



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT**

Reportable

Case No: 1143/2020

In the matter between:

J E L

APPLICANT

and

**THE *AD HOC* CENTRAL AUTHORITY FOR THE
REPUBLIC OF SOUTH AFRICA
(AS DELEGATED IN TERMS OF SECTION 277
OF ACT 38 OF 2005)
T C L**

**FIRST RESPONDENT
SECOND RESPONDENT**

Neutral citation: *L v The Ad Hoc Central Authority for the Republic of South Africa and Others* (1143/21) [2021] ZASCA 107 (3 August 2021)

Coram: SALDULKER, MOCUMIE, PLASKET, GORVEN AND CARELSE
JJA

Heard: 26 July 2021

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be at 10h00 on 03 August 2021.

Summary: International Child Abduction – Hague Convention on Civil Aspects of International Child Abduction (1980) – application for leave to appeal referred for oral argument in terms of s 17(2)(d) of the Superior Courts Act 10 of 2013 – applicability of Article 13(b) defence of the Convention– burden of proof on person resisting return to show that the return of the minor children to their habitual residence would expose them to grave risk of physical or psychological harm or otherwise place them in an intolerable situation – whether reasonable prospects of success – application for leave to appeal dismissed.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Desai J, sitting as court of first instance):

- 1 The application for leave to appeal is dismissed.
- 2 The date in paragraph 4 of the order of the Western Cape Division of the High Court is substituted by the date 20 August 2021.

JUDGMENT

Saldulker JA (Mocumie, Plasket, Gorven and Carelse JJA concurring):

Introduction

[1] This is an application for leave to appeal referred for oral argument in terms of s 17(2)(d) of the Superior Courts Act 10 of 2013, and if successful the determination of the appeal itself. It is against the judgment and order of the Western Cape Division of the High Court, (Desai J) (the high court). The high court ordered the return of three minor children presently living in South Africa (SA) to the Kingdom of Thailand (Thailand) in terms of the Hague Convention on the Civil Aspects of International Child Abduction (1980) (Convention), incorporated into SA law by virtue of the provisions of chapter 17 of the Children's Act 38 of 2005.¹

[2] This application has its genesis in an application instituted by the first respondent, the Ad Hoc Central Authority for the Republic of South Africa, as delegated in terms of s 277 of the Children's Act (the Central Authority), and the second respondent, Mr T C L, the father of the minor children, against the applicant, Mrs J E L, the mother of the minor children, whom I shall refer to as A, K and M. During December 2019, the applicant unilaterally, without the knowledge and consent of the

¹ Section 275 of the Children's Act.

second respondent, removed the children from Thailand, and brought A, K and M to South Africa. On 20 October 2020, on application by the second respondent, Desai J ordered the summary return of the children to Thailand, subject to detailed and comprehensive conditions. The applicant sought leave to appeal against this order, and on 24 November 2020, Desai J dismissed that application. Aggrieved with the outcome, the applicant applied to this Court. On 10 April 2021, this Court ordered that the application for leave to appeal be referred for oral argument in terms of s 17(2)(d) of the Superior Courts Act, and that the parties must be prepared, if called upon to do so, to address the court on the merits of the appeal. This Court heard both the application for leave to appeal and the merits on an expedited basis. The crisp issue is whether there are reasonable prospects of success on appeal on the basis that the applicant has successfully raised a proper defence in terms of Article 13(b) of the Convention.

Background

[3] The applicant is a South African citizen, and the second respondent, a British national. The parties were married to each other in the United States of America (USA) on 26 February 2007. The three minor children, A (12) and twins K and M (9), were born of the marriage. From 2016, the family resided in Thailand. On 28 June 2018, the parties were divorced in accordance with Thai law, and a Compromise Agreement, which regulated the divorce, custody, visitation rights of the second respondent and maintenance of the children, was made an order of court by the Thai Court hearing the divorce proceedings. In terms of the Compromise Agreement, both parties agreed, inter alia, to have joint custody of the children, that the children were to reside with the applicant, with the second respondent being entitled to visitation rights and telephonic communication.

