

SOUTH AFRICA / JUDGMENT

V.L v M.A.V and Others (B 39322/2022)

[2024] ZAGPPHC 861 (27 August 2024)

[2024] ZAGPPHC 861**COURT**

North Gauteng High Court, Pretoria

BEFORE

Swanepoel

CASE / FILE NUMBER

B 39322/2022

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Source record**FLYNOTES:****FAMILY**

– Children – Abduction –
Child

was not habitually resident in Switzerland at time of his removal
to South Africa – Applicant blatantly refused
to comply with

order – Attacked curatrix personally and professionally –
Planned to kidnap and remove child from
South Africa in defiance

of court order – No confidence that applicant would comply
with any condition imposed on respondent's
return to

Switzerland – Application dismissed – Hague
Convention, arts 3 and 4.

IN THE HIGH COURT OF

SOUTH AFRICA

GAUTENG DIVISION,

PRETORIA

Case number: B

39322/2022

Date of hearing: 18

July 2024

Date delivered: 27

August 2024

(1)

REPORTABLE: YES/NO

(2)

OF INTEREST TO OTHERS JUDGES: YES/NO

(3)

REVISED

DATE: 27/8/24
SIGNATURE
In
the application between: V
L
Applicant
and
M
A
V
First Respondent
THE
CENTRAL AUTHORITY OF THE
REPUBLIC
OF SOUTH AFRICA
Second Respondent
THE
DEPARTMENT OF HOME AFFAIRS
Third Respondent

JUDGMENT

SWANEPOEL J:

INTRODUCTION

- [1] In youth love often comes quickly, and it burns with a white-hot passion, consuming all before it. Sometimes it endures, but on occasion unseen fault lines in a relationship emerge over time, and love fades. This is, unfortunately, the sad tale of the applicant (“VL”) and the first respondent’s (“MV”) relationship that started during a ten-day holiday in their home town of Rovere in rural Italy in June 2019.
- [2] MV was then 24 years of age, and VL was eleven years her senior. They became entwined in a whirlwind relationship that drew the ire of MV’s parents who were staunch Catholics, and who were convinced of the importance of marriage before intimacy. MV held much the same beliefs. Little did MV then know that VL was an atheist, and that his mother had counselled him against marriage, calling it the worst state anyone can enter into. Over the next few months MV’s parents regularly cautioned her against her relationship with VL. Nonetheless, by December 2019 VL had asked for MV’s hand in marriage, and she had accepted the proposal.
- [3] VL and MV (to whom I shall collectively refer as “the parties”) continued to ignore her parents’ concerns, and notwithstanding her religious beliefs, she fell pregnant during about August 2020. VL was then working in Lausanne, Switzerland. MV was unemployed and had been residing with her parents in Italy. Despite her parents’

dire warnings against her moving to live with VL in Lausanne before they were married, the parties left for Lausanne in August 2020. Shortly thereafter VL took up employment with the United Nations High Commissioner for Refugees, and some time thereafter they moved to Geneva.

- [4] Shortly before their child was born, the parties travelled to Italy for the birth of their son, L, who was born in Italy on 14 May 2021. I shall deal with the parties' travels in the following months in more detail hereunder. Suffice it to say at this stage, that they travelled extensively between their home in Lausanne, later in Geneva, and Rovere in Italy, as well as to France. During May 2022, when MV wished to travel to South Africa to attend her brother's birthday, the parties decided to make a holiday of the trip. MV's parents were by then residing in South Africa. The parties were scheduled to return to Europe after the wedding and had booked flights for 19 May 2022. However, a routine Covid-19 test revealed that MV had tested positive for Covid, and she remained behind with L while VL travelled back to Geneva.
- [5] Once VL had returned to Europe, MV's misgivings about her relationship with VL grew apace. It eventually became clear to VL that she had decided not to return to Geneva. Having realized that VL might seek a court order to return L to Europe, MV brought an ex parte application seeking full parental rights and primary care of L, an order for VL to have limited contact rights with L, and for other ancillary relief. The order was granted on 6 December 2022
- [6] Once VL became aware of the order the relationship between the parties became extremely strained, and the relationship between VL and MV's parents (especially her father) became intolerable. VL referred in a message to MV's father as a subhuman, and they were even involved in a physical altercation at a church service during January 2023.
- [7] Following the confrontation between VL and D at church, VL was involved in a motor vehicle accident. MV took him to hospital. While VL was being treated for his injuries, MV came across Whatsapp messages between VL and his mother that revealed that VL had hatched a plot to kidnap L and to remove him to Europe via Botswana. MV then sought a variation of the original ex parte order to limit VL's contact with L even further. That application is still pending. In the meantime, VL had launched this application for L's return to Switzerland, in terms of the Hague Convention on the Civil Aspects of International Child Abduction ("the Convention"). VL had also applied to the Swiss Central Authority for their assistance in having L returned to Switzerland. The second respondent acts in furtherance of that application. The third respondent did not participate in the proceedings.
- [8] The matter came before me on 7 March 2023. As a result of the allegations that L would be at grave risk of emotional harm should he be returned to Europe, I appointed a curatrix-ad-litem to investigate the matter, with the powers to appoint a clinical psychologist to assist her investigation. I also indicated that I would case manage the matter to ensure a speedy resolution thereof. Unfortunately, the clinical assessment and the curatrix' report were

