

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

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: Yes
(3) REVISED: YES

CASE NO: 150/19
15/3/2019

In the matter between:

THE CENTRAL AUTHORITY

(THE REPUBLIC OF SOUTH AFRICA)

L D H

FIRST APPLICANT

SECOND APPLICANT

And

P H

RESPONDENT

JUDGMENT

COLLIS J:

INTRODUCTION

1. The book of James 1:17 it is written that: ***"Every good gift and every perfect present comes from God, the Creator of the heavenly lights who does not change or cause darkness by turning"***¹ Children are a gift from God and as such they have been the subject of many litigation.

31

¹ Good **News** Bible: Today's English Version

2. The present application is brought in terms of the Hague Convention on the Civil Aspects of International Child Abduction ("the Hague Convention")²
3. In terms of this application the above Honourable Court is requested to order the return of a minor child E D H to the jurisdiction of the Luxembourg Central Authority in terms of the Hague Convention.

THE CONVENTION

4. The objectives of the Convention are to secure the prompt return of children wrongfully removed to or retained in any contracting state; and to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in another Contracting State.³
5. The Convention provides for a mandatory return procedure whenever a child has been removed or retained in breach of the rights of custody of a person "under the law of the State in which the child was habitually resident immediately before the removal or retention."⁴ The mandatory return is tempered by a Court's discretion to refuse to order return of a child if the court is of the opinion that the provisions of Articles 13 and 20 have been met. In this regard the burden of prove rests on the respondent to prove elements of the defences which burden must be discharged on a balance of probabilities.⁵
6. The objectives of the Convention are predicated on the notion that the abduction of a child will generally be prejudicial to his or her welfare and that in general custody issues of children are best to be decided by the courts in the child's country of habitual residence which court is best placed to hear the merits of the case.⁶
7. In the decision *KG v CB and Others* quoted *supra* the following was

² In terms of section 275 of the Child ren' s Act 38 of 2005 the Hague Convention is in force in the RSA subject 2005 to the provisions of the Children's Act 38 of 2005

³ Article 1 of the Convention.

⁴ Article 3 of the Convention; *KG v CB and Others* 201 2 (4) SA 136 (SCA) para[19] at 145H - 146A

⁵ *Pennello v Pennello* (Chief Family Advocate as Amicus Curiae) 2004 (3) SA 11 7 (SCA) para 38

⁶ *Boezaart Child Law in South Africa* 2009 pg. 354

remarked:

"It must be remembered that a return order granted under the Convention is an order for the return of the child to the contracting state from which he or she was abducted and not to the left-behind parent. The child is not by virtue of a return order removed from the care of on parent or remanded to the care of the other parent. The situation which the child will face on return depends crucially on the protective measures which the court can put into place to ensure that the child will not have to face a harmful situation when he/she returns to the country of habitual residence."⁷

THE CONSTITUTION

8. In considering the present application this court remains mindful of the provisions of our Constitution more specifically section 2 and section 28(2) respectively.

Section 2 provides as follows:

"This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid and the obligations imposed by it must be fulfilled."

Section 28(2) further provides:

"A child's best interest are of paramount importance in even matter concerning the child".

BACKGROUND

9. The Respondent (mother of child) together with E arrived in South Africa on 4 October 2018.
10. Prior to her removal to South Africa, E was habitually resident in Luxembourg together with the respondent and her older brother called S.
11. Before her removal the Second Applicant (father of child) together with the respondent had agreed that they would share parental authority in respect

⁷ KG v CB para (51) at pg. 157E - F

of E.⁸ The shared parental authority was confirmed by the courts in Luxembourg prior to her removal from the jurisdiction of Luxembourg.⁹

12. As mentioned on 4 October 2018 the respondent removed E from Luxembourg, not only without the consent of the respondent but also in contravention of an order (confirmed on appeal) that refused her permission to leave to relocate to South Africa.¹⁰
13. This prompted the second applicant to approach the Luxembourg Central Authority with a plea to take all necessary measures to secure the return of E to her place of habitual residence. On or about 17 October 2018 the Luxembourg Central Authority directed a request to the RSA Central Authority. The request was received by the RSA Central Authority on or about 19 October 2018.¹¹