[4] In July 2018, a month after the divorce, the applicant relocated to a remote area in Thailand. The second respondent attempted to have contact with the children but this became problematic. The applicant permitted the second respondent to have contact with K only, claiming on each occasion that A and M were either too sick or did not want to see him. In November 2018, the second respondent engaged the services of an attorney to secure access to not only K but also A and M. In January 2019, the applicant cancelled the second respondent's visit. Attempts to mediate the matter also

failed. The applicant adopted an obdurate attitude and failed to answer telephone calls, emails and short message service (sms) text messages from the second respondent. The second respondent filed a petition to compel the applicant to comply with the terms of the Compromise Agreement, and at a hearing in April 2019, the applicant was ordered to do so. However, the issue of the second respondent's visitation rights remained problematic and in November 2019, a petition was filed in the Central Juvenile and Family Court in Bangkok. The applicant was summonsed to appear with the minor children in order for the court to determine the minor children's wishes. An interim date for the hearing of the matter, on 19 February 2020, was scheduled for both parties. However, in December 2019, while the matter was pending, the applicant left Thailand for South Africa, with the children, without the knowledge and consent of the second respondent. It is common cause that at the time of the children's removal, they were habitually resident in Thailand, and both parties were exercising joint custody rights in respect of the children. Thus in terms of Article 3 of the Convention, the children's removal from Thailand was wrongful. This much was conceded in argument before us.

[5] The second respondent approached the office of the Attorney-General in Thailand to secure the prompt return of the children under the Convention. In opposing the second respondent's application, the applicant relied on Article 13(b) of the Convention, contending that the children should not be returned to Thailand because there was a grave risk that if the children were returned, they would be exposed to physical or psychological harm or would be placed in an intolerable situation. The applicant's opposition was based on allegations that the second respondent had sexually molested one of the children, A, and of domestic violence and economic abuse, perpetrated against her by the second respondent, which the children had witnessed, resulting in them fearing the second respondent and not wanting to have contact with him. The second basis no longer applies. The applicant is safe from domestic violence and economic abuse because she and the second respondent no longer live together and the children will not be exposed to such conduct. For reasons that will become apparent, I do not intend to deal with the allegations of sexual molestation save to say that they were raised in extremely vague terms by the applicant and were denied in substantial detail by the second respondent. This because the

appropriate forum in Thailand will be confronted with this issue and it is inappropriate to make any determination on the papers in the manner they have been raised.

The judgment of the high court

[6] In the high court, Desai J summed up the difficulties experienced by the second respondent thus:

‘Despite his best efforts, the [second respondent] had limited access to his children after the divorce and he eventually engaged the assistance of a lawyer in order to secure better access to them.’

[7] Relying on the judgment of this Court in *Pennello v Pennello (Chief Family Advocate As Amicus Curiae)* 2004 (3) SA 117 (SCA), Desai J held that once the second respondent had established that the removal of the children was wrongful within the meaning of Article 3 of the Convention, ‘[t]he onus is upon a party [in this case the applicant] resisting the order to establish one or the other of the defences referred to in Article 13(a) or (b). The [applicant] is required to prove the various elements of the Article 13(b) defence on a balance of probabilities. (See *Pennello* supra para 38). An effect of article 13 is to vest the judicial or administrative authority with a discretion to refuse to order the return of a child if there is a grave risk as contemplated in the said article’.

[8] Having considered the matter, the high court concluded, after dealing in detail with the allegations of the sexual molestation of A, that the suggestion of grave risk or serious psychological harm had not been substantiated by the applicant and was not borne out by the evidence. In dealing with the children’s objections to being returned to Thailand, Desai J stated that ‘[i]t seems to me that their views are influenced by the [applicant] and the objections to return are premised upon their wish to remain with the abducting parent, that is the [applicant]’.

[9] Desai J subsequently ordered the return of the three children to the Kingdom of Thailand, in accordance with the provisions of Article 12 of the Convention, imposing substantial conditions. The order reads as follows:

‘1. The Second Applicant’s and Respondent’s minor children A L (born on 15 April 2009), K L (born on 23 October 2012) and M L (born on 23 October 2012) shall be returned to the Kingdom

of Thailand in accordance with the provisions of Article 12 of the Hague Convention on the Civil Aspects of International Child Abduction ('the convention') and incorporated into the Children's Act 38 of 2005 by virtue of the provisions of Chapter 17, section 275 thereof.