delayed, resulting in a months' long hiatus in the matter. In the meantime, L continued to reside with MV in Pretoria, and VL exercised contact in accordance with the directives given from time to time.

- [9] Having given directives as to time periods for the filing of supplementary affidavits and heads of argument, the matter was eventually set down for hearing on 9 July 2024. VL had appointed counsel, but only as a watching brief. I was of the view, which I expressed to VL, that this was an important matter of some complexity, and that he should consider whether it would not be in his best interests to be represented by counsel. Having considered my views, VL then instructed his counsel, Mr. Smith, to act in the matter on his behalf. Mr. Smith sought a postponement to prepare fully, which I granted, and the matter was postponed to 18 July 2024.

THE INTERLOCUTORY

ORDERS

- [10] Two interlocutory orders require explanation. At the hearing on 9 July 2024 MV's counsel, Mr Haskins SC, raised an objection to the late filing of VL's application to remove the curatrix, and the late filing of a supplementary affidavit, both documents having been delivered on 5 July 2024, four days before the hearing. The removal application spanned 125 pages, and the supplementary affidavit 299 pages. MV's counsel had not had an opportunity to consider the affidavits, nor to respond thereto. I took the view that the affidavits should be struck out in view of the prejudice that the respondents would suffer should the affidavits be allowed into evidence. Mr. Smit for VL agreed that the application for removal and the supplementary affidavit should be struck out. Consequently, the affidavits under sections 88 to 90 of CaseLines were struck out.
- [11] At the hearing on 18 July 2024 Mr Mokotedi SC, for the Central Authority objected to MV's late delivery of her supplementary affidavit. The affidavit had been due by 24 May 2024, but was only filed on 13 June 2024, 14 court days late. I enquired whether Mr Mokotedi had had an opportunity to consider the affidavit, which he had. Mr Mokotedi could not point me to any prejudice that either VL or the second respondent would suffer should the affidavit be admitted, and in the absence of prejudice to either party, I granted condonation for the late filing. Once again, Mr Smith did not object to condonation being granted.
- [12] After the matter was argued and judgment was reserved, VL personally uploaded 16 documents, and his attorney sent a letter to MV's attorney recording that I had asked for further affidavits. An unknown person also uploaded a further four documents. I had not granted leave to file further documents, and I have not taken cognizance of the documents uploaded after judgment was reserved.

- [13] This application was preceded by the ex parte application brought by MV, and a variation application. The parties argued the matter on all of the papers filed in the three applications, and I shall consider all of the affidavits filed in the various applications.
- [14] Various points in limine were taken by MV, none of which were persisted with. Ultimately, the main issues for determination are, firstly, whether VL has parental rights in respect of L, secondly, whether L was habitually resident in Switzerland. Thirdly, if it is held that L was habitually resident in Switzerland, whether he has been wrongfully retained in South Africa or whether VL acquiesced in his retention. Fourthly, if L were to be returned to Switzerland, whether he would be exposed to undue harm or intolerable circumstances, and finally, whether I should exercise my discretion to return L to Switzerland.

THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

- [15] The Convention is primarily aimed at securing the speedy return of children who are wrongfully removed from, or retained in a Contracting State.[1]

- [16] Articles 3 and 4 are at the core of this dispute, and they read as follows:

Article 3

“3.The removal or the retention of a child is considered to be 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 the 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 but for the removal or retention.

