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IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

REPORTABLE

CASE NO: 2821/2021

In the matter between:

THE AD HOC CENTRAL AUTHORITY FOR THE REPUBLIC OF SOUTH AFRICA (As delegated in terms of section 277 of the Children's Act, 38 of 2005)	First Applicant
PAUL GRAHAM BALL	Second Applicant

and

HEIDI NICOLE KOCH N.O.	First Respondent
HEIDI NICOLE KOCH	Second Respondent

Bench: P.A.L.Gamble, J.
Heard: 23 February 2021.

Delivered: 1 March 2021.

This judgment was handed down electronically by circulation to the parties' representatives via email and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on Monday 1 March 2021.

JUDGMENT

GAMBLE, J:

INTRODUCTION

1. This urgent application brought by the first respondent, the ad hoc Central Authority for the Republic of South Africa[1], seeks to secure the immediate return of a little girl, E[….] J[….] B[….] (born on 6 July 2017 in the United Kingdom – "the UK"), to the country of her birth. The application follows upon an order issued by Saldanha J on 11 December 2020 that E[....] be returned to her country of habitual residence within 30 days of the death of her mother (Claire Mechthilde Colyn) who, it is common cause, died after a long battle with cancer in Cape Town on 8 December 2020. The order of Saldana J is currently the subject of an appeal to the Supreme Court of Appeal ("the SCA"), leave having been granted by His Lordship to that court on 9 February 2021.

2. The application before Saldanha J was moved on 21 July 2020 by the Central Authority on behalf of E[....]'s father, Paul Graham Ball, a citizen of the UK, who sought his daughter's return to that country under the Hague Convention[2]. The father was the second applicant in that application and the second applicant in this application. The latter is brought pursuant to the provisions of s18 of the Superior

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[1] Duly delegated in terms of s277 of the Children's Act, 38 of 2005.

[2] The Hague Convention on the Civil Aspects of International Child Abduction was ratified by South Africa and first incorporated into our law by separate statute on 1 October 1997. It is now incorporated into our law through Schedule 2 to the Children's Act, read with s275 of that act.

Courts Act, 10 of 2013 and is intended to seek the immediate implementation of the order of Saldana J, notwithstanding the pending appeal to the SCA.

3. The Court was informed during the hearing of this application that no date has yet been allocated by the Registrar of the SCA because the notice of appeal due by the appellants (the respondents in this application) has not yet been filed. That delay was evidently occasioned by the legal representatives for the prospective appellants having to urgently apply themselves to this matter, which was brought on short notice in the fast track of the Motion Court on Friday 19 February 2021, when the matter was postponed until Tuesday 23 February 2021 for a virtual hearing.

4. At that virtual hearing the parties were represented as before Saldanha J – Adv. N. Mayosi for the Central Authority and Advs. J.L. McCurdie SC and L. Bezuidenhout for the first and second respondents, to whom I shall conveniently refer as “Ms. Koch” and/or “E[....]’s aunt”. The Court is indebted to counsel for their helpful heads of argument and their addresses that have facilitated the urgent preparation of this judgment. During the hearing, Ms. McCurdie informed the Court that enquiries to her client’s correspondent attorneys in Bloemfontein have established that the matter is likely to be added to the SCA roll for the second term, i.e. between 3 and 31 May 2021.

BRIEF FACTUAL BACKGROUND

5. The background facts and circumstances are well known to the parties and their legal representatives and I shall accordingly provide just a brief summary thereof.

6. The deceased is from Cape Town where her mother, Ms. Margaret Koch, and sister, Ms. Heidi Koch, reside in the suburb of Noordhoek. Where necessary, I shall refer to the former as “the grandmother” in order to avoid confusing her with her daughter, Heidi. In 2016 the deceased met Mr. Ball in the UK where she was residing at the time. E[....] was born there on 6 July 2017 out of the ensuing relationship. The deceased (then aged 42) and Mr. Ball (then aged 51) did not marry

but cohabited before and after E[....]'s birth. It seems as if the relationship floundered around August 2018 and Mr. Ball left the common home later that year but retained regular contact with E[....] thereafter. The deceased evidently maintained Mr Ball after he left the common home, as he was unemployed at that time.

7. In April 2019 the deceased was diagnosed with a very severe form of cancer and commenced treatment under the UK's National Health System ("NHS"). Mr. Ball then returned to the common home to support the deceased and E[....]. The NHS treatment did not adequately address the deceased's condition and in August 2019 the couple decided to travel to South Africa in order that the deceased could seek further medical attention locally. They arrived in Cape Town on 5 September 2019 and stayed with Ms. Koch where E[....] had access to her aunt and her grandmother who lives close by. It is said that the parties had hoped to resurrect their relationship during this time.

