REPORTABLE

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

Case No. 2011/21074

DATE:07/12/201

In the matter between:

THE CENTRAL AUTHORITY FOR
THE REPUBLIC OF SOUTH AFRICA — First Applicant

J — Second Applicant

and

B — Respondent

JUDGMENT

MEYER, J

[1] In these proceedings under the Convention on the Civil Aspects of International Child Abduction 1980 (the Hague Convention) as presently incorporated into South African Law by s 275 of the Children's Act 38 of 2005 (the Children's Act), the mother

(second applicant) seeks the immediate return to Australia of her son (K), who was born on 20 October 1998 and is thus now thirteen years old and presently residing with his father (the respondent) in Johannesburg.

[2] The provisions of the Hague Convention are, in terms of s 275 of the Children's Act, subject to those of the Children's Act. A legal representative must, in terms of s 279 of the Children's Act, represent the child involved in all applications in terms of the Hague Convention. I have in the as yet unreported judgment of *B & Ors. v G* (SGHCJ (Case No. 2009/34223)) accepted the correctness of the submission by CJ Davel and AM Skelton: *Commentary on the Children's Act*, at p 17 – 21, that '…in cases where very young children are involved, the role of the legal representative would be more akin to that of a *curator ad litem*, while with older children, the legal representative would take instructions from the child, act in accordance with those instructions and represent the views of the child.' K was represented before me by Mr HD Baer, who I, by agreement amongst all the parties concerned, appointed *amicus curiae*. K objects to being returned to his mother in Australia.

[3] The second applicant is an Australian citizen and the respondent has dual Australian and South African citizenship. They were married in Australia on 8 February 1997. Their son, K, was born on 20 October 1998. Their marriage failed. A settlement agreement concluded between them - in terms whereof it was *inter alia* agreed that K would reside with the second applicant and that the respondent would have reasonable rights of contact with him - was made an order of the Family Court of Australia at Sydney, on 14 December 1999. The respondent enjoyed regular contact with V while he was residing in Australia. The respondent settled in South Africa around May 2004. He thereafter regularly visited K in Australia. K, accompanied by his paternal grandmother, also travelled to South Africa on two previous occasions to spend the 2006 and 2008 summer holidays with the respondent. The second applicant again permitted K to travel to South Africa on 29 November 2010. He was due to return to Australia on 24 January 2011. On 24 December 2010, she received a text message from K informing her that he wished to stay in South Africa. He did not return to Australia on 24 January 2011, and

he is still residing with the respondent in Johannesburg.

[4] The respondent's retention of K in South Africa is wrongful within the meaning of art 3 of the Hague Convention and I must order his return to Australia pursuant to the provisions of art 12, unless the respondent or K establishes the defence raised, which is provided by art 13. The defence raised in this instance that K objects to being returned to his mother in Australia, requires an interpretation of art 13, which reads:

> '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 –
>
> (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 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 …'

[5] Ms Mansingh, who appeared for the applicants, submitted that the part of art 13 which relates to the child's objection to being returned does not constitute a separate defence and that a court may only refuse to order the return of the child if it finds that the child objects to being returned in circumstances where his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. I disagree. Even though the part of art 13 which relates to the child's objection to being returned is not separately numbered, it is separate from paragraphs (a) and (b) and constitutes a separate defence. I agree with the following *dictum* of Balcombe LJ in *Re S (A Minor) (Abduction: Custody Rights)* [1993] Fam 242

at p 250, sub nom *S v S (Child Abduction) (Child's Views)* [1992] 2 FLR 492, at p 499:
'It will be seen that the part of Art 13 which relates to the child's objections to being returned is completely separate from para (b), and we can see no reason to interpret this part of the Article, as we were invited to do by [counsel], as importing a requirement to establish a grave risk that the return of the child would expose her to psychological harm, or otherwise place her in an intolerable situation.'

[6] It is clear from the words used that the exercise of a discretion arises under art 13. It provides that notwithstanding the provisions of art 12, which require in mandatory terms that the child wrongfully abducted or retained be returned, the court 'may also refuse to order the return of the child' if it is found that the stated requirements have been met. Such discretion is also fortified by the provisions of art 18. It seems to me from my reading of many decided cases of foreign jurisdictions that it is generally accepted that an exercise of a discretion arises under art 13.

