THE SUPREME COURT OF APPEAL

OF SOUTH AFRICA

CASE NO: 262/06

Reportable

In the matter between

CENTRAL AUTHORITY Appellant

and

BRIDGET KNEPPERS VAN HANXLEDEN HOUWERT Respondent

Coram**:** Farlam, Heher, Van Heerden, Maya JJA et Hancke AJA

Heard: 17 May 2007

Delivered: 4 June 2007

Summary: ***Minor – wrongful retention of – Hague Convention on the Civil Aspects of International Child Abduction (1980) – defences – article 13(a) – consent to retention – onus on parent raising the defence – no real or genuine dispute of fact raised on consent issue – expeditiousness essential at all stages of the Convention process, including appeals***

Neutral citation: This judgment may be referred to as *Central Authority v Houwert* [2007] SCA 88 (RSA)

JUDGMENT

VAN HEERDEN JA:

Introduction

[1] This appeal concerns a little boy (Noë) who was born on 1 May 2002 and is now five years old. He was brought to South Africa by his mother, the respondent, from Zandvoort, the Netherlands, in September 2003. Both he and his mother are still in South Africa, presently living in Pretoria with the maternal grandparents.

[2] On 24 June 2004, the appellant applied to the Pretoria High Court in terms of the Hague Convention on the Civil Aspects of International Child Abduction (1980) (the Convention), as incorporated into South African law by the Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996 (the Act),[1] for an order directing the immediate return of Noë to the Netherlands.

[3] On 14 June 2005, Van Oosten J in the Pretoria High Court made an order in, inter alia, the following terms:

'1. That the respondent [the mother], if oral evidence is required:

1.1 Be ordered to return to the Netherlands for the purpose of attending and/or opposing the custody hearing in respect of the minor child, Noë van Hanxleden Houwert ("the minor").

1.2 Return to the Netherlands seven days prior to the hearing of the custody hearing.

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[1] Which came into operation on 1 October 1997. Section 2 of the Act provides that the Convention (the full text of which is annexed to the Act as a Schedule) applies in South Africa. Thus, in terms of s 231(4) of the Constitution of the Republic of South Africa, 1996, the Convention has the force of law in this country.

2. That the father of the minor child shall give the respondent's attorneys 30 days notice prior to the date of the hearing in the Netherlands of such date.

3. That the father of the minor child is ordered to:

3.1 Purchase a return ticket for the respondent and the minor child.

3.2 Provide free accommodation for the respondent and the minor child at 85 Keesom Street, Zandvoort and the father will move out from such address for the duration of the respondent's stay aforementioned in the Netherlands.

3.3 Pay the respondent 500 euro maintenance upon her arrival in the Netherlands and which amount will be a maintenance payment for a period of 10 days. If the matter should proceed after this period he shall be obliged to pay a further amount of maintenance in the amount of 50 euro per day.

4. If the custody hearing is postponed for any reason whatsoever the respondent and Noë will return to South Africa.

5. In the event of the respondent and the minor child having to return to the Netherlands for a continuation of the custody hearing, the provisions as set out in paragraph 3 above will apply.

6. Each party to pay their own costs.'

This order was more or less identical to a draft order prepared by counsel for the mother at the request of the court a quo. In fact, it appears from the judgment that, after hearing argument, the learned judge requested counsel for the parties to each prepare a draft order providing for Noë's return to the Netherlands 'for the purpose of determination of the custody dispute' and that both duly complied with his request.

[4] On 28 June 2005, the appellant applied to the Pretoria High Court for leave to appeal to the Full Court, which application was refused on 28 September 2005. On 23 February 2006, this Court condoned the late filing of the appellant's application for leave to appeal and granted leave to appeal to this Court, 'conditional upon the appeal against the order of the Haarlem Court dated 27 September 2005, succeeding'. I will return in due course to the significance of the proceedings in the Dutch courts. Suffice it at this stage to say that the appeal against the said order of the Haarlem Court did indeed succeed, on 23 March 2006, hence the present proceedings.

Background

[5] The father, who is presently 31 years old, is a citizen of the Netherlands. He met Noë's mother, who was born and bred in South Africa and who is now also 31 years old, in 1998 in the Netherlands, where she was working as an au pair. After living together for several years, first in Haarlem and then in Zandvoort, they were married in Pretoria on 15 July 2000 and thereafter returned to the Netherlands. Their son, Noë, was born in Zandvoort on 1 May 2002 and is also a citizen of the Netherlands. The mother has dual South African and Dutch citizenship.

