

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NUMBER: 2022/0001

DELETE WHICHEVER IS NOT APPLICABLE

1.REPORTABLE: NO
2.OF INTEREST TO OTHER JUDGES: NO
3.REVISED NO

Judge Dippenaar

In the matter between:

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

First Applicant

SC

Second Applicant

And

SC

Respondent

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on the 16th of September 2022.

DIPPENAAR J:

[1] This is an application under article 12 of Chapter III of the Hague Convention on the Civil Aspects of International Child Abduction Act¹ ("the Convention") incorporated in section 275 of the Children's Act² ("the Act"). The application concerns three minor girls, SA (aged 7), SD (aged 9) and SG (aged 11). The applicants seek the return of the minor children to San Antonio, Texas, United States of America ("USA"). They were brought to South Africa by their mother, the respondent, with the consent of their father, the second applicant, on 16 July 2021, pursuant to his written consent granted for travelling during the period 14 July to 31 December 2021³. The second applicant and the respondent are married and the second applicant had been exercising rights of custody as envisaged by article 3 of the Convention at the time the minor children were removed to South Africa.

[2] During September 2021 the respondent instituted divorce proceedings in South Africa and shortly thereafter notified the second applicant that she did not intend returning to the USA with the minor children. The second applicant in response revoked his consent for travelling and in turn instituted divorce proceedings in the USA during November 2021.

[3] A rule 43 application was launched by the respondent, which was opposed by the second applicant *inter alia* on the basis of a lack of jurisdiction. That application was

¹ 72 of 1996

² 38 of 2005

³ The consent was later extended to 11 January 2022.

dismissed. Mediation proceedings were unsuccessful. The respondent and the minor children remain in South Africa and reside in a garden cottage in Bedfordview, Gauteng, on a property owned by the respondent's parents.

[4] The background facts are not contentious. The second applicant and the respondent, who was born and lived in South Africa, met during 2006 in South Africa and were married in community of property at Austin, Texas on 26 June 2009. The second applicant became as USA citizen in 2010 and the respondent during January 2021. The minor children were all born in the USA and are USA citizens. The Second Applicant was born in Mexico, is a USA citizen and has USA and Mexican passports. Between 2010 and 2018 the family were based in Austin, Texas although the second applicant frequently travelled for work and his family often accompanied him. During 2018 the second applicant lost his job, the family condominium in Austin was sold and the family moved to Chihuahua, Mexico during or about July 2019. The respondent sought and obtained the second applicant's consent to remove the minor children to South Africa for purposes of visiting her family.

[5] This application was originally launched as one of urgency during January 2022. The application did not proceed and the parties agreed that Mr Strydom be appointed as legal representative for the children and a psychologist, Dr Roux, be appointed to conduct certain investigations. Case management meetings were held on 31 January and 8 February 2022 and timelines were set for the filing of affidavits and the reports by Mr Strydom and Dr Roux. Mr Strydom provided an interim report on 7 February 2022. In terms of that report Mr Strydom advised that the elder two children are of an age, maturity and stage of development to participate in the legal proceedings and provide him with instructions. Two social workers, Dr Henig and Ms Griesel, were appointed by agreement to supervise the regular contact sessions between the children and the second applicant via an electronic platform and to report thereon.

[6] The appointment of Mr Strydom was formalised by way of a court order granted by agreement between the parties on 1 March 2022. In terms of the consent order, Mr

Strydom was appointed as the legal representative of the children under s 279 of the Act and as curator *ad litem*. He was granted a broad mandate and directed *inter alia* to investigate the best interests of the children as well as their domestic circumstances prior to their departure to South Africa in terms of s278 of the Act. Mr Strydom provided a comprehensive final report pursuant to his investigations.

[7] Dr Roux, a clinical psychologist, was appointed by consent between the parties and in terms of an agreed mandate. She provided a comprehensive report and an addendum report prepared at the behest of the second applicant's legal representatives.

[8] On the papers, the respondent raised various points *in limine* which the parties agreed have since become academic and require no determination. The parties were also in agreement that the time periods envisaged in article 11 of the Convention could not be met. Over time, various supplementary affidavits and reports were delivered by the respective parties resulting in the papers being in excess of 2 500 pages by the time the application was heard.

The Convention

[9] It is apposite to first contextualise the application against the backdrop of the Convention. A useful starting point is *Heidi Nicole Koch NO and Another v The Ad hoc Central Authority for the Republic of South Africa and Another*⁴, wherein the Supreme Court of Appeal held:

"This Court, in KG v CB and Others held that:...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'. This is founded on the belief that the courts of the State of the child's habitual residence are best suited to determine disputes regarding the residence and welfare of the child."