ISSUES FOR DETERMINATION

14. The present application was first dealt by this court on the urgent court roll on 7 February 2019.
15. On this day two issues were raised *in limine* which the court was called upon to decide. Firstly whether the application was to be dealt with on the urgent roll and secondly the court heard arguments on the appointment of a curator ad litem in compliance with the provisions of section 279 of the Children's Act 38 of 2005. The court was further to decide as to this whether a social enquiry should be conducted as envisaged by section 278 of the Children's Act.
16. In addition to the points *in limine* this court was also to determine the respondent's opposition which is premised on the provisions of articles 13(b) and 20 of the Convention.

FIRST POINT IN LIMINE: LACK OF URGENCY

17. The issue of whether a matter should be enrolled and heard as an urgent application is governed by the provisions of Rule 6(12) of the Uniform

⁸ Founding Affidavit pg. 18 para 30; Answering Affidavit pg 216 para 27

⁹ Founding Affidavit pg. 18-19 para 31-32; Answering Affidavit pg 217 para 28

¹⁰ Founding Affidavit pg. 24 para 45.4; pg. 25 para 46.2 pg. 26 para 49

Rules.

18. In terms of the rules and practice directives of this court the applicant in an urgent application should set forth explicitly the circumstances which he avers renders the matter urgent and the reasons why he claims that he could not be afforded substantial redress at the hearing in due course.¹²
19. If the facts and circumstances set out in the applicant's affidavit do not constitute sufficient urgency for the application to be heard as an urgent application and do not justify the abrogation of time periods set out in Rule 6(5) the court will not grant an order for the enrolment of the application as an urgent application.
20. In respect of urgency and on behalf of the respondent it was argued in the absence of a social enquiry to be conducted as to the social circumstances of E and the respondent, together with a report of a curator ad litem, that the application lacks urgency and constitutes an abuse of the process of court. In this regard this court was referred to the decision *Band others v G* 2012 (2) SA 329 (GSJ).
21. The first applicant addresses urgency in paragraph 116 of its founding affidavit. Therein the first applicant states that the matter should be dealt with on the urgent roll as the applicants will not obtain sufficient redress at the hearing in due course and that they would suffer irreparable harm in the event that the application is not enrolled and adjudicated upon on an urgent basis.
22. Furthermore, due to the wrongful conduct of the respondent which has breach the rights of custody of the second applicant, it will be in the minor's interest and in the interest of that of the parents that the application be adjudicated upon on an urgent basis.
23. In addition to this in terms of the provisions and directive of the Hague Convention and the mandatory time periods set forth therein applications of this nature should be considered urgently as it provides for the prompt return of a child.

¹¹ Founding Affidavit pg. 33 para 75

¹² *Luna Meubels Vervaardigers (Edms) Bpk v Makin t/a Makin Furniture Manufacturers* 1977 (4) SA 13 5 (W) @137F

24. Having regard to the argument presented on behalf of the respondent it is clear no convincing argument was mounted against the matter being considered by the urgent court.
25. In the Heads of Argument prepared by counsel for the respondent the challenge was more directed at the absence of a social enquiry having been conducted prior to the hearing of the matter and the absence of a legal representative having been appointed to represent the interest of the minor.
26. This court remaining cognisant of the provision and directives of the Hague Convention deemed it prudent that the matter should be considered on the urgent roll.
27. The court having made the above ruling what followed next was a consent court order being made an order of court providing for compliance with the provisions of section 279 of the Children's Act wherein Advocate Lia Van Der Westhuizen was appointed *Curator ad Litem* on behalf of the minor.
28. The powers and scope of the curatrix ad litem were stipulated in paragraphs 3 and 4 of the court order dated 7 February 2019. It provided *inter alia* for:
 - "3.The curator ad litem shall represent the interest of the minor child in the proceedings before the above Honourable Court.
 - 4.The curator ad litem is authorized to inter alia:
 - 4.1 Investigate any matter related to the application.
 - 4.2 To interview the minor child
 - 4.3 To interview any other relevant person in the matter."
29. On this day the application was subsequently postponed to 18 February 2019 and the Curator ad Litem directed to file a report to be placed before the court for consideration.
30. The Curator ad Litem duly filed her report as directed by the court which report was accepted into evidence by the court.
31. Emanating from her report filed 13 February 2019 the Curator ad Litem³¹ reported that she consulted a number of individuals prior to finalizing her

