Editorial note: Certain information has been redacted from this judgment in compliance with the law.

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

CASE NO: 2023-055711

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

6 May 2024. ....
DATE
SIGNATURE

In the matter between:

THE CENTRAL AUTHORITY FOR THE REPUBLIC OF SOUTH AFRICA	First Applicant
M… B… Mc…	Second Applicant
and	
N…. Mc…	Respondent

JUDGMENT

CRUTCHFIELD J:

[1] The first applicant, The Central Authority for the Republic of South Africa, ("the Central Authority"), and the second applicant, M…B… M, invoked the provisions of the Hague Convention on the Civil Aspects of International Child Abduction, 1996 ("the Convention"), in respect of a minor, N M, a boy born on 7 September 2021 ("the minor").

[2] The respondent, N… Mc…, is the minor's biological mother.

[3] The second applicant is the minor's biological father. The second applicant and the minor are citizens and permanent residents of Australia. The Central Authority and the father claim the immediate return of the minor from South Africa to Australia.

[4] The respondent opposes the application and proffers a defence in terms of Article 13(b) of the Convention, being a grave risk of psychological harm to the minor in the event that I order his return to Australia. Furthermore, the respondent brought a counterapplication shortly before the date on which the application was set down for hearing.

[5] Counsel on behalf of the Centre for Child Law appeared at the hearing as *amicus curiae*. None of the parties opposed the intervention of the Centre for Child Law and I allowed its joinder to the proceedings accordingly.

[6] Both South Africa and Australia are contracting states under the Convention.

[7] The delay in the hearing of this application was the result of the parties trying to reach an accommodation between them, which attempts ultimately came to nought.

[8] The Central Authority, subsequent to my hearing the matter, sought to deliver additional submissions in respect of an offer made between the parties. Permitting the Central Authority to do so would have required a reply from the respondent and opened the door to various issues not raised on the papers before me. More importantly, permitting the Central Authority to do so would have embroiled this Curt in the settlement negotiations between the parties. Accordingly, I declined to allow the Central Authority's additional submissions.

[9] Shortly after I heard this matter, the Constitutional Court delivered judgment in the *Ad Hoc Central Authority for the Republic of South Africa and PB v HK N.O and HK,*[1] in which the Constitutional Court dealt with the interpretation of Article 13(b) of the Convention. The Court considered the threshold required for a *"grave risk"* of psychological harm or an intolerable situation.

[10] The underlying basis of the Convention is that the best interests of a child are served by the prompt return of the child to its home country under the Convention, and the determination by that country of any dispute between the parents or relevant parties as to the custody and / or place of residence of the minor. That determination is the function of the state in which the child is habitually resident in terms of the Convention.

[11] Article 13(b) provides one of the exceptions to this fundamental premise of the Convention.

[12] The Constitutional Court in *PB*[2] considered *inter alia* the legal principles applicable in dealing with factual disputes that arise in determining if a defence raised in terms of Article 13(b), has been established. The Court also considered the nature and

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1 *The Ad Hoc Central Authority for the Republic of South Africa & Another v Koch N.O and Another* [2023] ZACC 37 ("*PB*").

2 *PB id* note 1 above para 38.

content of the discretion exercised by a court following a defence in terms of Article 13(b) being proved.

[13] The primary rule under the Convention is "… if, following the wrongful removal of a child, the application for return is made within 12 months, an order for return must forthwith be made"[3].

[14] Article 13 read together with Article 13(b) provides that:

> "The party opposing the return of the child to the country of habitual residence of the child 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."

[15] The authority may in those circumstances refuse to order the return of the child.

[16] However, despite a court finding that a defence in terms of Article 13 read has been proved, the court tasked with determining the return or otherwise of the child to its country of habitual residence, retains "a general discretion"[4] to order the return of the child.

[17] The second applicant filed this application for the return of the minor with the Central Authority in Australia on 6 December 2022.

[18] The issues for determination by me are the place of the minor's habitual residence in terms of the Convention, whether the minor was wrongfully retained in South Africa, whether the respondent has proved the defence in terms of Article, and if

[3] *PB id* note 1 above para 43.
[4] *PB id* note 1 above para 48.

so, do I order the return of the minor to Australia or permit the minor to remain in South Africa.