The rights of custody mentioned in sub-paragraph 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

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 apply when the child attains the age of 16 years.”

- [17] The first question to be determined is whether VL has rights of custody in respect of L, and whether he was exercising those rights when the parties travelled to South Africa. The onus of proof regarding this jurisdictional requirement for the Convention to be engaged lies with the person who is seeking the child's

return.[2] Once it has been established that that person has custodial rights over the child, and that the child had been habitually resident in the Contracting Country at the time of the removal or retention, it then falls to the person opposing the child's return to establish one of the defences provided for in sections 13 (a) and (b), and section 20 of the Convention.

[18] The authorities are settled on the principle that a court dealing with a Hague matter is not concerned with the best interests of the minor child, and it is not to consider the issue of custody. The purpose of the Convention is to secure the prompt return of a child to its habitual residence so that a court of that jurisdiction may consider custodial and residential rights.[3] The sole purpose of this court is to consider where the child was habitually resident, and to order the return of the child unless one of the narrow defences provided for in the Convention are established.

CUSTODIAL RIGHTS

[19] VL has made the averment in the founding affidavit that he enjoys custodial rights under Italian law in that he had joint care of L, and, upon moving to Switzerland, under Swiss law. MV denied that VL had joint care of L, but she has not denied that VL enjoys custodial rights. In fact, MV admitted that the parties both enjoy full parental rights and responsibilities. That admission settles the first leg of the Article 3 test.

HABITUAL RESIDENCE

[20] The second leg of the Article 3 test is more fraught with difficulty, and requires a thorough consideration of the circumstances under which the parties found themselves in Switzerland.

[21] As I have said, the parties met in August 2019, and after a whirlwind romance, they became engaged to be married in December 2019. VL was gradually introduced to MV's parents. It appears that from the outset MV's father was opposed to the relationship and the relationship between VL and MV's parents was rocky from the start. VL perceived MV's father to be controlling and abusive towards MV.

[22] When the Covid-19 pandemic struck, VL obtained leave to travel to Italy from Switzerland where he spent the following three months working remotely. He says that he tried to convince MV to return with him to Switzerland. At first, she refused, but just before his departure in June 2020 MV packed a small bag and told VL that they should go quickly because she was afraid that her parents would discover that she was leaving with him. MV disputes this version and says that her parents always knew that she would be leaving with VL. Whatever the case may be, MV went to live with VL in Lausanne.

[23] VL says that they still planned to get married, but only once the Covid-19 restrictions had been lifted. In August 2020 they travelled back to Rovere for the summer holidays, each of them residing with their respective families out of respect for their families' sensitivities towards living together while not being married.

- [24] The issue of marriage is important in this case. VL says that whilst he intended to marry MV, the time was not right. MV, on the other hand, says that VL dangled the prospect of marriage in front of her, only confessing to her later in the relationship that he was an atheist, and that he did not believe in marriage. She says that whenever he sensed that she was distancing herself, he would moot the possibility of marriage.
- [25] Upon their return to Lausanne MV told VL that she suspected that she was pregnant. A pregnancy test confirmed her suspicions. In September 2020 VL joined the United Nations High Commission for refugees. The parties continued to live in Lausanne, although VL's employer was situated in Geneva. In November 2020 they travelled to Italy where they told their families that MV was pregnant. By then their relationship was already strained. MV believed that VL had had contact with an old girlfriend. VL had also been putting pressure on MV to obtain employment, which she says was impossible due to her lack of qualifications. It must also be noted that MV did not have a residence permit, and that she had entered Switzerland on a visitor's visa. The chances of MV finding employment were remote, if not impossible. However, when VL promised MV that he would not contact his old girlfriend again, and that he would support MV financially and emotionally, they agreed to return to Switzerland during January

2021.

