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

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No:188/2021

In the matter between:

H[…] K[…] N O	**First Appellant**
H[…] K[…]	**Second Appellant**

and

THE AD HOC CENTRAL AUTHORITY FOR THE REPUBLIC OF SOUTH AFRICA [AS DELEGATED IN TERMS OF SECTION 277 OF THE CHILDREN'S ACT 38 OF 2005]	**First Respondent**
P[…] B[…]	**Second Respondent**

Neutral Citation:	*H[…] K[…] N O and Another v The Ad hoc Central Authority for the Republic of South Africa and Another* (188/2021) [2022] ZASCA 60 (26 April 2022)
Coram:	ZONDI, NICHOLLS and CARELSE JJA and WEINER and MOLEFE AJJA
Heard:	28 February 2022

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 12h00 on 26 April 2022.

Summary: Children – whether retention by one parent of the child in South Africa was wrongful – return of the child to the United Kingdom (UK) sought in terms of the Hague Convention on the Civil Aspects of International Child Abduction, 1980 on the basis that the removal had become unlawful – whether a defence of consent under article 13*(a)* was established – evidence that the father had consented not established – application for admission of new evidence granted – defence under article 13*(b)* that there was a grave risk that the child would be exposed to psychological hardship or otherwise be placed in an intolerable situation, was established – return of the child to the UK ought not to have been granted.

ORDER

On appeal from: The Western Cape Division of the High Court, Cape Town (Saldanha J sitting as court of first instance):

1 The application to adduce further evidence is granted with costs.

2 The appeal succeeds with costs including costs of two counsel.

3 The order of the Western Cape Division of the High Court is set aside and replaced by the following:

'The application for the return of the child in terms of the Hague Convention on the Civil Aspects of International Child Abduction, 1980 is dismissed with costs including costs of two counsel.'

JUDGMENT

Zondi JA (Nicholls, Carelse JJA and Weiner and Molefe AJJA concurring):

Introduction

[1] This appeal concerns the return of a four-and-a-half-year-old girl (the child) from South Africa, Cape Town to the United Kingdom (UK) in terms of the Hague Convention on the Civil Aspects of International Child Abduction, 1980 (the Convention). Her mother, (the mother), who had been diagnosed with colorectal cancer on 8 April 2019 whilst still living in the UK decided to come to South Africa primarily for the purpose of enabling her to pursue available treatment options. The understanding was that the child's mother would return to the UK with her after her successful medical treatment in South Africa alternatively, if nothing further could be done to treat her cancer, the child and her mother would return to the UK.

[2] With this understanding, the child's father (the father), the child and her mother left the UK and arrived in South Africa on 5 September 2019. The

mother began consulting with a medical specialist soon after they arrived in South Africa and underwent surgery on 26 September 2019, after which it became apparent that she would not be able to return to the UK as planned.

[3] The child's father left South Africa for the UK on 2 October 2019 as planned. The child remained in South Africa with her mother and was being cared for by the second appellant, her maternal aunt (the aunt) and her maternal grandmother.

[4] As things turned out, when the child's mother realised that her chances from recovery were non-existent, she expressed the wish that should she become too ill to take care of the child, and in the event of her death, she would like the child to remain in South Africa and be raised by the aunt. At that point, the child's mother was still receiving treatment including radiotherapy which she concluded in May 2020.

[5] The child's father did not agree to the child remaining permanently in South Africa under any circumstances. He approached the Central Authority for England and Wales and submitted a request for the return of the child from South Africa to the UK under the Convention on the grounds that the child's retention in South Africa by her mother without his consent was wrongful. He cited the child's aunt as the second respondent.

[6] The mother opposed the return of the child to the UK on the grounds that the father had consented to the child remaining with her in South Africa for as long as she was undergoing treatment for cancer. In the alternative she opposed the Convention application on the ground that there was a grave risk that the child's return to the UK would expose her to both physical and psychological harm and also place her in an intolerable situation.

[7] The matter was heard by Saldanha J of the Western Cape High Court, Cape Town (the high court) in October 2020 and he reserved the judgment. On 8 December 2020 the child's mother passed on after losing her battle with cancer. On 11 December 2020, Saldanha J delivered a judgment in which he

dismissed the mother's defences under the Convention and ordered the child to be returned to the UK subject to certain conditions which he imposed. He granted the child's aunt leave to appeal to this Court.

[8] Two issues arise in this appeal. The first is whether the high court's rejection of the mother's defence under article 13 of the Convention and ordering the child's return to the UK, was correct. The second issue is whether further evidence should be admitted on appeal. This evidence relates to the events which occurred subsequent to the death of her mother and is relevant to the enquiry whether there is a grave risk that the court order for the return of the child to the UK would expose the child to physical or psychological harm or otherwise place her in an intolerable situation.