⁴ Para [29]

[10] The purpose of the Convention is to protect children from the harmful effects of their wrongful removal from the country of their habitual residence to another country, or their wrongful retention in another country. The Convention does so by establishing a procedure to secure the prompt return of any such child to the country of their habitual residence so that custody and similar issues in respect of the children can be adjudicated upon by the courts of that country⁵. The Convention is primarily aimed at deterring self-help and provides for the return of children in such circumstances⁶.

[11] As held by Van der Schyff J in *Engelenhoven* :⁷

The remedy against self-help, although intended to have a deterrent effect, is subject to several exceptions for self-evident reasons if regard is had to the question as to “what sacrifices society can morally expect from an individual child for purposes of benefitting the greater good, e.g. generally deterring abduction”. (emphasis provided)

[12] The Convention only applies if the Central Authority can illustrate that the children have been wrongfully removed or retained. It must be proved that: (i) the children were habitually resident in the requesting State immediately before the removal or retention; (ii) that the removal or retention of the children was wrongful in that it constituted a breach of custody rights of the left-behind parent; and (iii) that the left-behind parent was actually exercising these rights at the time of the wrongful removal or retention or would have exercised such rights but for the removal or retention⁸. In terms of the relevant portion of article 12 of the Convention, if such requirements are met and if the application is brought within a year from the date of the removal or retention, the return of the children is peremptory, save for certain narrow exceptions, contained in articles 12(2), 13(a), 13(b) or 20 of the Convention.

[13] Sections 274 to 280 of the Act, are also of relevance. In terms of s 278(3) of the Act, a child also has the right to object. The relevant provision provides:

⁵ Central Authority v H 2008 (1) SA 49 (SCA) (“H”) par 16

⁶ Central Authority of the Republic of South Africa and Another v Engelenhoven and Another (43352/21) [2021] ZAGPPHC 699 (11 October 2022) para 38 and the authorities referred to therein

⁷ Quoted in Engelenhoven, para 38.

⁸ Articles 3(a) and 3(b) of the Convention.

“The court must, in considering an application for the return of a child, afford that child the opportunity to raise an objection to being returned and in doing so must give due weight to the objection, taking into account the age and maturity of the child”.

[14] A court may refuse to return a child if it is found that the child has a valid reason for his or her objection⁹.

The issues

[15] Against this backdrop, the primary issues to be determined are: (i) whether San Antonio, Texas, USA was the minor children’s habitual residence immediately prior to the alleged removal; 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. An ancillary issue which arose is whether the second applicant has the means to afford the financial obligations placed on him if an order for the return of the minor children is granted. It was uncontested that if the exception under article 13(b) of the Convention was not established, the removal and retention of the minor children in South Africa would be unlawful.

[16] The applicants bore the onus pertaining to the habitual residence of the minor children. If it was determined in the applicants’ favour, the Convention would be applicable and, if not, the converse would apply. The respondent bore the onus in respect of the defence raised under article 13 (b) of the Convention¹⁰. In both instances the respective parties must prove the relevant elements on a balance of probabilities.¹¹

Any disputes of fact are to be determined in accordance with the well-known Plascon Evans¹² rule in proceedings on affidavit. The papers are replete with factual disputes in relation to the central issues. The respondent put up a detailed version in response to

⁹ Central Authority of the Republic of South Africa v B 2012 (2) SA 296 (GJ); Central Authority v MV (LS intervening) 2011 (2) SA 428 (GNP)

¹⁰ Penello v Penello 2004 (3) SA 117 (SCA) paras [40]-[41]

¹¹ Smith v Smith 2001 (3) SA 845 (SCA) at 815A; Senior Family Advocate, Cape Town and Another v Houtman 2004 (6) SA 274 (C) at paras [6], [15].

¹² Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634E-635C

the applicants' averments which in various instances were put up in broad terms in the founding papers. The respondent's version cannot in my view be rejected as palpably false or untenable¹³.

Where were the minor children's habitual residence?

[17] Article 4 provides that the Convention shall apply to:

"any child who has habitually resident in a Contracting State immediately before any breach of custody or access rights occurred".

[18] The applicants' case was that immediately before their departure to South Africa, the children together with their parents were habitually resident at 9602 Antoine Forest Drive, Texas USA. That property is owned by the second applicant's brother, Irving, occupied by him and his family. According to the second applicant, he and his family also reside there as well as his mother Irma Duran. It is contended that the minor children have many relatives in the USA, including nephews, nieces, 8 uncles and aunts and 15 cousins. The minor children have been living in the same house with the second applicant and the respondent as a family and the second applicant interacted with them every day except when he was travelling for work purposes.