- [26] Shortly before L's birth on 14 May 2021 the parties travelled to Italy where MV's mid-wife was practicing. MV says that VL and his mother continuously pressured her to find employment. VL apparently told MV that he would only marry her should she be able to find employment and fund half of their wedding. They returned to Switzerland after the birth on 14 May 2021, and in the period between June 2021 and October 2021, they travelled between Switzerland, France and Italy. In October 2021 the parties relocated to Geneva where VL had purchased an apartment. VL says that he immediately noticed that MV was unhappy and depressed. She told him (on his version, repeatedly) that her family wanted them to be married, and that they wanted her to live at home until then. By late 2021 the relationship was clearly in trouble. During November 2021 VL had travelled to Chad for work, and he broke off their relationship by text message.
- [27] After the breakup MV returned to Rovere. VL apparently had second thoughts about breaking up with MV, and he travelled to Rovere during December 2021 where he tried to convince MV to rekindle their relationship. VL made repeated promises to marry MV, as a result of which she agreed to try again. They returned to Geneva in January 2022. MV says that at that stage she noticed a deterioration in VL's mental health. He was unable to carry out simple tasks and he would curl up on the floor and cry. He expressed the wish to return to his mother's womb. VL's mental health challenges resulted in him being hospitalized during March 2022. MV alleges that she had planned on returning to Rovere earlier, but that she had stayed to support VL while he was indisposed. After his discharge from hospital during about April 2022 VL was heavily medicated. He could not cope, and he arranged for his mother to come to Switzerland to care for him. MV says that VL was in turn abusive and

unresponsive towards her.

[28] It is in these circumstances that MV decided to travel to South Africa for her brother's wedding. There is no doubt that, upon travelling to South Africa, MV had the intention of returning to Europe. The parties had booked tickets to return to Rome via Addis Ababa on 19 May 2022, and they were scheduled, according to VL, to then travel to Geneva. It is at that stage that MV contracted the Covid-19 virus which resulted in her remaining behind in South Africa with L, and VL returning to Europe by himself.

[29] By early June 2022 MV clearly had had second thoughts regarding their relationship. VL says that she came up with all kinds of excuses to explain why she was not returning to Europe. MV told him that she was thinking of remaining in South Africa. MV says that during that time she was contemplating a failed relationship and considering what to do. She had also realized that she had a support structure in South Africa, with her parents and extended family by then living in South Africa.

[30] There are brief texts attached to the papers that give some insight into the parties' state of mind. On 13 June 2022 VL wrote to MV saying:

"Are you thinking of staying in SA? For good? Or you coming back at least to Italy so I can see L?" On a different note I need the laptop I left with you."

[31] MV replied that she was thinking about her future, but that she had to go to Italy "sooner or later". VL then said that he would travel to Italy to see her. A telling series of texts were exchanged on 26 June 2022:

"V: Come back where L has he residency M. Its not all about you. There is a son in the relationship.

M: my baby lives where I find work.

V: And yes I have been thinking and hoped you were coming back so I could talk to you..

V: Its our baby M.

V: Both of us.

M: He doesn't officially live with you.

V: I heard you want to have phone conversation about each of the points you told me.

V: He's residency is in Rovere.

M: I told you why not in person

V: Not in South Africa

M: Yeah but he can't live somewhere alone where I don't have a life for myself

V: You prefer to keep the distance for the time being because you are vulnerable in person

M: Yeah and I don't trust you

M: We can't even have normal conversations even apart.

V: So I am not seeing my son again, you are telling me this basically?

M: I didn't say that.

V: Or to see him I would have to come to South Africa?" (sic)

[32] I have emphasized the passage that specifically struck me in this exchange, where VL does not say, as one would expect, that L's home is in Geneva, but he rather says that L is resident in Rovere.

[33] On 6 October 2022 VL wrote to M saying:

V: You wanna stay in SA

M: I never said that

V: I am open to working towards it."

[34] On 1 October 2022 the parties exchanged the following messages (I set out only the relevant passages):

"M: I'm working on coming.

M: Had a bit of an argument with my dad.

V: What does it mean?

V: For what? Not let him control your life.

V: To come to Rovere?

V: I need to decide if I stay here or I go to ch next week. I need your choice now.

M: ch: go to Switzerland then.

V: So you decide not to come?

V: It's your final choice?

M: Yes." (sic)

[35] it is likely that VL was in Italy at this point in time as he then urged MV to come to him, but he promised: "I promise you that I won't ask you to come with me to Switzerland."

[36] On 24 October 2022 VL made it very clear that marriage was not a possibility in their future. MV wrote a message that summarized, in my view, her state of mind on moving to Switzerland to be with VL:

“I don’t see going anywhere then. I’m a suckered for romance and passion. I would not create socio-economic stability with someone that doesn’t want to be with me and that I don’t want to be with for the long haul. I don’t start a family with someone and a life without marriage or spiritual connection. Otherwise I can do it in my own...thank God I live in a world that I don’t have to rely on a man and stay with him just because I can’t do it on my own.”