[19] The respondent contended that the deponent to the applicants' founding affidavit did not have personal knowledge of the contents thereof and that the second applicant's confirmatory affidavit was not properly commissioned. The respondent argued that the applicants' case stood to be dismissed as a result thereof.

[20] The Constitutional Court[5] dealt with the way a court may receive and evaluate evidence in Convention matters. The Court found that Convention matters are not required to comply with rule 6 of the uniform rules of court. Hence, evidence may be received by a court notwithstanding that it is not under oath[6] or not on affidavit.

[21] Accordingly, the respondent's contention that the deponent to the founding affidavit is not the second applicant and the second applicant did not furnish a confirmatory affidavit to the facts referred to in the founding affidavit, is of no merit.

[22] The receipt of evidence by a court and the determination of factual disputes that arise therefrom, lies within the discretion of the court. Regard must be had to the fact that the proceedings are of a summary nature and a court must equip itself to arrive at an informed decision speedily.[7] It is not appropriate for factual disputes in Convention matters to be determined by a strict application of the *Plascon-Evans* rule.[8]

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5 *Id* para 76.
6 *Id* para 76.
7 *Id* para 75.
8 *Id* para 76.

[23] Furthermore, a court seized with a return application is obliged to consider the 'information of the child's social background provided by the Central Authority of the child's habitual residence'.[9]

[24] I turn to the issues at hand, commencing with the respondent's counterapplication.

[25] The applicants, at the outset of the hearing, applied for the separation of the respondent's counterapplication, delivered by the respondent shortly before the hearing.

[26] The respondent opposed the separation, arguing that the counterapplication impacted significantly on the issue of the minor remaining in South Africa or returning to Australia ("the return application"), and thus that the two applications should be heard simultaneously.

[27] The respondent uploaded the notice of counterapplication on the caseLines digital platform on 14 November 2023. The respondent sought the following relief in terms of the counterapplication:

27.1 The joinder of the Minister of Justice and Correctional Services to the application;

27.2 That leave be granted to the respondent to file a supplementary affidavit in support of the counterapplication;

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9 *Id* para 77.

27.3 That section 275 of the Children's Act, 38 of 2005, be declared inconsistent with the Constitution and thus unconstitutional to the extent that it incorporates Articles 12 and 13 of the Convention into South African law;

27.4 That the declaration of unconstitutionality be referred to the Constitutional Court for confirmation.

[28] The respondent argued that an application for the return of the minor to the country of habitual residence in terms of the Convention, does not prioritise the best interests of the child and therefore violates s28 of the Constitution as well as the Children's Act.

[29] The respondent's argument ran along the lines that a return application assumes that the best interests of the child are facilitated by the return of the child urgently and expeditiously. Article 12 does not, however, articulate the best interests per se as a factor in and of themselves, and does not articulate that the best interests of the child are the paramount and overriding consideration in a return application.

[30] According to the respondent, the best interests of the child are low down on the list of considerations in a return application. This is contrary to the constitutional injunction that the best interests of a child are paramount. Thus, the incorporation of the Convention in s276 of the Children's Act and in our domestic law in terms thereof, results in a violation of the Constitution.

[31] However, contrary to the respondent's assertions, the Constitutional Court in *PB*, reiterated that the best interests of the child are protected by the purpose of the Convention together with the underlying premise thereof.

[32] The exercise of the court's discretion takes place in the context of the interrelated nature of the provisions of the Convention that has as its primary aim the best interests of the child.[10] Those interests are served by the expeditious return of the child to its place of habitual residence whilst the court is enjoined to consider simultaneously any exceptions raised under Article 13.

[33] Importantly, it is evident that the issues raised by the counterapplication are of a far-reaching and generalised nature. The issues do not relate directly to or arise directly from the return application.

[34] The counterapplication requires the joinder of various government departments to the proceedings. All of the parties must be given an opportunity to answer once the respondent has filed her supporting affidavit. Replying papers and heads of argument must be submitted and thereafter the matter will be heard by a court. There is little if any prospect that the counterapplication can be made 'court ready' within an expeditious period of time as required by proceedings under the Convention.

[35] Furthermore, there is no reason to subject the court seized with the counter-application, to the time limits necessary to fulfil the best interests of the minor, as well as the requirements of the Convention to an expeditious and summary determination of the return application.

