Child Abduction: The Hague Convention on the Civil Aspects of International Child Abduction and National Law

Ad Hoc Central Authority for the Republic of SA v Koch NO 2024 (3) SA 249 (CC)

1 Introduction

In *Ad Hoc Central Authority for the Republic of South Africa v Koch NO* (2024 (3) SA 249 (CC) (*AHCA v Koch*), the Constitutional Court considered an appeal from the judgment of the Supreme Court of Appeal (SCA) (*Koch NO v Ad Hoc Central Authority for the Republic of South Africa* 2022 (6) SA 323 (SCA) (*AHCA v Koch SCA*)). The Constitutional Court delivered its judgment on 23 November 2023. It is a landmark case in international family law and child abduction. The case not only considers the broader context of international law but also illustrates the multifaceted challenges created by international child abduction. The main issue that the Constitutional Court was required to consider was the interpretation of article 13 of the Hague Convention on the Civil Aspects of International Child Abduction, 1980 (South Africa ratified the Convention on 16 July 1995). Article 13 provides that a court is not under an obligation to order the return of a child if it is established that the person, institution or other body that opposes the return (a) had consented to or subsequently acquiesced in the removal or retention of the child; or (b) the return would "expose the child to physical or psychological harm or otherwise place the child in an intolerable situation" (*AHCA v Koch supra* par 147).

The matter before the court concerned the return of a six-year-old child (hereafter referred to as "E") from South Africa to the United Kingdom (UK) in terms of the Convention.

E's mother was a South African by birth, but both she and E's biological father held British citizenship. The biological parents of E were not married. After E's mother became ill, a decision was taken that the three of them would return to South Africa to seek medical treatment for E's mother. After receiving treatment, it became apparent that E's mother was terminally ill and would not be able to return to the UK as originally envisaged. E's father subsequently returned to the UK alone. E's parents agreed that E and her mother would remain in South Africa and continue residing with E's maternal aunt while E's mother received further medical treatment. The parties agreed that, if the treatment was unsuccessful, E and her mother would return to the UK.

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Notwithstanding this agreement, E's mother unilaterally decided that E would remain in South Africa in the care of E's maternal aunt in the event of her death. E's mother informed E's father of her decision on 7 November 2019.

E's father demanded the return of E to the UK in terms of the Convention. He contended that E was being kept in South Africa without his consent. He proceeded to seek the assistance of the Central Authority in the UK for E's immediate return. The *Ad Hoc* Central Authority (AHCA) emailed the attorney of E's mother on 7 May 2020, enquiring whether the mother would agree to the voluntary return of E to the UK. E's mother was not amenable to this request. On 20 June 2020, E's mother and her maternal aunt, as the second applicant, brought an application to the High Court seeking that certain parental rights and responsibilities be conferred on the maternal aunt and that she would rear E in South Africa. E's father opposed this application.

E's father, with the assistance of the AHCA, brought an application for the return of E to the UK on 7 July 2020. At this time, E's mother was still receiving medical treatment in South Africa and was unable to travel to the UK due to her frail medical condition.

E's mother passed away on 8 December 2020. The judgment of the High Court was handed down three days after the death of E's mother (*AHCA v Koch supra* par 5–15).

Before proceeding to discuss the Constitutional Court decision, the judgments of the High Court and SCA are discussed first.

2 *Ad Hoc Central Authority of the Republic of South Africa v Koch NO* (2821/2021) 2021 ZAWCHC 53 (1 March 2021) (*AHCA v Koch HC)*

2 1 Legal issues

The High Court was called upon to determine the following legal issues:

(a) whether parental rights and responsibilities of E could be vested in the maternal aunt (*AHCA v Koch HC supra* par 13);

(b) whether E must be returned to her biological father in terms of the Convention (*AHCA v Koch HC supra* par 14); and

(c) whether leave to appeal the decision of the court should be granted (*AHCA v Koch HC supra* par 16).

2 2 Judgment of the High Court

In respect of the legal issue stated under (a) above, the following transpired: On 25 June 2020, E's biological mother and maternal aunt filed an application in the High Court of South Africa, Western Cape Division, in which they sought parental rights and responsibilities for the maternal aunt in respect of E (*AHCA v Koch HC supra* par 13). E's father and the Central Authority for the Republic of South Africa (CASA) opposed this application

and launched Convention proceedings on 20 July 2020 by way of a counter-application (*AHCA v Koch HC supra* par 14). In accordance with article 16 of the Convention, the parties agreed to stay the application for parental rights pending the outcome of the Convention proceedings. Article 16 provides:

> "[a]fter receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice." (*AHCA v Koch HC supra* par 15)

The parties further agreed to allow E to remain with her maternal aunt, the second respondent in the case, in the interim (*AHCA v Koch HC supra* par 24). This was included in an order issued on 21 July 2020, and the Convention application was consequently postponed to 7 September 2020. E's mother passed away post-commencement of proceedings for the return of E to her father.

