Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

High Court Case No: 10498/2013

In the matter between:

A A **Applicant**

and

L A Respondent

Before: Judge J Cloete

Heard: 15 and 16 October 2013

Delivered: 6 November 2013

JUDGMENT

CLOETE J:

Introduction

[1] The applicant father seeks an order against his wife, the respondent mother, for

the summary return of their two minor children, J aged 3 years and 10 months, and F aged 1 year and 3 months, to San Francisco, California, United States of America, together with ancillary relief.

[2] The order sought is premised on an anticipatory breach of an alleged agreement, and is claimed in terms of art 3 of the Schedule to the Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996 (*'the Hague Convention'*) and in particular that the children have been wrongfully retained by the respondent in South Africa. There is also a dispute about whether the applicant launched these proceedings timeously, i.e. within a year of the alleged wrongful retention, as envisaged in art 12 of the Hague Convention.

[3] It is common cause that the applicant consented to the respondent travelling to South Africa with J in December 2011 and that he in fact accompanied them; that F was born here on 13 July 2012, that the respondent has continuously resided in South Africa with the children since she arrived in this country (in respect of F, obviously only since his birth); that the applicant has rights of custody in respect of the children which he exercises jointly with the respondent; and that at all material times the applicant has exercised those rights.

[4] Art 3 of the Hague Convention sets out three jurisdictional requirements, all of which an applicant is required to establish, before a court can turn to consider whether a child has been wrongfully retained in another State. These are that:

(a) the child was habitually resident in the first State immediately before the retention in the second State; (b) the retention constitutes a breach of the applicant's custody rights in the sense that it is wrongful; and (c) the applicant was actually exercising those rights at the date of the wrongful retention. The last-mentioned requirement has been established. What needs to be determined is whether the applicant has established the remaining requirements, namely habitual residence and the breach. Although, strictly speaking, a failure by the applicant to show either of the remaining requirements would suffice to non-suit him, in light of the importance of this matter to both parties, I intend to deal with both.

Habitual residence

[5] The concept of habitual residence is not defined in the Hague Convention and the approach of courts internationally has been to resist developing detailed and restrictive rules or principles, given the danger that this might cause the determination to become as technical an exercise as that of domicile. However, certain guiding principles have evolved. There are many decisions on this issue, but for purposes of this judgment, I will deal only with those that I consider to be reflective of the general principles.

[6] In the United State Court of Appeals decision of *Robert v Tesson* 507 F. 3d 981(6th Cir. 2007) at pp6-7 the court, referring to the earlier case of *Friedrich v Friedrich* 983 F. 2d 1396 (6th Cir. 1993) – referred to as *'Friedrich 1'*– found that

Friedrich 1 had provided *'five principles which guide this Court in weighing more complicated decisions'*. These were that:

6.1 Habitual residence should not be determined through the *'technical'* rules governing legal residence or common law domicile, but rather by way of close scrutiny of the facts and circumstances of each case;

6.2 Because the Hague Convention is concerned with the habitual residence of the child, the court should consider only the child's experience in determining it;

6.3 The enquiry into the child's experience should focus exclusively on his or her past experience. Any future plans that the parents may have are irrelevant [it should immediately be noted however that in *Friedrich 1* the court was not dealing with the future plans of *'the parents'*, but only with the future plans of one parent, namely the mother. She sought, unsuccessfully, to persuade the court that the child's habitual residence was in fact the United States of America because, *inter alia*, although the child had resided in Germany since his birth it had always been her intention to return to the United States with the child when she was discharged from military duty in Germany];

6.4 A child can only have one habitual residence at any given time; and

6.5 A child's habitual residence is not determined by the nationality of his or her primary caregiver. Only a change in geography and the passage of time may combine to establish a new habitual residence.

[7] After considering various other decisions of the United States Courts of Appeals, the court in *Robert* found at p10 that there was general consensus around two factors consistent with *Friedrich 1.*These are that a child's habitual residence is: (a) the place where he or she has been physically present for an amount of time sufficient for acclimatisation; and (b) the presence has a degree of settled purpose from the child's perspective (also referred to as the *'Feder test'*). This *'test'* was approved and applied in the *Robert* case.

[8] In *Re N (Abduction: Habitual Residence)* [2000] 2 FLR 899 (Family Division High Court of Justice, United Kingdom) at p6 the court found that a fixed period of residence is not required in the new State before habitual residence there is established. What must rather be shown is residence for a period that evidences that it has become habitual, and will, or is likely to, continue to be habitual.