[37] Further in the same conversation VL wrote:

“When I said marriage after you get a job I meant it. But you didn’t move any step towards it. . . . Look at you now. Not judgment, but the facts are you sit in SA for six months and did not start any job yet. You told me for you it would have been so easy to find a decent job and start it. Why haven’t you done so?”

[38] VL insists that he had always demanded that MV and L should return to Switzerland. The messages do not support his version. From the above snippets of conversation it does not seem as if even VL believed that L was supposed to reside in Switzerland. It is more likely that VL wanted L to live in Rovere where he could see him regularly. That belief is supported by the report of the curatrix ad litem, Adv Fitzroy, who interviewed VL. He told her that he wanted L to be returned to Rovere under MV’s care where they would not be controlled by her father, and where his parents could assist MV in caring for L. VL could then visit L every weekend. VL also said that if VL were to be returned to Switzerland, he would have to obtain different employment in order not to travel as often and to be able to care for L.

[39] VL made it clear that he did not want L to return to Switzerland without MV. That is a recurring theme in VL’s papers: that he believes that L should be primarily in MV’s care.

[40] Given this factual situation, it is necessary to see what the authorities say on this issue. In *Sonderup v Tondelli and Another*[4] the parties had married in South Africa and had lived in Italy for some years before emigrating to Canada in 1997. They were divorced two years later, and in terms of a consent paper the parties had joint guardianship of their minor child aged 4 years, the mother had sole custody of the child, and the father had certain rights of contact. In terms of a subsequent order, the mother was allowed to travel to South Africa for a month, but she was enjoined that she should thereafter return the child to Canada. When the mother failed to return the child, the father was granted sole custody by the Supreme Court of British Columbia.

[41] In respect of habitual residence, the Court pointed out that the right to determine the child’s habitual residence may arise by operation of law, judicial or administrative decision, or by agreement having legal effect.[5] The Court went on to say:

“Whether a parson, an institution or any other body has the right to determine a child’s habitual residence must, however, be established by the domestic law of the child’s habitual residence.”[6]

- [42] In *Smith v Smith* (supra) the Court it was common cause that the children were habitually resident in the United Kingdom. The circumstances were the following: The parties had married in South Africa, but had relocated to the United Kingdom where both their children were conceived and born. The mother had been granted a visa to work there, and they resided in the United Kingdom for some three years before the breakdown of the marriage.
- [43] In *Pennello v Pennello*[7] the parties were married in the United States of America in April 1999, their daughter was born there in May 2001, and they lived there until September 2002 when the mother removed the child to South Africa without the father's consent. It was common cause that the child was habitually resident in the United States.
- [44] I have mentioned these cases because in each of them it was clear that there was a measure of permanence to the child's residence in those countries. In contrast to those scenarios are the following cases where there is a lack of permanency to the parties' residency.
- [45] In *Senior Family Advocate, Cape Town and Another v Houtman*[8] the parties were both born and married in South Africa. During 1999 they left for the Netherlands where the father had Dutch citizenship and where the father intended to further his studies. The minor child was born in the Netherlands in January 2000. The child was registered as a Dutch citizen and the mother also later acquired Dutch citizenship. The parties purchased a property in the Netherlands. By 2001 the marital relationship was strained. The mother and child travelled to South Africa in October 2001, with the father following in November 2001 in an attempt to reconcile. The parties returned to the Netherlands on a trial basis, but by September 2022 the relationship had deteriorated to such an extent that the mother and child returned to South Africa permanently.
- [46] The question for determination was, firstly, whether the child had been habitually resident in the Netherlands. Erasmus J said (with reference to *C v S (Abduction: Illegitimate Child)*[9]) the following:

"[8] . . . Every case that is brought pursuant to the Hague Convention on the Civil Aspects of Child Abduction requires the Court to determine the habitual residence of the child in question. This concept is key to the operation of all aspects of the Convention, and yet, it is not defined by the Convention itself. Consequently, the expression habitual residence has been interpreted according to the 'ordinary and natural meaning of the two words it contains, [as] a question of fact to be determined by reference to all the circumstances of any particular case'. The intention being to avoid the development of restrictive rules as to the meaning of habitual residence 'so that the facts and circumstances of each case can be assessed free of presuppositions and presumptions'[10].