[6] On 25 September 2003, the mother and Noë left the Netherlands for South Africa, travelling on return tickets. It is common cause that the father consented to his wife's taking Noë to South Africa at that time. However, according to the father, the agreed purpose of the visit to South Africa was an

extended holiday, for no longer than three months, as the mother was homesick and needed some time to herself. The mother's version is that they had jointly decided to emigrate to South Africa and make their permanent home there with Noë; that it was agreed that she and Noë would travel to South Africa by themselves in September 2003, leaving the father behind to wind up the family's affairs in Holland, and that the father would join them in South Africa 'by December 2003'.

[7] In about January 2004, the mother informed the father that she was not returning to the Netherlands, but would remain in South Africa with Noë on a permanent basis. The mother says that the father informed her during December 2003 that he would be joining them in South Africa only in March 2004 and that, after December, it became apparent to her that their marriage relationship, which had been deteriorating for some time, had broken down irretrievably. In consequence, she telephonically discussed the question of divorce with him in January 2004, only to be told that he had already consulted a lawyer in Holland in that regard. According to her, they agreed that they should be divorced and that she would have custody of Noë and stay with the child in South Africa. It is her case that there is no question of a 'wrongful

removal' of Noë from the Netherlands or a 'wrongful retention' of Noë in South Africa within the Convention meaning of these concepts.[2]

[8] The father's version is again quite different. He states that, when he asked his wife, in about December 2003, exactly when she would be returning to the Netherlands with Noë, she indicated that she wanted to stay in South Africa a little longer. He did not agree to this and, in the weeks that followed, he realised that she had misled him and that she had in fact 'abducted' his son by retaining him in South Africa after the period of the agreed holiday visit had expired. It was at this stage (in about February 2004) that he consulted the Dutch Central Authority with a view to effecting Noë's return to the Netherlands under the auspices of the Convention. His case is that, sometime in December 2003, the mother wrongfully retained Noë in South Africa and that it was this wrongful retention that gave rise to the application to the Pretoria High Court.

[9] It is common cause that, at the time of the alleged wrongful retention of Noë in South Africa in December 2003, the little boy was habitually resident in the Netherlands. It is clear from the extract from the Dutch Civil Code annexed to the appellant's founding affidavit, as well as from the correspondence

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[2] The removal (or retention) of a child under the age of 16 years is considered to be 'wrongful' for the purposes of the Convention where it is in breach of custody rights attributed to a person, an institution or any other body under the law of the state in which the child in question was habitually resident immediately prior to the removal or retention, provided that those custody rights were actually being exercised at the time of the removal or retention, or would have been so exercised but for the removal or retention: articles 3 and 4 of the Convention (see further *Sonderup v Tondelli & another* 2001 (1) SA 1171 (CC) para 10, *Pennello v Pennello* 2004 (3) SA 117 (SCA) para 4, esp n 4).

addressed by the Dutch Central Authority to the (Acting) Chief Family Advocate of South Africa which forms part of the record,[3] that both parents were exercising equal custody rights in respect of their child at that time.

[10] On 3 February 2004, the father completed and signed the necessary documentation to request the Dutch Central Authority for its help in securing Noë's return. That Central Authority in turn transferred the father's application under the Convention to the (Acting) Chief Family Advocate of South Africa[4] in terms of article 9 of the Convention.[5] On 6 April 2004, the latter delegated her Convention powers and duties in respect of this return application to Mr Gerhard van Zyl, then a family advocate based in Pretoria.[6] Mr van Zyl attempted to correspond with the mother by registered mail dated 19 April 2004, but this letter was returned unclaimed. A few days later, upon receipt of a copy of the divorce summons issued by the mother against the father in the Pretoria

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[3] See article 14 of the Convention, in terms of which the judicial or administrative authorities of the requested State may, 'in ascertaining whether there has been a wrongful removal or retention within the meaning of Article 3 . . . take notice directly of the law of, and of judicial and administrative decisions, formally recognised or not in the State of habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise by applicable.'

[4] Article 6 of the Convention requires every Contracting State to designate a Central Authority to discharge numerous duties imposed on Central Authorities by the Convention. In terms of s 3 of the Act, the Chief Family Advocate is designated as the Central Authority for the Republic of South Africa.

[5] Article 9 provides that '[i]f the Central Authority which receives an application referred to in Article 8 has reason to believe that the child is in another Contracting State, it shall directly and without delay transmit the application to the Central Authority of that Contracting State and inform the requesting Central Authority or the applicant, as the case may be.'

[6] The Chief Family Advocate, as the Central Authority for South Africa, may delegate or assign any of her powers or duties under the Convention to any Family Advocate appointed in terms of the Mediation in Certain Divorce Matters Act 24 of 1987: see s 4 of the Act, read with regulation 3 of the regulations promulgated under s 5 of the Act in Government Notice R1282 of Government *Gazette* No.18322 dated 1 October 1997.