[9] In *Gitter v Gitter* 396F. 3d 124 (2nd Cir. 2005) at p33 the United States Supreme Court of Appeals introduced another factor, namely that a child's habitual residence is consistent with the intention of those entitled to fix it at the latest time those intentions were mutually shared. The rationale for introducing this factor is that *'children… normally lack the material and psychological wherewithal*

to decide where they will reside (referring to *Mozes v Mozes* 239 F. 3d (9th Cir. 2001) at p1076). Although it has been suggested that this is a different approach to that of the child's perspective, I do not understand the authorities to mean that one "approach" must necessarily apply to the exclusion of the other, given that each case must be decided on its own particular facts.

[10] In *B v H (Habitual Residence: Wardship)* [2002] 1 FLR 388 (Family Division, High Court of Justice, United Kingdom), a mother of three children, who was pregnant with her fourth child, accompanied the father on a visit to Bangladesh. After their arrival the father announced his intention to remain there and refused to hand over the passports of the mother and children. As a result the fourth child was born in Bangladesh. In a subsequent Hague Convention application it was held that although the youngest child had been born in Bangladesh, she was habitually resident in the United Kingdom, because it was the habitual residence of her parents. The father's unilateral decision not to return to the United Kingdom had not altered that fact.

[11] However in two United Kingdom Court of Appeal decisions, namely *Re M (Abduction: Habitual Residence)* [1996] 1 FLR 887 and *Al Habtoor v Fotheringham* [2001] EWCA Cir 186, it was held that before a child can be said to be habitually resident in a State, he or she must at some stage have been resident there:

> *'… the one thing about which I am quite clear is that the child's residence in India could not become a residence in England and Wales without his ever having returned to this country. As I said before, the idea that a child's residence can be changed without his ever leaving the country where he is resident is to abandon the factual basis of* "habitual residence" *and to clothe it with some metaphysical or abstract basis more appropriate to a legal concept such as domicile.*'
>
> [Per Sir John Balcome in the *Re M* case.]

[12] The guiding principles which may be distilled from the aforementioned authorities (which are not intended to be exhaustive) are the following:

12.1 Habitual residence is a question of fact based on the particular circumstances of each case;

12.2 A child can have only one habitual residence at any given time;

12.3 A child must have been physically resident in a State, at least at some prior stage, for there to be any consideration of whether that State is the child's habitual residence. This principle should however be qualified to cater for extreme situations, such as where a pregnant mother is detained in another State against her will and the child is consequently born there, or where, whilst pregnant, she flees of her own volition to another State for the express purpose of giving birth in that other State;

12.4 Only a physical, geographical change in residence, combined with the passage of time, may establish a new habitual residence;

12.5 The passage of time is not fixed or determined, but must be such that it has been sufficient for the child to have acclimatised and, from the child's perspective, the residence has a degree of settled purpose. Here, a court may have regard to objective indicators, as well as the latest time that the parents' intentions to fix the child's residence were mutually shared, as opposed to the subjective intentions (present or future) of one of the parents.

Breach

[13] As earlier indicated the applicant relies on an anticipatory breach by the respondent of an alleged agreement to return (with) the children to the United States of America (*'USA'*) by a certain date. The respondent denies that there was any such agreement.

[14] The onus (which similarly rests upon the applicant) is to establish: (a) the existence of an agreement; and (b) the breach thereof by the respondent: *Smith v Smith* 2001 (3) SA 845 (SCA) at para [11]. It is self-evident that if the applicant fails to establish requirement (a) it is not necessary to consider requirement (b). It would also not be necessary to consider any defences raised by the respondent in accordance with art 13 of the Hague Convention, namely consent or

subsequent acquiescence by the applicant to the *'retention'*.

[15] It is trite that in motion proceedings for final relief an applicant will only succeed if the facts averred in his affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify the granting of such relief. There are only two general exceptions to this rule, namely: (a) where a respondent's denial of a fact alleged by the applicant is not such as to raise a real, genuine or *bona fide* dispute of fact; or (b) where the allegations or denials of the respondent are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers: *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634H-635C. In the present matter most of the relevant facts are common cause.

Factual matrix

[16] The applicant is a USA national. The respondent was born in South Africa and her extended family lives here. She attained her permanent residency status in the USA via a *'green card'* in 2003. She moved to San Francisco where she lived and worked for eight years.