The facts

[9] These issues must be considered in the context of the facts which are either common cause or have not been disputed. The child's father is a British national. Her mother was a South African national who also held UK citizenship. In 2016 the mother and father became romantically involved whilst living in the UK. They were never married. The child was born on 6 July 2017 in the UK from this relationship. As I have alluded to above, the child's mother, accompanied by the child and the father, arrived in South Africa from the UK on 5 September 2019 for the mother to pursue available treatment options. After spending some weeks in South Africa, the father left for the UK on 2 October 2019, leaving the mother and child behind.

[10] The father's understanding was that the mother would return to the UK with the child after her successful medical treatment in South Africa, alternatively, if nothing further could be done to treat her cancer, the child and mother would return to the UK.

[11] In November 2019 it became apparent, although there was further treatment to assist the mother and to prolong and better the quality of her life, that she was in fact terminal. She could not travel to the UK. In her communication with the father, she expressed her wish for the child to be

raised by the aunt in South Africa, after her death. The father was opposed to this and, as a result of the mother's unilateral decision regarding care arrangements of the child after her death, he sought the child's return to the UK. On 7 May 2020, the first respondent, the *Ad Hoc* Central Authority, addressed an email to the mother's attorney of record in which it enquired if the mother would be amenable to consenting to a voluntary return of the child to the UK, failing which it would approach the court for an appropriate relief.

[12] In response thereto, on 13 May 2020, the mother, through her attorney of record, stated that she was not amenable to agreeing to a voluntary return of the child. In that letter it was proposed that an assessment take place regarding the child's best interest after the mother's death. This proposal was rejected on the basis that one of the purposes of the Convention is to provide for the return of the child to the UK so that questions of her custody, in the event of the mother's death, could be determined by a court in the UK.

[13] On 25 June 2020, prior to the father bringing the application under the Convention, the mother and the aunt as the second applicant brought an application in the high court citing the father as the respondent. In that application they sought that certain parental rights and responsibilities in respect of the child be conferred on the aunt and that she would raise the child in South Africa (the parental rights and responsibilities application). This application was opposed by the father.

[14] In July 2020, the father, assisted by the *Ad Hoc* Central Authority, launched the Convention application citing the mother and the aunt as the first and second respondents respectively. In the Convention application, the father sought the return of the child to the UK. This was at the time when the mother was still receiving treatment in South Africa and was unable to travel to the UK due to her frail medical condition.

[15] By agreement between the parties and in terms of article 16 of the Convention, the parental rights and responsibilities application was stayed

pending the finalisation of the Convention proceedings. The Convention application was postponed to 7 September 2020.

[16] The matter was postponed on 7 September 2020 as the high court had raised certain concerns arising from the report of Mr Njini, a qualified social worker registered with Social Care Wales and HCPC England. The report did not adequately deal with the father's circumstances in the UK. Additionally, the high court requested the mother's attorney to obtain a letter from the mother's treating doctors indicating her prognosis. The parties filed further affidavits in which they addressed the concerns raised by the high court. Ms Shirin Ebrahim (Ms Ebrahim), the principal family advocate in the Office of the Family Advocate contacted Mr James Twist (Mr Twist) who is employed at the International Child Abduction and Contact Unit (ICACU) that performs the functions assigned to the Central Authority in the UK under the Convention. Mr Twist is the case worker at ICACU responsible for South African matters. Ms Ebrahim had furnished him with a copy of Mr Njini's report. Mr Twist confirmed the contents of Mr Njini's report. In particular Mr Twist confirmed that every child in the UK was entitled to free schooling through the state system of education and that the psychological care and services referred to in Mr Njini's report will be provided to the child upon her return to the UK.

[17] In a letter dated 7 September 2020, the mother's treating doctor, Dr Brown, stated that the mother had been diagnosed with end stage colon cancer and expressed the view that he '. . . would not be surprised if she was to die in the next few months'. It was for this reason, and out of sympathy for the child that when the matter was argued on 28 October 2020, counsel for the father indicated that the father would not persist in an order for the child to be forthwith returned to the UK, but would seek an order that would allow the child to remain in South Africa with the mother until the mother's death.

[18] As already stated, the high court rejected the defences advanced by the mother under articles 13*(a)* and *(b)* of the Convention and ordered the return of the child to the UK. It is not clear from the judgment how the high court dealt with the article 13*(a)* defence (consent and acquiescence). It

is, however, apparent from its reasoning that it rejected it on the basis that there was no evidence that the father had agreed that the child would remain permanently in South Africa upon the death of the mother.