8. Shortly before the deceased was to undergo surgery for her condition on 26 September 2019, the extended family visited a private game reserve near the Kruger National Park, as this was one of the deceased's dreams. It appears as if the relationship between the deceased and Mr. Ball was under severe strain during this time. Be that as it may, upon their return to Cape Town towards the end of September 2019, they separated and Mr. Ball took up rented accommodation in Cape Town. He returned to the UK on 2 October 2019: this was the date upon which the couple had provisionally intended to return when the deceased arrived here for treatment. Upon Mr Ball's departure for the UK, the parties agreed that E[....] would continue to reside in Cape Town with her mother and her extended family while the deceased received further treatment.

9. In an email to Mr. Ball written on 10 October 2019, the deceased said that she would stay in South Africa for so long as there was a prospect of her treatment being successful. She told Mr. Ball that, in the event that there was no further treatment available to her, she would return to the UK with E[....]. Mr. Ball acquiesced in this arrangement and E[....] remained in the de facto care of her aunt and grandmother while the deceased was receiving treatment.

10. Sometime thereafter, the deceased had a change of heart and informed Mr. Ball via a WhatsApp message on 7 November 2019 that she would be returning alone to the UK to wind up her affairs but that E[....] would remain in Cape Town. She informed Mr Ball that if something happened to her and she was unable to care for E[....] in the future (and in the worst-case scenario, if she died) that E[....] would continue to reside with her family in Cape Town and be cared for, and raised by, Ms. Koch. In the result, the deceased's health took its toll and she was unable to return to the UK as contemplated.

COMMENCEMENT OF HAGUE CONVENTION PROCEEDINGS

11. Mr. Ball was unhappy with this development and ultimately approached the Central Authority in the UK to secure the return of E[....] under the Hague Convention on the basis that the deceased was unlawfully retaining her in Cape Town without his consent. The UK authorities made contact with their South African counterpart and Adv. Z. Abdullah (a staff member of the Office of the Family Advocate in Cape Town) was granted an ad hoc appointment under s275 of the Children's Act to represent the Central Authority locally.

12. On 7 May 2020 Mr. Abdullah wrote to the deceased and invited her to resolve the issue voluntarily and without resorting to litigation. This approach was consonant with Article 10 of the Hague Convention. However, no such agreement could be reached. Notwithstanding the fact that the Central Authority was informed by the deceased's legal representatives on 13 May 2020 of the inability of the parties to resolve the matter, no immediate application for the return of E[....] under the Hague Convention was launched.

13. On 25 June 2020 the deceased and Ms. Koch jointly approached this court on motion under case no. 7920/2020 for an order regulating the care of, and contact to, E[....]. The application made provision for attenuated time periods and was set down in the Motion Court for hearing during the winter recess on 21 July 2020. Conscious of the fact that her illness was then terminal, the deceased wished to appoint Ms. Koch as the child's de facto carer and to procure parental rights and

responsibilities for her in relation to E[....]. The parties referred to this as “the care and contact application” and I shall do likewise.

14. On 21 July 2020 the care and contact application came before Saldanha J who was on recess duty. On the very same day, the Central Authority launched the threatened Hague Convention application for the return of E[....] to the UK under case no. 9445/2020. The parties then concluded an interim agreement on that day in respect of both matters then before the court which was made in order of Court, and to which I shall refer more fully hereunder. The Hague Convention application was thereafter postponed and dealt with from time to time by Saldanha J until the judgment was delivered.

15. The care and contact application was held in abeyance by agreement between the parties. This was because, on the common assumption that the Central Authority’s application was brought within a reasonable time after Mr. Abdullah’s letter of 5 May 2019, the commencement of the Hague Convention proceedings had the effect of rendering the care and contact application incapable of being finally determined for so long as the Hague application was pending. This was in accordance with the provisions of Article 16 of the Hague Convention[3].

LEAVE TO APPEAL

16. On 31 December 2020 Ms. Koch delivered an application for leave to appeal the order of 11 December 2020, which was opposed by the Central Authority and Mr. Ball. The application served before Saldanha J on 19 January 2021 but was struck from the roll because the deceased had not been properly substituted by the executor of her deceased estate.

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[3] Article 16 reads as follows –

“After 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 the Convention is not lodged within a reasonable time following receipt of the notice.”

17. The following day, 20 January 2021, Ms Koch received her Letters of Authority as the executor in the deceased's estate and she was thereafter substituted in the Hague proceedings in her representative capacity as the first respondent, while continuing to litigate in her personal capacity as the second respondent. Ms. Koch is similarly cited as the first and second respondent in this interlocutory application.

18. An amended notice of application for leave to appeal having been filed on 29 January 2021, the application itself served before Saldanha J on 3 February 2021. On 9 February 2021 His Lordship granted the application for leave to appeal to the SCA in the following unusual circumstances.

19. The Court found that the first and second respondents had failed to establish that there were reasonable prospects of success on appeal or that there were compelling reasons to grant such leave. This notwithstanding, the Court granted leave for the reasons which were articulated as follows.