[36] The decision of the court seized with the counterapplication will likely be taken on appeal through the hierarchy of our courts and take a correspondingly lengthy period of time to resolve. The appeal process will extend the period necessary to finalise the counterapplication, potentially leave the minor's rights in abeyance, a wholly unsatisfactory situation.

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[10] *Id*, para [82].

[37] The rights of the minor to an expeditious determination of the return application should not pend the finalisation of the counterapplication. Moreover, the counterapplication does not sit comfortably with the summary nature of return application proceedings and the limited nature of the assessment that a court, tasked with a return application, is required to make in respect of the short-term best interests of a child.

[38] The duration necessary to determine the counterapplication finally will violate the essential premise of the Convention, being the determination of the return application as expeditiously as possible.

[39] It cannot be in the interests of the minor that a decision in respect of his return or otherwise to Australia pends the final outcome of the respondent's counterapplication. The minor will potentially and possibly be denied the reinstatement of his relationship together with adequate and easy contact with the second applicant, in the interim. It could be years in which the minor's interests are left to spend. The minor's rights cannot await the proliferation and finalisation of the counterapplication. Furthermore, the delay would violate directly the rights of the minor in terms of s6(4)(b) of the Children's Act and be detrimental to the minor's interests.

[40] The return application needs to be finalised as soon as possible. The return application cannot be allowed to remain in abeyance pending finalisation of the counterapplication.

[41] It is in the interests of the minor that the return application be finalised as soon as can be achieved and not pend the finalisation of the counterapplication in due course.

[42] Separating the counterapplication will allow the return application to be finalised as soon as possible and thereafter the custody dispute. It will permit the restoration of the minor's contact and bring some finality to the minor, the parents and the extended family members.

[43] In the light of the factors aforementioned, I intend to order the separation of the counterapplication and that the latter be postponed for determination in terms of rule 6 of the uniform rules of court.

The return application

[44] The respondent is a South African citizen, a major female swimming instructor, born on 28 May 1994. The second applicant is a major male combat rescue officer in the Australian Defence Force ("ADF"), residing in Queensland. The second applicant and the minor are Australian citizens.

[45] A holiday romance between the second applicant and the respondent resulted in their marriage to each other in South Africa, on 1 December 2020. Thereafter, the respondent relocated to Australia to live with the second applicant.

[46] The minor was born on 7 September 2021 in Queensland, Australia. The minor's birth in Australia was a deliberate choice by the second applicant and respondent. They decided that the minor should be born in Australia in order for the minor to be an Australian citizen.

[47] During their marriage, the second applicant and the respondent resided together with the minor as a family, at their marital home in Queensland, where the second applicant continues to reside.

[48] Accordingly, the minor's place of habitual residence in terms of the Convention is Australia.

[49] The respondent travelled to South Africa with the minor with the consent of the second applicant on 27 September 2022. The purpose of the respondent's journey was to visit her parents in South Africa. Prior to the respondent departing for South Africa, the respondent and the second applicant agreed that the respondent would return to Australia with the minor on 29 October 2022. Accordingly, the second applicant purchased return air tickets for the respondent and the minor from 27 September 2022 to 29 October 2022.

[50] The second applicant allegedly had misgivings about consenting to the respondent travelling to South Africa with the minor. This because a previous visit resulted in the respondent almost refusing to return to Australia with the minor. Hence, the second applicant initially refused to consent to the respondent travelling to South Africa with the minor during September 2022.

[51] It was only once the respondent promised to return to Australia with the minor that the second applicant consented to them making the trip to South Africa and purchased the return air tickets.

[52] The second applicant stated categorically that he had not consented to the minor remaining in South Africa permanently as alleged by the respondent. To the contrary, the second applicant referred to plans that were being made by them for Christmas 2022 and to visit the second applicant's family members that the respondent had not yet met, residing in other parts of Australia.

[53] Accordingly, the second applicant consented to the minor travelling with the respondent to South Africa for a limited and defined duration, and subject to the respondent returning to Australia with the minor on 29 October 2022.

[54] At the time that the respondent departed with the minor for South Africa on 27 September 2022, the minor was approximately 13 months old. The second applicant and the respondent shared parental responsibilities and rights, custody and residence of the minor as well as the responsibility and right to make decisions in respect of the minor under Australian law. The second applicant exercised those rights and responsibilities in respect of the minor in terms of Australian law, together with the respondent.