[7] Ms Mansingh submitted that, in the exercise of the discretion arising under art 13, the court may not have regard to welfare considerations, but must only balance the nature and strength of the child's objections against the Hague Convention considerations. There is, in my view, no merit in counsel's submission in this regard. It is not consistent with the obligation to treat as paramount, in every decision affecting a child, the well-being or best interests of that child - the paramountcy principle - which is enshrined in s 28(2) of our Constitution. Counsel's submission is also in conflict with clear authority of the Constitutional Court. In *Sonderup v Tondelli and Another* 2001 (1) SA 1171 (CC), paras [32] – [35], Goldstone J said this:

> '[28] The Convention itself envisages two different processes – the evaluation of the best interests of children in determining custody matters, which primarily concerns long-term interests, and the interplay of the long-term and short-term best interests of children in jurisdictional matters. …
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> [29] … One can envisage cases where, notwithstanding that a child's long-term

interests will be protected by the custody procedures in the country of that child's habitual residence, the child's short-term interests may not be met by immediate return. In such cases, the Convention might require those short term best interests to be overridden. ….

[32] … the exemptions provided by arts 13 and 20 … cater for those cases where the specific circumstances might dictate that a child should not be returned to the State of the child's habitual residence. They are intended to provide exceptions, in extreme circumstances, to protect the welfare of children. …

[33] The nature and extent of the limitations are also mitigated by taking into account s 28(2) of our Constitution when applying art 13. The paramountcy of the best interests of the child must inform our understanding of the exemptions without undermining the integrity of the Convention. The absence of a provision such as s 28(2) of the Constitution in other jurisdictions might well require special care to be taken in applying *dicta* of foreign courts where the provisions of the Convention might have been applied in a narrow and mechanical fashion.

[35] A South African court seized with an application under the Convention is obliged to place in the balance the desirability, in the interests of the child, of the appropriate court retaining its jurisdiction, on the one hand, and the likelihood of undermining the best interests of the child by ordering her or his return to the jurisdiction of that court. As appears below, the court ordering the return of a child under the Convention would be able to impose substantial conditions designed to mitigate the interim prejudice to such child caused by a court ordered return. The ameliorative effect of art 13, an appropriate application of the Convention by the Court, and the ability to shape a protective order, ensure a limitation that is narrowly tailored to achieve the important pruposes of the Convention. It goes no further than is necessary to achieve this objective, and the means employed by the Convention are proportional to the ends it seeks to attain.'

[8] Courts of foreign jurisdictions have in many cases considered the interpretation of art 13, and specifically what factors are to be taken into account in the exercise of a court's discretion under art 13 and the approach which a court should adopt in weighing the various factors. A concise and in my view accurate statement of the considerations established by the decided cases in England and in Scotland is to be found in the following passage of the judgment in *Singh v Singh* 1998 S.L.T. 1084, which was delivered by Lord Posser:

> 'A detailed review of these cases does not seem to us to be necessary in this case. It is clear that where there is an objection to return, by a child of sufficient age and maturity for his views to be taken into account, these particular factors, of objection and maturity, do not merely open the door to an exercise of the court's discretion, but are themselves factors to be taken into account in the exercise of that discretion. Thus the court must put in the balance not merely the fact of an objection, but its nature and basis; and as well as taking into account the views of the child, the court will give greater or lesser weight to these views, in accordance with the child's actual age and the degree or level of maturity which the court considers it to have. In addition to these factors, it is clear that in exercising its discretion, the court must bear in mind the general policy of the Convention which, subject to exceptions such as those permitted in terms of art 13, envisages and is designed to achieve the return, forthwith, of children wrongfully removed or retained, to the state of their habitual residence. Orders for return are not intended to be determinative of questions of custody or access, or even return the child de facto into the care and control of a parent resident in that state. But the general policy is to return such children into the jurisdiction of that state, which will thus normally become the jurisdiction in which such questions as custody and access will be determined. The discretion conferred upon the court by art 13, allowing it to refuse to order the return of the child, thus permits a departure from what the policy would normally require. And one consequence of this may well be that issues of custody and access will come to be determined not in the state of original habitual residence, but in the state where the child is wrongfully retained (although

issues of custody and access are not determined when the court exercises its discretion under art 13). The general policy is nonetheless a factor to which the court must have regard when considering how to exercise its discretion; the policy is an important one, and while an exception is permissible in the situation of objection by a sufficiently mature child, it must be seen as an exception, only to be allowed in situations which are indeed exceptional. …

[I]t was clear from the decided cases that the welfare of the child was a general factor which the court should take into account in exercising this discretion above and beyond the factors already mentioned. Reference was made to Re S (A Minor) (Abduction: Custody Rights); Re R; Re A (minors) (abduction: acquiescence) (No 2); Re M (A Minor) (Child Abduction); Marshall v Marshall; and Urness v Minto. It was not suggested that in this case any issue of intolerability arose, as it had in Urness. But in exercising its discretion, the court must have regard to the general welfare of the child not only in cases where intolerability was in issue, and cases where (as in Re R) there was an issue as to acquiescence, but also in cases arising from the fact of objection by a sufficiently mature child. …

The child's welfare being a matter which must be taken into account, we do not think that in principle any rule can be laid down as to whether the court should consider welfare "broadly" or in detail: that will be a matter within the discretion of the court concerned.'