report. Noteworthy of those individuals are Ms. N B the *Guardian ad Litem* with right of audience before the court in Luxembourg appointed to assist and represent the interest of E in the jurisdiction of that court.¹³

32. During the engagement which Adv. Van der Westhuizen had with Ms. B the latter made it clear that it would be in the best interest for E to return to Luxembourg. Furthermore, that the second applicant and the minor had formed a strong bond prior to the minors departure to South Africa also that she considered the respondent as selfish in that the respondent had made deliberate attempts to destroy the bond which was created between the second applicant and the minor.¹⁴
33. This court's appointed Curatrix ad Litem also had engagement with Prof Spies which professional was suggested by the respondent's attorney of record to assist with the contact which was granted to the second applicant as per the judgment of the court in Luxembourg dated 19 December 2018.¹⁵
34. Prof Spies was called upon to provide feedback on two aspects, namely the preparation of E for contact with her father and also to provide feedback regarding her observations of a contact session between father and daughter.
35. Prof Spies observed that the suggested contact as per the Judgment dated 19 December 2018 for the period 25 January 2019 - 10 February 2019 with sleepover would not be in E's best interest and the professor suggested a phase-in process to accommodate E's needs and pace.
36. Prof Spies further observed that E appears to have settled and adjusted in South Africa quickly in her newly established family unit consisting of her older brother and her mother's husband Mr N C.
37. She was of the opinion that E would suffer extreme trauma if her return would result in a separation between mother and child as she feels extremely loyal towards her primary caregiver. The expert was also of the

¹³ Report by the Curatrix ad Litem fi led 13 February 2019 pg. 1 - 41

¹⁴ Report by the Curator ad Litem para 2 pg. 6 - 9

¹⁵ Report by the Curator ad Litem para 3 pg. 11 - 20

opinion that a proper investigation of the newly established family unit is called for.

38. Lastly, she supported the view expressed by the Curatrix ad Litem that E was too young to be consulted on for her views and expressions as provided for by section 6(5) and 10 of the Children's Act.
39. Adv. Van Der Westhuizen also consulted Ms Candice Venter the teacher of E to obtain her views on the child's adjustment in South Africa since her arrival in October 2018.¹⁶
40. In this regard her teacher confirmed that E struggles slightly with her confidence but socialises well with friends of which she has made many. Her teacher further described her overall mood as that of a happy and lively girl.
41. Adv Van der Westhuizen also consulted the older brother of E, Mr S F. From her engagement with the brother, she observed that he has made a lot of new friends at school and at aftercare. Furthermore, that the older brother has intimated that he is aware that he might have to accompany his mother back to Luxembourg and stated that he would not want to do so as he prefers living in South Africa.¹⁷
42. The Curatrix ad Litem thereafter also consulted Ms A T. The latter is the partner of E's father. Ms T verbalized her love for E and had expressed the opinion that E is comfortable in her company and more often than not they have fun in each other's company. Ms T also opines that it would not be a normal life for E to see her father only a few times a year.¹⁸
43. Adv Van Der Westhuizen also had engagement with Mr N C. She observed that both E and S were comfortable with Mr C. During her discussion with him, he explained that in the event of the present application succeeding it will result in a disintegration of his newly established family unit. He also expressed the opinion that he considers it extremely unfair that the second respondent would not be entitled to relocate to South Africa and move on with her life, in the same way with