High Court, he ascertained that she was represented by attorneys, with whom he immediately made telephonic contact and arranged a meeting with the mother and her local attorney for 28 April. Pursuant to that meeting, Mr van Zyl informed the mother's attorneys in writing that she was 'retaining Noë wrongfully in South Africa' and put her to terms to agree to a voluntary return with Noë to the Netherlands. Shortly thereafter, Mr van Zyl resigned from the Office of the Family Advocate and, on 10 May 2004, Ms Cheryl Grobler, also a family advocate based in Pretoria, was delegated by the Acting Chief Family Advocate to deal with this matter in Mr van Zyl's stead. The latter's delegation was withdrawn on the same day.

[11] By letter dated 9 June 2004, Ms Grobler informed the mother's attorneys that an application under the Convention for the return of Noë to the Netherlands was about to be launched against her. Ms Grobler requested the attorneys to suspend the South African divorce proceedings instituted by the mother against the father in March 2004 – in which she was claiming inter alia custody of and maintenance for Noë – as well as her subsequent application in terms of Uniform Rule 43, pending a decision in the forthcoming return application.[7]

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[7] In terms of article 16 of the Convention, '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 this Convention is not lodged within a reasonable time following receipt of the notice.'

[12] As indicated above, the return application was instituted in late June 2004. Ms Grobler deposed to the main founding affidavit. For some (unexplained) reason, the father was not joined as a co-applicant, as is usually the case when a return application under the Convention is instituted by the Central Authority.[8] The application was opposed by the mother. In her answering affidavit, filed only on 15 November 2004, she relied mainly upon her allegation that the father had consented to the permanent removal of Noë to South Africa and that her retention of Noë in this country after December 2003 was therefore not 'wrongful' for the purposes of the Convention. In essence, she raised a defence in terms of article 13(a) of the Convention, which 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 [in other words, it has a discretion in this regard] 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 the removal or retention, *or had consented to* or subsequently acquiesced in the removal or *retention* . . .' (Emphasis added.)

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[8] See eg *Sonderup v Tondelli & another* above n 2 para 3; *Chief Family Advocate & another v G* 2003 (2) SA 599 (W) at 604I-605B; *Senior Family Advocate, Cape Town, & another v Houtman* 2004 (6) SA 275 (C) para 1. Article 8 of the Convention provides that any person, institution or other body who claims that a child has been removed 'in breach of custody rights' may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child. In terms of art 7(f), one of the obligations imposed upon Central Authorities is to 'initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child'.

[13] The appellant's replying affidavit was filed on 21 November 2004, provoking a supplementary answering affidavit by the mother which was filed on 8 June 2005. As already indicated, the Pretoria High Court delivered its judgment on 14 June 2005, ultimately giving rise to the present appeal.

[14] In the meantime, the father had instituted divorce proceedings against the mother in the Haarlem District Court on 9 February 2004, claiming inter alia custody of Noë. This claim was opposed by the mother who counterclaimed for sole custody of and maintenance for Noë. On 12 October 2004, the Haarlem court granted a divorce order, but stayed the proceedings in respect of the custody and maintenance issues because of the then pending return application in South Africa. Subsequently, on 27 September 2005, the Haarlem court declared that it did not have jurisdiction 'to hear the requests for relief separately submitted by both parties in respect of the parental authority and establishment of the principal residence of' Noë.

[15] On 23 March 2006, on appeal to it from the Haarlem Court, the Full Bench Division for Family Matters of the Amsterdam Court of Appeal held that –

' . . . the District Court wrongfully concluded that the case had little connection with the jurisdiction of the Netherlands in order to be able to properly judge the interest of the child.'

The Appeal Court thus 'annulled' the judgment of the Haarlem District Court in this regard and referred the case for further hearing and judgment back to that court. The effect of this judgment is, as explained by the Dutch Central

Authority in a letter to the Acting Chief Family Advocate dated 9 June 2005, that:

'the last mentioned Court [the Haarlem District Court] will await the outcome of proceedings before the Supreme Court [of Appeal] in South Africa before it will re-initiate proceedings. After it has been decided in South Africa whether the applicant father's request for return will succeed or whether it will be dismissed, the Court of Haarlem will decide upon the issues of parental custody and habitual residence.'

The object of the Convention and the proper approach to the article 13(a) 'defence'

[16] As has been pointed out by this Court more than once, the purpose of the Convention is to protect children from the harmful effects of their wrongful removal from the country of their habitual residence to another country or their wrongful retention in another country. This the Convention does by establishing a procedure to secure the prompt return of any such child to the country of his or her habitual residence so that custody and similar issues in respect of the child can be adjudicated upon by the courts of that country.[9]

[17] In terms of article 12 of the Convention, where the removal or retention of the child in question is indeed wrongful within the meaning of articles 3 and 4[10] and, at the date of commencement of the return proceedings before the judicial or administrative authority of the requested State, a period of less than a year after the wrongful removal or retention has elapsed – as is the case with

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[9] See *Smith v Smith* 2001 (3) SA 845 (SCA) para 6 and *Pennello* above n 2 para 25.
[10] See n 2 above.