[19] The respondent on the other hand paints the picture of a family without roots who had resided in Mexico since about July 2019 and for most of the two years before departing to South Africa. On her version, the family at best had a tenuous link to Texas, periodically visiting Irving's home. In a detailed version, she contended that the family had lived a nomadic existence often travelling with the second applicant to different cities in the USA where he was working. The respondent and the minor children were habitually resident in Chihuahua, Mexico and had travelled to San Antonio to stay with Irving only about a month before their departure from San Antonio to South Africa.

¹³ JW Wightman (Pty) Ltd v Headfour (Pty) Ltd 2008 (3) SA 371(SCA)("Wightman")

[20] It was undisputed that the family fell on hard times after the second applicant lost his job in October 2018 and the family's condominium they owned in Austin, Texas was sold at the beginning of 2019. The family had been based in Austin Texas since 2010. The second applicant is a self-employed business consultant. The respondent was not employed in the USA as she did not have the necessary qualifications to do so as an occupational therapist.

[21] After staying with Irving for a few months after their condominium was sold, the family relocated to Chihuahua in Mexico where the children were enrolled in a Canadian school, Maple Bear, for one year in August 2019. This is the only school the minor children ever attended and they were primarily home schooled.

[22] It is apposite to refer to *Central Authority for the Republic of South Africa v LC*, wherein Opperman J found:

[56] The Hague Convention does not define 'habitual residence'. Brigitte Clark¹⁴ summarises the approach accurately as follows: "...habitual 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.

[23] Referencing *Houtman*,¹⁵ 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 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

¹⁴ Family Law Service, Division P6-Child Abduction

¹⁵ Senior Family Advocate, Cape Town and Another v Houtman 2004 (6) SA 274 (C)

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.¹⁶

[24] Applying these principles to the facts it is not possible to determine habitual residence based on the common intention of the parents. It is not necessary to traverse all the factual disputes between the parties nor is it possible to make factual findings on all such issues. It is also not possible to determine on the papers whether the second applicant and the respondent held any common intention of where they would habitually reside, as they appear to hold differing views on the issue. Considering their nomadic lifestyle, it is difficult to determine a stable territorial link.

[25] The life experiences of the children indicate that they were all born in the USA and had a family base in Texas until 2018. The undisputed facts point to the family thereafter living mostly a nomadic existence rather than having a stable family base, considering that certain of their furniture and belongings were stored in the garage of Irving's home in Texas, whilst certain of their possessions and some of the children's toys were left in Chihuahua, Mexico when the respondent and the children left there during about June 2021. The respondent and the children also accompanied the second applicant to various places in the USA where the second applicant had secured work. The children are primarily English rather than Spanish speaking. It is undisputed that at least since 2020 the respondent and the minor children did not have valid visas or passports to live in Mexico. The minor children and their parents have USA passports and hold USA citizenship.

[26] The family originally had their roots in Texas. From the available evidence it cannot be concluded that, despite being in Mexico for an extended period of some two

¹⁶ Houtman paras 8-12

years, the parties broke all ties with Texas and that any habitual residence in Texas was lost or that an intention was formed to permanently reside in Mexico.

[27] In their heads of argument, none of the parties sought a referral to oral evidence despite the factual disputes that exist on this issue on the papers. The first applicant in reply argued that if it was found that the disputes of fact were irresoluble, the matter of habitual residence should be referred to oral evidence, although no formal application for a referral was made. The respondent on the other hand argued that if the disputes of fact were irresoluble, the applicants have failed to discharge their onus and the application fell to be dismissed. I am not persuaded that the matter should be referred to oral evidence, considering the restricted use of oral evidence in exceptional circumstances in proceedings under the Convention¹⁷. Nor am I persuaded that the application should be dismissed on this basis.

[28] Considering the undisputed evidence, I am persuaded that the children have a factual connection to Texas, USA on a cultural, social and linguistic level. The evidence did not establish a similarly close bond with Mexico, specifically from a linguistic or cultural perspective. On either version, it is clear that the children were mostly not in school and had not been meaningfully socially integrated in any society. However, considering all the facts and circumstances the territorial and societal links between the minor children and the USA is far stronger than the link between them and Mexico, notwithstanding that I accept that the children and the respondent spent most of the two years preceding their departure to South Africa in Mexico.

[29] There is insufficient evidence establishing that the children or their parents established any voluntary or stable territorial link with a settled purpose¹⁸ with any degree of permanency in Mexico. The fact that they resided in Mexico and the circumstances relating thereto, are however also relevant in the context of the article 13 (b) exception raised by the respondent.

¹⁷ Central Authority v H para [21]. Pennello v Penello 2004 (3) SA 117 (SCA) par 4; Sonderup v Tondeli and Another 2001 (1) SA 1171 (CC) para 10

¹⁸ Central Authority (South Africa) v A 2007 (5) SA 501 (W) para 20

[30] Applying the relevant principles and in light of all the undisputed factual circumstances, I conclude that the applicants have established a sufficient link with Texas, USA for purposes of the establishment of habitual residence there. It follows that the Convention does apply.