[19] In rejecting the article 13*(b)* defence, the high court, in paragraph 106 reasoned as follows:

'I am satisfied that in the consideration of all the circumstances of this matter that the first respondent failed to show that should [the child] be ordered to return to her habitual state of residence, she will be faced with the risk of grave psychological and physical harm or that she may otherwise be placed in an intolerable situation. More importantly, the first respondent failed to establish that the UK is not able to mitigate any of the risks that she has raised or that alluded to by Professor Berg should [the child] be returned to the UK. In my view the applicants have demonstrated that there are indeed sufficient mechanisms in place in the UK as evidenced in the reports of Mr Njini and Mr Twist to mitigate the impact of a return by [the child] to the UK.'

Application for leave to adduce further evidence

[20] Before dealing with the merits of the appeal it is necessary to dispose of the appellant's application to lead further evidence. The new evidence which the appellant seeks to adduce is the expert opinion of Ms Pettigrew, educational psychologist, specialising in the field of child forensic psychology. This was served at the offices of the State Attorney on behalf of the first respondent and the father on 1 February 2022. Her opinion was based on her assessment of the child. She commented on the child's current functioning taking into account her bereavement, being the death of her mother on 8 December 2020. Additionally, Ms Pettigrew commented on the likely impact on the child, psychologically and emotionally, in view of such bereavement, of being removed from the appellant (the aunt) and her home and placed in the care of the father in the UK.

[21] The father opposed the application on five grounds. He pointed out, first, that the new evidence relates to new facts which came into existence subsequent to the conclusion of the trial. He argued that a court of appeal

should decide whether the judgment appealed against is right or wrong on the facts at the time. Secondly, he argued that the issues canvassed in the new evidence were already before the high court and were considered by it.

[22] Thirdly, it was submitted by the father that the new evidence sought to be adduced by the appellant was not material to the issue for determination, namely, whether or not the appellant could establish that there was a grave risk that the return of the child to the UK would expose her to psychological harm or alternatively place her in an intolerable situation. Fourthly, the application to adduce further evidence was opposed on the basis that the admission of further evidence would undermine the imperative to deal with Convention matters expeditiously. Finally, it was argued by the father that the introduction of new evidence would prejudice him.

[23] During argument, the court was informed by counsel for the respondents that in order to avoid further delay in the matter, the respondents did not intend to obtain an expert opinion to respond to the allegations made by Ms Pettigrew in her report. They would abide by the court's ruling.

[24] After hearing argument, we granted the appellant leave to introduce Ms Pettigrew's report and indicated that reasons would be provided in the judgment. These are the reasons for the order we granted.

[25] In terms of s 19 of the Superior Courts Act 10 of 2013, a court is afforded powers, on hearing an appeal, to receive further evidence. But in the interests of finality, such powers must be exercised sparingly and in exceptional circumstances. In *De Aguiar v Real People Housing (Pty) Ltd*[1] the court emphasised that '[i]t is incumbent upon an applicant for leave to adduce further evidence to satisfy the court that it was not owing to any remissness or negligence on his or her part that the evidence in question was not adduced at the trial'.

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[1] *De Aguiar v Real People Housing (Pty) Ltd* [2010] ZASCA 67; [2010] 4 All SA 459 (SCA); 2011 (1) SA 16 (SCA) para 11.

[26] The Constitutional Court in *S v Liesching and Others*,[2] endorsed the following test that was formulated in *S v De Jager*:[3]

'Accordingly, this Court has, over a series of decisions, worked out certain basic requirements. They have not always been formulated in the same words, but their tenor throughout has been to emphasise the Court's reluctance to re-open a trial. They may be summarised as follows:

(a) There should be some reasonably sufficient explanation, based on allegations which may be true, why the evidence which it is sought to lead was not led at the trial.

(b) There should be a *prima facie* likelihood of the truth of the evidence.

(c) The evidence should be materially relevant to the outcome of the trial.'

[27] There are exceptional circumstances in this matter justifying the admission of further evidence in the form of Ms Pettigrew's expert opinion. Ms Pettigrew's opinion is based on her assessment of the child. She commented on the child's current functioning, taking into account her bereavement being the death of her mother on 8 December 2020 and the likely impact on the child, psychologically and emotionally should her return to the UK be ordered. This assessment could not have been conducted while the mother was still alive. Moreover, the basis of the appellant's article 13*(b)* defence has not changed. What has changed is the child's factual situation being that her mother is now deceased and the appellant is now her remaining care-giver.

[28] This then brings me to the next question whether the high court was correct in ordering the return of the child to the UK. The objectives of the Convention as set out in article 1 are:

'*(a)* to secure the prompt return of the children wrongfully removed to or retained in any Contracting State; and

(b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.'

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[2] *S v Liesching and Others* [2018] ZACC 25; 2019 (4) SA 219 (CC) para 68.
[3] *S v De Jager* [1965] 2 All SA 490 (A); 1965 (2) SA 612 (A) at 613B-D.

