IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE DIVISION, CAPE TOWN

REPORTABLE

Case No.: 2026-105403

In the matter between:

S C **Appellant**

(Passport No: [0])

and

L J H **First Respondent**

(Passport No: [0])

THE CENTRAL AUTHORITY FOR THE **Second Respondent**

REPUBLIC OF SOUTH AFRICA

In re the application for the return of the minor children:

A J H ("AH"), **H C H ("HH")** and **B R H** ("BH").

Coram: Cloete, J et Wille et Kusevitsky, JJ

Heard: 11 September 2026

Further Developments: 21 and 23 October 2026.

Delivered: 6 November 2026

Summary:

Section 18 (1) of the Superior Courts Act 10 of 2013 permits a court to make a decision effective pending an appeal under exceptional circumstances. This may be ordered where a successful litigant, in terms of section 18 (3), is additionally able to show that he or she will suffer irreparable harm if the court's order remains suspended and the unsuccessful litigant will not suffer such harm if the order is implemented, despite an application for leave to appeal. The enquiry into exceptional circumstances is always determined on a case-by-case basis. There is no general rule for what constitutes exceptional circumstances. A Hague Convention matter is not per se exceptional. Appeal upheld.

ORDER

The following order is granted**:**

1. The appeal is upheld.
2. The order granted directing the immediate return of AH, HH and BH to Australia is set aside.
3. AH, HH and BH are to remain in the Republic of South Africa pending the decision of the Supreme Court of Appeal on the merits of the appeal.
4. The costs of the application are to be costs in the appeal.

JUDGMENT

WILLE, J: (Cloete, J concurring and Kusevitsky, J dissenting)

INTRODUCTION

[1] This is an opposed application about cognisable judicial harm, or, put another way, legally recognised prejudice in the context of a ringfenced automatic appeal.[1]

[2] Because this appeal is ringfenced and discretionary, it focuses on very limited issues. This appeal is not about rehearsing the merits of the dispute between the appellant (the mother), the first respondent (the father), and the minor children.[2]

[3] The test to be applied is as follows. Section 18 of the Superior Courts Act 10 of 2013 permits a court to make a decision effective pending an appeal under exceptional circumstances. This may be ordered where a litigant, in terms of section 18 (3), is additionally able to show that he or she will suffer irreparable harm if the court's order remains suspended and the other party will not suffer such harm if the order is implemented despite an application for leave to appeal.[3]

[4] The enquiry into exceptional circumstances is always determined on a case-by-case basis. Put another way, there is no general rule for what constitutes exceptional circumstances. They exist where something is rare, unusual or uncommon.[4]

[5] Furthermore, the exceptional circumstances enquiry is the overarching consideration, but it cannot be divorced from the irreparable harm determination. Determining whether the threshold requirements are satisfied requires more than a tick-box approach.[5]

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[1] In terms of section 18(4)(ii) of the Superior Courts Act 10 of 2013, (the Act).
[2] The ages of the children are 12, 13 and 17 years respectively.
[3] This case is thus about "exceptional circumstances" in a "Convention" setting.
[4] As a general proposition.

[6] Thus, the absence or presence of irreparable harm becomes subsumed into whether exceptional circumstances exist. The latter cannot exist without irreparable harm. They are close cousins. A mechanical approach is impermissible. Although a litigant must prove irreparable harm, this does not usurp the function of the court. Ultimately, this court, on appeal and at this stage, must determine whether irreparable harm will be suffered.[6]

[7] To argue otherwise would undermine the rule of law and remove the rationality, reasonableness, and proportionality yardsticks of our settled jurisprudence.[7]

[8] This case also concerns the statutory scheme for appeals and the hierarchy of our courts. The relevant section 18 provisions were no doubt enacted to make execution an extraordinary deviation, not an administrative default. Parliament incorporated the Hague Convention into South African law via the Children's Act 38 of 2005, yet deliberately subjected all High Court orders to the uniform appeal framework of the Superior Courts Act without creating an exemption for Hague proceedings. Normal appellate delay is an unavoidable incident of the constitutional right to appeal and cannot in itself constitute an exceptional circumstance. I say this because at the time the matter was argued before us, the appellant had lodged an application for leave to appeal (petition) with the Supreme Court of Appeal.[8]