Were the minor children wrongfully removed or retained in South Africa and must they be returned?

[31] It is common cause that when the respondent and the minor children left the USA, the second applicant had granted permission for them to remain in South Africa until December 2021. It is further undisputed that the respondent unilaterally and without regard to the second applicant's parental rights decided not to return with the minor children and to institute divorce proceedings. It was further not disputed that the second applicant was exercising parental rights to the children at the time of removal to South Africa.

[32] The main focus of the respondent's case was 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 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”..

[33] A child's right to object to his or her return is expressly protected under article 13 of the Convention, the relevant portion of which provides:

“The judicial or administrative authority may also refuse or order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views”.

[34] As pointed out by Van Der Schyff J in *Engelenhoven*¹⁹ :

¹⁹ Para [40]–[42] and fn21 Weiner MH Intolerable Situations and Counsel for Children: Following Switzerland's Example in Hague Abduction Cases, American University Law Review 2008

“The intolerable situation defence is to be regarded as a separate defence to the Convention’s remedy for return. It is not to be assumed to be coextensive with the “grave risk of harm” defence²⁰.

[35] It is trite that harm and intolerability extends beyond that caused by a court ordered return of a child to his or her habitual residence and must be both substantial and severe.²¹

[36] It is further well established²² that:

“A 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.”

[37] As stated in *KG*²³:

“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”.

[38] In *KG*²⁴, the interpretation of “intolerable situation” being “a situation which this particular child in these particular circumstances should not be expected to tolerate” was endorsed. As referred to in *Koch NO*²⁵:

“Art 13 (b) looks to the future: the situation as it would be if the child were returned forthwith to his or her home country. The situation which the child will face on return depends crucially on the protective measures which can be put in place to ensure that the child will not be called upon to

²⁰ Par [42]

²¹ LD para [29]. Minority judgment Mocumie JA para [46]-[4]

²² IN re C (Abduction: Grave Risk of Psychological Harm 42 [1999] 1 FLR 1145 (CA) at 1153A-B quoted in *KG* para 49; *Penello v Penello* 2004 (3) SA 117 SCA paras 32-34; *LD v Central Authority (RSA) and Another* (812/20) [2022] ZASCA (18 January 2022) para [24]-[29]

²³ Para 51

²⁴ Para [50]

²⁵ *Supra* para [46], referring to *G v D and Others (Article 13b: Absence of Protective Measures)* [2020] EWHC 1476 (Fam) para 35

face an intolerable situation when he or she gets home. Where the risk is serious enough the court will be concerned not only with the child's immediate future because the need for protection may persist."

[39] A pertinent question which arises²⁶ is whether the court can avoid placing the children in an intolerable situation by extracting undertakings as to the conditions in which the children will live when they return.

[40] In considering the best interests consideration in LC²⁷, Opperman J gave the following useful exposition of the applicable principles:

[101] The general assumption of the Hague Convention is that, and as a general rule, a unilateral decision by a parent to wrongfully remove or retain a child in a country other than the child's country of habitual residence is harmful to the child. In this regard: "the removal or retention is accompanied by a sudden severance of the child's relationships and ties with the country of habitual residence, including a severe limitation of the child's contact with the left-behind parent. Abduction will generally be prejudicial to children due to the disruption and trauma it causes, and in the vast majority of cases, it will be in the best interests of the child to be returned.

[102] That is not to say that there can never be a debate about the best interests of the child. On the contrary, the exceptions create an opportunity to investigate the best interests of the individual child as follows:" first, once the abducting parent successfully raises an exception to return, the words 'is not bound to order the return' and 'may also refuse to order the return'...make it clear that the court retains a residual discretion to grant or refuse an order for the return of the child²⁸. Secondly, once a defence is raised and the court is exercising its discretion to refuse or order the return of the child, the court may conduct an investigation into the best interests of the individual child concerned²⁹.

[103] It is within these parameters that a court must have regard to the best interests of the child."

[41] Against these principles I turn to the facts to consider whether the return of the minor children would expose them to physical or psychological harm or otherwise place them in an intolerable situation and whether there are sufficient safeguards in place to prevent the children being placed in an intolerable situation.

²⁶ Baroness Hale in RE D (A child) (Abduction: Rights of custody) [2007] 1 All ER 783 (quoted in paras 66 and 67 of Koch NO)

²⁷ Supra para s960106 at para 105

²⁸ Relying on Smith v Smith 2001 (3) SA 845 (SCA) at para 11;

²⁹ Relying on Family Advocate v B [2007] 1 All SA 602 (SE); Chief Advocate v G 2003 (2) SA 599 (W) at 618D-E; Central Authority v B 2012 (2) SA 296 (GJ); Central Authority v TK 2015 (5) SA 408 (GJ); C du Toit "the Hague Convention on the Civil Aspects of International Child Abduction" in T Boezart (ed) Child Law in South Africa 92017) at 476

[42] As stated before, the papers are voluminous and contain a myriad of facts. For the sake of privacy and brevity, reference is not made to all the relevant facts. Rather, reference is made to various of the topics raised by the respective parties on a conspectus of the facts presented.