[55] Whilst the second applicant consented to the minor travelling to South Africa until 29 October 2022, he did not consent to the child remaining in South Africa thereafter, subsequent to 29 October 2022.

[56] In the circumstances, the respondent, by virtue of her failing to return to Australia with the minor as agreed with the second applicant prior to her travelling to South Africa, and her remaining in South Africa together with the minor, post 29 October 2022, unlawfully retained the minor 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 in South Africa. The second applicant would have exercised his rights of custody absent the respondent's retention of the minor in South Africa.

[57] The respondent's retention of the minor in South Africa absent the second applicant's consent thereto, violated the latter's rights to shared custody of the minor with the respondent under Australian law.

[58] The respondent and the minor currently remain at the respondent's parents' home in Gauteng.

[59] Accordingly, in the circumstances set out above, the respondent's retention of the minor in South Africa subsequent to 29 October 2022, was wrongful in terms of Article 3 of the Convention.

[60] The Court in *PB*[11] observed that:

60.1 In dealing with the scope of Article 13(b), a court dealing with a return application is entitled. in limited circumstances, to refuse to 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.[12]

60.2 Of particular importance regarding the matter before me, the Court in *PB* determined[13] 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 focussing 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 child be returned. The evidence must therefore be limited to psychological and emotional impact of returning a child to their habitual residence. The enquiry is, as a result, of a limited nature.'[14]

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[11] *PB id* note 1 above para 55.
[12] *Id* (footnotes omitted).
[13] *PB id* note 1 above paras 56 – 57.
[14] *Id*.

[61] A court hearing a return application may not allow the proceedings to morph into an "adversarial contest on the merits"[15] of the underlying dispute regarding the merits of the removal of the child from its habitual country.

[62] Article 13(b) deals with the "short-term interests" of the child in respect of its return to its habitual country. Accordingly, the issues, facts and evidence relevant to the merits of the underlying dispute, must be delineated from those relevant to the "much narrower scope" of whether the return of the child would result in the "grave risk" envisaged in Article 13(b). A court dealing with a. return application should not deal with issues, facts or evidence outside of that necessary to consider and determine the existence of the Article 13(b) exemption.[16]

[63] Hence, issues such as "the psychological profiles of the parents, detailed evaluations of parental fitness, evidence concerning lifestyles and the nature and quality of relationships will bear upon the issues that will ultimately be determined by the appropriate tribunal in the child's home country. To this may be added the projective long-term psychological consequences of the return of the child in the nature of that considered in *Sonderup.*"[17]

[64] The burden of proof of facts in support of the Article 13(b) exception lies on the party resisting the return of the child to its habitual residence by raising the exception, the respondent herein. The standard of proof is the civil standard of a balance of probabilities.[18]

[65] "The risk to the child must be 'grave.' The risk must be sufficiently serious as to be characterised as 'grave'. Whilst 'grave' refers to the risk rather than the harm, the

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15 *PB* note 1 above para 57.
16 *Id* para 58.
17 *Id* para 59 (footnotes omitted).
18 *Id* para 61; *Re D (a child)* [2006] UKHL 51.

two are linked."[19] A lower level of risk might be required for more serious forms of harm whilst a higher level of risk might be required for less serious forms of harm.[20]

[66] The ordinary meaning of the words used in Article 13(b)[21] set a high threshold for the establishment of the exception. The level of the risk must be of a serious nature. The words "otherwise place the child in an intolerable position" give meaning to the seriousness of the risk and to the harm itself, required in terms of the exception. The physical and emotional harm envisaged to meet the threshold is harm of a serious degree.[22]

[67] There does not have to be certainty 'that (the) harm will occur …'. The requirement is 'a "grave risk" that the return will "expose" the child to harm."[23] The Article 13(b) exemption caters for 'extreme circumstances, to protect the welfare of children'.[24]

[68] An integral part of the enquiry as to whether there is 'a grave risk of harm or intolerable situation as contemplated in Article 13(b), is the presence or absence of ameliorative measures to ensure the child's safety upon return to their home country.'[25]

[69] If the child can be protected from 'grave harm when returned,' then the child will not face a "grave risk" of significant harm as envisage in Article 13(b).[26] This correlates with the 'underlying premise of the Convention that the judicial and social authorities of