"[34] What is of particular concern to this court is the consequence of protracted appeal processes in a Hague Convention matter such as this, which would in effect defeat the very purpose and objective of the Convention and the order of the court. In my view and respectfully so, that is the only compelling reason in this matter for it to be considered by a higher court and with a measure of urgency. It is for that reason, and to avoid what would be lengthy delays in the implementation of an order by this court, on the merits or in the event of this court being wrong, that I have considered granting leave to appeal to the Supreme Court of Appeal. I am mindful that this is an unusual consideration, but equally mindful that these are Hague Convention proceedings. Moreover, I have considered the best interest of the minor child where protracted appeal proceedings may ensue. The court has therefore requested the counsel for the first applicant and the Central Authority for the United Kingdom and Wales to endeavour, through the rules of the Supreme Court of Appeal, to have the appeal heard on an expedited basis in that court. Counsel for the applicants undertook to do so subject, of course, to the rules of the Supreme Court of Appeal."

20. Notwithstanding the clear concerns expressed by Saldanha J, the Central Authority immediately set about launching this application to give immediate effect to the order of 11 December 2020. As I have said, on Monday, 15 February

2021 it lodged this application for urgent relief under s18 of the Superior Courts Act ("the SC Act") and set it down for hearing at 10h00 on Friday, 19 February 2021. The papers were served on Ms. Koch's attorneys just after 14h30 that afternoon with the notice of motion affording her an opportunity to file an answering affidavit just over 48 hours later - by 16h00 on Wednesday, 17 February 2021.

21. The time frames set by the Central Authority in this application were, in my view, unduly tight in the circumstances and did not conform to the approach of affording the opponent a reasonable chance to answer the case as contemplated in cases such as Gallagher[4]. I thus gave serious consideration to striking the matter from the roll but, in light of the fact that this matter is ancillary to Hague proceedings and given that comprehensive answering papers had been lodged before the matter was due to be called, I directed that the matter be heard early in the following week in order that a replying affidavit could be filed, together with heads of argument.

THE ORDER OF 21 JULY 2020

22. The first point is taken in the answering affidavit, and effectively argued by Ms. McCurdie as a point in limine, is the import of the agreed order taken by the parties on 21 July 2020. I recite the terms of the order in full.

"By agreement between the parties:

IT IS ORDERED THAT:

1. The application under the above case number 7920/2020 ("**the Care and Contact application**") is stayed, pending the outcome of the Hague Convention proceedings under case number 9445/20 ("the Hague application");

[4] Gallagher v Norman's Transport Lines (Pty) Ltd 1992(3) SA 500 (W)

2. Pending the outcome of the Hague application, and in the event the Hague Application is unsuccessful, pending the outcome of the Care and Contact application:

2.1 E[....] shall not be removed from the Republic of South Africa by any party other than in terms of this court; and

2.2 E[....] shall continue to reside primarily with the Second Applicant[5].

3. Costs to stand over."

23. Ms. McCurdie argued that the terms of the order were clear and unambiguous. She submitted that for so long as the Hague application was before the courts in South Africa awaiting the outcome of the litigation, the parties had agreed that E[....] was to continue to reside with Ms. Koch. It was said that the pending appeal, granted with the leave of the court of first instance, would of necessity determine that outcome and the Central Authority was roundly criticised by counsel for failing to address the order in its founding affidavit in these proceedings and for seeking to act in breach of the order without motivating its stance

24. The import of the order was addressed by Ms. Koch in the answering affidavit in this application and a copy thereof was annexed to the affidavit. She criticized the conduct of the Central Authority and Mr Ball as follows.

"5.5 Applicants agreed, in an order of Court, that E[....] would reside primarily with me pending the outcome of the Convention proceedings, alternatively, if the Convention application was unsuccessful, pending the outcome of the care and contact proceedings (referred to below). Applicants have failed to disclose this term of the order in their application and accordingly have not provided an explanation for what appears to be their view that they are not bound by such order…"

[5] Ms Koch was cited as the second applicant in the care and contact application.

25. While the founding affidavit in this application was deposed to by Mr. Abdullah, the replying affidavit was made by Mr. Ball, who replied to the contents of subparagraph 5.5 of Ms. Koch's answering affidavit as follows.

"13. The terms of [the order of 21 July 2020] are clear; it sought to regulate the stay of the care and contact application pending the outcome of the Hague Convention proceedings that were before this Court under case number 9445/2020. The outcome of these proceedings was handed down on 11 December 2020, and the Hague Convention application was successful.

14. Further [the order] sought to ensure that if the Hague Convention proceedings were not successful, E[....] would remain with the second respondent until her care and contact application was finally determined. Once again that this does not arise because the outcome of the proceedings under case number 9445/20, to which [the order] relates, has been successful."