RELEVANT BACKGROUND AND CONTEXT

[9] The matter concerns three children, AH (17 years old), HH (14 years old) and BH (12 years old) ("the children"), born of the marriage between the appellant and the first respondent. The appellant and the first respondent permanently separated in August 2020.[9]

[10] The children, who were primarily in the appellant's care since birth, lived with the appellant and the first respondent on a shared, week-about residency basis since June 2023.[10]

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[5] Tyte Security Services CC v Provincial Government 2024 (6) SA 176 at 180 at paragraph 9 B-C.
[6] Tyte Security Services CC v Provincial Government 2024 (6) SA 176 at 180 at paragraph 11 F
[7] Tyte Security Services CC v Provincial Government 2024 (6) SA 176 at 180 at paragraph 10 D.
[8] Since the hearing of the matter leave to appeal has been granted to the Supreme Court of Appeal.
[9] It is alleged that this was because of a domestic violence incident.
[10] This arrangement has also been beset with problems.

[11] The appellant (the taking parent), without the first respondent's knowledge or consent, brought the children to South Africa with her just before their school holidays in March 2026, and they have lived with her here since.[11]

[12] The children have all stated clearly and consistently that they wish to remain in South Africa with their mother.[12]

[13] The children have also, to some extent, maintained a relationship with the first respondent.[13]

THE PRIOR LITIGATION

[14] The first respondent launched an urgent application on 9 May 2026 ("the main application") in terms of which he sought the return of HH and BH to Australia in terms of the Hague Convention on the Civil Aspects of International Child Abduction.[14]

[15] In respect of AH, the application was chartered in terms of the Children's Act 38 of 2005 based on the best interest of the child principle.[15]

[16] The appellant raised an Article 13(b) defence in respect of HH and BH and, in respect of AH, denied that it would be in his best interests to return to Australia to live with the first respondent on a full-time basis.[16]

[17] She alleged that she personally fears the first respondent, *inter alia* due to previous assaults and his psychological functioning, and that she cannot, for various reasons, return to Australia.[17]

[18] The court *a quo* found that the appellant had failed to establish a defence in terms of Article 13(b) and further ordered the return of AH in terms of the best interest of the child

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[11] This is not disputed.
[12] Voice of the Child Report and Addendum prepared by Ms Bruwer.
[13] Through telephonic communication.
[14] The Convention.
[15] The Children's Act, 38 OF 2005.
[16] AH is not subject to the provisions of the Convention.
[17] The merits of these allegations are not for this court to decide.

principle and in compliance with an order granted by Mr Justice Cohen of the Family Court of Western Australia, Perth on 22 April 2026.[18]

[19] The appellant filed an application for leave to appeal against the judgment and the first respondent then launched the section 18(3) application on 6 July 2026. The applications were heard on 15 July 2026.[19]

[20] On 31 July 2026, the application for leave to appeal was dismissed, and the Court granted an immediate execution order in terms of section 18(3) of the Act.[20]

[21] The appellant filed an application (a petition) to the Supreme Court of Appeal for leave to appeal against the judgment and order in the main application.[21]

THE STATUTORY FRAMEWORK

[22] Sections 18(1) and (3) of the Act provide for the following:

'…18 Suspension of decision pending appeal

(1) Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.

(2) …

(3) A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders…'[22]

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[18] Para 83 of the judgment dated 29 June 2026.
[19] This application was dismissed.
[20] This is the order which form the subject of this appeal.
[21] This was granted in the SCA on 22 October 2026 and the matter is to be heard on 8 December 2026.
[22] Sections 18(1) and (3) of the SC Act.

[23] Thus we are here dealing with a default position. The operation and execution of a decision which is the subject of an application for leave to appeal is suspended pending the decision of the application or appeal unless the court under exceptional circumstances orders otherwise.[23]

[24] Section 18(3) informs a two-fold test and analysis, namely:

(i) The requirements are cumulative and more onerous than the common law. This means something sufficiently out of the ordinary and of an unusual nature, a deviation from the norm.