¹⁶ Report: Curator ad litem para 5 pg. 20 - 21

¹⁷ Report: Curator ad litem para 5 pg. 21 - 22

¹⁸ Report: Curator ad litem para 5 pg. 22 - 24

the second applicant has been able to do. He further informed the curatrix, that he gets along well with the father of S and that he would accompany S to Luxembourg in April this year for a visit with his father. He further indicated to the curatrix, that his daughter from a previous marriage have also been integrated into their newly established family until she stays in the same complex where they currently stay. He considers that it would be unfair to expect E to return to Luxembourg only for her father to exercise visitation every alternative weekend. Lastly, he expressed an opinion to engage the second applicant directly and tendered for E to spend every school holidays with her father.¹⁹

44. The Curatrix ad Litem also consulted the second applicant. Her first observation she records, is that the second applicant feels extremely frustrated with the second respondents' lack of respect for the court orders of the Luxembourg court. Mr. d H informed the curatrix that he was against an assessment to be conducted by Ms De Vos, an educational psychologist as he holds the opinion that the respondent is negatively influencing E against him. He further tendered the cost of rental of an apartment for the minor upon her return as well as other financial contributions if necessary. He lastly assured the curatrix that he does not intend to merely be a remote father and that he is committed on playing an active role in the upbringing of his only child.²⁰
45. Lastly, the Curatrix ad Litem had engagement with the respondent Ms H. During her discussions with the respondent she intimated to her that she felt that she is being punished, against her will and right to free movement by indirectly forcing her to return to Luxembourg with E. She admitted that she does not like the second applicant and prefers not to speak to him at all. She reiterated that she does not discuss or speak about the second respondent with her daughter at all, and that her newly established family unit would be destroyed if ordered to return to Luxembourg. She further confirmed to the curatrix that she has settled well in South Africa and was of the opinion that the respondent wishes to punish her out of spite by

¹⁹ Report: Curator ad Litem para 7 pg. 24 - 28

insisting that she should return to Luxembourg. She also expressed the opinion, if ordered by this court to return to Luxembourg that the second applicant would feel empowered and that he would destroy her in the process.²¹

46. In conclusion the curatrix ad litem opined that E should be returned to her jurisdiction of her habitual residence which is situated in Luxembourg. Furthermore, given the tender age of E (4 years) the curatrix was unable to consult the child to ascertain any possible objections which might be raised by her and therefore she would not fulfil the requirements of section 6(5) and 10 of the Children's Act neither the provisions of Article 13 of the Hague Convention.
47. As a result she requested an extension of her powers to permit her to appoint Ms M De Vos to conduct an emotional assessment on E and to provide a report to this court pursuant to such assessment having been conducted.²²
48. As a consequence of the conclusion reached by the appointed curatrix ad litem this court deemed it prudent after the hearing of argument to extend the powers of the curatrix to provide for the appointment of Ms De Vos, an educational psychologist, to conduct an emotional assessment on E.
49. The purpose of the emotional assessment to be conducted was to determine whether E objects to her return to Luxembourg and her reasons for that objections. This resulted in the matter being postponed to 1 March 2019 for adjudication upon receipt of the report by the educational psychologist.

EXCEPTIONS AS CONTEMPLATED IN ARTICLE 13 OF THE HAGUE CONVENTION

50. A court faced with an application under the Convention is obliged to place in balance the desirability in the interest of the child of the appropriate court retaining its jurisdiction on the one hand and the likelihood of

²⁰ Report: Curator ad Litem para 8 pg. 28 - 32

²¹ Report: Curator ad Litem para 9 pg. 32 - 37

²² Report: Curator ad Litem para 10 pg. 37 - 41

undermining the best interest of the child by ordering his or her return to the jurisdiction of that court. A court ordering the return of a child under the convention would be able to impose substantial conditions designed to mitigate the interim prejudice to such child caused by the court ordered return.

