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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 150/2019

9/5/2019

In the application for leave to appeal between:

**THE CENTRAL AUTHORITY
(THE REPUBLIC OF SOUTH AFRICA)
L[....] D[....]**

**FIRST APPLICANT
SECOND APPLICANT**

and

P[....] H[....]

RESPONDENT

JUDGMENT APPLICATION FOR LEAVE TO APPEAL

COLLIS J:

[1] In the present application, the respondent Ms H[....], is seeking leave to appeal the order¹ wherein this Court, ordered the forthwith return of the minor child (Ms E[....] D[....], to the jurisdiction of Luxembourg. The main application was brought in terms of the Hague Convention on the Civil Aspects of International Child Abduction.²

[2] The application for leave to appeal is sought in terms of the provisions of section 17(1) (a)(i) and section 17 (1) (a) (ii) of the Superior Court's Act, No 10 of 2013. The respondent contends that the appeal would have a reasonable

¹ Judgment Collis *J* delivered 15 March 2019

² Section 275 of the Children's Act 28 of 2005, sets out the Hague Convention is in force in South Africa subject to the provisions of the Children's Act

prospect of success and that there is a compelling reason why the appeal should be heard.

[3] A court in considering an application for leave to appeal must be persuaded with a measure of certainty that another court will differ from this court's judgment to be appealed against.

[4] The objectives of the Convention is to secure the prompt return of children wrongfully removed to or retained in any contracting state; and to ensure that rights of custody and access under the law of one Contracting State are effectively respected in another Contracting State.³

[5] The Constitutional Court, in the decision *H v Fetal Assessment Centre*⁴ expressed a view in para [64] as follows:

"In South Africa, in addition to section 28 (2) of the Constitution, the common law principle that the High Court is the upper guardian of children obliges courts to act in the best interest on the child in all matters involving the child. As upper guardian to all dependent and minor children, courts have a duty and authority to establish what is in the best interests of children. Notably, in *Mpofu* this Court endorsed the approach in *Kotze v Kotze*:

"The High Court sits as upper guardian in matters involving the best interests of the child (be it in custody matters or otherwise), and it has extremely wide powers in establishing what such best interest are. It is not bound by procedural strictures or by the limitation of evidence presented, or contentions advanced or not advanced, by respective parties". "

[6] The respondent in her application had listed 28 grounds of appeal, with counsel appearing on behalf of the respondent having filed extensive Heads of Argument. In this regard, the first applicant had also filed a short note in opposing the application. Similarly, the second applicant presented opposing arguments.

[7] In essence counsel on behalf of the respondent argued, that this court in broad terms had failed to adjudicate this matter with a child-centred approach;

³ Article 1 of the Convention

⁴ 2015 (2) SA 193 (CC)

failed to bear in mind the provisions of the Children's Act and that it failed to consider a defence raised with substance in terms of Article 13(b) of the Hague Convention.

[8] In addition to this, counsel had argued that this Court considered the matter with reference to the *Sonderup v Tondelli & Another* 2001 (1) SA 1171 (CC) matter which was decided before all the provisions of the Children's Act , Act 35 of 2008 came into force.

[9] The first applicant had argued that the application for leave to appeal should not succeed. By allowing the. responded leave to appeal this court's decision, counsel submitted will not result in a just and prompt resolution of the all the issues, more specifically the custody dispute between the parties as envisaged in terms of section 17(1)(c) of the Superior Courts Act. The custody dispute remains pending within the jurisdiction of the Luxembourg Courts and still needs to be finalised. It is for this reason that counsel contended that the application should fail.

[10] On behalf of the second applicant Ms Liebenberg had argued, that it is unlikely that another court would come to a different decision, and therefore the application for leave to appeal should be refused. She submitted that in this regard, the respondent resorted to self-help in violation of two court orders and throughout her answering affidavit had initially maintained that if so ordered by this Court, that she would accompany the minor to Luxembourg. Furthermore, that she changed this position on the eve of the hearing of the application when she was permitted to file a further supplementary affidavit, which affidavit only considers her own interest and fails to take into account the rights and interest of the father towards his child.

[11] Ms. Van Der Westhuizen, the minors' court appointed curatrix, also expressed an opinion, that it would not be in the best interest if the minor is not returned to the jurisdiction of Luxembourg as ordered by this Court.

[12] Having carefully considered the grounds of appeal together with the arguments presented and more importantly taking into account the judgment of this Court, I am not persuaded that the appeal would have a reasonable prospect of success nor does there exist a compelling reason why the appeal should be

heard. The judgment of this Court had regard to the provisions of the Children's Act, the previous case law on point and importantly the evidence presented before this Court, by way of affidavits and reports and concluded that the minor should be returned forthwith, as it would be in the best interest of the minor.

ORDER

[13] In the result, the following order is made:

13.1. The application by the respondent (Ms. H[...]) for leave to appeal against the order of 15 March 2019, is accordingly refused with costs.

C. J. COLLIS
JUDGE GAUTENG DIVISION
PRETORIA

APPEARANCES:

For the First Applicant:	Adv. C. Woodrow
Instructed by:	The State Attorney PRETORIA
For the Second Applicant:	Adv. S. Liebenberg
Instructed by:	Du Randt Du Tait Pelsers Attorneys.
For the Respondent:	Adv. C. Van Schalkwyk
Instructed by:	Couzyn Hertzog & Horak Inc.
Curatrix Ad Litem:	Adv. L. Van Der Westhuizen
Date of hearing:	06 May 2019
Date of judgment:	09 May 2019