[43] The respondent's version paints a picture of the second applicant as a manipulative, domineering and controlling person who abused the respondent both physically and emotionally and excessively controlled and dominated the children. According to the respondent she and the minor children lived in fear of the second applicant, who insisted on controlling their lives and making choices about the children's hairstyles and clothing and was obsessive about none of them gaining weight.

[44] The respondent relied on the nomadic lifestyle led by the parties already referred to, resulting in a lack of stability and the children being exposed to grueling car trips and living with family members and in hotels and motels rather than in a stable home environment. The respondent further relied on the second applicant's failure to provide for the financial needs of his family, his erratic employment record, his verbal and physical abuse, the military style exercises he obliged the children to do, his obsessions with hoarding, religion and male dominance in the family, his refusal to allow the children to attend school and his insistence on home schooling. She further relied on the second applicant isolating her from family and friends, preventing her obtaining employment or the necessary qualifications to obtain employment in the USA and his secrecy about his financial affairs.

[45] It was undisputed that the respondent has secure accommodation and employment in Gauteng, living on the same property as her parents as opposed to San Antonio where the respondent has no employment and must obtain additional qualifications to pursue her career as occupational therapist and where she has no family or social support structure. It was also undisputed that the children are in school full time, which they enjoy and are involved in various extra mural activities and are happy in their present environment.

[46] There are numerous factual disputes between the parties on the papers on these issues. However, the respondent's version stands largely uncontroverted by any countervailing evidence on certain material issues pertaining to the family's experiences and must be accepted. In reply, the applicant in various instances contented himself with bald denials without meaningfully grappling with the respondent's version of events or putting up any countervailing evidence³⁰. I appreciate that these matters are by their nature emotionally charged and challenging for the respective parties and accordingly emphasis must be placed on the facts as opposed to inferences.

[47] The second applicant's version in various respects evidences a lack of appreciation for the impact the family's lifestyle would have had on the minor children, such as the extensive travelling and home schooling and his lack of appreciation of the implications of risk to the minor children and the respondent being without visas for a large part of their stay in Mexico and travelling across the borders on numerous occasions in a clandestine manner.

[48] The respondent's version of the various instances of her physical and psychological abuse suffered at the hands of the second applicant, was met with bald denials, accusations of her suffering a mental illness and criticism for not providing photographs or other proof of the alleged abuse.

[49] In argument, the second applicant also trivialised the respondent's complaints and emphasised that the complaints were directed at abuse of the respondent, rather than the minor children. The approach adopted by the second applicant to the alleged abuse is over simplistic and ignores the pervasive and subtle toxicity of emotional abuse and the reality of the reluctance of victims of physical abuse to share such issues with third parties. It also disregards the impact such abuse may have on the minor children. The second applicant did not meaningfully challenge respondent's version that she had sought assistance from a women's shelter in Chihuahua during November 2020 who could not assist her as she had no legal documentation.

³⁰ Wightman supra paras [12]-[13]

[50] The second applicant further presented a glowing picture of life in Texas filled with amenities and opportunities whilst contrasting it to life in South Africa which “*provides a far less certain future*”, apparently intended to balance the respondent’s version that she and the children are currently happy in a stable environment where she is employed and enjoying support from her own parents. The second applicant’s picture is painted in broad and abstract terms and disregards the realities of the family’s life experiences and the erosion of various constitutional rights which are presently taking place in the USA and specifically in Texas, rights which enjoy protection under the South African Constitution.

[51] The second applicant gave various undertakings to provide suitable and separate accommodation for the minor children and the respondent, were the children to return and should the respondent decide to accompany them and undertook to ensure the children were placed in school. However, these undertakings were in broad and vague terms and indicated a future intention rather than any concrete steps taken to ensure that the undertakings could be implemented. He also only provided proof of having employment secured until 1 July 2022 and did not seek to supplement his papers to provide proof of future employment. On the papers thus there is no indication that the second applicant is employed and can financially meet his undertakings.

[52] What is glaringly absent from the second applicant’s affidavits is any form of corroboration of his version by his family members, notably by his brother, Irving and his wife, Jarra. The only information put up by the second applicant pertained to what is essentially character references by his friends and co-employees. These are in broad and glowing terms but it cannot be concluded that any of these persons know the second applicant or his domestic circumstances well.