In respect of the legal issue indicated in (b) above, the court was called upon to consider the defence of E's mother under article 13(a), namely, that the retention of E in South Africa was not wrongful because E's father had consented to her stay in South Africa. The second matter for consideration by the High Court was the defence in the alternative in terms of article 13(b), namely, that an order for the return of E to her father in the UK would expose her to a grave risk of physical or psychological harm or otherwise place E in an intolerable situation.

In respect of the defence in terms of article 13(a), the court stated that it was a well-known fact that E's father only consented to her remaining in South Africa while E's mother was undergoing medical treatment. At no time did E's father agree to E staying permanently in South Africa (*AHCA v Koch HC supra* par 35). This defence, therefore, failed. The High Court was, therefore, bound to order the return of E to the UK, unless the defence under article 13(b) applied in the present case.

In this regard, the High Court held that there were no substantial objections concerning E's biological father's ability to take care of her. The High Court found that the availability of social support services mitigated the risks associated with her transition and adjustment in the UK, and that her psychological well-being would be adequately addressed there. Therefore, E's mother's defences under article 13(a) and (b) were both unsuccessful.

Saldanha J delivered his judgment on 11 December 2020, three days after the demise of E's mother on 8 December 2020. In his judgment, Saldanha J dismissed the defences submitted by E's mother under article 13(a) and (b) of the Convention. Subject to the imposition of certain conditions, the crux of the judgment of Saldanha J was that E had to be returned to her biological father in the UK.

Regarding the third legal issue – whether leave to appeal the court's decision should be granted – E's maternal aunt subsequently applied for leave to appeal the Western Cape High Court's order requiring E's return to

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her father in the UK. Despite finding that the maternal aunt in her capacity as the first respondent (at the demise of E's mother, E's aunt was substituted in the Hague proceedings as the first respondent) and second respondent (she continued to litigate in her personal capacity as the second respondent) (*AHCA v Koch HC supra* par 17) had failed to establish that there were reasonable prospects of success on appeal or that there were compelling reasons to grant such. Saldanha J, granted leave to appeal to the SCA.

Saldanha J was of the opinion that the only compelling reason for granting leave to appeal was due to the fact that time was of the essence and that lengthy, drawn-out litigation would not be in the best interests of the minor child (*AHCA v Koch HC supra* par 19). The maternal aunt accordingly appealed to the SCA.

3 The SCA judgment

3 1 Legal issues

The SCA had to consider two issues, namely:

(a) whether it should allow further evidence to be adduced (this evidence essentially relates to what transpired after the mother's death that was relevant to the inquiry in terms of article 13 of the Convention; *AHCA v Koch SCA supra* par 20).
(b) whether the High Court was correct in ordering E to return to her father in the UK.

3 2 Judgment of the SCA

In respect of (a) above, it was submitted that the application to introduce new evidence by Ms Pettigrew, an educational psychologist who specialised in the field of child forensic psychology, sought to provide insight into the emotional and psychological impact the removal of E from her maternal aunt would have on E. Ms Pettigrew's opinion was based on her assessment of E.

E's father opposed the introduction of further evidence on the following bases:

(a) The introduction of the new evidence relates to new facts which only arose at the conclusion of the trial, and the appeal should only be based on the facts which were present at the time that the matter was heard in the High Court.
(b) The issues that the new evidence sought to introduce were already presented to and considered by the High Court.
(c) The new evidence was not material in establishing whether E would be exposed to psychological harm or placed in an intolerable predicament should she be returned to her father in the UK.
(d) In terms of the Hague Convention, it is incumbent that matters of this nature be dealt with as expeditiously as possible. It was argued that to allow the application to adduce further evidence would undermine this imperative.

(e) The father argued that the introduction of new evidence would prejudice him (*AHCA v Koch SCA supra* par 21 and 22).