2. The minor children of the First Respondent, if she elects to accompany the said children, shall return to Thailand on the first date that the Second Applicant is able to secure and pay for their flights from the RSA after Monday 30 November 2020, subject to any travel bans applicable to travel from South Africa to Thailand, and in accordance with such directives from the relevant authorities as may then be applicable.

3. In the event of the First Respondent electing not to accompany the children to Thailand, the Second Applicant is granted leave and authorisation, insofar as it may be necessary, to remove the children from the RSA after 30 November 2020 and accompany them back to the kingdom of Thailand, which is the State of habitual residence of the minor children.

4. Should the Respondent wish to accompany the minor children to Thailand she is required to notify the applicants on or before the close of business on Friday 6 November 2020, whether or not she intends to accompany the said children to Thailand.

5. The Second Applicant shall arrange and pay for all visas, medical certificates and/or tests and all other necessary requirements, inclusive of any quarantine required for the minor children and First Respondent, and financial security required so to allow the minor children and the First respondent to travel from Cape Town to Thailand and to be able to remain in Thailand indefinitely.

6. The provisions of the Compromise Agreement of 28 June 2018 regarding, amongst other things, the custody of the minor children, visitation rights and the payment of maintenance by the Second Applicant for the minor children shall endure until an order is made by a Court of competent jurisdiction in the Kingdom of Thailand which has the effect of substituting the provisions of the Compromise Agreement.

7. In the event of the Respondent's return to Thailand with the minor children:

7.1 The second applicant shall make a contribution to her in the amount of THB 10 000 per month, for a maximum period of six months, as financial support for the Respondent.

7.2 The Second Applicant shall, prior to their arrival in Thailand, secure suitable accommodation for occupation by them in Bangkok, and ensure that such accommodation is available for the immediate occupation of the minor children and the respondent upon their arrival in Thailand. The Second Applicant shall be responsible for the costs of the minor children's accommodation.

8. As First Respondent intends to home school the children, the parties shall endeavour to agree upon a suitable home schooling program for which the Second Applicant will make payment of all costs inclusive of any registration fees.

9. The Second Applicant shall secure, in consultation with the First Respondent and with the involvement of ChildLine Thailand, and pay for, such objective and independent English speaking therapeutic support services as may be required by the minor children after their return to Thailand, including, but not limited to, psychotherapy or such other appropriate counselling services as the minor children may require.

10. The First Applicant is directed to request the assistance of the Thai Central Authority to put in place such further measures as may be necessary to ensure the welfare of the minor children as soon as possible after their return to Thailand.

11. A copy of this Order shall forthwith be transmitted by the First Applicant to be Thai Central Authority.

12. Pending the return of the minor children to the Kingdom of Thailand, the orders made by this Court on 12 June 2020, in paragraphs 1.1 to 1.8 (inclusive) of that Order, shall apply and be in force.

13. No order as to costs.'

[10] In *Pennello*, this Court set out the proper approach to the Article 13(b) defence. The Court identified that the most important element in Article 13(b) was that of 'risk' to the children. This Court asserted that the various elements of the Article 13(b) defence were required to be proved on a balance of probabilities. Before us, it was contended that there was indeed a grave risk that the children's return to Thailand would expose them to physical or psychological harm. The applicant repeated her concerns that were raised in the high court particularly that the children faced the risk of harm of alleged sexual molestation. In my view, and for the reasons which follow, the onus in terms of Article 13(b) has not been discharged by the applicant.

[11] If one interrogates the high court's order, it is clear that it was designed to mitigate interim prejudice which might be caused by the children's return to Thailand. There are built-in mechanisms and a wide range of protective measures in the high court's order. The high court has prescribed conditions in its order aimed at the protection of the children, which include the residence of the children with the applicant; maintenance for the applicant; psychologists and occupational therapists for the children; financial commitments on the part of the second respondent; and the assistance of the Thai Central Authority.