[53] Both Mr Strydom and Dr Roux provided comprehensive reports in which they considered the best interests of the minor children. Their conclusions and recommendations are however fundamentally different.

[54] Mr Strydom in his report concluded that to return the children to the USA (or Mexico) would thrust them back into an unhealthy environment and they would be exposed to a grave risk of harm. His view was that the children should not be returned to the USA, but should be encouraged to have regular contact with their father.

[55] Dr Roux on the other hand recommended that the children be returned to the USA. She further made various other recommendations, including that the children's primary residence should be with the respondent subject to very regular contact by the second applicant. The appointment of a parenting coordinator and psychotherapy was also proposed.

The report of the children's legal representative and curator ad litem, Mr Strydom

[56] Mr Strydom provided a comprehensive report in which substantial evidence was placed before court pertaining to the living conditions experienced by the minor children and the respondent, both in Mexico, where they stayed in two different apartments, and in San Antonio. His report was not challenged by the second applicant, who also presented no countervailing evidence in response to the facts set out by Mr Strydom. The facts presented were corroborated by photographs and other collateral evidence.

[57] Mr Strydom's report presents evidence of the children living in circumstances which were not child friendly in a foreign country, where they had difficulties adapting because of language barriers. The photographs provided evidenced the children sharing a room with bunk beds, which room also doubled as a store room in an apartment which had no garden. Whilst in San Antonio at Irving's house, the children slept in the games room on a convertible sleeper couch. In sum, the facts presented indicate an unhealthy environment for the children.

[58] The report of Mr Strydom in material respects corroborated the respondent's version. His report further detailed the complaints of the children pertaining to their life experiences before coming to South Africa, which included the second applicant's control over their hair and clothes and the chores and exercises they had to perform at his behest. According to Mr Strydom, the children all expressed the desire to remain in South Africa and did not want to return to the USA, a factor which must be considered taking into consideration the children's respective levels of maturity.

[59] The collateral information obtained by Mr Strydom as particularised in his report is presented in great detail and included a poignant report by Shelby, the second applicant's major daughter from his previous marriage to Mrs Farrar. The correlation and patterns which emerge between how Shelby was treated as a child and the complaints of the respondent and the minor children are disconcerting. The second applicant acknowledged that his relationship with Shelby is bad but contended that she made no effort to heal their relationship, thus blaming her for the rift rather than taking responsibility for his own conduct. He broadly averred that he deeply cares for her yet his conduct speaks to the contrary.

[60] It was undisputed in the papers that the second applicant had been substantially in arrears with payment of his maintenance obligations in relation to Shelby. During May 2022, shortly before the scheduled hearing of 5 May 2022, the second applicant provided proof that he had eventually paid the arrear maintenance during April 2022, shortly before the initial hearing of the application. No evidence was placed before the court how the second applicant has been financially contributing to his minor daughters during their stay in South Africa, other than a tender in his replying affidavit to pay a monthly contribution of \$1 400. There is no evidence that they received birthday or Christmas presents from the second applicant during their stay in South Africa.

[61] Both social workers, Dr Henig and Ms Griesel in their reports of their observations regarding the second applicant's contact with the children raised various concerns regarding how the second applicant interacted with the children and how in

certain instances his statements and conduct was inappropriate. They too, raised the issue that the children were reluctant to show the second applicant that they had cut their hair.

[62] Mr Strydom's report further provided evidence, corroborated with evidence from third parties who are involved in the children's lives, that the minor children are presently in a stable and settled environment where they are thriving, going to school and engaging in their society.

[63] All the children expressed a preference to remain in South Africa. Mr Strydom concluded that the eldest two siblings are of an age, maturity and state of development as to be able to understand his questions and provide their views, whereas the youngest sibling is not. The views of adolescents will carry more weight than those of much younger children. The children cannot however bear any responsibility for any final decision, but their opinions should be factored into the considerations³¹.

[64] In argument, the applicants criticised Mr Strydom for being emotionally moved and having developed a sense of sympathy with the respondent and her circumstances. They further criticised Shelby and her mother for not being impartial and having strong feelings against second respondent.

[65] These criticisms do not bear scrutiny. The objective and undisputed facts support the stance adopted by Mr Strydom who has comprehensively provided all the relevant available facts. The investigations undertaken by Mr Strydom have been thorough and comprehensive and the court is grateful for his assistance.

[66] The stance adopted by Shelby and Mrs Farrar need not be objective and appears to be reflective of the life experiences they have had with the second applicant. Significantly their evidence stands uncontroverted but for bald denials.

³¹ Goodman v Ryskulova (22608/20) [2022] ZAGPPHC 96 (21 February 2022) para [12]

The report of the clinical psychologist, Dr Roux

[67] Dr Roux's ultimate assessment informing her recommendations was that the minor children were experiencing a deep loss with not having contact with their father and there was a risk of their attachment paths being disrupted if they did not return to the USA where they could have regular contact with him.