51. At this juncture it would be appropriate to allude to same relevant articles contained in the Hague Convention.

Article 3 of the Hague Convention provides as follows:

"The removal or retention of a child is to be considered wrongful where:-

- a) It is in breach of rights of custody attributed to a person an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before removal or retention ; and
- b) at the time of removal or retention those rights were actually exercised either jointly or alone or would have been so exercised for the removal or retention. The rights of custody mentioned in subparagraph a above may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State."

Article 4 of the Hague Convention provides:

"The convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to exist when the child attain the age of 16 years."

Article 12 of the Hague Convention provides as follows:

"Where a child has been wrongfully removed or retained in terms of Articles 3 and at the date of commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is a period of less than the year has elapsed from the

date of the wrongful removal or retention the authority concerned shall order the return of the child forthwith....."

Article 13 of the Hague Convention provides 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 the child was not actually exercising the custody rights at the time of removal or retention or had consented to or subsequently acquiesced in the removal or retention; or
- 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 may also refuse to order the return of the child if it finds 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."

Article 19 of the Hague Convention provides:

"A decision under this convention concerning the return of the child shall not be taken to be determination on the merits of any custody issue."

52. In the present matter as previously mentioned, the respondent placing³¹ reliance on the provisions of Article 13, must prove the exception on a

balance of probability.²³ In this regard the respondent places reliance on the exception provided for in article 13(b) i.e. that there is a grave risk that E's return will expose her to physical or psychological harm or otherwise place her in an intolerable situation.

53. In the decision *Soderup v Tondelli & Another* 2001(1) SA 1171 (CC) [44] the Constitutional Court states the following in respect of the nature of an Article 13 enquiry:

"[44] An art 13 enquiry is directed to the risk that the child may be harmed by a court- ordered return. The risk must be a grave risk. It must expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. The words 'otherwise place the child in an intolerable situation' indicate that the harm that is contemplated by the section is harm of a serious nature."

54. The harm which is a natural consequence of a child's removal from his or her habitual place of residence, a court-ordered return and a contested custody dispute is not of a serious nature as contemplated by the Hague Convention. The Hague Convention contemplates this type of harm and takes it into account in the remedy that it provides.²⁴

55. . In replying on the provisions of Article 13 of the Hague Convention and emanating from the respondent's answering affidavit, it is evident that the mother is submitting that E would be at grave risk of psychological harm and that she would be placed in an intolerable situation should she be returned.

56. Emanating from her answering affidavit the following allegations are made by the Respondent:²⁵

56.1 That there exist a lack of bond between E and her father as they were never married and separated as a couple when E was a mere 11 months old.

56.2 That she has always been E's primary caregiver and that E is

²³ *WS v LS* 2000 (4) SA (C) 11 21-J

²⁴ *Sonderup v Tondelli & Another* 2001 (1) SA 1171 (CC) [46]

closely bonded with her newly formed family.²⁶

56.3 As a result of a lack of proper bond between E and her father if ordered to return she will suffer tremendous psychological harm and trauma if placed in the primary care of the father.²⁷

56.4 The respondent further contends that from a financial point of view, she would be unable to afford to return to Luxembourg as she has no job to return to nor does she own property in Luxembourg.²⁸

56.5 Her precarious financial position would make it impossible to maintain two minor children as she considers it inconceivable to merely return on her own with E and for Sebastien to remain in South Africa.²⁹

56.6 Furthermore she contends that the respondent has failed to financially maintain E and if she is ordered to return to Luxembourg by this court it will result in an intolerable situation for E as she would find herself unable to support herself and E financially.³⁰

56.7 She also alleges that the second applicant habitually resides in Belgium and not Luxembourg and therefore she denies that Luxembourg is the habitual residence of the second applicant.³¹

57. Counsel on behalf of the mother repeated the allegations and had argued that this court as upper custodian of all minor children should place particular emphasis on the best interest of the child.

58. As previously mentioned in paragraph 48 this court extended the powers of the curatrix ad litem to appoint an educational psychologist Ms M De Vos and to permit the parties upon receipt of such report to file supplementary affidavits where necessary.