[29] This Court, in *KG v CB and Others*[4] 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.[5]

[30] Once an unlawful removal has been established as envisaged in article 3, the operation of the provisions of article 12 is triggered. This article provides:

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

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.'

[31] In this case, it is not disputed that the Convention proceedings commenced less than a year after the child's removal from the UK. It is clear that the high court was obliged to order the return of the child unless the mother had a defence under article 13 of the Convention. Article 13 provides:

'Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that–

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[4] *KG v CB and Others* [2012] ZASCA 17; [2012] 2 All SA 366 (SCA); 2012 (4) SA 136 (SCA) para 19.

[5] Ibid.

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

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

The judicial or administrative authority may also refuse to 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.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.'

Mother's defences

[32] The mother and the aunt opposed the Convention application on the basis that the retention of the child in South Africa was not wrongful as the father had consented thereto or acquiesced in her retention (article 13*(a)* defence). In the alternative, it was contended that in the event of the retention being found to be wrongful, there was a grave risk that the child's return would expose her to physical or psychological hardship or otherwise place her in an intolerable situation (article 13*(b)* defence).

Consent

[33] It was held in *Pennello v Pennello*,[6] that the abducting parent has the burden of proving the elements of the defence on a preponderance of probabilities. Holman J in *Re C. (Abduction: Consent)*, quoted with approval the following dictum in *Re W (Abduction: Procedure)*:[7]

'. . .where a parent seeks to argue the Art 13(a) "consent" defence under the Hague Convention, the evidence for establishing consent needs to be clear and compelling. . .'[8]

The evidence in support of it needs to be clear and cogent. If the court is left uncertain, then the 'defence' under article 13*(a)* fails.[9]

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[6] *Pennello v Pennello* [2004] 1 All SA 32 (SCA); 2004 (3) SA 117 (SCA) para 38.
[7] *Re W (Abduction: Procedure)* [1995] 1 FLR 878 at 888F.
[8] *Re C. (Abduction: Consent)* [1996] 1 FLR 414.
[9] Ibid at 419.

[34] In my view, the mother failed to establish that the father had consented to the continued retention of the child in South Africa. In the first place, the father's consent was not unequivocal and secondly, the mother unequivocally evidenced her intention that she no longer wished to be bound by the conditions in terms of which the child was to remain in South Africa.

[35] It appears to be common cause that the father consented to the child remaining in South Africa with the mother for as long as she was undergoing medical treatment. That this was the arrangement between the parties is also confirmed by the mother. In an email the mother addressed to the father on 14 October 2019, she confirmed the basis on which she and the child would remain in South Africa. She stated that she would remain in South Africa for '. . . some time fighting this horrible disease' and then when she was well again or '. . . there is nothing more they can do I will be heading home' and that her intention for the future was simply '. . . to get well, come home, raise my baby girl and live a simple life. I hope I get the chance to do so'. It is apparent from this email that the mother understood the terms upon which the child was to be retained in South Africa.

[36] Sometime after this email, the mother appeared to have changed her mind regarding the returning of the child to the UK in the event that she became unable to care for her. On 15 November 2019, she advised the father via a WhatsApp text message that she would be returning to the UK for a short period of time and that she would leave the child behind in South Africa. She also informed the father that the child would remain in South Africa permanently because she had decided that in the event of her death, the aunt should care for and raise the child.

[37] The father was opposed to the child remaining permanently in South Africa under any circumstances. But be that as it may, there is no dispute that due to her cancer prognosis and ongoing treatment the child's mother was unable to travel to the UK as she had contemplated.

[38] The mother's evidence in support of her consent defence is not clear and cogent. In paragraph 10.1 of her answering affidavit, her consent defence is pleaded as follows:

'I state that the (sic) applicant consented [to the child] remaining with me in SA for *as long as I was undergoing treatment for cancer* as per article 13*(a)* of the Convention.' (My emphasis).

[39] She goes on to state the following in paragraph 10.2:

'Applicant now alleges that this consent did not extend to [the child] remaining with me in SA until my death. I am now receiving palliative care that includes treatment for the purposes of managing my pain. I state that this Court, as the upper guardian of children within its jurisdiction and in view of the provisions of article 20 of the Convention, should not construe the (sic) applicant's consent to [the child] remaining with me in SA as limited to during my treatment for cancer.'

[40] As stated above, it is common cause that the father later consented, on compassionate grounds, to the child remaining in South Africa with the mother for as long as she was undergoing medical treatment, or until her death. His consent went no further than that.

[41] In paragraph 73 of her answering affidavit, the mother advances a different ground for which she sought to justify her retention of the child in South Africa. This ground is not based on the allegation that the father had consented to the child remaining in South Africa. It is rather based on the allegation that the father would not be able to raise the child and provide for her financially and emotionally.