[68] According to Dr Roux, the children indicated they enjoyed life in the USA and wanted to return thereto. This statement was however not corroborated by any other evidence and is in stark contrast with the report and evidence of Mr Strydom and the letters penned by the eldest two children, evidencing a desire to remain in South Africa and an objection to being returned.

[69] The scope of the mandate provided by the parties to Dr Roux was to conduct a full investigation into the wellbeing of the minor children, their best interest and the allegations of abuse, the habitual residence of the children and the nomadic lifestyle they were living, the implications of the children being settled in SA and to consider the reports of Ms Griesel and Dr Henig.

[70] Dr Roux described the purpose of the report as being "to determine that which would be in the children's best interests with regard to residency, care and contact". Her report emphasised the factors in section 7 of the Act. No psychological evaluation was conducted on the parents. I agree with the respondent's criticism of the approach adopted by Dr Roux. The present enquiry is not an investigation into custody issues³².

[71] In a supplementary report obtained at the behest of the second applicant's legal representatives, Dr Roux formally responded to Mr Strydom's report in which she raised various criticisms to its contents. Dr Roux emphasised the differences between children's verbalisations and the information provided by their psychological

³² Sonderup v Tondelli and Another 2001 (1) SA 1171 (CC); LD supra, para 26

assessment. Dr Roux opined that some of the dynamics appearing to have influenced the children are that: (i) they are residing in an environment far more luxurious than the environment they had in USA and Mexico; (ii) they are aware they are residing with their mother and her parents and are entirely dependent on her and her family, which influences what they say. She further stated that the zoom contact may influence children as it can be reported back to their mother.

[72] She emphasised the importance of the attachment theory where children have a primary attachment to the respondent but their attachment to the second applicant is of equal significance. Her view is:

“Whilst the children’s living circumstances in America and especially Mexico were not ideal, and that they moved around a lot which was very unsettling, this can be prevented going forward with relevant and applicable court orders. However, a disrupted attachment plan causing psychological damage in a child cannot be remedied easily and takes extensive and long-term psychotherapy.....this is not a path that any child should be placed on”.

[73] It appears that Dr Roux’s recommendations that the children must be returned to the USA is based on their need to have significant contact with the second applicant. There are however alternative options to ensure that the minor children have significant contact with their father.

[74] Ultimately, these views do no more than serve as a justification for the view Dr Roux adopted in her recommendations. Whilst this is laudable, it disregards the reality of the minor children’s past experiences and the prospect of those experiences being repeated. Dr Roux also simply accepts the second applicant’s bald averment that his circumstances have improved financially.

[75] The report of Dr Roux must be evaluated to determine whether and to what extent the opinions advanced are founded on fact and logical reasoning³³.

³³ Michael & Another v Linksfeld Park Clinic (Pty) Ltd and Another 2001 (3) SA 1188 (SCA) paras [36]-[37]

[76] Considering all the facts, it cannot be concluded that Dr Roux had due consideration to all the available facts and in certain respects resorted to speculation. Her primary focus was the need of the children to have contact with their father and the apparent deficiencies in both parents' parenting skills. The prejudice to the minor children can in their best interests be alleviated by an order ensuring that they have regular contact with the second applicant.

[77] I am further not persuaded that that the recommendation that the minor children be returned to the USA is based on a sound logical footing, given that Dr Roux's focus was on a residency, contact and care enquiry in a post divorce context, rather than on an investigation of the elements of an article 13(b) enquiry.

[78] In my view, the undisputed evidence establishes various intolerable features of the minor children's family life immediately prior to their departure to South Africa³⁴.

[79] Considering all the undisputed facts, there is no evidence that the children's nomadic lifestyle with its concomitant challenges will not continue if they are returned to Texas, USA. Despite the second applicant's protestations to the contrary and his promises, his expressed best intentions are not corroborated by objective evidence.

[80] By way of example, the second applicant only provided information pertaining to employment up to 1 July 2022 with no indication that he had procured another job thereafter. The absence of any corroboration that the second applicant will continue to live with Irving and his family whilst he procures alternative accommodation for the children and the respondent, is also significant. The second applicant, although tendering to pay the rental of suitable accommodation, being a 3 bedroom apartment and payment of an amount of \$3000 per month, provided no proof that he can afford to do so on an ongoing basis. Moreover, other than bald promises that arrangements will be made, the second applicant has provided no proof that any steps have in fact been

³⁴ LD minority judgment para [49] TB v JB, [56]

taken either to enroll the children in a school or to procure suitable accommodation for the respondent and the minor children.