- [9] However, the fact that there is no objective temporal baseline on which to base a definition of habitual residence requires that close attention be paid to subjective intent when evaluating an individual's habitual residence. When a child is removed from its habitual environment, the implication is that it is being removed from the family and social environment in which its life has developed. The word 'habitual' implies a stable territorial link; this may be achieved through length of stay or through evidence of a particularly close

tie between the persona and the place. A number of reported foreign judgments have established that a possible prerequisite for ‘habitual residence’ is some ‘degree of settled purpose or intention’.

- [47] As regards the meaning of a ‘settled purpose’, Erasmus J said that it is clearly not a temporary one, that it is not to be searched for under a microscope and, if it is there, it will stand out clearly as a matter of general impression. The learned Judge said that one has to consider the child’s factual connection to the state culturally, socially and linguistically[11]
- [48] In *Houtman* (supra) the Court considered that the parties had travelled to the Netherlands with the stated purpose of returning two years later. After the mother and child came to South Africa in September 2001, they only returned to the Netherlands after the parties had undergone marriage counselling, and on a temporary basis. The child had only been at a play group for two days per week, which cannot be said to have integrated the child into Dutch society. In these circumstances the Court held that the child had not been habitually resident in the Netherlands.
- [49] In *Central Authority for the Republic of South Africa and Another v LC*[12] the parties were married to one another in South Africa in September 2012, and their first child was born in February 2014. They applied for residency rights in Canada during 2015 with the view to relocate there. Their second child was born in February 2016. By 2017 the father had secured employment in Canada, but by then he had reservations regarding the marriage and he expressed the intention to divorce. He travelled to Canada in February 2018.
- [50] The mother accompanied the father in order to explore the circumstances under which he would be living, in order to consider whether she was willing to relocate with him, and to attempt a reconciliation. Ultimately, the mother agreed to move to Canada for a trial period. Upon the marital relationship breaking down the mother returned to South Africa with the father’s consent in December 2019. In considering the children’s habitual residence Opperman J pointed out the similarity of the facts to *Houtman*, in that the parties had agreed to a temporary arrangement, but had not committed to residing in those respective countries permanently.

In finding that the children had not been habitually resident in Canada, the Court took note of the writings of Brigitte Clark[13] where she said:

“However, habitual residence cannot be acquired in a day. An appreciable period of time and a settled intention will be necessary to enable him or her to become habitually resident.”

- [51] Boezart[14] highlights the following considerations:

[51.1] The family must have voluntarily adopted the new residence and have a settled purpose to make the new residence a part of their lives, irrespective of whether they wished to stay for a long or short period;

[51.2] Determining a parent's intention is a question of fact to be determined in light of all the circumstances;

[51.3] Although there is no fixed period to establish a new residence, the duration must have been for an appreciable time to indicate that the previous habitual residence had been departed from.

[52] Given the above considerations, can one say that L was habitually resident in Switzerland? MV had moved to Switzerland with a view to marrying VL. Little did she then know that VL had no intention of marrying her. As soon as they settled in Switzerland VL had started making excuses for not marrying her. For instance, MV says that he insisted that she should obtain employment before they were married, which he knew was objectively impossible. VL says that he wanted MV to pay half of the wedding costs, which he also knew was impossible considering that she was unemployed, and had no prospect of finding employment. MV did not have permanent residence rights, and was obliged to return to Rovero every few months. Although MV had agreed to enroll L in a daycare centre, that had not yet materialized. It seems that neither L nor MV had settled in the Swiss community.

[53] In the first months of their stay in Switzerland the couple travelled extensively between France, Switzerland and Italy. By late 2021 VL had broken off the relationship, only to seek a reconciliation a few months later. During that period MV resided in Rovero. MV followed VL back to Switzerland in early 2022. She says that she did not intend to remain there permanently, but that VL's admission to a mental facility prevented her early return to Rovero. MV remained in Switzerland to care for VL until she travelled to South Africa in May 2022.

[54] Even though MV was due to return to Europe after her brother's wedding, it has not been established that she intended to return to Geneva. Her air ticket was booked for Rome. It is also not certain that at that stage VL regarded Geneva as L's habitual residence. In the messages referred to above VL suggests that MV should return to Rovero. At no stage did he demand that she should return to reside with him in Geneva. In fact, VL even suggested working on a solution that would allow MV to live in South Africa.

[55] It follows from the above, that I do not believe that the parties had the settled purpose of residing in Switzerland. MV most certainly did not intend to remain there unless VL married her, a prospect that had become bleaker as time went by. I find, therefore, that L was not habitually resident in Switzerland at the time of his removal to South Africa.