The SCA relied on section 19 of the Superior Courts Act 10 of 2013 (s 19 allowed the court to permit the introduction of further evidence when considering an appeal) as well as case law (see *S v Liesching* 2019 (4) SA 219 (CC); *De Aguiar v Real People Housing (Pty) Ltd* 2011 (1) SA 16 (SCA); *S v De Jager* 1965 (2) SA 612 (A)) to grant the application to adduce further evidence (*AHCA v Koch SCA supra* par 25 and 26).

The court found that, in this matter, there were exceptional circumstances that warranted the admission of further evidence from the expert witness. The court stated that the emotional and psychological well-being of E, as well as her current functioning since the demise of her mother, could not have been realised while her mother was still alive. E's *de facto* situation drastically changed with the death of her mother, and her aunt now being her remaining caregiver (*AHCA v Koch SCA supra* par 27).

In respect of the (b) above, the court stated that the High Court had an obligation to order the return of E unless it is proven that the mother had a defence in terms of article 13(a) or (b) of the Convention (*AHCA v Koch SCA supra* par 31).

To determine whether the mother indeed had a defence in terms of article 13(a), the SCA reconsidered whether the father had consented to E's stay in South Africa. The court held that the mother's defence that the father had consented to E's stay in South Africa failed because, from the outset, the agreement between the parents had always been that E would remain in South Africa while the mother was undergoing cancer treatment. Both the mother and E would return to the UK, regardless of whether the medical treatment was successful. The father was opposed to E remaining permanently in South Africa. Based on this evidence, the court held that the retention of E in South Africa was unlawful. The defence under article 13(a) accordingly failed because the father did not consent to E remaining in South Africa (*AHCA v Koch SCA supra* par 43).

The court then considered whether the mother had a defence under article 13(b) of the Convention. The SCA first considered the reports of Professor Astrid Berg, who is a child and adolescent psychiatrist. The first report stated that if E was exposed to psychological harm or otherwise placed in an intolerable situation, she would be removed from the care of her maternal aunt and her familiar world in South Africa if she returned to her father in the UK (*AHCA v Koch SCA supra* par 50). The second report of Professor Berg concerning E addressed whether E and her father had established a relationship before she left South Africa in October 2019. The report opined that even if E and her father had established a meaningful relationship, the impact of returning to the UK would not be less severe because a child of E's age bonds and forms relationships with the people who take care of her. This is the role the maternal aunt played before and after E's mother's demise (*AHCA v Koch SCA supra* par 51).

The second issue for consideration by the SCA in respect of a defence in terms of article 13(b) was in relation to the father's history of mental illness,

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abuse of alcohol and other substances, his employment history, and his parenting of E. Having regard to these factors, the psychiatrist's report concluded that to return E to her father in the UK would expose her to physical and psychological harm or otherwise place her in an untenable situation as contemplated in article 13(b) of the Convention (*AHCA v Koch SCA supra* par 56).

The SCA was also called upon to consider whether there are sufficient mechanisms in place to alleviate and eliminate the harm that E could suffer if she was removed from her maternal aunt and returned to her father in the UK. The court concluded that there was compelling evidence that the mechanisms to reduce the emotional and psychological harm to E were not in place. The SCA expressed concern about the quality of care that E would receive if she had to return to the UK (*AHCA v Koch SCA supra* par 74).

The SCA accepted the evidence of the expert witness that even though E would receive bereavement counselling on her return to the UK, this would not be sufficient to counteract the trauma that she underwent with the passing of her mother and the further loss of her family in South Africa (*AHCA v Koch SCA supra* par 75).

The SCA, therefore, found that the High Court had erred in its order for the return of E to her father in the UK. The order of the High Court was set aside. The application for the return of E to her father in the UK in terms of the Convention was, therefore, dismissed (*AHCA v Koch SCA supra* par 78).

The respondents in the SCA matter applied for leave to appeal to the Constitutional Court.

4 The Constitutional Court judgment

4 1 Application for leave to appeal the judgment of the SCA

For clarity's sake, the role players at the Constitutional Court level were the applicants in the matter before the Constitutional Court, which included CASA and the father of E. The respondents were the maternal aunt of E and another. The applicants applied for leave to appeal portions of the SCA judgment, which culminated in the Constitutional Court considering the matter.

The applicant sought leave to appeal the decision of the SCA on the grounds that:

(a) The appeal is in the interests of justice.

(b) The SCA erred in finding that an order to return E to the UK would expose E to a grave risk of harm and expose her to psychological harm and/or an intolerable situation and in finding that a bond may not be re-established between the applicant and his child, E.