26. In argument, Ms Mayosi submitted that the terms of the order were not intended to cover any proceedings beyond those being conducted in this court. She relied on the reference in the body of the order to the High Court case as recorded in the heading thereto as limiting the outcome to proceedings in this court only. That argument is without merit because the number of an appeal court case is allocated by the SCA and then only after leave to appeal has been granted: there was no appeal court case number that could have been reflected at that stage.

27. Counsel suggested, further, that had it been the intention of the parties to agree that the undertaking would cover further proceedings such as an appeal, the order would have explicitly stated so by including, for instance, the word "final" before the word "outcome" where it appears in paragraphs 1 and 2 of the order. Absent that limitation on the outcome, said Ms Mayosi, Mr Ball was fully entitled to ask for the immediate implementation of the order of Saldanha J.

28. The argument now advanced on behalf of Mr Ball is, firstly, not based on the allegations made in either the founding or replying affidavits, whose purpose is to

contain both the evidence and the pleadings in these motion proceedings.[6] There is no claim in either affidavit that the agreement was intended to be limited to the proceedings in this court only and, further, that it was expressly intended not to apply pending any subsequent appeal. The interpretation contemplates a drastic inroad into a party's ordinary procedural rights to seek to appeal a court order and in so doing assume that any implementation of an order granted against her would be suspended pending the appeal. This is the usual position and one would thus have expected that such a deviation from the normal arrangement would be clearly articulated in both the order itself and in any affidavit seeking to rely thereon.

29. But, regardless of whether the matter has been properly addressed by Mr Ball and the Central Authority on the papers, I am of the view that the wording of the order itself does not sustain the argument advanced by Ms Mayosi. The order embodies an agreement concluded between the parties and is to be assessed in accordance with the contemporary approach to interpretation in which it has repeatedly been said that "context is all." This mode of interpretation requires the document to be considered in its contextual setting with due regard for background and surrounding circumstances, as well as the subsequent conduct of the parties in relation thereto.

30. In Bothma-Batho[7] the SCA restated the approach thus:

"Whilst the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is 'essentially one unitary exercise'."

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[6] Transnet Ltd v Rubinstein [2005] 3 All SA 425 (SCA) at [28]

[7] Bothma-Batho Transport (Edms) Bpk v S.Bothma & Seun (Edms) Bpk 2014 (2) SA 494 (SCA) at [12]

31. Earlier, in Endumeni[8], the SCA stressed that in considering the import of a written instrument,

"An interpretation will not be given that leads to impractical, unbusinesslike or oppressive consequences or that will stultify the broader operation of the legislation or contract under consideration.'

32. The background to the 21 July 2020 order is that the deceased and her sister had initiated proceedings in this Court to address the future care and contact arrangements in respect of E[....]. That application required, as a primary jurisdictional fact, the presence of E[....] within this Court's jurisdiction and it was, in the absence of pending Hague proceedings, a legitimate route for the deceased and her sister to pursue at that stage given the gravity of the deceased's medical condition. However, once the Hague proceedings were launched the deceased's entitlement to continue with the care and contact application was effectively suspended by statute.

33. Both parties would have been aware, when they concluded the agreement that underpinned the order, that either set of proceedings in this Court would be subject to a possible appeal. To suggest that the deceased and Ms. Koch did not contemplate the right to appeal an adverse ruling in the Hague proceedings is simply untenable: like so many Hague Convention applications this is heavily contested litigation which will determine in which continent or foreign country E[....] will live for the foreseeable future.

34. And, a Hague Convention application, like any other class of litigation, is not constrained by the terms of the Convention to a single round of litigation in the court of first instance. The law reports in the UK and this country are replete with any number of reports of the extent of appeals in Hague matters and the consequent delays occasioned thereby.[9]

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[8] Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) at [26]

[9] See, for example, Sonderup v Tondelli 2001 (1) SA 1171 (CC); Penello v Penello 2004 (3) SA 117 (SCA); In re D (a child) [2007] 1 All ER 783 (HL) at [53]; In re E (children) [2011] All ER 517 (SC); KG v

35. Indeed, Mr Ball readily accepted that risk as he explains in the replying affidavit when dealing with the fact that he had commenced an internet-based campaign to raise funds in relation to the Hague application.

"81. On the advice of friends in the UK, I did indeed begin a go-fund-me campaign to cover my costs of being in South Africa. Although I had wished to return to the UK with E[....] on 11 January 2021, even before I left the UK I was aware that my stay in South Africa could be for much longer than that. - because of pending appeals - hence the crowd funding campaign."

This is demonstrative of Mr. Ball's understanding of the order of 22 July 2020 and is relevant as subsequent conduct in interpreting the order.

36. I consider, too, that, had the boot been on the other foot, and had Mr Ball not been successful at first instance, it is only reasonable to infer that he too would have exhibited the same degree of interest in the litigation, which the deceased and her sister had, and sought to appeal the matter further. Given that the consequence of such an outcome would have meant that the deceased and Ms Koch were then free to resume the care and contact application, it is reasonable to infer further that Mr Ball would have relied on the terms of the 21 July 2020 order to further restrain the pursuit of that application.