Noë – then the authority concerned is *obliged* to order the immediate return of the child. Even if a period of longer than a year has elapsed, the authority concerned is still obliged to order the return of the child unless it is demonstrated that the child is settled in its new environment.

[18] There are, however, certain limited exceptions to the mandatory return of the child, one of which is contained in article 13(a).[11] Once the applicant for a return order under the Convention has established that the child was habitually resident in the Contracting State from which he or she was removed immediately prior to the removal or retention and that the removal or retention was wrongful, then the onus is on the party resisting return to establish one or other of the defences referred to in articles 13(a) or (b),[12] or that the circumstances are such that the return of the child 'would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms'.[13] Even if the requirements of one or more of these 'defences' to a mandatory return of the child are satisfied, the relevant authority may still in its discretion order the return of the child.

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[11] See para [12] above.
[12] On the 'defence' referred to in article 13(b), see *Pennello* above n 2 paras 29-35 and the other authorities there cited. The authority hearing the return application may 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 his or her views into account (article 13).
[13] Article 20.

[19] As indicated above, the central issue in this case revolved around the article 13(a) defence of consent. In her heads of argument filed before this Court, the mother's counsel submitted that, because of the lengthy period of time that Noë has been in South Africa, a return to the Netherlands at this stage would place him in 'an intolerable situation' within the meaning of article 13(b) of the Convention. Although counsel did not pursue this argument at the hearing before us, it must be pointed out that the question of the inordinate delay adversely impacting on Noë and creating an 'intolerable situation' in the event of his return to the Netherlands was not specifically raised as an issue for determination nor adequately canvassed in the affidavits before the court a quo. Had the mother thought it necessary for this Court to consider that issue, even at this late stage of the proceedings, it was open to her to launch an appropriate application to place before us such additional information as may have borne upon that issue. Had this been done, then the appellant would of course have been entitled to reply.[14] The mother did not, however, follow this route. Although I will return later in this judgment to the systemic delays which have plagued these Convention proceedings, there is in my view no basis for deciding the matter other than on the central issue of consent.

[20] As was pointed out by Hale J in *Re K (Abduction: Consent)*:[15]

' . . . the issue of consent is a very important matter:

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[14] See in this regard *Pennello* above n 2 paras 17-18 and the other authorities there cited.
[15] [1997] 2 FLR 212 (FD) at 217.

> "It needs to be proved on the balance of probabilities, but the evidence in support of it needs to be clear and cogent. If the court is left uncertain, then the 'defence' under Art 13(a) fails."
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> . . . [i]t is obvious that consent must be real. It must be positive and it must be unequivocal.'[16]

In that case, Hale J expressly approved the following view expressed by Holman J in *Re C (Abduction: Consent)*:[17]

> 'If it is clear, viewing a parent's words and actions as a whole and his state of knowledge of what is planned by the other parent, that he does consent to what is planned, then in my judgment that is sufficient to satisfy the requirements of Art 13. It is not necessary that there is an express statement that "I consent". In my judgment it is possible to infer consent from conduct.'[18]

Consent by the father?

[21] The main dispute of fact arising from the affidavits relates to whether or not the father consented, either expressly or tacitly, to the continued residence of the mother and Noë in South Africa on a permanent basis. As stated already, the onus of establishing such consent rests on the mother. As neither party sought to have the matter referred for the hearing of oral evidence, whether or not the 'defence' of consent will succeed depends upon the uncontested facts in this regard in the appellant's founding affidavit and the respondent's (the mother's) version in her answering papers in respect of those

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[16] See further *Re P (Abduction: Consent)* [2004] 2 FLR 1057 (CA) para 33.
[17] [1996] 1 FLR 414 (FD) at 419.
[18] See also *Re A (Abduction: Habitual Residence: Consent)* [2006] 2 FLR 1 (FD) paras 70-88.

facts which are the subject of a 'real, genuine or *bona fide* dispute of fact'.[19] In a situation where such a dispute exists, the court may well be obliged, in appropriate circumstances, to refer it for oral evidence if there is no other way of deciding the issue. However, any such reference to oral evidence would have to be strictly circumscribed by the essential elements of the defence and the hearing would have to take place as a matter of urgency. It should always be borne in mind that, as pointed out in *Pennello*:[20]

'[T]he Convention is framed around proceedings brought as a matter of urgency, to be decided on affidavit in the vast majority of cases, with a very restricted use of oral evidence in exceptional circumstances. Indeed, there is direct support in the wording of the Convention itself for return applications to be decided on the basis of affidavit evidence alone, and courts in other jurisdictions have, in the main, been very reluctant to admit oral testimony in proceedings under the Convention. In incorporating the Convention into South African law by means of Act 72 of 1996, no provision was made in the Act or in the regulations promulgated in terms of s 5 thereof indicating that South African courts should not adopt the same approach to proceedings under the Convention as that followed by other Contracting States. In accordance with this approach, Hague proceedings are peremptory and "must not be allowed to be anything more than a precursor to a substantive hearing in the State of the child's habitual residence, or if one of the exceptions is satisfied, in the State of refuge itself".' (Footnotes omitted.)