(ii) The two irreparable-harm findings do not involve a balancing exercise but must both be established on a balance of probabilities.[24]

THE FIRST RESPONDENT'S SUBMISSIONS

[25] The first respondent's case is that the appellant is merely seeking to delay the proceedings, that she is manipulating the children, and that they are not expressing their true wishes about returning to Australia.[25]

[26] Further, it is alleged that the children's emotional and psychological well-being are at risk whilst they remain in South Africa in the appellant's care. This is because the children have not settled in South Africa and need to be returned to their day-to-day lives in Australia as a matter of urgency, so they can reintegrate by returning to their previous schools and being with their friends.[26]

[27] In *Koch,* the Constitutional Court rejected the previous approach that Hague Convention matters fall to be determined on the Plascon-Evans test applicable to motion proceedings for final relief, and held that such applications must be decided, essentially, on a balance of probabilities, having regard to a conspectus of all the evidence. [27]

THE GROUNDS FOR EXECUTION

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[23] My emphasis.
[24] Incubeta Holdings (Pty) Ltd and Another v Ellis and Another 2014 (3) SA 189 (GSJ) paragraphs 16, 22 and 24;
[25] These issues are not for this court to decide.
[26] These circumstances, viewed in isolation cannot be "exceptional circumstances".
[27] Ad Hoc Central Authority v Koch NO (2024) 3 SA 249 (CC), delivered on 27 November 2023. See also Ad Hoc Central Authority for the Republic of South Africa and Another v LCC (2026/034707) [2026] ZAWCHC 301 (10 June 2026 paras 8 – 12.

[28] At the hearing we raised with counsel the appellant's pending petition, as well as the expedited process contained in Supreme Court of Appeal Practice Directive 1/2024 with regard to Hague Convention matters. It was then agreed that the sensible approach would be to await the outcome of the petition before we delivered judgment. The delay ground has now been somewhat diluted by developments. On 21 October 2026, we were provided with the order of the Supreme Court of Appeal dated 16 October 2026, in which the appellant was granted leave to appeal on the merits to that Court. On 22 October 2026, we were also provided with the Directives of that Court in relation to the appeal. The Supreme Court of Appeal will now hear the appeal on 8 December 2026. In any event, the appellant did not delay the expeditious hearing of the main application.[28]

[29] It is so that these matters fall to be dealt with expeditiously for obvious reasons. This does not mean that these cases, because of their features alone, mean that exceptional circumstances arise without meeting the legal threshold for purposes of a section 18(3) application.[29]

[30] It is undisputed that the appellant removed the children from Australia contrary to the agreed shared residency order in place since 2023. The appellant says she did so for good reason. This, however, is not for this court to determine.[30]

[31] The first respondent's next point is that the appellant is "manipulating" the children. Again, this is a disputed issue, and the children have stated their preference to remain in the appellant's care.[31]

[32] Again, this is not an issue for this court to decide. So too is the allegation that the children's wishes are not their own. Suffice it to say that they are not "young" children and are acutely aware of the 'toxic' relationship between their parents as evidenced in the expert reports filed.[32]

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[28] This is not disputed.
[29] The normal threshold test applies irrespective.
[30] This dispute is beyond the jurisdictional remit of this court in this discrete application.
[31] Voice of the Child Report and Addendum prepared by Ms Bruwer.
[32] Voice of the Child Report and Addendum prepared by Ms Bruwer.

[33] Finally, without descending into the merits of the dispute between the appellant and the first respondent about a number of collateral issues, it seems evident from the expert report filed that the minor children are coping in their existing environment and that they are not in any sort of imminent danger and are not suffering any psychological harm while they remain in South Africa.[33]

CONSIDERATION

[34] In my view, the first respondent has not set out any facts evidencing, in the context of exceptional circumstances, that the children need to be returned immediately pending the outcome of the appeal in the Supreme Court of Appeal. The children have been in South Africa for over six months and have apparently, on the available independent evidence of the school, adjusted to their school. They seemingly also wish to remain in the care of the appellant in South Africa.[34]

[35] AH deposed to an affidavit in which he stated, *inter alia,* that it was his choice to remain in South Africa with the appellant. He felt strongly about this and stated that his views were not heard and that he would not return to Australia regardless. AH is seventeen (17) years old and has expressly stated that it is his wish and choice to remain in South Africa with the appellant. AH, of course, does not fall under the Hague Convention, since it applies only to children under the age of 16. It is also common cause that all three children share a close bond.[35]