37. Of course it would have been much easier to interpret the extent of the 22 July 2020 agreement had the parties employed the sort of language so often used in interim arrangements: words such as "pending the final determination of the main proceedings/action to be instituted". But, I am not persuaded by Ms Mayosi's submission that the failure to import such a phrase into the order is fatal to Ms. Koch's argument. Considering the order in its contextual setting, and having regard to its intended "business efficacy", I am satisfied that the parties intended the reference to "the outcome" of the Hague application to embrace any appeals against the finding of the court of first instance therein and that the removal of E[....] from the Republic and her continued residency with her aunt was governed thereby. Any interpretation to the contrary would stultify the customary approach to Hague matters.

CB 2012 (4) SA 136 (SCA) at [57] *et seq.*

38. In the result, I am satisfied that there is merit in the point in limine raised by Ms McCurdie. Given that the Central Authority and Mr Ball have advanced no valid reasons to explain why they are no longer bound by the order of 22 July 2020, I am of the view that it remains binding on the parties and that the present application falls to be dismissed on this basis alone. In the event, however, that I am wrong on the point in limine, I proceed to consider the merits of the Central Authority's application under s18 of the SC Act.

THE APPROACH TO S18 OF THE SUPERIOR COURTS ACT

39. Prior to the promulgation of the SC Act in 2013, the common law practice as discussed by Corbett JA in South Cape Corporation[10] applied.

"(I)t is today the accepted common law rule of practice in our Courts that generally the execution of a judgment is automatically suspended upon the noting of an appeal, with the result that, pending the appeal, the judgment cannot be carried out and no effect can be given thereto, except with the leave of the Court which granted the judgment. To obtain such leave the party in whose favour the judgment was given must make special application."

40. Whereas the common law position was effectively regulated by Uniform Rule 49(11), the status of a judgment subject to an appeal is now extensively governed by the provisions of s18 of the SC Act.

"**Suspension of decision pending appeal**

18.(1) Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or an appeal, is suspended pending the decision of the application or appeal.

(2) Subject to subsection (3), unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order not having

[10] South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd 1977 (3) SA 534 (A) at 544H – 545H

the effect of a final judgment, which is the subject of an application for leave to appeal or of an appeal, is not suspended pending the decision of the application or appeal.

(3) A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders.

(4) If a court orders otherwise, as contemplated in subsection (1) –

(i) the court must immediately record its reasons for doing so;

(ii) the aggrieved party has an automatic right of appeal to the next highest court;

(iii) the court hearing such an appeal must deal with it as a matter of extreme urgency; and

(iv) such order will be automatically suspended, pending the outcome of such appeal.

(5) For the purposes of subsections (1) and (2), a decision becomes the subject of an application for leave to appeal or an appeal, as soon as an application for leave to appeal or a notice of appeal is lodged with the registrar in terms of the rules."

41. The application of s18 has been considered by the courts in a number of decisions at both High Court and SCA level.[11] In one of its earliest decisions on the section in question, the SCA noted as follows in UFS.

"[9] In embarking upon an analysis of the requirements of s18, it is firstly necessary to consider whether, and, if so, to what extent, the legislature has interfered with the common-

[11] Incubeta Holdings (Pty) Ltd and another v Ellis and another 2014 (3) SA 189 (GJ); Liviero Wilge Joint Venture and another v Eskom Holdings SOC Ltd [2014] ZAGPJHC 150 (12 June 2014); Minister of Social Development, Western Cape and others v Justice Alliance of South Africa and another [2016] ZAWCHC 34 (1 April 2016); Ntlemeza v Helen Suzman Foundation and another 2017 (5) SA 402 (SCA); University of the Free State v Afriforum and another 2018 (3) SA 428 (SCA) ("UFS")

law principles articulated in *South Cape Corporation*, and the now repealed Uniform Rule 49(11). What is immediately discernible upon perusing s18(1) and (3) is that the legislature has proceeded from the well-established premise of the common law that the granting of relief of this nature constitutes an extraordinary deviation from the norm that, pending an appeal, and extraordinary deviation from the norm that, pending an appeal, a judgment and its attendant orders are suspended. Section 18(1) thus states that an order implementing a judgment pending appeal shall only be granted 'under exceptional circumstances'. The exceptionality of an order to this effect is underscored by s18(4), which provides that a court granting the order must immediately record its reasons; that the aggrieved party has an automatic right of appeal; that the appeal must be dealt with as a matter of extreme urgency; and that pending the outcome of the appeal the order is automatically suspended.