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[19] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635C. This rule has been held to apply even in cases where the onus of proving facts in dispute rests on the respondent and not only when the onus rests on the applicant: *Ngqumba v Staatspresident; Damons NO v Staatspresident; Jooste v Staatspresident* 1988 (4) SA 224 (A) at 259C-263E. It should be mentioned that, in the judgment of this Court in *ABSA Bank Ltd t/a Bankfin v Jordashe Auto CC* 2003 (1) SA 401 (SCA) para 23, there was an oblique indication that the correctness or otherwise of the *Ngqumba* case might have to be reconsidered at some stage.

[20] Above n 2 para 40 and the other authorities there cited.

[22] In her answering affidavits, the mother alleged that she and the father discussed the question of a permanent move to South Africa from about May 2003 and that these discussions had resulted in a *joint* decision that the family would *emigrate* to South Africa. However, in a document written by her on 15 April 2004, which was annexed to the appellant's replying affidavit as Annexure 'G',[21] she made the following statements:

'*My* decision to come to S.A. in Sept. 2003 was firstly my concern for Noë's emotional stability and safety and also to remove myself from the emotional and verbal abuse and neglect from Nico [the father] during our short marriage . . .

After the outburst from Nico's mother [in September 2003] *I* started making plans and discussing (I thought) with Nico, that I needed time to think and find myself again. *I* told him I was taking Noë with, and going home to S.A. *for an indefinite period, until I could make a decision* . . .

. . . I at that stage [immediately prior to her departure for South Africa on 25 September 2003] just had in mind that I needed time and space to think, and decide whether I still wanted this marriage and to be a part of that family . . .

It was during this time [in December 2003] that *I came to the decision* that things would never work out between Nico and I. In January '04 *I informed him of my decision* and proceeded to get an appointment with my lawyer 12th Feb. On this visit I asked what the legal position was and what my rights were . . .'. (Emphasis added.)

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[21] Although not deposed to under oath, this document is admissible in the present proceedings in terms of article 30 of the Convention which provides as follows: 'Any application submitted to the Central Authorities or directly to the judicial or administrative authorities of a Contracting State in accordance with the terms of this Convention, together with documents and any other information appended thereto or provided by a Central Authority, shall be admissible in the courts or administrative authorities of the Contracting States.'

[23] In support of her ‘defence’ of consent, the mother also relied quite heavily on the signature by the father of a so-called ‘change of address form’ at the Zandvoort municipal offices on the day before she left with Noë for South Africa. However, in this regard too, the mother’s version as set out in her answering papers conflicts in material respects with her version as set out in the abovementioned Annexure ‘G’. There are also other uncontested facts set out on the papers which detract from the mother’s version, and favour the father’s version, on the issue of consent. So, for example, the mother and Noë came to South Africa in September 2003 on return tickets; the mother travelled with only two suitcases, leaving behind in Zandvoort the bulk of her personal belongings such as clothing, photo albums and video tapes of Noë, make-up and personal letters, as well as almost all Noë’s belongings such as his clothing and toys; in the few weeks leading up to her departure from the Netherlands with Noë, she and the father purchased several bulky items of furniture for their home (eg a king-size bed, a dining table and chairs etc), all of which would have had to be shipped to South Africa at considerable expense had the couple really been planning to ‘sell up’ in Zandvoort and emigrate to South Africa.

[24] It must also be borne in mind that, after the alleged wrongful retention of his son in South Africa in December 2003, the father wasted little time in approaching the Dutch Central Authority for its assistance in securing Noë’s return under the Convention. By no later than 3 February 2004, he had completed all the necessary documentation in this regard. Whilst not decisive, this conduct certainly provides support for the father’s version and is

inconsistent with the notion that he had consented to a permanent removal of the child to South Africa.

[25] In my view, the material contradictions in the mother's version, against the backdrop of the papers as a whole, makes it evident that the mother did not raise a real or genuine dispute of fact on the key issue of the father's consent. There was thus no sustainable 'defence' based on article 13(a).