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[19] *Re D (a child)* [2006] UKHL 51.
[20] *Re D (a child)* [2006] UKHL 51.
[21] *PB* note 1 above para 62.
[22] *PB Id* (footnotes omitted).
[23] *PB id* para 63.
[24] *PB id* para 64.
[25] *PB id* para 66.
[26] *Id.*

the home country are in a position to provide the necessary protection and support in dealing with any eventuality that may arise from the return of the child'.[27]

[70] Proceedings under Article 13(b) are '… summary in nature, and a determination … thereof must be based on an overall assessment of all the evidential material placed before the court'.[28]

[71] Article 13(b) makes it apparent that even if the respondent establishes the existence of the exception, this court retains a discretion to decide that the child should be returned to its habitual residence.[29]

[72] All of the jurisdictional facts required in order to invoke the obligatory provisions of Article 12 are present in this matter. The minor resides habitually in Australia in terms of the Convention. The minor's retention by the respondent in South Africa beyond 29 October 2022, the date agreed upon with the second applicant, was unlawful. Furthermore, less than a year passed since the date of the minor's unlawful retention in South Africa and the date that the AHCA commenced the return application proceedings under the Convention in the High Court.

[73] As a result, I am required in terms of the Convention to order the return of the minor to Australia unless the respondent proves, on a balance of probabilities, a grave risk of harm to the minor.

[74] In determining the existence of a grave risk, a court must consider the likelihood of the risk of harm occurring and the seriousness of the envisaged harm if it does occur.

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[27] *PB* note 1 above para 66.
[28] *Id* para 79 (footnotes omitted).
[29] *Id* para 81 (footnotes omitted).

A feared harm, if it is mundane, requires a greater likelihood of it occurring for the risk to be described as grave.[30]

[75] The essence of the respondent's opposition to the minor's return to Australia is the risk of psychological and physical harm if the minor is separated from the respondent. The respondent alleges that the second applicant does not have an established relationship with the minor.

[76] However, the minor has had video contact with the second applicant whilst in South Africa, responds to and identifies with the second applicant as his "dada" or his father. Hence, contrary to the respondent's assertions, the second applicant is not a stranger to the minor and their father and son bond remains intact.

[77] The respondent refers to a single incident of aggression between herself and the second applicant that the second applicant denies. Given that the marital relationship was under strain at the material time, the parties attended counselling services made available to them through the ADF. The respondent does not refer to any aggression or physical harm by the second applicant towards the minor.

[78] The respondent does not furnish any reason for the minor to suffer physical harm pursuant to an order for his return to Australia. The social services available to the family from the ADF will serve to ameliorate any potential harm to the minor or the family as a whole consequent to a return of the minor to Australia.

[79] In respect of the psychological harm that the respondent alleged will result from an order that the minor return to Australia, the premise of the respondent's argument is that she is the minor's primary caregiver and has been throughout the minor's lifetime.

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[30] *PB id* para 77.

Thus, the respondent contends that removing the minor him from the respondent and the extended maternal family will be detrimental to him.

[80] The respondent stated unequivocally that she is not returning to Australia. It is the respondent's choice not to return to Australia. The respondent is entitled to make that choice and cannot be criticised for doing so. However, the respondent is not the focus of this application and may not delay or prevent the administration of justice in respect of the minor. The respondent must reconcile herself with the consequences of her decision, being the minor's separation from her in the event of his return to Australia.

[81] Moreover, I have demonstrated above that the relationship between the minor and the second applicant remains intact.

[82] The respondent argued that the minor has settled in South Africa with her family in the interim. He attends school, has made a few friends, undergoes speech therapy, has bonded with his maternal grandparents and formed a close primary attachment with the respondent.

[83] The respondent, in retaining the minor unlawfully in South Africa, effectively withheld the minor from the second applicant. If the respondent had returned to Australia as she undertook to do, the minor would have benefitted from the presence of both parents, would be in school, have friends and be happy and settled in Australia in the same way as the respondent alleges, he is settled in South Africa.

[84] In effect, the minor's alleged settled state in South Africa is artificial as it is the result of the respondent's unlawful retention of the minor and refusal to return the minor to Australia. Furthermore, the minor is not in a position to make a choice of his own.

[85] The respondent furnished a report by a social worker, one Ms Keeve, who confirmed the existence of a close emotional bond between the minor and the respondent and the maternal family members.