[17] The parties married in Cape Town, South Africa, on 29 December 2007. J was born in San Francisco on 22 December 2009. F was born in South Africa on 13 July 2012.

[18] In December 2011 the parties were living in San Francisco. They had discussed the possibility of moving permanently to South Africa. In early December 2011 the respondent discovered that the applicant had been engaged in a number of intimate on-line relationships. He admitted as much to the respondent and begged her forgiveness. Their marriage became strained. The respondent had also just discovered that she was two months pregnant with F.

[19] In mid-December 2011 the parties travelled to South Africa on a previously planned holiday to visit the respondent's family in St James, Cape Town. The respondent and J travelled to South Africa on one-way tickets. The applicant travelled on a return ticket. It was envisaged that the respondent would return to the USA together with J and her parents in February 2012.

[20] The applicant returned to the USA on 14 January 2012. On 25 January 2012 the respondent informed him that she would be returning with J to the USA on 19 February 2012.

[21] Towards the end of January 2012 the parties discussed the feasibility of the respondent giving birth to their second child in Cape Town, where she would have the support of her family and where the birth expenses would be more affordable. The applicant was not unduly concerned about the respondent having their second child in South Africa. J's birth had been a difficult one and the respondent needed the support of her family. He said:

> *'The issue of respondent wishing to have our second child in Cape Town did not unduly concern me. I missed J and also felt frustrated as respondent and I were not able to work towards a reconciliation, however I was sensitive to respondent's position. Respondent had had a very bad experience during and after J's birth. Her painkillers were ineffectual, she had a lot of bleeding post op and required 3 blood transfusions. Her cautious approach to her medical care was therefore not unexpected. I was happy to support any decision she made in regard to the birth of our second child, even though the decision adversely affected me and separated me from J for longer.'*

[22] On 31 January 2012 the respondent advised the applicant that she would be returning to the USA later than 19 February 2012 as she needed to undergo medical tests in relation to her pregnancy. She asked the applicant to give serious consideration to relocating permanently to South Africa. She also made it clear that when she returned to the USA the parties would not be living together. The respondent also suggested that it would be wise to look into the cost of separate accommodation for herself and J in St James, as well as purchasing a small vehicle and enrolling J in a local pre-school.

[23] On 5 February 2012 the respondent informed the applicant that she was actively engaged in looking for a pre-school for J. On 10 February 2012 she asked the applicant to cancel her garage parking bay at their apartment in San Francisco as well as the satellite TV subscription debit order on her USA bank account.

[24] Due to her own medical problems as well as her mother's, the respondent did not

return to the USA in the months that followed. Although she told the applicant that she had not yet decided to remain permanently in South Africa, she made it clear that her preference was to remain here with J. She urged the respondent to come up with a plan for their future, living in South Africa. In her email to the applicant of 5 February 2012, the respondent wrote that*'I have not heard back from you on your plans to move to CT to join us. I am looking into pre-schools for J here and working out what I need to do to move my life down here permanently. I hope this is something you are thinking about and working on, as I think you should be doing it with us'.*

[25] Two days later, on 7 February 2012, the respondent wrote to the applicant that *'I am not moving here permanently, I wouldn't do that to you. We need to work on a solution together. I just cannot face returning to the scene of the crime now. Walking back into that apartment is going to break my heart and I am dreading it'.* On 9 March 2012 the respondent wrote to the applicant that she would not be returning to the USA *'in the near future'.*

[26] The respondent suggested that the applicant visit South Africa over the April 2012 Easter holiday. On 11 March 2012 she provided the applicant with a long list of items that she required from their home in San Francisco and asked him to bring them with him on his next visit to Cape Town. In mid-March 2012 she requested the applicant to place a permanent hold on her gym membership in the USA and, if this was not possible, to cancel it altogether. On 11 April 2012

she requested the applicant to sign documents to enable J to obtain a South African passport. On 16 April 2012 the respondent wrote to the applicant that she intended obtaining a local credit card linked to a local bank account.

[27] The applicant travelled to South Africa in April 2012 and returned to the USA on 5 May 2012. During that visit he attended on the respondent's therapist where they discussed the prospect of him moving to South Africa. The parties also visited a pre-school where J's name was placed on the waiting list;as well as one of the applicant's colleagues to discuss future employment prospects for him in South Africa.