[26] As none of the exceptions justifying the non-return of Noë to the Netherlands was established on the papers, the court a quo was obliged in terms of article 12 of the Convention to order Noë's return to that country. This it did not do, instead ordering the *mother* to return to the Netherlands 'for the purposes of attending and/or opposing the custody hearing in respect of' Noë, and that only 'if oral evidence is required'. That order clearly does not comply with the Convention and must be set aside.

[27] Prior to the hearing of the matter before us, counsel for the appellant filed a draft order, setting out conditions for Noë's return to the Netherlands intended to ameliorate any potential hardships to which Noë might be exposed on his return. Counsel for both parties were requested to comment on the draft order during the course of the hearing, and also to consider certain aspects of the order and revert to this Court in writing. In formulating the conditions which I intend to impose, I have carefully considered the oral and written submissions

made by counsel in this regard. However, before dealing with the return order, there are two important aspects which need to be addressed.

Delays

[28] The primary object of the Convention is to secure the *swift* return of children wrongfully removed to or retained in any Contracting State, to restore the *status quo ante* the wrongful removal or retention as expeditiously as possible so that custody and similar issues in respect of the child can be adjudicated upon by the courts of the country from which the child was removed. Not only is this explicitly stated in article 1 of the Convention, but article 11 expressly enjoins the relevant authorities to 'act expeditiously in proceedings for the return of children' and provides that –

'If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of the commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay.'

[29] So too, the *Guide to Good Practice under the 1980 Convention* drafted by the Permanent Bureau of the Hague Conference on Private International Law states as one of its 'key operating principles' that 'expeditiousness is essential at all stages of the Convention process including appeals'.[22] At the fifth meeting of the Special Commission to review the operation of the

[22] See *Guide to Good Practice* (2003) Part II *Implementing Measures* para 1.5.

Convention, held in late 2006, the Commission reaffirmed the following important recommendations made by its 2001 meeting:

'3.3 The Special Commission underscores the obligation (Article 11) of Contracting States to process return applications expeditiously, and that this obligation extends also to appeal procedures.

3.4 The Special Commission calls upon trial and appellate courts to set and adhere to timetables that ensure the speedy determination of return applications.

3.5 The Special Commission calls for firm management by judges, both at trial and appellate levels, of the progress of return proceedings.'[23]

The South African government was represented at this fifth meeting of the Special Commission.

[30] Unfortunately, the proceedings in the present case were anything but expeditious. Some three and a half years have elapsed from the time of Noë's wrongful retention in South Africa in December 2003. Noë is now five years old and has spent most of his young life in this country. In a recent decision of the House of Lords in *Re D (A child)*,[24] Baroness Hale of Richmond expressed the view that the object of the Convention 'is negated in a case such as this where the return application is not determined by the requested State until the child has been here [in the United Kingdom] for more than three years.'[25] She pointed out, however, that –

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[23] See March [2007] *International Family Law* 38 at 41.
[24] [2006] UKHL 51.
[25] Para 48.

‘ Article 12 of the Convention caters for delay in making the application for return. If an application is launched more than 12 months after the wrongful removal or retention, the child is nevertheless to be returned “unless it demonstrated that the child is now settled in its new environment”. The choice of the date of application rather than the date of decision is deliberate: the left behind parent should not suffer for the failings of the competent authorities . . . It is not possible, therefore, to argue that cases such as this fall outside the Convention altogether.’[26]

In the *Re D* case, the return application ultimately failed before the House of Lords on the ground that the father did not have ‘rights of custody’ for the purpose of the Hague Convention when the minor child was removed from the country in question (Romania), that the removal was accordingly not wrongful, and that no obligation to return the child arose under article 12 of the Convention. Although the question of delay thus did not arise for decision in that case, Baroness Hale pointed out that the passage of time had contributed to a situation in which the child concerned was adamantly opposed to returning to Romania,[27] and the child had reached an age and state of maturity where it could not be taken for granted that it was inappropriate for him to be given the opportunity of being heard.[28] She thus expressed the view that, in that context:

‘ . . .a delay of this magnitude in securing the return of the child must be one of the factors in deciding whether his summary return, without any investigation of the facts, will place him in a situation which he should not be expected to have to tolerate.’[29]

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[26] Para 49.
[27] Paras 51-54.
[28] Paras 57-62.
[29] Para 53.

[31] In the present case, the retention of Noë in South Africa was wrongful. Moreover, unlike in *Re D*, there was no evidence before us that the delay has been such that the return of Noë to the Netherlands would indeed place him in an intolerable situation.[30] It is also significant that the present circumstances were caused by the mother's unlawful conduct in retaining the child in South Africa and systemic delays which cannot be attributed to the father. A court in the Netherlands is anxiously awaiting the outcome of these proceedings and, in my view, justice will brook no further delay.