59. On 27 February 2019 the report of Ms De Vos was filed. The instruction for the evaluation was premised on the expert to conduct a comprehensive

²⁵ Answering Affidavit pg. 197 para 4.4

²⁶ Answering Affidavit pg. 197 para 4.5

²⁷ Respondent's Answering Affidavit pg. 198 para 4.9

²⁸ Respondent's Answering Affidavit pg. 199 para 4.10

²⁹ Respondent's Answering Affidavit pg. 199 para 4.11

³⁰ Respondent's Answering Affidavit pg. 200 para 4.14

assessment to establish the best interest of the minor child specifically related to the provisions of article 13(b) of the Hague Convention.

60. Ms De Vos conducted various assessments on E and in the end recorded the following findings in respect of E.³²

60.1 The psychologist observed that E is young girl that regards her mother, grandmother, N C and her brother Sebastian as her support structure.

60.2 She feels emotionally safe and secure.

60.3 She avoids discussing her biological father because she feels angry at him.

60.4 She has largely been sheltered from any adult conflict conversation.

61. The educational psychologist recommended that given E's young age she does not have the capacity to fully comprehend the implications of raising an objection.

62. She further remarked that if E is ordered to be returned it could potentially lead to an intolerable situation. This potential intolerable situation could be caused by having to uproot E now that she has settled in school and socially.

63. The psychologist also opined that E could also experience an intolerable situation if she is ordered to return and her older brother remains behind.

64. Pursuant to the report compiled by Ms De Vos and upon having considered her report the appointed curatrix had filed a supplementary report. In her supplementary report Adv. Van Der Westhuisen recommended that if this court orders the return of E to Luxembourg same would result in an intolerable situation and trauma which E would experience if such order will result in her being separated from her brother Sebastien and her mother.

65. The respondent upon receipt of both the supplementary report of the curatrix and the report of Ms. De Vos, elected to file a further

³¹ Respondent' s Answering Affidavit pg. 201 para 4.1 6 - 4.21

³² Confidential report by Ms Mariaan De Vos filed 27 February 2017

supplementary affidavit.³³

66. Evident from her further supplementary affidavit, the respondent undertakes to return with E, if this court orders her return. Furthermore, she alleges that she at best will only be able to return to Luxembourg for a maximum period of three months, and thereafter she would relocate to France where her mother stays. If she then was to take E along, the second applicant would then again invoke the provisions of the Hague Convention which will result in further psychological harm to E and would place her in an intolerable situation.³⁴
67. Furthermore , she alleges that she will face arrest upon her entry into Luxembourg and that if so arrested it will gravely affect not only E but also her older child.³⁵
68. In addition to the above, she alleges that any court order which our courts will give, the Luxembourgish courts will pay very little attention to.
69. As to her older child upon discussion between this child's father and with that of her husband the decision was taken that he will remain behind in South Africa if E is ordered to return to Luxembourg and that this will no doubt result in terrible punishment not only for Sebastien but also for E and the rest of her family.³⁶
70. Important from this affidavit is the concession made by the respondent that she relocated to South Africa despite her application for relocation being refused by the *court a quo* and on appeal.³⁷

APPLICATION OF THE LAW TO THE FACTS

71. Now at the onset, it should be mentioned that the provisions of Article 12 only finds applicability in as far as it mandates a Contracting State to return a child forthwith, where a child in is such Contracting State for less than twelve months from date of wrongful removal to date of commencement of proceedings.