[56] For many months VL corresponded with MV about her intentions. He did not once demand that L should return to Geneva. As I pointed out above, VL mooted the possibility of L returning to Rovero, or even staying in South Africa. It is only on 13 January 2023, some eight months after MV had travelled to South Africa, and five weeks after MV had obtained an ex parte order in respect of parental rights, that VL brought this belated application to the Swiss authorities. Therefore, I find that VL acquiesced to L residing in South Africa.

- [57] If I am wrong in the findings I have made, it is common cause between the parties that L must remain primarily in MV's care. There is no evidence to suggest that if L is returned to Europe with MV that he would be at grave risk of harm. However, removing him from MV's care would cause the child serious emotional harm. It follows that if L were to be returned to Switzerland, MV would have to be placed in a position to return with him. That is practically impossible given the fact that MV does not have permanent rights of residence in Switzerland. One would have to order VL to assist MV in obtaining a residency permit, which I am not sure is possible.
- [58] VL would also have to be ordered to provide for MV and VL, in the form of a place to reside and maintenance. However, I am convinced that VL would not comply with such an order. His conduct thus far in this matter leaves little doubt that he would simply ignore any order. I say so for the following reasons: VL has a virulent hatred of MV and her family. When MV's father paid for VL's hospitalization in South Africa in January 2023, he not only refused to repay the medical costs, he also retained for himself a refund repaid to him by the hospital. He did so on the spurious grounds that he was not legally obliged to repay the monies to MV's father. Despite his dislike for VL, MV's father reached out to him in a time of need. VL was, however, incapable of responding appropriately.
- [59] Moreover, I have made orders in respect of payment for the services of the curatrix. VL has blatantly refused to comply with the order, laying complaints against the curatrix with the Legal Practice Council when he disagreed with her views on the matter, and complaining about her "professional conduct". He has attacked the curatrix personally and professionally. He has done so when in fact her conduct was at all times professional and proper, and where on occasion she worked without remuneration to fulfil her mandate. VL launched an application for the curatrix' removal at the eleventh hour on extremely spurious grounds. In my view the curatrix has acted in the best traditions of the Bar throughout this case, whilst under severe personal and professional attack.
- [60] VL has also reported MV's erstwhile attorney to the Legal Practice Council for alleged professional misconduct. His sense of grievance is clearly palpable, and he attacks anyone who does not comply with his wishes.
- [61] VL clearly has no regard for court orders, even going as far as hatching a kidnap plan to remove L from South Africa in defiance of the court order of 6 December 2022. In short, VL's conduct in this matter has been appalling, and I have no confidence that he would comply with any condition imposed on MV's return to Switzerland. I would therefore, had I not found as I have above, have exercised my discretion against ordering L's return to Switzerland.
- [62] In the premises I make the following order:
- [62.1] The application is dismissed.

[62.2] The applicant shall pay the costs of the application, including the costs of two counsel where so employed, as well as the costs of the curatrix, on Scale C.

SWANEPOEL J

JUDGE OF THE HIGH COURT

GAUTENG DIVISION PRETORIA

Counsel for the applicant: Adv. Smith Instructed by: Hopgood Attorneys Counsel for the first respondent: Adv. M. Haskins SC Adv B. Bergenthuin Instructed by: De Oliveira Serrão Attorneys Counsel for second respondent: Adv. Mokotedi SC Instructed by: The State Attorney Date heard: 18 July 2024 Date of judgment: 27 August 2024

[1] Article 1 of the Convention.

[2] Smith v Smith [2001] 3 ALL SA 146 (A) at para 11

[3] Penello v Penello and Another 2004 (3) SA 117 (SCA)

[4] 2001

(1) SA 1171 (CC)

[5] Article 3

[6] Para 11

[7] 2004

(3) SA 117 (SCA)

[8] 2004

(6) SA 274 (C)

[9] [1990] 2 ALL ER 961 (HL)

[10] Dicey and Morris on the Conflict of Laws 144 10th Ed 1980 p 8 at 144-5

[11] At para 10

[12] 2021

(2) SA 471 (GJ)

[13] Family Law Service (division 6) 'Child Abduction'

[14] Child Law in South Africa 2nd Ed Juta p 454

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Prepared on 10 October 2026 · Esheria