[36] AH was found to be a mature and thoughtful young man who is acutely aware of the conflict between his parents and has witnessed serious incidents of domestic abuse. The expert reported, *inter alia*, as follows in this regard:

'…*AH is nearly seventeen years old* [he attained the age of 17 years on 26 July 2026]. *At this developmental stage, autonomy and self-determination are central to identity formation, and adolescents whose clearly and repeatedly expressed wishes are overridden commonly experience this not as a parenting decision made in their interests, but as a loss of voice and agency. This is recognised in the literature as a risk factor for anger, resentment, and diminished*

[33] Voice of the Child Report and Addendum prepared by Ms Bruwer.
[34] Voice of the Child Report and Addendum prepared by Ms Bruwer.
[35] This cannot be disputed.

trust in the adults and systems involved in the decision, and, in older adolescents particularly, is more likely to produce resistance or a rupture in the relationship with the parent to whom they are returned than acceptance of the outcome. Thus, a meaningful risk may be that he experiences the outcome as something done to him rather than for him. Separately from the question of autonomy, an enforced return without his mother would constitute a significant relational loss for A, given his stated wish not to be separated from her. It is well documented that adolescents separated from a primary attachment figure in this manner may display grief-like reactions, including low mood, anxiety, disrupted sleep and appetite, difficulty concentrating, and irritability, particularly where the separation is abrupt…'

and

'…As the eldest of the three boys, AH's emotional state is also relevant to his brothers, given the close relationship between the siblings described throughout the Report and this addendum; distress experienced by AH may reasonably be expected to affect HH and BH as well. I make this observation to assist the Court in managing outcome-neutral welfare risk, and not as a submission on the merits of the application…'[36]

[37] AH is a seventeen (17) year-old minor. His position is expressly excluded from the Convention. The first respondent's case regarding AH may involve a jurisdictional error. I say this because the first respondent concedes that, pursuant to Article 4 of the Hague Convention, the Convention does not apply to a child aged 16 or older. Despite this, the first respondent appears in truth (and this is merely an observation for present purposes) to seek to apply summary Convention return principles to AH. The Convention's summary return presumptions cannot be elevated to apply to AH without due consideration in terms of the Children's Act.[37]

[38] I say this because once a child reaches sixteen (16) years, summary restoration of the status quo ante without a plenary inquiry is legally impermissible. The position of AH had to be assessed strictly, and independently, under section 7 and section 9 of the Children's Act.[38]

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[36] Voice of the Child Report and Addendum prepared by Ms Bruwer.
[37] This may be a good ground of appeal. It is certainly a very arguable ground of appeal.
[38] An independent investigation and assessment needed to be followed.

[39] Thus, forcing an execution order under Section 18(3) on a seventeen (17) year-old risks subjecting a non-Convention 'adolescent' to unauthorised summary repatriation mechanics, where the appellant is then effectively precluded from pursuing her constitutional right to exhaust the appeal remedies available to her. This is because, once the children leave the jurisdiction of the South African courts, any order made here will not bind the judicial authorities in Australia. As counsel for the first respondent correctly conceded at the hearing, should the Supreme Court of Appeal subsequently set aside the court a quo's order, that Appeal Court's order may well have no practical effect, irrespective of the first respondent's undertaking to comply therewith. Moreover, Section 10 of the Children's Act mandates that every child who is of such an age, maturity, and stage of development as to be able to participate has the right to participate, and their views must be given due consideration.[39]

[40] Turning now to the core consideration. The Convention's substantive objectives require a rigorous statutory threshold to displace the default suspension of an order pending appeal under Section 18 of the Act. Under Section 18(1), read with Section 18(3), the default rule remains that the operation and execution of a decision subject to an application for leave to appeal or an appeal is suspended. The statutory requirements under Section 18(1) and 18(3) are cumulative jurisdictional prerequisites and not discretionary weighing.[40]

[41] Thus, exceptional circumstances arise from the specific facts of the case. Proof on a balance of probabilities that the applicant for execution will suffer irreparable harm if execution is not ordered and proof on a balance of probabilities that the other party (and, in child-centred matters, the children) will not suffer irreparable harm if the order is put into operation is required.[41]