(c) The SCA rejected the relevant material evidence in its assessment in that it found that the existing mechanisms in the UK are not sufficient to ameliorate the inherent harm that E would suffer because of a court-ordered return.

The respondents opposed the application to appeal to the Constitutional Court, contending that the issues raised by the applicants do not engage the jurisdiction of the Constitutional Court and, further, that they do not raise any new principle in respect of the Convention that had not already been considered. They contend that the invocation of section 28(2) of the Constitution of the Republic of South Africa, 1996 (Constitution) does not warrant the jurisdictional engagement of the Constitutional Court.

Contrary to this, the applicants submitted that the Constitutional Court does have jurisdiction in this instance as the matter raised is, in fact, a constitutional issue as provided for in section 28(2). CASA submitted that this court's jurisdiction was engaged on the basis that the matter raised a constitutional issue and arguable points of law of general public importance. The constitutional issue was the best interests of the child in section 28(2) of the Constitution. The arguable points of law relate to how the court should conduct an inquiry as envisaged in article 13(b) of the Convention. These points encompass the nature of the test for determining a grave risk of harm or an intolerable situation; the balance between the short- and long-term interests of the child; and the weight to be given to the absence of existing custody or access rights by the party resisting the child's return. The return of the child takes place without any complete determination of what the best interests of the child concerned may demand. In challenging the constitutional jurisdiction of this court, the aunt asserted that the best interests of the child, paramount in all child-related matters, have limited application beyond the scope of Convention applications.

The application for leave to appeal before the Constitutional Court was successful, and the Constitutional Court entertained the merits of the case. The success of the leave to appeal was based on the Constitutional Court's consideration that E's maternal aunt had failed to demonstrate that there were reasonable prospects of another court coming to a different conclusion or alternatively, that there were compelling reasons to grant leave to appeal (*AHCA v Koch supra* par 20). Because the High Court was concerned that a lengthy appeal process in Hague Convention matters could have the consequence that the purpose and objective of the Convention could be defeated, the High Court granted leave to appeal to the SCA. The High Court was presumably concerned that, if it refused leave to appeal, there would be a delay while the aunt petitioned the SCA for leave to appeal. In retrospect, the wisdom of this decision by the High Court may be doubted. Furthermore, the applicants contended that questionable and unique points of law of general public importance were raised in the case. The arguable points of law relate to how the court should conduct an inquiry as envisaged in article 13(b) of the Convention. In terms of section 167(3)(*b*)(ii) of the Constitution, provision is made for the Constitutional Court to grant leave if:

(a) the matter raises an arguable point of law;
(b) that point is of general public importance, and
(c) the point ought to be considered by this court.

A discussion of the majority and dissenting judgments of the Constitutional Court is undertaken below.

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4 2 Legal issue

The central issue before the Constitutional Court was the correct interpretation and application of article 13(b) of the Convention. The overarching aim of the Convention is to address the concerns relating to international child abduction. The Convention provides that an abducted child must be expeditiously returned to their country of habitual residence. Specific exceptions are outlined in article 13(b) of the Convention, which makes provision for the judicial or administrative authority in the state hearing the application for the return of the abducted child, to refuse to order the child's return if it finds that there is a grave risk that their return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

4 3 Majority judgment of the Constitutional Court

The majority judgment was handed down by Majiedt AJ (Zondo CJ, Makgoka AJ, Kollapen J, and Potterill AJ concurring). The facts of the matter were discussed above.

In considering the issue before it, the Constitutional Court referred to the primary aim of the Convention, namely, to address any instance where an international child abduction has taken place. The Convention provides that where a child has been abducted, measures must be taken to ensure the expeditious return of the child to their country of habitual residence. The court held that it is necessary to decide what constitutes "harm" as contemplated in article 13(b) of the Convention. In doing so, the court referred to articles 12(2) and 13 of the Convention (see the Introduction above for art 13).

Besides the provisions of article 13, 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 (art 12 of the Convention).

In considering the circumstances referred to in article 12, the judicial and administrative authorities shall consider 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.

In considering the divergent judgments of the High Court and the SCA, the court held that the factor of the delay of the return of E cannot redound to the detriment of the applicants, E's father, and the AHCA (a statutory applicant). The court held that to do so would undermine the aims of the Convention.