[28] On 22 May 2012 the respondent received news that J might well be accepted into the chosen pre-school. She immediately relayed this information to the applicant who responded by email as follows:

> *'This is very exciting news! Definitely take the spot if J is offered it. I will be holding thumbs and crossing fingers for J at* [the pre-school]*in the beginning of June 2012.'*

[29] The applicant actively participated in J's enrolment at the pre-school. On the same date, i.e. 22 May 2012, he also wrote to the school principal:

> *'Mandy,*
> *I want to make sure that you also sent this letter to my wife L, on behalf of our*

son J. Our son is 2½. Does that put him in the butterfly group? If so, we would be very interested in taking the current opening.
Regards
A'

[30] On 23 May 2012 the applicant wrote to the respondentthat:

'L,
I am very excited about the potential of getting J into [the pre-school]*. I really hope it works out! I have put together a Preschool Analysis spreadsheet to help with the process. Hopefully we won't need* [sic] *and he will be able to go to* [the pre-school]*.'*

[31] The parties were informed that J had been accepted at the pre-school and the applicant paid his school fees. He continues to do so. During June 2012 the respondent joined a medical aid in South Africa and registered J as a dependent. The applicant assisted with this process. F was added as a dependent after his birth. The respondent also opened a bank account at a local South African bank, and updated her Facebook page to reflect that her home town was Cape Town. The respondent's Facebook status was discovered by the applicant on 25 June 2012. He wrote to her that:

'Needless to say, most, if not all of our friends know that something is up between us since you have listed your hometown as Cape Town, etc… <u>which I am fine with and completely accept. That is the reality of the situation</u>.'

[Emphasis supplied.]

[32] The applicant was scheduled to visit South Africa for F's birth in July 2012 and the applicant sent him another list of items to bring with him from the USA. The applicant did not question that the respondent would continue to stay on in South Africa, at least for a period, after the birth. The applicant himself stated in these proceedings that:

> *'After respondent was advised in March that she was unable to fly, we were both aware that she would remain in Cape Town for the winter which lasts at least until the end of September and into early October.'*
>
> [Emphasis supplied.]

[33] The respondent gave birth to F on 13 July 2012. The applicant was not present as F was born earlier than anticipated. He arrived in South Africa on 22 July 2012. During that visit the parties went shopping for items such as a new toddler bed and booster seat for J. They also visited three boys' schools in Cape Town which offer both primary and secondary education. The applicant urged the respondent to place the children's names on the waiting list for one of these schools. The applicant returned to the USA in approximately mid-August 2012. The respondent contends that the applicant did not once raise the issue of her return to San Francisco during the visit, or indeed thereafter, until January 2013. The applicant's version is that:

> *'I deny that I did not raise respondent's return. It was after F's birth that we discussed not making any decisions for a year.'*

[Emphasis supplied.]

[34] In October 2012 the parties agreed to askJ's pre-school to permit him to repeat the 2013 school year (which in South Africa runs from January to December) in the same class. On 15 October 2012 the respondent wrote to the applicant that she had attended*'a meeting with the principal and teacherat*[the pre-school] *today. Went well. They confirmed that he can stay back next year'.*

[35] In December 2012 the applicant again visited South Africa for J's birthday. During that visit he accompanied the respondent to the Department of Home Affairs to apply for South African passports for both children. On 27 December 2012 the parties attended at the US consulate to register F's birth as a *'foreign birth'* to enable F to acquire American citizenship. Therethe parties argued. The respondent's version is that they argued because the applicant wished to record that the children resided in the USA, whereas she insisted that the children now lived in South Africa. The applicant relented and the relevant forms, which were submitted with the applicant's consent, reflect the children as being resident in South Africa and their family contact details as being those of the respondent's parents. The applicant's version is that they disagreed because he wanted to include his family members (who reside in the USA) as family contacts. The respondent refused and threatened to leave the consulate if she did not get her way. However, the applicant does not specifically deny the respondent's version about the children's residence in South Africa. All that he states is that *'I wanted*

to register F's birth so that he could qualify for a social security card in the USA, this would mean that he would be included in my taxes and it would entitle him to a US passport'.

[36] On 31 December 2012 the parties completed forms to enrol F on the waiting list for J's pre-school for the 2014 school year. The parties paid the enrolment fee during January 2013.