[86] Ms Keeve stated that removing the minor from the respondent to return to Australia would be traumatic for the minor, such trauma rising to the level of harm. As aforementioned, the respondent's refusal to return to Australia is a choice made by her and not one imposed upon her by this Court.

[87] Ms Keeve referred to attachment disruption and its importance. The minor has a strong bond with his mother, his primary caregiver, and removing him from this relationship may have adverse effects on him. These may include emotional and psychological developmental issues including difficulties in forming trust relationships, emotional regulation issues, low self-esteem, mental health challenges including anxiety, depression or borderline personality disorder.

[88] The alleged disruption of the secure emotional bonds between the minor and the respondent is an issue that will be considered, in the event that it is raised, by the court dealing with the custody application in due course. In the light of the temporary nature of the order that I am obliged to deliver, attachment disruption and the long-term relationship between the minor and the respondent and the maternal extended family, are not issues for consideration by me at this stage.

[89] Furthermore, in the event of an order for the return of the minor to Australia, and the respondent persisting in her refusal to return to Australia, the minor will retain contact by way of video platforms such as Skype or WhatsApp video with the respondent and her family members. This would serve as a temporary solution pending finalisation of the custody dispute and occur in the same manner as the minor has

maintained contact with the second applicant since the respondent's return to South Africa.

[90] Whilst Ms keeve stated that the minor displayed "no resilience as he is constantly seeking the presence of his mother in unknown and unfamiliar circumstances," that conduct according to Ms Keeve, was age appropriate.

[91] Ms Keeve[31] stated that in the light of the minor's close relationship with the respondent, it would cause *"extreme trauma"* to the minor if the minor is returned to Australia absent the respondent. However, Ms keeve did not consider the social services available to the second applicant and the minor and the potentially ameliorative effects thereof, for the benefit of the minor. Nor did Ms keeve consider the relationship between the minor and the second applicant.

[92] Furthermore, Ms Keeve stated that the minor requires special care to address his individual and special needs. There is no reason why the respondent should be the only parent capable of providing that special care or why the required care cannot be made available by the second applicant supported by the ADF.

[93] Whilst Ms Keeve considered the second applicant's occupation, lifestyle and the absence of family support, she relied wholly on the respondent for that information. Ms Keeve did not refer to any attempts to contact the second applicant and to canvas his relationship with the minor, his occupation, lifestyle and alleged absence of family support referred to by her.

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[31] CaseLines 06-36, para 9.3.

[94] Accordingly, Ms Keeve had no insight into the relationship between the minor and the minor's father, the second applicant. Ms Keeve had knowledge only of the minor's relationship with his mother, the respondent.

[95] Ms Keeve did state however that steps must be taken to ensure that the minor has an opportunity to maintain a strong relationship with his father as that relationship is of equal importance.

[96] Accordingly, Ms Keeve's report is of limited weight and value in that it was not informed by any contribution from the second applicant. It is obvious that the mother is the primary attachment figure as the minor was removed from the father for a period in excess of one year.

[97] The minor is entitled to a meaningful relationship with both parents. It is critical to the minor's relationship and bonding with the second applicant as well as the minor's healthy development, that he be reunited with his father as soon as possible.

[98] In respect of the respondent's averment that that returning the minor to Australia would expose the minor to psychological harm and an intolerable situation as contemplated under Article 13(b), the factors for consideration at this stage, being the return application, relate primarily to the 'availability of adequate and effective measures of protection in the state of habitual residence pending the final determination'[32] of the custody or care proceedings.

[99] The second applicant furnished evidence of the social services and levels of support that the ADF provides to its members and their families. These services are available to mitigate the envisaged harm relied upon by the respondent. According to

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[32] *PB* note 1 above para 88.

the second applicant, all aspects of the minor's health will be provided for adequately by the military healthcare services and it will not be difficult to arrange for such special care as the minor might need, including speech therapy.

[100] Various benefits are made available by the ADF to its members and their families, including crisis support, healthcare benefits and family programmes and services. These benefits include generous funding for specialist medical care for the dependants of serving members of the ADF, mental health services provided by the ADF to the second applicant and his family through a designated service provider, (the same provider that made counselling services available to the respondent and second applicant after their holiday in Zanzibar), 24-hour call lines providing medical and mental health support for families and children, including assistance with childcare, an education assistance scheme, a school mentor programme, resilience programmes and family financial advice.