[10] It is further apparent that the requirements introduced by s18(1) and (3) are more onerous than those of the common law. Apart from the requirement of 'exceptional circumstances' in s18(1), s18(3) requires the applicant 'in addition' to prove on a balance of probabilities that he or she 'will' suffer irreparable harm if the order is not to made, and that the other party 'will not' suffer irreparable harm if the order is made. The application of rule 49(11) required a weighing-up of the potentiality of irreparable harm or prejudice being sustained by the respective parties and, where there was a potentiality of harm or prejudice to both of the parties, a weighing-up of the balance of hardship or convenience, as the case may be, was required. Section 18(3), however, has introduced a higher threshold, namely proof on a balance of probabilities that the applicant will suffer irreparable harm if the order is not granted, and conversely that the respondent will not if the order is granted."

42. Having agreed with the views of the authors of Erasmus: Superior Court Practice that s18(3) was "a novel provision [which] places a heavy onus on the applicant", the SCA set the test as follows.

"[13] Whether or not 'exceptional circumstances' for the purposes of s18(1) are present must necessarily depend on the peculiar facts of each case. In *Incubeta Holdings…* [at [22]] Sutherland J put it as follows:

> "Necessarily, in my view, exceptionality must be fact-specific. The circumstances which may be 'exceptional' must be derived from the actual predicaments in which the given litigants find themselves.'

I agree. Furthermore, I think, in evaluating the circumstances relied upon by an applicant, a court should bear in mind that what is sought is **an extraordinary deviation** from the norm, which, in turn, requires the existence of **truly exceptional circumstances** to justify the deviation." (Emphasis added.)

43. In Incubeta Holdings the High Court held that the prospects of success on appeal did not fall for consideration when "exceptional circumstances" under s18(1) were examined. On the other hand, the Full Bench in this Division found in Justice Alliance that they were capable of being considered. In both UFS[12] and Ntlemeza[13] the SCA confirmed the approach in Justice Alliance[14] but in each of those cases, the SCA declined to include consideration of that factor because the complete record of the proceedings *a quo* was not before it.

44. Ms Mayosi accepted that in applying s18(1) and (3) this Court was required to approach the matter incrementally. First, the Court has to be satisfied that the Central Authority has cleared the stringent test[15] of establishing circumstances which constitute "an extraordinary deviation from the norm" and are thus "truly exceptional". Counsel accepted, too, that it was not appropriate for this Court, in considering such exceptionality, to be bound by Saldanha J's finding that the prospects of success were poor: this Court is to make its own evaluation of this factor.

45. Then, it was not in dispute that the Court must thereafter be satisfied that the Central Authority has established that it and Mr Ball "will" (not "might") suffer irreparable harm. Finally, the Court must be persuaded by the Central Authority that Ms. Koch "will not" (rather than "might not") suffer irreparable harm. Counsel fairly accepted that should the Central Authority stumble at any of these hurdles along the way, that that was the end of the race, as it were, and the application was bound to fail.

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[12] At [15]

[13] At [44]

[14] At [28]

[15] In Ntlemeza at [28] the SCA observed that "the legislature has set the bar fairly high"

EXCEPTIONAL CIRCUMSTANCES

46. In the founding affidavit in these proceedings, Mr Abdullah relies heavily on the correctness of the finding by Saldanha J that Ms Koch had failed to establish her reliance on Article 13(b) of the Hague Convention that E[....]'s return to the UK would expose her to psychological harm or otherwise place her in an intolerable situation.

47. Article 13 reads as follows –

"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 child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

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

The judicial or administrative authority might also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

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

48. Although the file in the Hague application was placed before me, I have not had an opportunity to consider the many 100's of pages therein in the time available. Importantly, the parties did not address me on the contents thereof in

relation to the merits of the appeal and it is certainly not the function of this Court to fossick around in the file looking for relevant information.

49. What is clear, however, from reading the judgment of Saldanha J, is that that Ms. Koch relied on the expert opinion of Emeritus Professor Astrid Berg, a Senior Child and Adolescent Psychiatrist of the University of Cape Town's Department of Psychiatry, a copy whereof was annexed to the answering affidavit in this application, in support of her Article 13(b) defence.

50. Prof Berg did not interview the child nor the parties and relied on information conveyed to her by Ms. Koch's attorney. I have seen those instructions and they appear to be a fair and balanced assessment of the relevant facts and circumstances. The professor's approach to the matter is at the level of general application of the principles of psychological and psychiatric consequences applicable to the immediate removal of E[....]. Suffice it to say that the expert opinion of an eminently qualified academic is not challenged by a similar expert on the side of the Central Authority either locally or abroad. After a detailed discussion of the pros and cons in relation to E[....]'s removal back to the UK, Prof Berg concluded that-

"4.6 The consequences of returning to the UK would thus be dire for E[....]'s mental health in the short as well as long-term."

