THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

Date: 19 December 2024

Status: Immediate

The following summary is for the benefit of the media in the reporting of this case and does not form part of the judgments of the Supreme Court of Appeal

N M v The Central Authority for the Republic of South Africa and Another (1078/2024) [2024] ZASCA 178 (19 December 2024)

Today the Supreme Court of Appeal (SCA) upheld an appeal in part. It further amended paragraphs 4 and 5 of the order of the Gauteng Division of the High Court, Johannesburg (the high court) and lastly, dismissed the appeal with each party to pay their own costs.

The appeal related to proceedings in terms of the Hague Convention on the Civil Aspects of International Child Abduction (the Hague Convention) wherein the high court granted an order returning a two-year-eight-month-old baby, NEM, to his country of habitual residence in Brisbane, Australia from where he was wrongfully removed by his mother, NM, a South African citizen. The second respondent, MBM, is NEM's father who, with the assistance of the first respondent, the Central Authority of the Republic of South Africa (the Central Authority), instituted these proceedings in high court.

At the end of 2019, NM and MBM met on holiday. MBM was a citizen and resident of Australia and NM was a citizen and resident of South Africa. The two started a long-distance relationship and subsequently got married in South Africa on 1 December 2020. After falling pregnant, both NM and MBM agreed that their child should have Australian citizenship and, consequently, NM joined MBM in Australia and gave birth there as MBM worked for the Australian Defence Force.

When NEM was 13 months old, NM requested to visit her parents in South Africa with NEM. MBM agreed and bought return tickets for both. They departed from Australia on 27 September 2022 to return on 29 October 2022. On 18 October 2022, NM sent MBM a WhatsApp message informing him that she did not intend to return to Australia as, apparently, she was unhappy in their marriage. On 22 October 2022, she sent another WhatsApp message telling him that she was no longer returning to Australia permanently. On the return date of 29 October 2022, NM and NEM did not arrive back in Australia.

Thereafter, MBM instituted an application for the return of NEM in terms of the Hague Convention through the Central Authority of Australia in December 2022. The Central Authority duly instituted proceedings in the high court for NEM's return, with MBM as the second applicant. NM opposed the application and raised a defence under Article 13*(b)* of the Hague Convention, namely that there was a grave risk that NEM's return to Australia would expose him to physical or psychological harm or otherwise place him in an intolerable situation.

On 14 November 2023, NM filed a counterapplication (NM's constitutional challenge) in which she sought to have s 275 of the Children's Act 38 of 2005 (the Children's Act), declared inconsistent with the Constitution and unconstitutional, to the extent that it incorporated Articles 12 and 13 of the Hague Convention. She sought to file a supplementary affidavit to join the Minister of Justice in the application in support of the constitutional challenge, alleging that the return of NEM does not prioritise his 'best interest' as envisaged in s 28(2) of the Constitution of South Africa,1996 (the Constitution). At the hearing, MBM and the Central Authority successfully applied, from the bar, for an order in terms of which NM's constitutional challenge was separated from the rest of the issues in the application in terms of uniform rule 33(4). That order (the separation order) was granted, and the high court proceeded to consider the main application, namely whether an order under Article 12 should be made.

As stated above, the high court granted an order returning a two-year-eight-month-old baby, NEM, to his country of habitual residence in Brisbane, Australia, holding that all of the jurisdictional facts required in order to invoke the obligatory provisions of Article 12 were present in the matter and that NM had failed to discharge the onus that rested upon her in terms of Article 13(*b*). It rejected a report by a social worker, Ms Keeve, holding that the said report should be accorded limited weight as Ms Keeve had conducted no interviews with MBM, nor did she seek to obtain his views or any contributions from him in compiling the report.

On the issue of s 275 of the Children's Act being declared unconstitutional, the high court ordered the separation of the counterapplication and directed that it be postponed to another time for determination in terms of rule 6 of the uniform rules of court.

The issues before the SCA related to whether the high court erred in holding that the appellant did not discharge the onus upon her in terms of Article 13(*b*) and also, whether the high court erred by separating the counterapplication from the main application on the merits.

In addressing these issues, the SCA found that Ms Keeve, in compiling the report, did not consult with MBM and only relied on information provided by NM. Therefore, the report lacked the important characteristic of providing a balanced assessment of MBM's position and took no account of the extensive support services available to NEM in Australia through MBM's employment. It further held that a fundamental flaw in the report and recommendations was that Ms Keeve's opinion that NEM's return to Australia would cause him extreme trauma was premised on the assumption that his return would necessarily involve a separation from NM but the report did not consider the effects on NEM of a return with NM, at all. On this note, the SCA concluded that it was quite clear that Ms Keeves' report and her recommendations did not constitute clear and compelling evidence to establish that NEM's return would place him at grave risk of exposure to physical or psychological harm or otherwise place NEM in an intolerable situation. With regards to the allegations of domestic violence, the SCA found that those allegations would be for the relevant authorities in Australia to consider when it determines an appropriate long-term care and custody regime for NEM, holding that the undertakings made by MBM to, inter alia, provide separate accommodation and provision of maintenance pending the resolution of custody matters between the parents would go a long way to ameliorate the perceived harshness of the return order and ought to have been included as part of the high court's order.

On the last issue, the SCA held that the high court cannot be faulted for separating the issues as it considered all that was placed before it in the counterapplication and, faced with an urgent application, exercised its inherent power to separate the issues.

In the result, the Court made an order upholding the appeal in part, amending paragraphs 4 and 5 of the high court's order and dismissing the appeal with each party to pay their own costs.

--------oOo--------