The Convention also involves the rights of a child provided for in section 28(2) of the Constitution by mandating contracting states to return a child to the country of habitual residence when the child was removed in the circumstances postulated by the Convention (*AHCA v Koch supra* par 35). The interpretation of article 13(b) raises a constitutional matter since a determination had to be made if article 13(b) is capable of an interpretation that strikes a fair balance between the competing interests and constitutional

rights at stake in Convention proceedings. These aspects serve to limit the rights of the child in section 28(2) of the Constitution, and their consideration raises a constitutional matter (*AHCA v Koch supra* par 37).

Majiedt AJ held that the case before the Constitutional Court presented unique challenges, *inter alia*, with respect to determining what weight to afford to the short-term challenges of the impact on E following the demise of her mother, versus the weight to be given to the long-term impact on E, following her removal from the UK, her state of habitual residence. Such removal and retention led to an estrangement between her and her father, her only living parent. Furthermore, under the Convention, E's father has rights of custody and access to her and has parental rights and responsibilities to her in the UK. In contrast, E's aunt, who seeks to assert parental rights, has neither the legal rights of custody nor access under the Convention, nor does she have parental rights and responsibilities in terms of the Children's Act (38 of 2005).

Majiedt AJ referred to article 12(2) which provides that where a child has been wrongfully removed from their place of habitual residence, or where the child has been unlawfully retained (art 3) in the instance under consideration, 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 to their place of habitual residence. Notwithstanding that a year has elapsed since the abduction of the child concerned,

> "the judicial or administrative authority 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." (*AHCA v Koch supra* par 157)

In respect of article 12(2), the court held that the defence provided for in article 13(b) places an onus on E's aunt to prove on a balance of probabilities that E is at grave risk in that her return to the UK would expose E to physical or psychological harm or otherwise place her in an intolerable situation. The court referred to the judgment in *Pennello v Pennello* ([2004] 1 All SA 32 (SCA)), where the court held that "grave risk" meant:

> "more than an ordinary risk, or something greater than would normally be expected on taking a child away from one parent and passing him to another … not only must the risk be a weighty one, but … it must be one of substantial, and not trivial, psychological harm. That, as it seems to me, is the effect of the words "or otherwise place the child in an intolerable situation". (par 32)

Furthermore, the Constitutional Court held in *Sonderup v Tondelli* (2001 (1) SA 1171 (CC)):

> "[a]n article 13 enquiry is directed to the risk that the child may be harmed by a Court-ordered return. The risk must be a grave one. It must expose the child to "physical or psychological harm or otherwise place the child in an intolerable situation". The words "otherwise place the child in an intolerable

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> situation" indicate that the harm that is contemplated by the section is harm of a serious nature." (*AHCA v Koch supra* par 29)

Majiedt AJ referred to the expert evidence of Professor Berg in the SCA, and acknowledged that E's young age works in her favour in the respect that she does not fully appreciate the finality of her mother's death, and that the bereavement counselling that she would receive in the UK, would assist E upon her return (*AHCA v Koch supra* par 169–170).

Furthermore, the bond that had been established, *inter alia*, between E and E's maternal aunt does not diminish the biological bond between E and her surviving parent, her father. The court held that where E's father was afforded the opportunity to care for her, such a bond could be established between father and child.

Referring to the psychiatric report of Professor Berg, which was considered in the SCA, the Constitutional Court held that these reports did not suggest a grave risk that the return of E to the UK would expose her to physical or psychological harm or otherwise place her in an intolerable situation as envisaged in article 13(b).

The expert opinion evidence from Ms Pettigrew in the High Court relied heavily on the child attachment theory. The court rejected her evidence, which held that the risk of harm in separating E from her aunt to return and place her with her father in the UK is a consequence of the wrongful retention and the unfortunate delay in finalising the litigation of the matter. It is also the harm that can be created by anyone who wrongfully retains a child in another country, a scenario that the Convention serves to discourage. The court held in this regard that:

> "[A] [d]elay would become a strategic tool to evade the Convention's objectives, not only to protect children from the harmful effects of international child abduction and retention by a parent, but importantly also to secure the prompt return of the abducted or retained children to their state of habitual residence". (*AHCA v Koch supra* par 216)

Furthermore, the harm envisaged is not harm so that it is serious enough so that it is not reasonable to expect a child to tolerate (*AHCA v Koch supra* par 181). The reasoning behind the judgment of the SCA and the minority judgment in the Constitutional Court lacked any consideration of the harm that E would potentially suffer from her father's absence. The court further considered the structures and systems available for E's support in the UK upon her return and held that her father had led evidence which indicated that he was committed to her care and that the services available in the UK were of a standard that could provide the necessary support to E.