[81] As highlighted by Opperman J in LC³⁵:

“Rigid enforcement of the Hague Convention provisions could lead to injustice in individual cases. As the upper guardian of minor children in its jurisdiction, the high court of South Africa should not excuse itself from the obligation to protect the best interests of each individual child on the basis that international undertakings allow it to defer this responsibility. The Sonderup decision emphasises the importance of shaping an order by means of incorporating substantial conditions designed to mitigate the interim prejudice to a child caused by a court ordered return. In doing so, clearly regard is had to the best interests principle in doing so.”

[82] In the present instance an order cannot in my view be shaped to mitigate any prejudice to the minor children, absent the assurance that the second applicant will be able to financially afford and otherwise comply with his undertakings, failing which any order will simply be a *brutum fulmen*. This does not discriminate against the second applicant but simply takes cognizance of the realities and the minor children’s best interests.

[83] On a conspectus of all the available evidence, I conclude that there is clear and compelling evidence that there is a substantial and severe risk that the children will be placed in an intolerable situation if they are returned to the USA. I am further not persuaded that there are sufficient safeguards in place to prevent the children being placed in an intolerable situation if they are returned.

[84] I further conclude that the respondent has discharged her onus to establish under article 13 (b) of the Convention that the minor children should not be returned to Texas, USA.

[85] It follows that the application must fail.

³⁵ Supra para 90 and 106

Proposed orders

[86] At the hearing, the second applicant proposed two alternative draft orders, one dealing with the situation where it was concluded that the children should not be returned. The second applicant tendered maintenance of \$1400 per month for the minor children and an order incorporating the recommendations by Dr Roux. He also proposed a draft order regulating interim arrangements pertaining to contact, maintenance and the appointment of a parental coordinator advanced in the alternative in the event that the children were not returned to the USA. In argument, reliance was placed on the orders granted in *H* and *KG v CB*³⁶, which included orders granted on an interim basis pertaining to interim maintenance, residence and access.

[87] Despite the voluminous nature of the papers, various of the issues addressed in the second applicant's proposed draft order, were not fully canvassed in the papers. There is simply insufficient factual material placed before me to make a well-considered determination of all the aspects raised in the proposed draft order. Moreover, various of the proposed orders pertain to issues more appropriately dealt with in the pending divorce proceedings, such as the appointment of a parental coordinator.

[88] As contact via video conferencing has been dealt with in the papers, such order will facilitate regular contact between the second applicant and the minor children and alleviate any prejudice to the minor children on an interim basis. The minor children should further be provided with whatever therapeutic services they require to ensure that their bond with the second applicant is nurtured.

Costs.

³⁶ [2012] ZASCA 17 (22 March 2012)

[89] A costs order has already been granted in relation to the postponement application of 5 May 2022. The applicants proposed that no costs order be granted whereas the respondent sought an adverse costs order on a punitive scale as between attorney and client.

[90] On a conspectus of all the facts, I am persuaded that no costs order should be granted.³⁷

[91] I grant the following order:

[1] The application is dismissed;

[2] The minor children are not to be returned to San Antonio, Texas, United States of America and the respondent is granted leave to remain resident with the minor children in Gauteng, Republic of South Africa;

[3] The second applicant is directed to pay maintenance in an amount of \$1400 for the minor children from 1 October 2022, being the month following this order, unless and until a court of competent jurisdiction shall rule otherwise;

[4] The minor children are to have regular contact with the second applicant as follows, unless and until a court of competent jurisdiction may order otherwise or by agreement between the parties:

[4.1] Videoconferencing sessions at least 3 times a week on a Tuesday, Thursday and Saturday for a period of one hour on times to be agreed between the parties, which virtual videoconference sessions are to be unsupervised and are to be subject to the minor children's scholastic, religious and extra mural

³⁷ KG para 61, quoting *Mc Call v Mc Call* 1994 (3) SA 201 (C) at 209C with approval

activities. The children must be afforded the necessary privacy during the contact sessions so that the contact may be conducted without interference;

[4.2] Reasonable telephonic, WhatsApp and email contact;

[4.3] Physical contact as agreed between the parties;

[5] The second applicant and the respondent are directed to secure such therapeutic support services as may be required by the minor children, including therapy to ensure that the bond between the children and the second applicant is fostered;

[6] No order is made as to costs

**EF DIPPENAAR
JUDGE OF THE HIGH COURT
JOHANNESBURG**

APPEARANCES

DATE OF HEARING	: 05 May, 14 and 17 June 2022
DATE OF JUDGMENT	: 15 September 2022
1ST APPLICANTS COUNSEL	: Adv. K. Nondwangu
1ST APPLICANTS ATTORNEYS	: The State Attorney
2ND APPLICANTS COUNSEL	: Adv. I. Ossin
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: Mr H Strydom