³³ Index pg 457

³⁴ Index para2.5 pg 461 and para 3.4-3.5 pg 462

³⁵ Index para 3.15 pg 464

³⁶ Index para 3.16 pg 464 and para 4.1; 4.2 and 4.12

72. In the present instance it is common cause that E was removed from the jurisdiction from Luxembourg to South Africa on 4 October 2018 and proceedings were launched in this Court on 7 January 2019.
73. The next question for determination is whether E was habitually resident in Luxembourg prior to her wrongful removal to South Africa. By habitual residence is meant, when a child is being removed from the family and social environment in which her or his life has developed.³⁸
74. Having regard to the founding affidavit as well as the answering affidavit, it is not the habitual residence of the father which is determinative, but indeed that of the child prior to her wrongful removal. On the evidence presented E was staying in Luxembourg, together with her mother and older brother prior to her removal. She even attended a school in Luxembourg prior to her removal.
75. Therefore, the assertion made by the respondent that the father was in fact habitually resident in Belgium and merely owns property in Luxembourg is entirely misplaced for the purposes of this hearing.
76. This court in assessing whether the respondent has alleged the elements for exemption under Article 13 has to conclude that the facts as alleged by her are sufficient to support a finding that E should not be returned.
77. In this regard as mentioned the respondent alleges that E will suffer psychological harm if she is ordered to be returned and in so doing would be separated from her primary caregiver and or brother.
78. In this regard the respondent has allege, that a decision was taken by all concerned, that if ordered to return E, that the respondent will accompany her, but that her brother will remain in South Africa.
79. Now this court is mindful that it cannot order the return of either the respondent or S. Neither of them are the subject-matter of this dispute and as such it cannot be dictated to by this court what would be in the best interest of her child, in the event that the latter is ordered to be returned to Luxembourg.
80. If however the respondent is to pay due regard to the recommendations

made in this regard by Ms. De Vos, together with that made by the Curatrix ad Litem, it begs the question as to why the respondent would make an election to deliberately expose E to psychological harm by electing not to return with her brother.

81. The respondent in attempting to address the elements as contained in Article 13, further asserts that when she accompanies E to Luxembourg, she potentially will face arrest upon port of entry and this too will expose E to grave risk.
82. In this regard the first applicant in reply had filed a supplementary affidavit deposed to by the General State Prosecutor of Luxembourg indicating that no arrest warrant(national or international) exists against her and as such she will not face arrest upon her port of entry.³⁹ Albeit that a criminal case is pending same is still under investigation and no decision has been taken on any charges if any to be instituted against her.
83. The respondent resorted to self-help against two court orders ordering her not to remove E from the jurisdiction of Luxembourg. In addition to this, our courts certainly has no authority to prescribe to another independent state not to take any criminal sanction against any individual who have violated its laws.
84. Therefore, any arrest which she might face was entirely that of her own doing and it cannot be said that such potential arrest would be an element established in terms of Article 13.
85. The respondent has alleged that as a European citizen she will only be permitted to enter and remain in Luxembourg for a period not exceeding three months, unless she can prove that:
 - 85.1 that she is employed or self-employed;
 - 85.2 that she has resources to ensure that E are not dependent on social welfare and medical insurance;
 - 85.3 they are registered with and approved public or private education institution

³⁸ Senior Family Advocate Cape Town v Houtman 2004 (6) SA 274 (C) [15]

³⁹ First Applicant Supplementary Affidavit pg 441

86. In as much as the respondent asserts that E will be subjected to grave risk, if returned same will be assuaged if she returns with E.
87. The second applicant in order to ameliorate any financial burden which the respondent might suffer has undertaken to contribute an amount of 1000 Euros per month for a period of three months towards accommodation for E and a further 200 Euros towards her maintenance.⁴⁰ These undertakings this court considers reasonable under the circumstances.
88. Apparent from this undertaking is clearly an appreciation by the second applicant for the challenges which the respondent will face upon the court ordering the return of E and upon her making an election to accompany E.
89. The respondent as mentioned is a married woman and as such Mr. C owes her a spousal duty to support. Her affordability to maintain herself can therefore not be borne by the second applicant, and must be borne by her husband.
90. Having regard to the above and her concession made of having violated two court orders with her wrongful removal of E, I have come to the conclusion that she has failed to allege facts sufficient to either point to potential harm or grave risk referred to in Article 13.
91. This court can only implore the parties to finalise their pending custody dispute speedily in order to bring stability to their child E.