[12] In terms of the high court's order, A, K, M and the applicant will return to Thailand on flights secured and paid for by the second respondent, including the costs of visas and any quarantine required. On reaching Thailand, the applicant has been directed to request the Thai Central Authority to put in place such measures as may be necessary to ensure the welfare of the children. Both the applicant and the second respondent, together with the involvement of Childline, Thailand, must secure objective and independent therapeutic support and appropriate counselling services as may be required by the children. This is to be paid for by the second respondent. He has also been ordered to make a contribution towards the applicant's financial support for a period of six months, including securing suitable accommodation for the applicant and the children. Importantly, Desai J ordered that the provisions of the Compromise Agreement (including the clauses relating to custody, maintenance and visitation rights) shall endure, until an order is made by the Thai courts which has the effect of varying the provisions. In this way the high court has ameliorated the potential hardships that the applicant and the minor children might be exposed to on their return. There is nothing to prevent the applicant, upon her return to Thailand, from contacting the appropriate Thai authorities and requesting them to once again investigate the allegations of sexual molestation of A by the second respondent. Thailand, the State of habitual residence, is best placed to investigate such serious allegations. The Thai authorities, including child and social services, are competent and capable of investigating any allegations of sexual abuse. Furthermore, as the applicant is accompanying the minor children, there is thus no immediate risk that they would face harm and abuse (should this allegation materialise) at the hands of the second respondent. In the past the applicant has successfully thwarted the second respondent's attempts to have contact with the minor children. The applicant may also on her arrival in Thailand, approach a Thai court to vary the terms of the Compromise Agreement in relation to the second respondent's contact with the children, in the interim, pending an investigation into the serious allegations. Despite repeated invitations, counsel for the applicant was unable to point to any potential harm to the children if the order of the high court is put into effect.

[13] The best interests of a child who has been removed from the jurisdiction of a court in the circumstances contemplated by the Convention are ordinarily served by requiring the child to be returned to that jurisdiction so that the law can take its course.

Parents have a responsibility to their children to allow the law to take its course and not to attempt to resolve their disputes by resorting to self-help. Any attempt to do so inevitably increases the tension between the parents and that regrettably adds to the suffering of the children. The scope of the court's powers under the Convention and in terms of the Children's Act, with the ultimate emphasis being on the protection of children and having regard to the child's best interests, and to allay the fears (if any) of the returning mother with the abducted children, allows this Court to consider recording the undertaking given by the second respondent that he will not institute or cause to be instituted or support any legal proceedings for the arrest, prosecution or punishment of the applicant relating to the removal of the minor children from Thailand.

[14] The second respondent has and continues to go to great lengths to be given the chance for meaningful contact with his children. In particular, the facts of this case do not justify a refusal to the return of the children, as there is no evidence of grave risk to the children should they return to Thailand. Moreover, the substantial conditions imposed on the second respondent allows for the necessary protection of the children in returning to Thailand.

Conclusion

[15] The high court's order is tailored to meet every need of the minor children so as to achieve the objectives of the Convention. The high court shaped the order to effectively encompass protective mechanisms thereby ensuring that the best interests of the children are protected. In the circumstances the high court's order is the most appropriate. There is no reasonable prospect of another court coming to a different finding. Due to the effluxion of time, the date in paragraph 4 of the high court order needs to be amended. An appropriate substituted date would be 20 August 2021. As regards the costs, in matters such as these there are no winners or losers. Both are concerned parents. In my view the most equitable outcome is that each party should pay their own costs.

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

- 1 The application for leave to appeal is dismissed.

2 The date in paragraph 4 of the order of the Western Cape Division of the High Court is substituted by the date 20 August 2021.

H SALDULKER
JUDGE OF APPEAL

Appearances

For appellant:

J M Boltman

Instructed by:

C M B Attorneys, Bellville

Symington & De Kok Attorneys, Bloemfontein

For first and second respondents:

N Mayosi

Instructed by:

State Attorney, Cape Town

State Attorney, Bloemfontein