[42] This further defence is pleaded as follows in paragraphs 73.1 and 73.2 of the answering affidavit:'

'73.1 It became apparent during my treatment in SA, that the chances of me going into remission and being able to return to the UK and raise [the child] were slim. I state that as a responsible parent, I of course had to give consideration to the [the child's] care arrangements after my death.

73.2 I recognise that the applicant has certain parental responsibilities and rights in respect of [the child]. However, realistically, I also had to consider whether the

applicant would be able to raise [the child] and provide for her financially and emotionally. In view of his misuse of alcohol, his non-compliance with treatment for his mental health issues and his dire financial circumstances, I was of the view and remain of the view that the applicant is not in a position to raise [the child] and provide her with stability and security she requires.'

The mother's consent defence is not clear. It must fail as the court is left uncertain as to what the consent entailed.

[43] On the facts in the present case and for the reasons already given, the defence of acquiescence must also fail. The father had always expressed his intention that the child should return to the UK if the doctors could no longer do anything to treat the mother's cancer. It became clear, after May 2020, following her application for parental rights and responsibilities that the mother no longer intended to return the child to the UK. This was irrespective of the outcome of her treatment, which resulted in the father approaching the Central Authority for England and Wales for assistance in securing the child's return to the UK. I, therefore, conclude that the retention of the child by the mother was unlawful as the father had not consented to it. The high court was, therefore, bound to order her return to the UK unless circumstances under article 13*(b)* existed.

[44] In conclusion, the mother's defence that the father had agreed that the child would remain in South Africa after her death and that, upon her death, she would be cared for by the appellant, is rejected. Save for the father's provisional consent that the child would remain in South Africa until her death, any further retention by the mother or the appellant, through the mother's stated intention, constituted a wrongful retention of the child within the meaning of the Convention. The high court was, therefore, bound to order the return of the child to the UK unless circumstances under article 13*(b)* existed.

Article 13*(b)* defence

[45] It remains to consider the mother's alternative defence based on article 13*(b)* of the Convention (article 13*(b)* defence), namely whether 'there is a

grave risk that the [child's] return would expose [him or her] to physical or psychological harm or otherwise place the child in an intolerable situation'.

[46] In *G v D and Others (Article 13b: Absence of Protective Measures)*,[10] the court said the following:

'The law in respect of the defence of harm or intolerability under article 13(b) was examined and clarified by the Supreme Court in *Re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27, [2012] 1 AC 144. The applicable principles may be summarised as follows:

i) There is no need for Art 13(b) to be narrowly construed. By its very terms it is of restricted application. The words of Art 13 are quite plain and need no further elaboration or gloss.

ii) The burden lies on the person (or institution or other body) opposing return. It is for them to produce evidence to substantiate one of the exceptions. The standard of proof is the ordinary balance of probabilities but in evaluating the evidence the court will be mindful of the limitations involved in the summary nature of the Convention process.

iii) The risk to the child must be "grave". It is not enough for the risk to be "real". It must have reached such a level of seriousness that it can be characterised as "grave". Although "grave" characterises the risk rather than the harm, there is in ordinary language a link between the two.

iv) The words "physical or psychological harm" are not qualified but do gain colour from the alternative "or otherwise" placed "in an intolerable situation". "Intolerable" is a strong word, but when applied to a child must mean "a situation which this particular child in these particular circumstances should not be expected to tolerate".

v) 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 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.

vi) Where the defence under Art 13(b) is said to be based on the anxieties of a respondent mother about a return with the child which are not based upon

[10] *G v D and Others (Article 13b: Absence of Protective Measures)* [2020] EWHC 1476 (Fam) para 35.

objective risk to her but are nevertheless of such intensity as to be likely, in the event of a return, to destabilise her parenting of the child to a point where the child's situation would become intolerable, in principle, such anxieties can found the defence under Art 13(b).'

[47] This Court, in a majority judgment in *LD v Central Authority (RSA) and Another*[11] emphasised that the test:

'. . . when an art 13*(b)* defence is raised to an application for the return of a child to their habitual residence, may be summarised thus: (a) the party who raises the defence bears the onus to prove it because the Hague Convention's default position is the return of abducted children to their habitual residences; (b) a certain degree of harm is inherent in the court ordered return of a child to their habitual residence, but that is not harm or intolerability envisaged by art 13*(b)*; (c) that harm or intolerability extends beyond the inherent harm referred to above and is required to be both substantial and severe.'

[48] A party who bears the onus must discharge it on a balance of probabilities and should the factual disputes arise on the affidavits, such disputes must be resolved through the application of the Plascon-Evans rule.[12]

[49] The article 13*(b)* defence has two legs. The first leg, based on the two reports of Professor Astrid Berg (Professor Berg), Child and Adolescent Psychiatrist, was that should the child be removed from the aunt and her familiar world in South Africa and placed in her father's care in the UK, there was a grave risk that such return would expose her to psychological harm or otherwise place her in an intolerable situation. Professor Berg's reports were based on the framework of the Attachment Theory as well as her extensive clinical experience with bereaved children. Professor Berg's reports dealt with the child's psychological well-being before the death of her mother.