ORDER

92. In the result the following order is made:
- 92.1 The minor child, E D H ("E") shall be returned forthwith, but subject to the terms of this order, to the jurisdiction of the courts of Luxembourg.
- 92.2 Respondent is ordered to indicate in writing to First Applicant, within 5 days from date of this order, whether she intends accompanying E to Luxembourg, in which event, Respondent is ordered and directed to return with E to Luxembourg within 10 days of this order, subject to the terms of paragraph 3 hereunder.

92.3 Unless otherwise ordered by a court of competent jurisdiction in Luxembourg:

92.3.1 E's residence shall vest with Respondent, subject to Second Applicant's rights contact and visitation, in accordance with the existing orders of the courts in Luxembourg.

92.3.2 Second Applicant is ordered to arrange separate accommodation for Respondent and E in Mondorf-les-Bains, Luxembourg, chosen by Respondent, and Second Applicant is ordered to contribute the sum of no more than € 1 000 per month, for a period of 3 months, towards the cost of such accommodation.

92.3.3 Second Applicant is ordered to pay maintenance for E, from the date of her arrival in Luxemburg at the rate of € 200 per month.

92.3.4 Second Applicant and Respondent are ordered to co-operate fully with relevant authorities and courts in Luxembourg and with any professionals who conduct an assessment in order to determine what future custody, care, contact and visitation arrangements will be in the best interests of E.

92.4 In the event of Respondent failing to indicate in writing to First Applicant within 5 days of this order, her intention to return to Luxembourg with E alternatively indicating that she does not intend to return to Luxembourg with E, then in such event:

92.4.1 Respondent is ordered and directed to hand E over to First Applicant within 10 days of this order; and

92.4.2 First Applicant is ordered to facilitate E's return to the Jurisdiction of Luxembourg, such facilitation to include the return of E to be accompanied by E's father, Second Applicant alternatively by a social worker and/or any other suitably qualified person appointed by First Applicant.

92.5 In the event of Respondent failing and/or refusing to comply with the

order in paragraph 92.4 above, the sheriff of the court (*"the sheriff"*) is authorized. Empowered and ordered to remove E from the care of Respondent forthwith, wherever she may be found and to handover E to the Family Advocate, Advocate Ingrid Eberlanz (*"the Family Advocate"*) or any other person designated by First Applicant, so as to facilitate E's return to the jurisdiction of Luxembourg, and First Applicant is directed to take steps to ensure that such removal is the least disruptive to E, including utilizing the services of a social worker and/or any other suitably qualified person to assist with such removal.

- 92.6 Respondent is ordered to hand over to the family advocate forthwith the travel documents of E.
- 92.7 In the event of Respondent's failure to comply with the order in paragraph 92.6 above, the sheriff is authorized, empowered and ordered to search for and seize the travel documents of E and to hand same to the Family Advocate.
- 92.8 Pending E's return to Luxembourg, as provided for in this order, Respondent shall not remove E from the area of jurisdiction of this Court and shall keep Second Applicant and the Family Advocate informed of her physical address and telephone numbers in South Africa.
- 92.9 The respondent is ordered to pay First and Second Applicants' costs of this application.

COLLIS J

**JUDGE OF THE HIGH COURT OF
SOUTH AFRICA**

Appearances:

Counsel the First Applicant: : Adv. Chris Woodrow

Attorney for the First Applicant : The State Attorney PRETORIA

Counsel for the Second Applicant : Adv. Sarita Liebenberg.

Attorney for the Second Applicant : Du Randt Du Toit Pelser Attorneys

Counsel for the Respondent	: Adv. C. Van Schalkwyk
Attorney for the Respondent	: Couzyn Hertzog & Horak Inc.
Curatrix Ad Litem	: Adv. L. Van Der Westhuizen
Dates of Hearing	: 7 February 2019, 18 February 2019, 1 March 2019
Date of Judgment	: 15 March 2019