[9] A most helpful collection and discussion of some of the leading decisions by the English and Scottish courts appear in *M* 2005 S.L.T. 2., paras [24] - [38]. In applying art 13, the court asked:

'1. Does S object to being returned to Ireland? 2. Is S of an age and maturity at which it is appropriate to take account of his views? 3. If the answers to 1 and 2 are in the affirmative, whether I should exercise the discretion available to me and refuse to order his return? This involves considering questions of comity,

convenience and the general principle that it is in the best interests of a child that his welfare be determined by the court of his habitual residence. A review of the authorities to which I have referred, other than W v W, indicates that this also involves me considering why, if he does, S objects, the strength of any such objection, whether any objection is independent of the views of his mother, whether he appreciates that the purpose of the order for return to which he objects would be to enable the court in Ireland to decide on his future, and his welfare in the immediate future.'

[10] This approach to the application of art 13, in my view, accords with the obligation of a South African court '… to place in the balance the desirability, in the interests of the child, of the appropriate court retaining its jurisdiction, on the one hand, and the likelihood of undermining the best interests of the child by ordering her or his return to the jurisdiction of that court.' See: *Sonderup (supra)*.

[11] As regards the first question, it is not disputed that K objects to being returned to Australia. I return to his objections. The second question whether or not he is of an age and maturity at which it is appropriate to take account of his views should in my view also be answered in the affirmative. Ms N Khanyile, who is a registered social worker and appointed as a family counselor at the Office of the Family Advocate, was requested by the Family Advocate to assist in this matter. K, in her assessment, is '… at a stage of development where his wishes need to be considered.' K's legal representative, Mr Baer, informed this court that K impressed him '… as an intelligent young man, who understands the nature of the present proceedings and knows what he wants.' At some stage during argument of the matter before me, K instructed Mr Baer to convey to me that if I were to order his return to Australia in order for an Australian court to decide the issue of his custody, he would prefer to reside with his paternal grandmother pending such resolution of his future custody. I interpolate to add that I observed K carefully during the hearing, which lasted several hours. He sat listening attentively throughout. My subsequent interview with K in chambers confirmed to me the recommendation of the family counselor and the observations of K's counsel, who is an

advocate of many years' standing and experienced in family related matters. K turned 13 during October. He was nervous, but confident, and he addressed me appropriately. He is articulate. He answered my questions appropriately and directly without touching on unrelated matter. When I required elucidation, he furnished it without hesitation. His views are firm and cogent. He fully appreciates that the present proceedings are only jurisdictional in nature. I have no hesitation in finding that he is of above average intelligence, despite his academic performance at school. It is, in my view, not only appropriate to take K's views and strength of feelings into account, but they should be given considerable weight.

[12] My findings on the threshold requirements (see: *Zaffino v Zaffino (Abduction: Children's Views)* [2005] EWCA Civ 1012, para [40], necessitate that I consider the remaining questions. Before doing so, I pause to deal with Ms Mansingh's submission on behalf of the applicants that K's views were the result of his father's influence. There is ample and persuasive authority from foreign jurisdictions, which I unhesitatingly endorse, that if the court should come to the conclusion that the child's view has been influenced by the abducting or retaining parent, or that he objects to return is because of a wish to remain with the abducting or retaining parent, then it is probable that little or no weight will be given to those views. One example is *Re K (Abduction: Child's Objections)* (FD) [1995] 1 FLR, at p 944 F – H.

[13] The second applicant infers that K's objection to returning to Australia has been influenced by the respondent. This is denied by the respondent. Ms Mansingh submitted that the content of an e-mail that a former girlfriend of the respondent had sent to the second applicant in which allegations of undue influence and of manipulative conduct on the part of the respondent are made, confirms the applicant's suspicion of undue influence. The respondent agreed to the admission of the e-mail into evidence. No weight should, however, in my view be given to the content of this e-mail. The author thereof refused to depose to an affidavit. She and the respondent were involved in what appears to have been a stormy relationship that ultimately ended and their present relationship seems to be very acrimonious.

[14] Mr Baer conveyed to me his instruction from K that he had planned not to return to his mother and to remain with his father once he arrived in South Africa before he had left Australia at the end of November 2010. K also informed me during my interview with him that while he resided in Australia he had over time resolved to reside with his father once he became older and that his ultimate decision to reside with his father and not to return to Australia had been taken before he had left Australia at the end of November 2010. The veracity of K's version on this aspect cannot, on the totality of the evidence before me, be rejected.