[50] In her first report, Professor Berg dealt with potential consequences for the child returning to the UK. She stated:

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[11] *LD v Central Authority (RSA) and Another* [2022] ZASCA 6; [2022] 1 All SA 658 para 29.

[12] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] 2 All SA 366 (A); 1984 (3) SA 623 (A) at 634E-635; *Pennello v Pennello* [2004] 1 All SA 32 (SCA); 2004 (2) SA 117 (SCA) para 39.

‘4.1 By all accounts [the child] is on a positive developmental trajectory: she has settled into playschool, she has friends, she has a primary caregiver (her aunt) and a grandmother whom she now knows.

4.2 To return [the child] to the UK would disrupt this positive development in a significant way: Not only would she lose her aunt, but also her nurturing and stimulating environment.

4.3 It is accepted in the field of childhood bereavement, that one of the most important therapeutic factors is the continuity of everyday life. The death of a parent is one of the most significant stressors a child can experience. A child who has lost a parent, needs to know that life will go on as before – school, home and general care will remain unaltered. These stable external factors help the child to come to terms with the huge loss that the death of a parent is.

4.4 Returning to the UK would mean entering a completely new environment for [the child] Because of the young age at which she left the UK, [the child] is unlikely to remember it as her “home”. In addition, and importantly, there is much uncertainty about the quality of care she would receive. This would compound the loss of her mother. It would also mean a rupture of her newly found secure base with her aunt and her environment.’

[51] In her second report, Professor Berg addressed, among other things, two questions namely whether the relationship the father had established with the child prior to his departure from South Africa in October 2019 and the counselling the father and the child would receive in the UK are likely to render the impact of her return to the UK less severe. She stated that even if it is assumed that the father and the child had established a secure bond prior to his leaving South Africa in October 2019 and that the Zoom contact with the child since his departure was regular and meaningful for the child, this would not render the impact of her going back to the UK less severe. This is so, she explained, because the child, just over three-years-old, will bond and form relationships with the person or persons who, during the past year, have taken care of them. She pointed out that it is the immediacy of the physical contact and care that matter to the young child which in this case was done by the appellant and maternal grandmother.

[52] In relation to the question whether the bereavement counselling that would be provided to the father and the child in the UK would alleviate the risk

of psychological harm to the child, Professor Berg stated that bereavement in and of itself could not make up for the loss of the mother and the loss of the relationship that the child had formed since the return of the father to the UK in October 2019.

[53] Ms Pettigrew undertook an assessment for the purposes of making recommendations regarding the impact of the child's psychological functioning should she 'lose' the appellant (aunt) having lost her mother, and in addition be removed from her known environment in the context of Childhood Development Theory and Attachment Theory.

[54] Her finding was that the child is securely and primarily attached to the appellant and that removing her from the appellant's care will result in a second maternal 'death.' She stated that this loss and the loss of her known life will be insurmountable. She emphasised that this child has been '. . . exposed to many negative events in her very short life and it is impossible for her to have experienced these negative events without some negative emotional consequences later in her life. The impact of this will in all likelihood emerge in her early to mid-primary school years. However, whilst in the care of her primary attachment figure, and safe and secure in a routine and a known [environment], [the child] is likely to overcome these challenges and consequences that she will face with the least harm to her emotionally and psychologically'.

[55] Ms Pettigrew concluded that '. . . it is highly likely that if [the child] is returned to the UK and placed in [her father's] care, her already limited coping resources [are] likely to lead to a complete breakdown. . .'.

[56] The second leg of the mother's article 13*(b)* defence was based on the contention that, having regard to the father's history of mental issues, abuse of alcohol and other substances, his employment history and his parenting of the child when in the UK, there was a grave risk that the child's return would expose the child to physical and psychological harm or otherwise place her in an intolerable situation.

[57] In support of her conclusion, the mother alleged that since the inception of their relationship, the father never had a house of his own. While they were in the UK, the father lived in her house. When she ended the relationship, she asked him to move out but he had nowhere to go. She had to rent an apartment for him from November 2018 until the end of the lease in April 2019. As he had no alternative accommodation upon the expiry of the lease, she allowed him to move back into her house.

[58] She went on to state that whilst she was in the UK, the father was unemployed. He suffered from depression and abused alcohol. He left the work that he had subsequently obtained, because of his mental health challenges.

[59] The father admitted that at some stage while he lived with the mother, he had had some mental health challenges which caused him to misuse alcohol. But he stated that he received help offered by the UK Mental Health System and is continuing with his treatment regimen. He stated that he hardly drinks now. He further stated that he left the mother's house because the mother was very controlling and her actions towards him in her house were not welcoming.