51. Much was said before Saldanha, J about the fact that the professor used the word "dire" to describe the potential consequences of E[....]'s return, as opposed to the "grave risk" which Article 13(b) contemplates. In my view, the distinction sought to be drawn is in truth much ado about nothing and the professor's concerns cannot be dismissed simply because she has not parroted the wording of the Article in question.

52. Having considered the extensive definitions of both "dire" and "grave" in the New Shorter Oxford English Dictionary and the synonyms of each word in the

Collins Thesaurus A-Z (Desktop edition)[16], it is apparent that both contemplate extremely deleterious degrees of the human psychiatric condition considered by Prof Berg to be antithetical to E[....]'s best interests. Indeed, there might well be an argument that "dire" is intended to convey a more serious degree of harm than "grave'.

53. In the result, I am of the considered view that there are reasonable prospects of success on appeal (as that phrase is now contemplated in s17 of the SC Act) and that the views of Saldanha J to the contrary do not constitute "truly exceptional circumstances" for the purposes of applying s18(1) of the SC Act.

54. Ms Mayosi made two further submissions concerning this hurdle which are foreshadowed in the founding affidavit in this application. Firstly, it was said that this was a Hague application and that the prompt return of the child was paramount. Of course, counsel is correct in relation to the importance of the issue of promptness, but she was unable to produce any authority, either locally or abroad, where a court had ordered the return of the child pending an appeal. The absence of such authority is not surprising in light of the complaints of the various appellate courts about the systemic delays in finalising Hague matters to which I referred in footnote 9 above. The urgency implicit in a Hague application for return of a child, or rather the frustration thereof, is manifestly not a "truly exceptional circumstance" as contemplated in s18(1) of the SC Act. It is unfortunately part and parcel of the judicial process where the wheels notoriously grind slowly.

55. Secondly, Ms Mayosi argued that our Central Authority's inability to secure the immediate return of E[....] to the UK would be viewed in a dim light by its counterpart on the other side, the International Child Abduction and Contact Unit ("ICACU"). I do not agree. The ICACU will be well aware of the delays occasioned by

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[16] "**Dire** = desperate, pressing, crying, critical, terrible, crucial, alarming, extreme, awful, appalling, urgent, cruel, horrible, disastrous, grim, dreadful, gloomy, fearful, dismal, drastic, catastrophic, ominous, horrid, woeful, ruinous, calamitous….

Grave = serious, important, significant, critical, pressing, threatening, dangerous, vital, crucial, acute, severe, urgent, hazardous, life-and-death, momentous, as perilous, weighty…."

appeal proceedings in any Hague application (as the decisions of the House of Lords and the UK Supreme Court referred to in footnote 9 above reflect) and it would no doubt, in the interests of international comity, allow the South African legal system to follow its ordinary processes in that regard.

56. In fact, I would have thought that any concerns that the ICACU might have regarding undue delay would be adequately explained by the remarks of Saldanha J in para 34 of his judgment in the application for leave to appeal as set out in para 19 above, which demonstrate that the South African court of first instance was acutely aware of the necessity for the prompt resolution of the application.

57. In the result, I conclude that the Central Authority and Mr Ball have failed to establish the exceptional circumstances implicit in s18(1) of the SC Act and that the application falls to be dismissed at that level too.

IRREPARABLE HARM.

58. In the event that I am wrong in relation to the issue of the presence of exceptional circumstances warranting immediate implementation of the return order, I address briefly the issue of irreparable harm. I do so with consideration of the prejudice on both sides of the litigation-divide.

59. In the founding affidavit, Mr Abdullah complains that Mr Ball is the only person who has parental rights and responsibilities in respect of E[....] and that his right to exercise same is being interfered with. It is said, quite understandably, that Mr Ball is being deprived of the opportunity to care for his child and that every day that he does not have her with him is a lost day. It is said that such time cannot be made up and thus it is claimed that the harm is irreparable.

60. I do not think that the distress, frustration and despondency that a left-behind-parent in a Hague application suffers is the sort of irreparable harm which the Legislature contemplated under s18(3). Perhaps if there were evidence of a psychological or psychiatric condition which had eventuated, this might conceivably

be considered as harm. But that is not the case here. I am of the view, subject to what I say hereunder in respect of E[....], that the Legislature considered “irreparable harm” to be the sort of harm that courts ordinarily consider in relation to the granting of temporary interdictory relief, for that is where the phrase is most commonly encountered.

61. Generally, that harm would be patrimonial in nature and readily capable of measurement. For that reason, one often encounters an offer by the party opposing the interim relief, to make good any harm suffered by the other party during the currency of the order.

62. The harm of which Ms. Koch complains does indeed appear to be of a patrimonial nature. Ms. McCurdie argued that if E[....] were to leave Cape Town now and the SCA were to uphold the appeal later in the year, E[....] would, in terms of the 22 July 2020 order, be required to be returned to Cape Town to enable the care and contact application to proceed. Counsel pointed out that Mr. Ball has given no undertaking to return the child in such event: on the contrary, he has suggested that Ms. Koch would be free to approach the Central Authority to procure the return of E[....] to Cape Town. In other words, success on appeal for Ms. Koch would lead to the necessity for a further Hague application in the UK, which most assuredly would have financial implications.

