevitably be determined by the facts of any particular case. As a general proposition, it may be said that the risk of harm must be of a severity which is more than is inherent in the inevitable disruption, uncertainty and anxiety which follow on an unwelcome return to the jurisdiction of the child's home country. It is important to make the observation that Article 13 (b) does not require there to

[19] *Id* at paras 56-57.

be a certainty that harm will occur. What is required is persuasion by applying the legal standards of proof that there is a risk which warrants the qualitative description of a ‘grave risk’ that the return will ‘expose’ the child to harm. Whether the risk reaches that threshold must inevitably be determined on the facts of the case and by the nature of the projected harm.”

[49] In this case all the jurisdictional facts required in order to invoke the obligatory provisions of article 12 are present. The minor children reside habitually in Germany in terms of the Convention. The minor children's retention by the respondent in South Africa beyond 26 February 2024 was unlawful. Furthermore, less than a year has passed since the date of the minor children's unlawful retention in South Africa and the date on which the return application commenced. As a result and in terms of the Convention, I am required to order the return of the minor children to Germany unless the respondent proves, on a balance of probabilities, a grave risk of harm to the minor children.

[50] There are no facts alleged by the respondent that the minor children are at risk of psychological harm in the event of an order for their return to Germany. There is nothing before me in respect of the circumstances of the minor children upon their return to Germany to demonstrate on a balance of probabilities that the circumstances will expose them to a “grave risk” of harm in terms of article 13(b). I accept that if the respondent chooses not to accompany the children to Germany and to facilitate their resettlement in Germany, they will be upset. But I also take into consideration that the relationship between second applicant and the minor children remains intact.

[51] The threshold for meeting the exception in article 13(b) of the Convention is high. The level of risk alluded to by the respondent in the founding affidavit does not rise to the standard of a serious nature required by the exception and does not reach the degree of seriousness envisaged in the Convention. The emotional harm that is contemplated by the article must rise to the level equivalent to an intolerable situation. The facts and the evidence before me do not meet this threshold. The alleged intolerable situation relied upon by the respondent in the event of the return of the minor children to Germany is that described by the Constitutional Court in

paragraph 63 of the *Koch* judgment. The severity of the harm or intolerable situation must be more than is “inherent in the inevitable disruption, uncertainty and anxiety which follow on an unwelcomed return to the jurisdiction of the child's home country”.

[52] In considering the issues raised by the respondent, I have considered the reports filed by Dr T Holtz and the Family Advocate. In her report, Dr Holtz having interviewed both the second applicant and the two minor children did not find that a grave risk of harm or other intolerability exists in the event the children are returned to Germany. Dr Holtz writes - “from the investigation it therefore appears that if the children are returned to Germany, it is reasonable to conclude that it is improbable that harm will come to them or that they will otherwise be placed in an intolerable situation.”[20]

[53] The Family Advocate, while sympathetic to the respondent’s marital struggles and inability to adjust to the German lifestyle has concluded that “no grave risk of harm or other intolerability exist and that the children should be returned to Germany.”[21]

[54] In the circumstances, I am not persuaded that the alleged intolerable situation is serious. Further, I am persuaded that there is no real or grave risk that the minor children, upon their return to Germany will be exposed to harm or risk to the level that might be termed grave. In my view the children will also not be placed in any intolerable siuation.

[55] The respondent also raised a defence under article 20 of the Convention which was not enthusiastically pursued during argument. No facts in support thereof are furnished by the respondent in her answering affidavit. There is no explanation furnished why returning the children to Germany will not be permitted by our Constitution. Our courts, including our highest courts, routinely apply the provisions of the Convention, and there can be no doubt that Convention passes Constitutional muster.

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[20] Caselines pages 08-13 to 08-42 para 5.15
[21] Caselines 08-3 to 08-11 para 21

[56] In conclusion, I am of the view that the respondent has not discharged the burden of proof resting upon her to demonstrate the existence of Article 13(b) defence. In my view, the minor children's best interests and the general purposes of the Convention will both be met by an order that they be returned to Germany, their place of habitual residence.

[57] The second applicant tendered to provide the respondent with accommodation separate from the parties' rented home if I order the return of the minor children to Germany.

[58] In the result the following order is made:

Order

1. The minor children, LS and MS are to be returned forthwith to the jurisdiction of Germany, Munich in accordance with the provisions of article 12 of the Hague Convention on the Civil Aspects of International Child Abduction.

2. The Respondent is to hand over all the travel documents of the minor children to the first applicant forthwith.

3. The Sheriff of this Court is to forthwith search for and seize all the travel documents of the minor children, wherever they may be found and hand same over to the first applicant, in the event the respondent fails to comply with prayer 2.

4. The respondent is to indicate to the applicants within 7 days of this order whether she intends to travel with the minor children to Germany.

5. In the event the respondent chooses to travel with the minor children and does not wish to stay with the second applicant and the children at their apartment, the second applicant is ordered to pay for the accommodation and all related costs for the respondent's stay in close proximity to the apartment in Germany.

6. In the event the respondent elects not to return to Germany with the minor children, the second applicant, or a representative of the Germany Central Authority, being a registered social worker, or an Advocate of the High Court, duly appointed by the Family Advocate, shall be entitled to remove the minor children from the borders of South Africa and travel to Germany with them.

7. The second applicant and the respondent shall agree on issues relating to the education of the children for which the second applicant will make payment of all costs inclusive of any registration fees.

8. The second applicant shall secure, in consultation with the respondent and with the involvement of Child Services or institutions of Germany and pay for, such objective and independent English-speaking therapeutic support services as may be required by the minor children after their return to Germany, including, but not limited to, psychotherapy or such other appropriate counselling services as the minor children may require.

9. Either party may approach the Family Courts in Germany inter alia:

   a. for a variation of this order; and/or

   b. making this order a mirror order of court in Munich.

10. No order as to costs is made.

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M B MAHALELO
JUDGE OF THE HIGH COURT
JOHANNESBURG

APPEARANCES*:*

For the 1st Applicant:	Adv T A Mokadikoa
For the 2nd Applicant:	Adv KG Knill
Instructed by:	
For the Respondent:	OS Matlaila
Instructed by:	Matlaila Attorneys
Date of Hearing:	01 August 2024
Date of Judgment:	10 September 2024