[60] In his replying affidavit, the father claimed that he will be able to care for the child because he has a stable job, he lives in a two bedroomed first floor apartment. The child will attend a local play school while he is at work and his friends have agreed to help him to care for the child as and when it is necessary. His employer has expressed the willingness to make his job flexible to accommodate his child care commitments. He further stated that should the child be returned to the UK; he will provide all the support needed by her. He added that social services in the UK through the National Health Services (NHS), are fully equipped to provide psychological care and services to her. In support of these assertions, the father relied on Mr Njini's report which, among other things, confirms his employment and the status of his accommodation and that in addition to his income from work, he gets

universal benefits. It is further stated in the report that the father will also be able to claim for child benefits for the child once she returns to his care.

[61] Mr Njini further stated in his report that social services are able and will continue to provide support to the father and the child. A referral will be made to the bereavement counselling service to support the child and the NHS will continue to meet her health needs as and when required. The child will also be allocated to a health visitor who will visit her at home to ensure that her health needs are being met and she is meeting all her developmental milestones.

[62] The relevant support structures will all be involved with the father and the child to ensure that the child's safety and emotional well-being is fully safeguarded. Should any concerns in relation to the care provided by the father be identified, a strategy meeting will be held involving all agencies to put in place a safety plan for the child and identify any support for the father. If this does not work, the local authority may consider implementing Child Protection Procedures on how to safeguard the child.

[63] The high court rejected the mother's defence under article 13*(b)* of the Convention on the ground that there was no evidence that should the child be ordered to return to the country of her habitual residence, she would be faced with the risk of grave psychological and physical harm or that she may otherwise be placed in an intolerable situation. Additionally, the high court found that the mother failed to establish that the UK is not able to mitigate any of the risks that she had raised or that were alluded to by Professor Berg should the child be returned to the UK. The high court accepted the evidence of Mr Njini as confirmed by Mr Twist that there are indeed sufficient mechanisms in place in the UK to mitigate the impact of a return by the child to the UK.

[64] The high court's findings on the article 13*(b)* defence and sufficiency of the proposed measures to protect the child from the harm she would face on her return to the UK are challenged by the appellant. She contends that the

implementation of the measures proposed will not protect the child from the harm she will face. She argues that the child will suffer the harm, whereafter the measures proposed by Mr Njini, will be implemented in an attempt to assist her to deal with the trauma and harm already experienced and which will be of an ongoing nature. It is submitted by the appellant that if the proposed measures will only be able to provide remedial measures to the child after the harm has already taken place, then such measures are not adequate and a return should not be ordered. The appellant asserted that measures that are implemented after the fact, do not insulate the child against harm. In support of this contention, the appellant referred to the decision of the House of Lords in *Re D (A child) (Abduction: Rights of custody)*.[13]

[65] This case does not provide authority for the proposition that the return of the child to the country of his or her habitual residence should be refused if the measures put in place to ameliorate harm will only be able to provide remedial measure after the harm has already taken place. It has been held that in this case some psychological harm to the child is inherent whether the child is or is not returned.[14]

[66] In *Re D,* the House of Lords was dealing with the Convention application for the return of the child from England to Romani a few years after his arrival in England. The mother who had removed the child from Romania without the consent of his father resisted the return application. One of the grounds on which she resisted the return of the child was that the delay had been such that the return of the child to Romania would place him in an intolerable situation.

[67] Baroness Hale in whose speech other members concurred had this to say in relation to the concept ‘intolerable situation’:[15]

‘. . . "Intolerable" is a strong word, but when applied to a child must mean "a situation which this particular child in these particular circumstances should not be expected to tolerate". It is, as article 13(b) makes clear, the return to the requesting state, rather

[13] *Re D (A child) (Abduction: Rights of custody)* [2007] 1 All ER 783 (*Re D).*
[14] *C v C (minor: abduction: rights of custody abroad)* [1989] 2 All ER 465 CA at 473.
[15] *Re D (A child) (Abduction: Rights of custody)* para 52.

than the enforced removal from the requested state, which must have this effect. Thus the English courts have sought to avoid placing the child in an intolerable situation by extracting undertakings from the applicant as to the conditions in which the child will live when he returns and by relying on the courts of the requesting State to protect him once he is there. In many cases this will be sufficient. But once again, the fact that this will usually be sufficient to avoid the risk does not mean that it will invariably be so. . ..'

However, it was not necessary in that case to decide on the article 13*(b)* defence as the removal of the child was found not to have been wrongful because the father did not prove that he had 'rights of custody' for the purposes of the Hague Convention when the child was removed from the country of his habitual residence. Baroness Hale's speech, however, sets out clearly the interpretation to be placed on the phrase 'intolerable situation'.