63. Since I do not know what the extent of the deceased’s estate is, I am unable to say whether these expenses will be borne by Ms Koch personally or in her representative capacity. Be that as it may, there is nevertheless the potential for patrimonial harm on the side of the respondents in the sense of legal expenses that are unlikely to be recovered. Firstly, because costs orders are not customarily made in Hague proceedings and, secondly, because Mr Ball does not appear to be a person of means. The papers suggested that he has been in and out of employment in the UK, that the deceased supported him on occasion in 2019/2020 and, we know, too, that he had to resort to an online funding campaign to cover his expenses in Cape Town.

64. Mr. Ball is obliged to demonstrate under s18(3) that Ms. Koch will not suffer any irreparable harm. He has failed to do so and for this reason, too, the application for immediate implantation of the order cannot succeed.

HARM TO E[....]

65. Given the unique circumstances of this case, I believe that the Court is in any event obliged to consider, in the context of competing claims of irreparable harm, whether the granting of the application might occasion harm to E[....] or, at the very least, may be inimical to her best interests.

66. In Sonderup the Constitutional Court dealt with the constitutionality of the Hague Convention in the context of s28(2) of the Constitution, 1996, which upholds the paramountcy of the best interests of the child and found that the Convention passed constitutional muster. However, in delivering the unanimous judgment of the Court, Goldstone J did touch upon the situation where there was the potential for a clash between Hague Convention principles and the paramountcy of the child's best interests under the Constitution.

"[29] What, then, of the short-term best interests of children in jurisdictional proceedings under the Convention? 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. I shall assume, without deciding, that this argument is valid. To that extent, therefore, the Act might be inconsistent with the provisions of section 28(2) of the Constitution which provide an expansive guarantee that a child's best interests are paramount in every matter concerning the child. I shall proceed therefore to consider whether such an inconsistency is justifiable under section 36 of the Constitution, which requires a proportionality analysis and weighing up of the relevant factors."

67. This application is not strictly brought under the Hague Convention but it is clearly related thereto in that it seeks to enforce the rights protected and granted under the Convention. I consider that this Court finds itself in the position referred to

by Goldstone J in the first sentence of para 29 in Sonderup. Consequently, I am of the view that this Court is entitled, indeed obliged, to have regard to the short-term consequences of the granting of the s18 order on E[....]'s best interests.

68. Ms. Koch has placed before this Court evidence regarding E[....]'s welfare since her mother's death and the interaction that there has been between her and Mr. Ball during such time as he has had contact to her. The evidence shows a confused little girl who does not comprehend fully what has happened to her mother. She tires easily when she is with Mr. Ball and while she seems to have exhibited a measure of attachment towards him, she is clearly more comfortable with her aunt and grandmother who have become important attachment figures in her life. The evidence shows too that E[....] was admitted to hospital for a couple of days in early February 2021 suffering from an unknown viral infection. She also suffers from chronic asthma and is evidently not the healthiest little girl at the moment.

69. I consider that it would be detrimental to E[....]'s best interests to order her return to the UK now, when there is a possibility that the SCA may either decide otherwise in upholding the appeal or, possibly, fix different terms for her removal from the Republic. The proposition really only has to be postulated for its folly to manifest. It can never be in a child's best interests for her to be shuttled back and forth between countries while pending Hague proceedings are being finalised. All the more so, where the child has recently lost her mother and where there is no immediate maternal substitute at the other end with whom she is familiar.

70. In saying this, I have to consider too the prospect of E[....] being transported across international borders during the existence of a deadly world-wide pandemic which, according to Mr Ball's replying affidavit, will require her to undertake a long flight to the UK without the option of a direct overnight flight from Cape Town to London and then for her to be quarantined in a hotel room alone with her father for at least 10 days upon her arrival in the UK.

CONCLUSION

71. In the result I am of the view that the application to enforce forthwith the order of this court of 11 December 2020 cannot succeed. Ms Mayosi accepted that if the application was dismissed, that costs should follow the result. I am of the view that those costs should include the costs attendant upon the employment of two counsel. Not only does the application raise important issues of law but the time frames imposed by the Central Authority were such that the matter could only be responsibly opposed using two counsel.

ORDER OF COURT

The application is dismissed with costs including the costs of two counsel where so employed.

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GAMBLE, J

APPEARANCES:

For the applicants:	Adv. N.Mayosi Instructed by the State Attorney, Cape Town
For the respondents:	Advs.J.L McCurdie SC and L.Bezuidenhout Instructed by Ross Mc Garrick Attorneys, Lakeside C/o Norman Wink and Stephens, Cape Town.