[15] K has maintained his objection to returning throughout this year. He raised his objection to his parents, to the family counselor, to his counsel and ultimately to me during my interview with him in chambers. His reasons are consistent and of substance. He was unhappy at home and at school in Australia. His home environment was not harmonious and home cooked meals were, according to him, the exception. The family counselor summed it up as follows:

> 'It emerged during the interview that K loves both his parents very much and is missing his mother in Australia. However, he expressed his unhappiness about the kind of life that he and his mother were leading in Australia and does not want to live in that environment again. He threatened to run away if he is forced to return to Australia.'

K informed me that his adjustment to the South African school which he currently attends had initially been difficult. He had to adjust to a more disciplined school environment and to a higher academic standard to what he had been used to in the past. He persevered and is now fully settled at school and he enjoys a wide circle of friends, which he did not have in Australia. He received extra tutoring in mathematics and in Afrikaans throughout this year and he has improved academically. He also received extra English tutoring during the first term of this year. He actively participates in sport, namely cricket, soccer, and rugby, which, apart from playing rugby only when it

took place at the school which he attended in Australia, he was not able to do in the past due to his mother's lack of involvement in his sporting activities. He informed me that his mother did not participate in activities with him and had not taken him on holiday. He formed a very close bond with his father, who often visited him in Australia in the past, and who presently assists him with his school work, supports him in his sporting activities, and actively participates with him in various outdoor activities, such as jet-skiing, hiking and fishing. A two week holiday in Mozambique is planned for this summer holiday and he will be accompanied by a friend from school about which he is very excited. He and his father's new wife enjoy a good relationship. The three of them have home-made meals together every evening, unless they occasionally go out for dinner. K informed me that he now has 'a stable family' and that he feels 'secure'.

[16] The active involvement and participation of the respondent in the life and activities of his son do not amount to undue influence of the child. Such involvement and participation form part of parenthood. Such involvement and participation might have influenced K's objection, but cannot be said to have manipulated or unduly influenced him.

[17] K has settled well and to move him back to Australia now would be a disruption in his life, physically and emotionally. The assumption of the Hague Convention is that the return of a child to a foreign jurisdiction, if concluded within a very short time, will not ordinarily cause irreparable harm to the child. The longer the delay, the greater the potential for harm to the child. *Per* Kerby J, in *De L v Director–General, NSW Department of Community Services* (1996) 187 CLR 640. I also agree with the following *dictum* by Wall J in *In re L (A Minor) (Abduction: Jurisdiction) (Fam D)* [2002] 1 WLR 3208, para [65]:

> 'In my judgment, although the Convention lays down a 12-month period before which it can be said that a child is "settled in its new environment" under article 12, I am of the view that once the door is open to discretion (as it is here) delay in the resolution of the proceedings is a factor which can properly be taken into account

in deciding whether or not a child should be returned.'

[18] Hague Convention matters in this Division are to be dealt with in accordance with the relevant Practice Directive, which facilitates their expeditious finalisation by providing a specific 'route' that they should follow once an application is issued. It requires that the court file be taken to the Deputy Judge President, who will then allocate a judge to case manage the matter and ultimately hear it when it is ripe for hearing. The case management in this instance seems to have been assumed by the functionary who had been designated to discharge the duties imposed by the Convention.

[19] I deal briefly with the background chronology. The request from the Australia was signed on 3 February 2011, and received by the Central Authority for the Republic of South Africa on 22 March 2011. Mediation took place on 20 April 2011. The present application was launched on 2 June 2011. The answering affidavit was filed on 30 June 2011. The Family Counselor's report became available on 11 July 2011. The replying affidavit was filed on 31 August 2011. The matter was brought before this court on 4 October 2011. Because K was not legally represented, Mr Baer was appointed *amicus curiae*. The hearing was postponed to 10 October 2011, which was a few weeks before K's final school examination for this year. His immediate return to Australia at that stage before he had written his final examinations would have seriously compromised his best interests, especially after he had worked so hard at school this year. I was informed by counsel that the school year of Australian schools coincides with that of South African schools. There was accordingly no urgency for an immediate judgment in this matter and it was reserved. An interlocutory application was thereafter launched on behalf of the applicants for the handing down of judgment to be stayed pending the finalisation of that application and for the admission of further evidence in the form of the e-mail to which I have made reference earlier on in this judgment. Answering and replying affidavits were filed and this application was heard on 5 December 2011. There was evidently an extraordinary delay in bringing this matter before this court on 4 October 2011. I echo the warning expressed by Wall J in *In re L (supra)* '… that delay in Hague

Convention cases would not be tolerated.'

[20] A balancing of all the relevant considerations leads me to conclude that this is a matter in which the child's objection should prevail. I consider it appropriate for each party to pay his or her own costs. Compare: *Central Authority v B* 2009 (1) SA 624 (W), para [13].

[21] In the result I make the following order:

1. The application for the return of the child to the jurisdiction of the Central Authority of Australia is dismissed.

No order as to costs is made.

P.A. MEYER
JUDGE OF THE HIGH COURT

7 December 2011