[32] We were nevertheless so troubled by the inordinately lengthy delays in finalising this matter that we asked the Chief Family Advocate for an explanation in this regard. It appears from the affidavit deposed to by the Chief Family Advocate in response to our request that one of the main reasons for the lapse of more than two months between her receipt of the request for Noë's return from the Dutch Central Authority on 5 April 2003 to the institution of the return application on 24 June was the resignation of Mr van Zyl from the Office of the Family Advocate, necessitating the delegation of Ms Grobler to deal with the matter in his stead. This does not, however, explain the subsequent delays in the course of the proceedings in both the Pretoria High Court and in this Court.

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[30] The minor in *Re D* was more than seven and a half years old when the proceedings were heard by the trial judge and more than eight years old when the appeal was heard by the House of Lords. By contrast, Noë is only five years old and it has never been suggested that he has attained an age and degree of maturity at which it would be appropriate for the court to take account of his views.

[33] This Court must bear some of the blame. The record of the proceedings was lodged with the Registrar on 23 August 2006. In the practice note filed on behalf of the appellant on 23 October 2006, it was pointed out that the matter, being in terms of the Convention, was 'inherently of an urgent nature'. However, it was only some time after the filing of the respondent's practice note on 24 November 2006 that the urgency of the matter came to the attention of the President of the Court. By then it was too late to set the matter down for hearing for the first term of 2007 and it was therefore only set down for hearing in May. In a letter dated 14 February 2007 addressed to the Registrar of this Court, the State Attorney pointed out that its client, the appellant, 'was under tremendous pressure from the Dutch Central Authority regarding finalisation of this matter given its international status' and that 'all Hague Convention applications are urgent in their nature'. Had this letter accompanied the appellant's practice note, there is no doubt that the matter would have been set down for hearing at an earlier stage. Procedures have now been put in place to ensure that matters such as this one, which are described as 'urgent' in a practice note filed with the Registrar of this Court, are immediately brought to the attention of the President of the Court.

[34] Both the Chief Family Advocate, in her capacity as the South African Central Authority, and the South African courts are obliged by the Convention to act expeditiously in return proceedings. There has been a dismal failure in this matter to give effect to our Convention obligations. This is no doubt due in considerable measure to the fact that the resources (including training and

proper procedures) currently available to the Chief Family Advocate and the various regional offices of the Family Advocate are insufficient to enable the former effectively to carry out the functions of and obligations imposed on Central Authorities under the Convention.[31] The training of South African judicial officers in the principles and procedures underpinning the Convention also appears to be less than that required by South Africa's obligations under the Convention. It is to be hoped that these shortcomings will receive the prompt and proper attention of the relevant authorities. To that end, I intend to direct that a copy of this judgment be sent to the Minister for Justice and Constitutional Development, as well as her Director-General.

Non-joinder of the father

[35] As indicated above, the father was not joined as a co-applicant in the return application and is, therefore, not a party to the present proceedings. This means that the conditions which I intend to impose to govern Noë's return to the Netherlands, insofar as they impose obligations on the father, will not be binding upon him unless he consents in some way to be bound by our judgment notwithstanding the fact that he has not been cited as a party. This problem was raised with counsel for the appellant during the hearing before us. Subsequent to the hearing (and pursuant to our request), an affidavit was deposed to by the father on 23 May 2007 in the Netherlands stating that a copy of the draft order prepared by counsel for the appellant has been forwarded to

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[31] See in this regard *Brown v Abrahams* 2004 (4) BCLR 349 (C) paras 49-56.

him by electronic mail; that he is aware that if an order is made in terms of the draft order or any variation thereof, he will be subject to certain obligations; and that he –

‘ . . .being fully aware of the obligations that may be placed on me by an order of the SCA, I hereby confirm that I am fully aware of the issues placed before the SCA for its consideration and I freely, voluntarily and unequivocally consent to and submit myself to the jurisdiction of the SCA in this appeal with full and complete acceptance and adherence to any order that may be issued in this appeal by the SCA.’

A copy of this affidavit was filed with the Registrar of this Court. In order to ensure that the father is indeed bound by the order which I intend to make, this order will only be issued once the original of such affidavit is filed with the Registrar.

The appellant does not seek an order for costs and, in my view, the most equitable outcome is that each party should pay its or her own costs, both in this Court and in the court below.

Order

[36] The following order is made:

A. The appeal is upheld.

B. The order of Van Oosten J in the Pretoria High Court dated 14 June 2005 is set aside and replaced with the following order:

‘1. It is ordered and directed that the minor child, Noë Jean Paul Joseph van Hanxleden Houwert (Noë) be returned forthwith, but subject to the terms of this order, to the jurisdiction of the Central Authority for the Netherlands.