[68] Returning to the present case, arguing for the return of the child to the UK, counsel for the father submitted that the social services available in the UK are adequate to respond to the needs of the child and the father and that there is no impediment to the child being able to re-establish her bond with her father in the same way that she had managed to establish a bond with the aunt, whom she did not know before September 2019. I disagree.

[69] The facts in this case are complex and exceptional. The person who brought the child to this country in September 2019 when she was 26 months old is now deceased. She cannot return her to the UK should the child's return be ordered. It appears from the evidence that the mother has always been the child's primary caregiver. The mother cared for and provided for the child whilst they were in the UK. Her father, due to various personal challenges he faced in life, was unable to provide for her. He lived in the mother's house and when she terminated the relationship, he had to move out. He did not have alternative accommodation or funds with which to get one. The mother had to pay rental for his flat. When the lease expired, he almost became homeless and the child's mother had to accommodate him again.

[70] It appears that the mother was the most consistently available parent to the child when they lived in the UK and the one who provided her with a predictable presence. She continued to provide a predictable presence for her in South Africa. This strongly suggests that until her death the mother was the child's primary attachment figure. However, as the mother's presence in the child's day-to-day life diminished due to her illness, she transitioned into the appellant's care. The appellant became her primary carer and she became attached to her.

[71] According to Ms Pettigrew, the child is securely and primarily attached to the appellant and removing her from the appellant's care will result in a second maternal 'death' for the child. She says this loss, in addition, to the loss of her known life, will be insurmountable. She goes on to say that the child is likely to overcome these challenges and consequences that she will face with the least harm to her emotionally and psychologically if she remains in the care of the appellant. Ms Pettigrew opines that it is highly likely that if the child is returned to the UK and placed in her father's care, her already limited coping resources are likely to lead to a complete breakdown.

[72] It is clear from Ms Pettigrew's report that the removal of the child from her primary attachment figure in the form of the aunt and safe and secure environment, will expose the child to psychological harm or otherwise place her in an intolerable situation.

[73] The next question is whether the appellant has established that the UK is not able to mitigate any of these risks the mother and the aunt have raised or those that have been alluded to by Ms Pettigrew. It is the obligation of the requesting state to put in place sufficient mechanisms to minimise or eliminate this harm and in the absence of compelling evidence that it will be unable to do so, I should assume it will be able to do so.

[74] In my view, there is compelling evidence that the mechanisms in place in the UK are not sufficient to ameliorate the psychological and emotional harm to which the child will be exposed on her return to the UK. There is merit

in the views expressed by Professor Berg that return to the UK would mean entering a completely new environment for the child considering that she was only 26 months old when she left the UK. She is unlikely to remember the UK as her 'home.' In addition, there is much uncertainty about the quality of care she would receive. The consequences are correctly captured by Professor Berg in her report:

'This would compound the loss of her mother. It would also mean a rupture of her newly found secure base with her aunt and her environment.'

[75] Professor Berg pointed out that the bereavement counselling, which the child would receive upon her return to the UK, cannot counter the trauma induced by the losses she would have endured. She stated that '[i]t [was] the equivalent of putting a small plaster on an open wound. . . [which]could have been prevented by allowing her to remain with the mother's family.'

[76] In my view, the high court erred in rejecting the mother's evidence as supported by that of Professor Berg which showed that the return of the child to the UK would expose her to the risk of grave psychological and physical harm or otherwise place her in an intolerable situation. It is clear from the expert report of Professor Berg, on which the mother relied, that the mechanisms put in place in the UK are not sufficient to mitigate any of the risks she would face upon her return to the UK.

[77] For the reasons advanced by the mother and those alluded to by Professor Berg and Ms Pettigrew, the high court was not obliged to order the return of the child to the UK as the mother had succeeded to establish that the return of the child to the UK would expose her to the risks of psychological harm or otherwise place her in an intolerable situation as contemplated in article 13*(b)* of the Convention. The high court should have dismissed the application. Costs should follow this result in both courts, including costs of two counsel.

The Order

[78] In the result, I make the order in the following terms:

1 The application to adduce further evidence is granted with costs.

2 The appeal succeeds with costs including costs of two counsel.

3 The order of the Western Cape Division of the High Court is set aside and replaced by the following:

‘The application for the return of the child in terms of the Hague Convention on the Civil Aspects of International Child Abduction, 1980 is dismissed with costs including costs of two counsel.’

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JUDGE OF APPEAL

Appearances

For appellant:	J L McCurdie SC (with L Bezuidenhout)
Instructed by:	Ross McGarrick Attorneys, Cape Town Honey Attorneys, Bloemfontein
For respondent:	N Mayosi (with K Ngqata)
Instructed by:	State Attorney, Cape Town State Attorney, Bloemfontein