

Familial Child Abduction: Ad Hoc Central Authority, South Africa and Another v Koch NO and Another

2024 (3) SA 249 (CC)

INTRODUCTION

Familial child abductions usually occur during or after messy divorces and include, *inter alia*, when a child is taken to another country or location by one parent, unbeknownst to and without permission from the other parent. This type of abduction can take many forms. It can be as simple as one parent keeping the child for longer than the allotted visitation period ordered by the court or as dire as a parent moving the child to another country without the required permission from the other parent. However, not all cases of familial child abduction are as harmless - some may involve a family member abducting a child for abusive and sexual purposes. It is therefore essential for parents and guardians of children to be aware of the legal position surrounding familial child abductions and how their rights or the rights of the children in question may be implicated.

It is for the reasons set out above that the Children's Act 37 of 2005 (the "Act") and the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abductions (the "Hague Convention") set forth provisions and procedures for the prevention and recovery of children abducted by family members.

Article 13(b) of the Hague Convention provides: *"Notwithstanding the provisions of the preceding Article, the judicial... authority of the requested State is not bound to order the return of the child if the person... which opposes its return establishes that — there is a grave risk that...her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation"*. This Article is an important consideration in light of the case below.

CASE LAW

In the Constitutional Court matter of Ad Hoc Central Authority, South Africa and Another v Koch NO and Another 2024 (3) SA 249 (CC), the court had to interpret

By **Dominique Lobban** (Candidate Attorney) and **Robert January** (Senior Associate)

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and apply the Act and Hague Convention with regard to a child with a widowed mother.

The facts set out that the mother and father were born in South Africa but moved to the United Kingdom after getting married. Their child grew up in the UK until 2 years old, when the mother grew gravely ill and the family decided to return to South Africa for treatment, with the intention of returning to the UK once the mother had recovered. During this time, they stayed with the mother's sister but the marriage between the mother and father became very strained and eventually led to the irretrievable breakdown of their marriage. The father returned to the UK and the mother and child stayed in South Africa with the child's aunt. It was during this time that the mother decided that when she died, the child should not be raised by the father but rather by her sister in South Africa.

The father strongly objected to these wishes and enlisted the help of the Central Authority for England and Wales ("CAEW") to retrieve the child on the grounds that he, as the child's father, had not consented to the child remaining in South Africa. When the mother refused to consent to the child being returned to the UK, the Central Authority for South Africa ("CASA") applied to the High Court for an order returning the child to the UK, on the instruction of the CAEW. The defence raised was that there was a grave risk that the child's return would expose her to psychological or physical harm or otherwise place her in an intolerable situation, which is not in line with Article 13(b) of the Hague Convention. Before the judgment was given, the mother passed away. The High Court ruled in favour of the father. The child's aunt appealed the decision to the Supreme Court of Appeal ("SCA"). The SCA upheld the appeal. The father and CASA consequently appealed the SCA's decision to the Constitutional Court.

COURT HELD

The majority judgment held that the Article 13 defence had not been fully established on the fact that risk was mitigated by social support available to the child in the UK.

Properly viewed, the harm described by the experts would be harm of a degree naturally flowing from an order to return but would not satisfy the threshold of gravity envisioned in Article 13(b), and finally, harm would likely flow from the father's absence. Consequently, the appeal was upheld, and the child was ordered to return to the UK. Pending her return, she was not to be removed from the Western Cape.

The dissenting judgment considered issues left open in *Sonderup v Tondelli* 2001 (1) SA 1171 (CC). The first was whether Article 13(b) should be narrowly interpreted. The dissenting judges held that it should not be, as its plain wording implicitly set a high threshold. To meet it, the risk needed to be grave, and the harm must be of a degree that was intolerable. Second was the issue of proof. The dissenting judges held that the party raising the defence bore the burden of proof, the standard being a balance of probabilities. Evidence did not need to be on affidavit, and the discretion to admit evidence needed to be exercised in this light, influenced by the circumstances, as well as the evidence's nature and the issues surrounding the situation. Furthermore, it was held that factual disputes should not be resolved by application of the *Plascon-Evans* rule, but by assessment of what the common facts were, what facts were unchallenged or corroborated, and the probabilities. Third was the discretion to order the return of the child, even if Article 13(b) was established. The dissenting judges held that, in the exercise of this discretion, the child's interests had to be weighed against the Convention's purposes (deterring abduction and unfair advantage in custody disputes by forum-shopping).

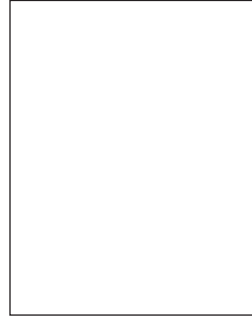
Here, the Article 13(b) defence was established, and the overriding discretion to order the child's return should not be exercised. The dissenting judges would therefore have upheld the appeal, set aside the SCA's order, and replaced it with an order dismissing the appeal from the High Court's judgment.

CONCLUSION

Through the above Constitutional Court decision, as well as the dissenting judgment, it is evident that proving risk and harm to a child regarding their removal by one parent without the consent of the other parent has a higher threshold than what the High Court originally held it against. It further highlights that a child's best interests, and not the parent's, should be considered at all times. This is evident in that it was ultimately decided that the child should be returned to the UK after the Constitutional Court had real regard to the child's best interests in living in the UK with her father, and not in South Africa based on the mother's dying wishes, for her to live with the aunt. The best interests of the child were clearly at the forefront of the Constitutional Court's mind, both in the majority and dissenting judgments, and this is the position which will be followed in future instances of familial child abductions.

VALUE

The Constitutional Court drew a line in terms of the applicability and threshold of Article 13(b) of the Hague Convention, successfully clarifying the high threshold in determining its applicability as a defence.



Robert January
(Senior Associate)



Dominique Lobban
(Candidate Attorney)