[101] Pastoral care is also available free of cost. The respondent was invited to make use of this service prior to returning to South Africa with the minor when she spoke to the local pastor on 21 April 2021. Notwithstanding the service having been available to the respondent, she declined to make use of the PANDA National Perinatal Mental Health Helpline.

[102] The second applicant provided a copy of the Defence Housing Australia Residence Agreement in respect of the second applicant, the respondent and the minor's residence at […] C[…] D[…], G[…] Q[…].

[103] In considering the minor's emotional needs, I am guided by the fact that the order that I am tasked to deliver is of an interim nature. The long-term relationships and caregiving ability of the various parties involved are matters for the court dealing with

the long term custody aspects and not relevant to the return application before me. This includes the respondent's averments in respect of the second applicant's family members.

[104] It is apparent from the details abovementioned that extensive mental, emotional and physical health support is available to the second applicant, as a serving member of the ADF, and his family members. Such assistance can be invoked to render the support, if any, needed by the minor and / or the second respondent in adjusting to the minor's return to Australia.

[105] The respondent's failure to return to Australia with the minor on 29 October 2022 resulted in the minor being deprived of an opportunity to strengthen his relationship with the second applicant. The best interests of the minor require that he be permitted an opportunity to develop that relationship as soon as possible by way of an order for the return of the minor to Australia.

[106] There is no evidence before me that the minor does not have a secure attachment with the second applicant as alleged by the respondent. The absence of physical contact between the second applicant and the minor in the interim is the result of the respondent's refusal to return the minor to Australia. Furthermore, the fact that the contact between the minor and the second applicant has taken place via telephone and video call, does not result in there not being a secure attachment between the minor and the second applicant.

[107] It is in the interests of the minor that he be reunited with the second applicant and that their physical contact and proximity be restored as soon as possible.

[108] The respondent alleged that the second applicant resides in army barracks at an address unknown to her. This is not so. The second applicant resides in the former marital home at the address abovementioned. Insofar as the respondent contended that the second applicant's employment does not permit him any flexibility in work hours, requires him to be absent from the home for up to five weeks at a time and that the second applicant is not in a position to care for the minor, the second applicant will procure the assistance of his mother to care for the minor and will benefit from the support and social services available to him as a member of the Australian army.

[109] I accept that the respondent is happy in South Africa and comfortable in her maternal family environment. Furthermore, the respondent benefits from the supportive relationships enjoyed by her with her with extended family members. That, however, is not sufficient for me to refuse the return of the minor to Australia. It is imperative that the minor be reunited with the second applicant as soon as possible. The minor is not of an age where he can be considered to be settled in South Africa. Furthermore, the absence of the second applicant militates against the minor having settled in South Africa.

[110] The physical circumstances under which the respondent resides together with the minor in South Africa are issues to be considered by the court dealing with the underlying custody proceedings.

[111] Similarly, the second applicant's alleged refusal to contribute towards the minor's maintenance needs in South Africa are issues for the custody proceedings. There is no dispute that the second applicant maintained and supported the respondent and the minor whilst they lived together in Australia. This is notwithstanding the respondent's allegation that the second applicant controlled the purse strings and was not financially generous to her.

[112] I am sympathetic to the respondent's position but I am bound to consider the interests of the minor in returning to Australia as soon as possible with or without the respondent.

[113] The *amicus curiae* argued that the interests of the minor were facilitated by the minor remaining in South Africa pending finalisation of the respondent's counterapplication rather than risk the minor returning to Australia and then having to return to South Africa in the event of the respondent's counterapplication finding success. The finalisation of the counterapplication is undoubtedly a process a lengthy duration.

[114] It does not facilitate the minor's interests to remain in South Africa with his situation in abeyance for that extended period of time. Granting such an order would be to overlook the respondent's unlawful conduct in retaining the minor in South Africa. Furthermore, on consideration of the test in respect of Article 13(b) it appears to me that the respondent has not met the threshold of the test for establishing a grave risk of harm to the minor.

[115] Whilst the respondent refers to the chid being placed in an intolerable situation as envisaged in Article 13(b) of the Convention, in her heads of argument, no facts in support thereof are furnished by the respondent in her answering affidavit. There is no evidence that ordering the return of the minor to Australia would result in an intolerable situation to the minor.