2. In the event of Bridget Kneppers van Hanxleden Houwert (the mother) notifying Mr Chris Maree of the Office of the Family Advocate, Pretoria (the Family Advocate) within one week of the date of issue of this order that she intends to accompany Noë on his return to the Netherlands, the provisions of paragraph 3 shall apply.

3. Nicolas Christian Bernard Paul van Hanxleden Houwert (the father) shall within one month of the date of issue of this order, institute proceedings and pursue them with due diligence to obtain an order of the appropriate judicial authority in the Netherlands in the following terms:

3.1 The mother is awarded interim custody of Noë pending the final adjudication and determination by the appropriate court in the Netherlands of the issues of custody and care of and access to Noë, which adjudication and determination shall be requested forthwith by the father.

3.2 Until otherwise ordered by the appropriate court in the Netherlands:

3.2.1 The mother and Noë shall reside at 85 Keesom Street, Zandvoort, the Netherlands, until the matter of the custody and care of and access to Noë has been resolved in the Netherlands. The father shall move out from the said address during such period, but shall continue to pay the full rent and other expenses in respect of the lease of such accommodation.

3.2.2 The father is ordered to pay the mother maintenance for herself and Noë from the date of Noë's arrival in Zandvoort at the rate of 350 euros per week. The first pro rata payment shall be made to the mother on the day upon which she and Noë arrive in Zandvoort and thereafter weekly in advance on the first Monday of every week.

3.2.3 The father is ordered to pay any medical and dental expenses reasonably incurred by the mother in respect of herself and Noë.

3.2.4 The father is ordered to provide a roadworthy motor vehicle equipped with a child seat for Noë, for the use of the mother and Noë from the date of their arrival in Zandvoort, and to pay all reasonable expenses in respect of the running of the motor vehicle, including petrol and oil.

3.2.5 Pending such further determination as to access as may be made by the appropriate court in the Netherlands, the father shall have reasonable access to Noë, the details of such access to be arranged between the parents under the supervision of the Central Authority for the Netherlands.

3.2.6 The father and the mother are ordered to co-operate fully with the Family Advocate, the Central Authority for the Netherlands, the relevant court or courts in the Netherlands, and any professionals who are approved by the Central Authority for the Netherlands to conduct any assessment to determine what future custody, care and access arrangements will be in the best interests of Noë.

3.2.7 The father is ordered to purchase and pay for economy class air tickets, and if necessary, pay for rail and other travel, for the mother and Noë to travel by the most direct route from Pretoria, South Africa, to Zandvoort.

4. In the event of the mother giving the notice to the Family Advocate referred to in paragraph 2, the order for the return of Noë shall be stayed until the appropriate court in the Netherlands has made the order referred to in paragraph 3

and, upon the Family Advocate being satisfied that such an order has been made, he shall notify the mother accordingly and ensure that the terms of paragraph 1 are complied with.

5. In the event of the mother failing to notify the Family Advocate of her willingness to accompany Noë on his return to the Netherlands, it is to be accepted that the mother is not prepared to accompany Noë, in which event the Family Advocate is authorised to make such arrangements as may be necessary to ensure that Noë is safely returned to the custody of the Central Authority for the Netherlands and to take such steps as are necessary to ensure that such arrangements are complied with.

6. Pending the return of Noë to the Netherlands, as provided for in this order, the mother shall not remove Noë on a permanent basis from the Province of Gauteng and until then she shall keep the Family Advocate informed of her physical address and contact telephone numbers.

7. Pending the return of Noë to the Netherlands, the father is to have reasonable access to Noë, the details of which access shall be arranged between the parents under the supervision of the Family Advocate.

8. There is no order as to costs.'

C. The Family Advocate is directed to seek the assistance of the Central Authority for the Netherlands in order to ensure that the terms of this order are complied with as soon as possible.

D. In the event of the mother notifying the Family Advocate, in terms of paragraph B.2 above, that she is willing to accompany Noë to the Netherlands, the Family Advocate shall forthwith give notice thereof to the Registrar of the Pretoria High Court, the Central Authority for the Netherlands and to the father.

E. In the event of the appropriate court in the Netherlands failing or refusing to make the order referred to in paragraph B.3 above, the Family Advocate and/or the father is given leave to approach this Court for a variation of this order.

F. In respect of this appeal there is no order as to costs.

G. This order shall not be issued until the original of the affidavit deposed to by the father on 23 May 2007 has been filed with the Registrar of this Court.

H. A copy of this order once issued shall forthwith be transmitted by the Family Advocate to the Central Authority for the Netherlands and to the father electronically or by telefacsimile.

I. The Registrar is directed to send copies of this judgment to the Minister for Justice and Constitutional Development and to her Director-General.

B J VAN HEERDEN
JUDGE OF APPEAL

Concur:

Farlam JA

Heher JA

Maya JA

Hancke AJA