The Constitutional Court accordingly held that the SCA had erred in conflating the two inquiries: the long-term interests of the child, including the determination of custody matters, and the short-term interests of the child, which concerned jurisdictional matters. Furthermore, the court held that E's aunt failed to prove, on a balance of probabilities, that E would suffer grave harm upon her return to the UK.

The court concluded that there was no convincing evidence that proved on a balance of probabilities that if E is ordered to be returned to her state of

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. The aunt had failed to establish that the social services available in the UK are not able to mitigate any of the risks raised should E be returned to the UK. These services would mitigate the impact of E's return. The delay occasioned by the litigation, especially that of the SCA, cannot be permitted to impede the objectives of the Convention.

4 4 Order of the Constitutional Court

The Constitutional Court accordingly upheld the appeal. The orders of the SCA and the High Court were set aside. E was returned to the jurisdiction of the Central Authority for England and Wales in the UK by the end of February 2024.

Pending E's return to the UK, the aunt was not permitted, without the prior written consent of CASA, to remove E from the province of the Western Cape in the Republic of South Africa. She was also obliged to keep CASA informed of her and E's physical address and contact details.

Should E's aunt intend to accompany E upon her return to the UK, she was to notify CASA and the second applicant (the father) thereof in writing, within one week of the date of issue of the court order, and in that event, she was granted leave and authorisation, insofar as it might be necessary, to remove E from the RSA and accompany E to the UK.

4 5 Dissenting/minority judgment of the Constitutional Court

4 5 1 Introduction

Van Zyl AJ (Madlanga J, Rogers J, and Theron J concurring) handed down a minority judgment.

4 5 2 Legal issues

The question considered whether the exceptions provided for in article 13(b) of the Convention constituted a defence against the return of E.

4 5 3 Minority judgment of the Constitutional Court

Article 13 provides that the judicial or administrative authority in the state that is hearing the application for the return of the child (South Africa) has a discretion to refuse to order such if it finds that there is a grave risk that their return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. The Convention recognises that it may not always be in the best interests of a particular child to be returned to their country of habitual residence. The Convention gives effect to this purpose by recognising in article 12(2) that the interests of a child who has

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become settled in their new environment may not be best served by their return to the country of habitual residence. Furthermore, article 12(1) emphasises the prompt return of such a child and provides for a time frame to be considered.

Van Zyl AJ (writing for the minority) held that article 12(1) was applicable in those instances where an application is made for the return of the child concerned within a period of less than one year following the removal of a child. Article 12(1) is clear that the primary rule regarding the abducted child's return was applicable where the application for return was made within one year. Where the best interests of the child, E, are not served by her prompt return to the country of her habitual residence, an exception to the mandatory return is found in article 12(2). In terms thereof, if the return proceedings were commenced a year or more after the removal of the child, the court or other administrative authority of the contracting state remained obligated to order the return of the child, *unless it is demonstrated that the child had settled in the new environment* (author's emphasis). It provides:

> "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." (*AHCA v Koch supra* par 30)

In reaching its decision, the court has to weigh the interests of the child concerned in a specific case in the context of a factual situation, and the limited determination of what constitutes an exception to the duty of the court to order the immediate return of the child. In exercising its discretion, the court considers the interrelated nature of the provisions of the Convention, which has as its primary aim the best interests of the child. It requires balancing the considerations that inform the application of the Convention. Van Zyl AJ held that the current case has not proven to be an exception in the sense that it has been established that E would not be subject to "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" (art 13(b)). It was incumbent on the court to strike a balance between two considerations: namely, the welfare and the best interests of E, and the significance of the deterrent policy and the general purpose of the Convention (*AHCA v Koch supra* par 84).

Expert evidence led by Professor Berg bore testimony to the fact that a young child such as E normally forms a bond with the person who cares for her daily needs. In the current case, this role is primarily undertaken by her maternal aunt. Ms Pettigrew focused her assessment on the childhood attachment theory and the potential impact on E's psychological functioning at her stage of development. E's maternal aunt fulfilled this role in E's life following her mother's death. Ms Pettigrew led evidence that indicated that removing E from her maternal aunt would be like a second maternal death for E. She further stated that E did not have a secure bond with her father and that it was unlikely she would form one with him upon her return. Ms Pettigrew expressed a concern that E may suffer a complete emotional and psychological breakdown should she be removed from her current stable environment and returned to the UK. Van Zyl AJ held that the evidence led

was undisputed and that E's mother was her primary attachment figure until her death, and that she was subsequently replaced by E's aunt, in whose care she has remained since. Against this background, Van Zyl AJ held that the removal of E from her maternal aunt, her primary attachment figure, can establish the required grave risk as envisaged in article 13(b).