[116] There are no facts alleged by the respondent that the minor is at risk of psychological harm in the event of an order for his return to Australia. I am dealing with a short term situation. There is nothing before me in respect of the circumstances of the minor upon his return to Australia to demonstrate on a balance of probabilities that the

circumstances will expose the minor to a “grave risk” of harm in terms of Article 13(b). I accept that if the respondent chooses not to accompany the child to Australia and to facilitate the minor’s resettlement in Australia, that the minor will be upset.

[117] 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 and the report of Ms Keeve does not rise to the standard of a serious nature required by the exception and does not reach the degree of seriousness of the risk of harm or the harm itself envisaged in the Convention.[33] 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 the threshold in terms of Article 13(b).

[118] The alleged harm relied upon by the respondent in the event of the return of the minor to Australia is that described by the Constitutional Court in paragraph 63. It is harm that is *“inherent in the inevitable disruption, uncertainty and anxiety which follows on an unwelcomed return to the jurisdiction of the child’s home country”*.[34]

[119] In the circumstances the alleged risk of harm does not warrant the description of *“grave risk”* and there is no real or grave risk that the minor upon return to Australia will be exposed to harm or that the level of the risk is grave.

[120] The circumstances envisaged in Article 13(b) of the Convention refer to *“extreme circumstances, to protect the welfare of children”*.[35]

[121] 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 a grave risk of harm to

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[33] *PB* note 1 above para 62.
[34] *PB id* para 63.
[35] *PB id* para 64.

the minor in the event of his return to Australia. The social circumstances in Australia that will serve to ameliorate the upset pursuant to the child's return to Australia, will serve to ameliorate any risk of harm such that I cannot find that there is a *"grave risk"* to the child, that there is a significant level of harm that may occur or that the likelihood of it taken place is significant.[36]

[122] Having considered the various factors involved in this matter at length, I am of the view that the degree of risk and the seriousness of the harm relied upon by the respondent, do not meet the threshold required to prove a grave risk of harm to the minor in the event of an order for his return to Australia. The harm relied upon by the respondent does not rise 'above the inevitable disruption, uncertainty and anxiety that would follow a Court ordered return'.[37]

[123] In my view, the minor's interests and the general purposes of the Convention are both met by an order that the minor be returned to Australia, his place of habitual residence and I intend to grant such an order accordingly.

[124] The second applicant expressed his willingness to travel to South Africa to fetch the minor from the first applicant if I order the return of the minor to Australia.

[125] As to the costs of this application, there is no reason for them not to follow the order on the merits.

[126] In the circumstances I grant the following order:

1. The respondent's counterapplication is separated from the first and second applicant's application and postponed *sine die*.

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[36] *PB id* para 70.
[37] *PB id* para 94.

2. The respondent is granted leave to pursue the counterapplication in terms of Rule 6 of the Uniform Rules of Court.

3. The minor child, N M, is to be returned forthwith to the jurisdiction of Australia in accordance with the provisions of Article 12 of the Hague Convention on the Civil Aspects of International Child Abduction.

4. The respondent is to surrender forthwith the passport of the minor child to the first applicant pending the outcome of the proceedings, or until otherwise directed by this Court.

5. The Sheriff of this Court or his/her deputy is authorised to seize the passport of the minor child wherever it may be found and hand the passport over to the first applicant, in the event that the respondent fails to comply with prayer 4 above.

6. The respondent is to indicate to the applicants within seven (7) days of this order whether she intends to travel with the minor child to Australia.

7. In the event that the respondent elects not to return to Australia with the minor child, the second applicant or a representative of the Australian 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 child from the borders of South Africa and travel with him to Australia.

8. Either party may approach the family courts in Brisbane, Queensland, Australia, *inter alia*:

   8.1. To vary the terms of this order; and/or

   8.2. Making this order a mirror order of court in Brisbane, Queensland, Australia.

9. The respondent is to pay the costs of the application.

I hand down the judgment.

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CRUTCHFIELD J
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 6 May 2024.

COUNSEL FOR THE APPLICANTS: Adv Simelane.

INSTRUCTED BY: The State Attorney, Johannesburg.

COUNSEL FOR THE RESPONDENT: Adv L Grobler.

INSTRUCTED BY:	Alice Swanepoel Attorneys.
DATE OF THE HEARING:	27 November 2023.
DATE OF JUDGMENT:	6 May 2024.