[37] After the applicant's return to the USA, the parties had discussions about their future. On 16 January 2013 the respondent wrote to the applicant that *'…moving back to SF is not an option for me at this time'.* The applicant replied in an email dated 17 January 2013 that *'I am saddened but not surprised by your wanting to stay in Cape Town'.*

[38] The respondent avers that they also discussed her visiting San Francisco with the children during the June/July 2013 school holiday. Although denied by the applicant, hehad written to the respondenton 17 March 2013 that *'your visit in June will provide you with another opportunity to assess your items in the States and determine what you want to take back…'*. On 22 February 2013 the respondent wrote that *'I don't think we should exclude from our* [joint] *tax return this year that I am now living in SA with the kids. Let me know whether you think we should file jointly or separately'.* The applicant admits receipt of this email, but seeks to contextualise it by claiming that it was sent during *'the agreed twelve*

month period. I was aware respondent would remain in South Africa <u>until at least July 2013</u>.' [Emphasis supplied.]

[39] In early March 2013 the respondent's father travelled to the USA on business and also visited the applicant to pack up some of the respondent's belongings. The applicant contends that it was after this visit that he knew that the respondent would not be returning to the USA although her father had refused to confirm this.

[40] On 28 March 2013 the applicant instituted divorce and separate child custody proceedings in the USA. In the child custody proceedings he declared that it was in the email from the respondent dated 5 February 2012 that he had learnt that she wished to remain in South Africa *'permanently'*; but that he had not acted on this information because he had been *'so distraught at the prospect of not seeing our son and potentially missing out on the upcoming birth, as well as the overall position that* [the respondent] *had put me in'.*

[41] In the same proceedings the applicant declared that the collection of her belongings by the respondent's father *'further reaffirmed my wife's intent of not coming back'.* Significantly, his declaration in the USA child custody proceedings was not disclosed by the applicant in his founding papers in the present matter; nor did he disclose in the USA child custody proceedings that on 7 February 2012 the respondent had told him that *'I am not moving here permanently, I*

wouldn't do that to you. We need to work on a solution together'.

[42] Unbeknown to the respondentat the time, the applicant also instituted Hague proceedings through the US Department of State in late March 2013. He did not pursue those proceedings but has not explained why. He also failed to annex a copy of those papers to his founding papers in this matter. They were only made available to the respondent's legal representatives after service of the relevant notice on the applicant's attorneys during the course of preparing the respondent's answering affidavit. The declaration made by the applicant in that Hague application contains the averments that:

> *'At the time of our leaving the United States, my wife, L, had stated that she was fully planning on returning to the United States. I flew back to the US and she reconfirmed her intent on returning to the United States, but on the day that she was supposed to travel back to the United States, she refused to board the plane, keeping my son in South Africa. She has since refused to return back to the United States.'*
>
> [Emphasis supplied.]

[43] On the applicant's own version,neither the respondent nor J even had a ticket to return to the USA in February 2012. If the applicant was referring to the months that followed, he does not suggest that the respondent fabricated her mother's illness and her own medical condition as excuses not to return. The above allegations are also at variance with what he claimed in the USA child custody

proceedings;as wellas the contradictory grounds advanced in the present matter, namely that:

> *'During my visit* [to South Africa] *in July 2012 respondent, her family and I discussed our situation. In the context of respondent having a newborn baby as well as J to deal with, and the fact that we had still not resolved our marital problems or made a firm decision on what to do, respondent's mother… suggested that we adopt a passive approach for at least a year. In effect respondent and I agreed that neither of us would make a decision regarding where we wished to live, whether it would be together as husband and wife or apart in different homes, whether we would live in the same city or in the same country…*
>
> *Respondent felt she was not emotionally strong enough to make a final decision and I was loathe to push her into doing so. She was clear however that at that stage* [i.e. July 2012] *she had not yet decided to remain in South Africa… After* [the respondent's father's] *departure I knew that respondent was not going to return to the USA… I immediately contacted my attorney… with a view to instituting divorce proceedings…*
>
> *I have not consented to my children remaining in South Africa beyond 13 July 2013.'*

[Emphasis supplied.]

[44] The applicant's unconvincing attempt to explain these material contradictions is that:

> *'On the realisation that respondent would not return to the USA I was emotionally distraught and extremely angry. I admit that she did not refuse to board a plane. However I deny that these inconsistencies in the* [USA] *Hague Convention application and this application are material…*
>
> *I deny that I have relied on a date for respondent's return. I have repeatedly stated that we agreed to wait for at least a twelve month period before making decisions regarding our future. It is respondent who has created this fictional return date.'*
> [Emphasis supplied.]