Van Zyl AJ further held that the focus of article 13(b) is on the abducted child, E. The article concerns the risk of harm to E in the short term. Any harm that is of a long-term nature is to be considered by the court that will eventually be asked to determine issues relating to custody and other rights to the child.

The question that must then be asked is whether the social services in the UK could ameliorate the probability of the harm predicted by Ms Pettigrew from materialising or reducing the impact thereof.

Van Zyl AJ held that the Convention envisaged a consideration as to whether the deterrent purpose of the Convention should, in the circumstances of the case, outweigh the interests of the child in question.

The following considerations are relevant in determining the best interests of E in this matter, namely:

(a) The length of time that has elapsed since E's initial retention in South Africa, given that the Convention is one of hot pursuit and the restoration of the *status quo ante*.
(b) The provision in article 12 that the child should be returned within a year and "if no steps were taken following the removal or retention of a child, eventually a point may be reached when the child becomes settled in their environment and that the return of the child might well cause further distress and a disruption" (*AHCA v Koch supra* par 128). The emphasis is on the expeditious return of the child.
(c) E has settled in South Africa, where she has stability.
(d) The assumed interests which could have been expected to be served by the prompt return of E were no longer able to be fulfilled because of time delays (*AHCA v Koch supra* par 128).

Since E was of a young age when she was removed from the UK, any assumption that such removal would have a harmful effect on her is dismissed. A return of E to the UK would not be in her best interests. Van Zyl AJ went further and held:

> "this conclusion is strengthened by the absence of any evidence of meaningful undertakings by the authorities in the UK to provide reasonable protection against the harm postulated by Ms Pettigrew in her evidence". (*AHCA v Koch supra* par 130)

Considering the evidence led, Van Zyl AJ held that the circumstances of the case before the court were sufficient to favour E remaining in South Africa and not being returned to the UK.

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5 Legal implications

5 1 Upholding the provisions of the Convention

Both the High Court and Constitutional Court decisions demonstrate that the courts were prepared to uphold the provisions of the Convention, particularly article 13(b), notwithstanding previous court decisions that showed a reluctance to order the return of a child. A case in point is the decision of the SCA in *LD v Central Authority* (*RSA*) (2022 (3) SA 96 (SCA)), where the majority judgment was not prepared to give effect to the provisions of the Convention even though the mother unlawfully abducted the child. This case was an appeal from the Gauteng Division of the High Court, Pretoria. The legal issue that the court was required to consider was whether the mother, who had unlawfully abducted her daughter from Luxembourg to South Africa, had a defence in terms of article 13(b) of the Convention (*LD v Central Authority* (*RSA*) *supra* par 1). Since the removal of the child from Luxembourg was unlawful, article 12 of the Convention became effective, which provided that the judicial or administrative authority of the contracting state where the child is, is under an obligation to make an order for the return of the child (*LD v Central Authority* (*RSA*) *supra* par 4). This meant that in the absence of a defence in terms of article 13(b) of the Convention, the court is placed under an obligation to make an order for the return of the child who was unlawfully abducted. It is submitted that the majority judgment in this matter erred, as the mother failed to prove, on a balance of probabilities, that returning the child to her father in Luxembourg would expose the child to a grave risk. The mother averred that she would expose herself to the risk of being arrested if she returned to Luxembourg. In addition, the father instituted proceedings under the Convention approximately three months after discovering the child's whereabouts. Owing to the timeframe of the proceedings, the child had not yet integrated into her new surroundings and environment. It is submitted that the majority judgment also did not consider the psychological harm that the child experienced from being uprooted from her familiar surroundings and environment when the mother unlawfully abducted her from Luxembourg. Even though the mother in this case did not meet the requirements of the defence set out in article 13(b), the SCA dismissed the appeal of the father. This case illustrates that the court was not prepared to apply and uphold the provisions, particularly article 13 of the Convention.

5 2 Upholding the aims and objectives of the Convention

The objectives and aims for the promulgation of the Convention remain important. The Convention was enacted “to protect children internationally from the harmful effects of the wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access” (Preamble of the Convention). It would, therefore, conflict with the aims and objectives of the Convention if the court, in consideration of a defence in terms of article 13 in child abduction matters, allows the proceedings to be converted into a

custody application (*Sonderup v Tondelli* 2001 (1) SA 1171 (CC) par 30). To this effect, article 19 of the Convention provides that a "decision under this Convention concerning the return of a child shall not be taken to be a determination on the merits of any custody issue". If there is an abduction of a child from their habitual residence, save for a defence in terms of article 13, the court is under an obligation to return the child to their place of habitual residence. The court in the country of habitual residence will then decide, insofar as the custody of the child is concerned.

5 3 Best interests of the child

The High Court judgment decision furthermore illustrates that the commitment of the court to take the child's best interests into account as despite finding that the respondent had failed to establish that there were reasonable prospects of success if the matter was taken on appeal, nor compelling reasons to grant leave to appeal, leave to appeal was nonetheless granted because the best interest of the child was taken into account. The court was cognisant that a lengthy and protracted appeal process would defeat the very purpose and objective of the Convention. It was for these reasons that leave to appeal was granted with the request that the appeal be heard on an expedited basis in the SCA. By doing so, the court demonstrated the proper interpretation of the best interests of the child principle/standard.

The SCA was prepared to allow the application to adduce further evidence if this was also in the best interests of the child. The stance taken by the SCA indicates that it was of the view that the High Court had erred in rejecting the evidence of the expert witnesses. The SCA was of the opinion that the evidence provided by the expert witnesses demonstrated that E's mother had a defence under article 13(b), that to order the return of E to her father in the UK would expose her to a grave risk of physical or psychological harm or otherwise place E in an intolerable situation. Unlike the High Court, the SCA found that the mechanisms that are in place in the UK were insufficient to alleviate and eliminate the psychological and emotional harm that E would experience on her return to the UK. As such, the SCA held that there was no obligation of the High Court to order the return of E to her father in the UK as E's mother was successful in her defence under article 13(b). But this was overturned by the majority judgment of the Constitutional Court.

6 Conclusion

The *Koch* case is a landmark judgment in international family law and cases involving child abduction. The complexity of issues that emerge when family disputes extend beyond national frontiers cannot be doubted. International abduction of children is a global issue with a continued escalation and has significant implications within the South African legal framework. The judgment in the case discussed is significant in that it clearly shows South Africa's commitment to complying with international law and provides evidence of recognition of the need to protect and acknowledge children's

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rights across state boundaries – a commitment that appeared to be waning in previous rulings.

The interpretation of article 13(b) is central to the case, with the Constitutional Court's judgment highlighting the judiciary's challenge to balance respect for foreign legal systems and cultural contexts with the overarching principles of the Convention. The divided opinion of the Constitutional Court reveals the ongoing debate about reconciling international treaties with domestic laws, particularly in family matters. The court emphasised that applying article 13(b) requires a case-by-case analysis of the potential harm to the child. The sensitive nature of determining "grave risk" when returning a child to their habitual residence sets a precedent for future child abduction cases. The court must also consider the child's current attachments and psychological well-being, and its ruling suggests prioritising the Convention's goals over immediate psychological effects on the child. The undue delays and length of time it took for the *Koch* case to reach its conclusion emphasise the importance and need for more swift legal proceedings in such matters. The protracted legal process underscores the need to expedite these cases to reduce the emotional strain on the child and family members caused by the delays. The emotional burden of the prolonged process on E would be difficult for anyone to bear, let alone a young, traumatised child. This decision might spark debate among child welfare experts and family law practitioners. The Constitutional Court's ruling establishes a precedent binding all South African courts and reaffirms the judiciary's commitment to the Convention's principles.

The case has shed light on the multifaceted challenges posed by international child abduction. The judgment in the case considered highlighted a complex interplay between legal mandates and the paramountcy of the child's welfare. It especially noted that it is of utmost importance that the courts strive for prompt yet considerate resolutions in cases governed by the Hague Convention. It is hoped that the High Courts will heed this ruling and establish directives to ensure faster resolutions.

Razaana Denson
BA Law LLB HDE LLM LLD
Private Law Department, Faculty of Law
Nelson Mandela University, Port Elizabeth, South Africa
https://orcid.org/0000-0002-0876-7367

Glynis van der Walt
B Juris LLB LLM LLD
Private Law Department, Faculty of Law
Nelson Mandela University, Port Elizabeth, South Africa
https://orcid.org/0000-0002-4877-6794