[45] The USA divorce and child custody proceedings were served on the respondent in early April 2013. On 14 April 2013 the respondent's father wrote to the applicant and his parents, stating that:

> *'L and A promised to give each other a year after F was born to decide on their future as a couple. This was an idea* [respondent's mother] *had to let emotions calm and to encourage clear thinking. They also agreed not to involve litigators. From our point of view they have nothing to lose by trying mediation. If it does not work, they can always then get lawyers…'*

[46] It appears that this suggestion did not find favour with the applicant, because on10 May 2013 the respondent herself instituted divorce proceedings in South Africa, claiming primary residence of the children and alleging South Africa to be their permanent place of residence. In his plea filed in the South African proceedings, the applicant put forward yet another version, namely that the

respondent *'only recently formed the intention of remaining in South Africa…'.* [Emphasis supplied].

Evaluation

[47] In the Scottish case of *Moran v Moran* 1997 S.L.T. 541 the children had been taken to Scotland by the mother after they had lived in California for three years. When the mother failed to return the children after a period of one year the father applied for their return to California. While the purpose of the trip to Scotland was in dispute, the court found that it was the intention of the parties that they would discuss the family's future at the end of that one year period. At page 7 the court concluded that it would be wrong to construe the agreed stay in Scotland as a mere temporary absence from California given that:

> *'There is no doubt that a return* [to California]*was at the very least a possibility, after the agreed year or so in Scotland. There was however also a clear possibility, in the minds of the parties when agreeing to the stay in Scotland that such a return would not be the answer. Discussion, not return, was to be the next chapter. And it would be wrong in my view to construe the agreed stay in Scotland as a mere temporary absence from California, or a mere intermission, as a sort of suspension of ordinary life in California. Ordinary life, for the next year at least, was to be in Scotland, precisely because ordinary life in California was not satisfactory.'*
>
> [Emphasis supplied.]

[48] In *Moran* the court accepted that for a person to be habitually resident in a particular place, there is no need for that person to intend to stay there indefinitely; there must be a degree of settled purpose, but that purpose might be for a limited period.

[49] On the applicant's version, the parties agreed that the children would remain in South Africa for at least a 12 month period calculated from July 2012. At that point discussion, not return, would be the next step. As in *Moran* there were two possibilities. One was a return to the USA; the other was for the respondent and the children to remain in South Africa, whether for a fixed period, indefinitely or permanently. And while it is so that the respondent declared in the South African divorce proceedings that she and the children reside permanently in Cape Town, this was in May 2013, i.e. after the applicant had shown that he did not consider himself bound by that agreement, given that in the USA divorce and child custody proceedings instituted in March 2013, he had sought the children's immediate return to the USA.

[50] It is not in dispute that J has now resided in South Africa for close to two years. F has resided here since his birth. Nor is it in dispute that the children's reality is the life that they have lived in South Africa. J is flourishing in the attention of an extended family as well as the respondent's social circle. He is settled and happy in his pre-school. The applicant visits regularly. Although the applicant contends that because the children are very young they*'would not have experiences that*

would result in acclimatisation in Cape Town' he has not produced a shred of evidence, whether factual or otherwise, to support this.

[51] The applicant furthermore actively assisted the respondent in fully integrating the children into life in South Africa. He participated in all decisions and financed their implementation. He clearly envisaged something other than a temporary absence from,or *'sort of suspension of ordinary life'*, in the USA.

[52] In my view there is abundant evidence to show that the children are acclimatised to life in South Africa; that their residence here has a significant degree of settled purpose; and that, on the applicant's own version, in July 2012 the parties had shared the mutual intention to fix the children's residence in South Africa until at least July 2013 whereafter further discussion would take place as to the family's future.

[53] I thus conclude that the applicant has failed to establish the existence of any agreement for the children's return to the USA by a fixed date; and that, at the earliest date that any such*'retention'*could conceivably have taken place, i.e. May 2013, the children were in any event not habitually resident in the USA.

[54] In light of these findings it is not necessary to consider whether the applicant launched these proceedings timeously under art 12 of the Hague Convention.

CONCLUSION

[55] I accordingly make the following order:

The application is dismissed with costs.

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CLOETE J