[42] The first respondent implicitly contends that because the Convention requires the expeditious return of children to restore the *status quo ante*, the overarching delay occasioned by appellate procedures inherently creates exceptional circumstances warranting immediate execution. I say this reasoning may be legally untenable. I say so because every Convention

[39] This is mandatory.
[40] Tyte Security Services CC v Provincial Government 2024 (6) SA 176 at 181 at paragraph 13 G.
[41] Tyte Security Services CC v Provincial Government 2024 (6) SA 176 at 181 at paragraph 11 H.

application involves allegations of wrongful removal, a statutory objective of summary return, and the reality that appellate proceedings may consume time.[42]

[43] For circumstances to be exceptional within the meaning of Section 18(1), they must be out of the ordinary and of an unusual nature; something excepted in the sense that the general rule does not apply. Thus, something uncommon, rare or different. If the general objective of expeditious return under Article 11 of the Convention were sufficient to satisfy Section 18(1), the default rule of suspension would be rendered entirely nugatory in every international child abduction matter. An underlying international treaty objective cannot override the express statutory safeguards enacted in Section 18.[43]

[44] The prompt return mandate informs the adjudication of the substantive merits of the Convention application and the six-week benchmark under Section 23(1) of the Children's Act 38 of 2005. It cannot serve as a jurisdictional lever to strip an aggrieved litigant of the automatic statutory stay, pending appellate review.[44]

[45] The first respondent also argues that exceptional circumstances exist because there is a small window of opportunity for the boys to return to Australia and immediately resume their pre-abduction routine, schools, grades, peers, and familiar therapists. I disagree. The children previously resided under a shared, week-about residency regime pursuant to a 2023 parenting order. Under the execution order, the children would not return to a shared parenting structure. Rather, they would be placed into the sole, exclusive daily care of the first respondent. This constitutes an untested change in their custodial environment, not the preservation of an existing routine.[45]

[46] Moreover, it is noted that the court a quo put no protective measures in place for the children following their return to Australia, and the Central Authority, although duty-bound to do so, does not appear to have made the necessary enquiries with its counterpart in Australia, nor given any input to the court a quo on this score. This is concerning. Protective measures are not

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[42] This may apply in every Convention case.
[43] The statutory threshold must still be met.
[44] The statutory threshold must still be met
[45] This especially in the case of AH.
[45] This cannot be disputed.

limited to domestic violence risks, something which is regrettably often misunderstood and thus overlooked.[46]

[47] The assertion that a temporary delay during the prosecution of an expedited appeal will permanently extinguish their capacity to reintegrate into Australia is speculative and unsupported by empirical expert evidence.[47]

[48] Under Section 18(3), the applicant must prove that he or she will suffer irreparable harm if the interim execution order is not granted. Because Section 18(3) requirements are strict jurisdictional facts, judicial discretion cannot bypass them or subsume them into a free-floating enquiry into the general interests of justice. Where the applicant establishes no personal irreparable harm, the court lacks the statutory competence to order execution under Section 18(3).[48]

[49] To circumvent this lack of proof, the first respondent seeks to rely on *Ad Hoc Central Authority v Koch* to argue that harm to the children can replace the statutory requirement of harm to the litigating parties.[49]

[50] In respect of AH, the best interests of the child are paramount in substantive custody determinations under Section 28(2) of the Constitution. Section 18(3) regulates the exceptional suspension of the ordinary appellate hierarchy. Thus, even if child-centric harm were imported into Section 18(3), one cannot ignore the potentially irreversible psychological trauma inflicted on the children by their forcible removal to Australia prior to the determination of the appeal by the Supreme Court of Appeal.[50]

[51] I say this because the purpose of the default suspension under Section 18(1) is to prevent the creation of irreversible factual situations pending appeal. In this case, once minor children are physically removed to a foreign jurisdiction, the South African appellate court's ability

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[46] This is unfortunate.
[47] This is in any event not for this court to decide.
[48] Tyte Security Services CC v Provincial Government 2024 (6) SA 176 at 182 at paragraph 14 D.
[49] Ad Hoc Central Authority, South Africa and Another v Koch NO and Another 2024 (3) SA 249 CC.
[50] It cannot be said that by not removing the children the judicial cognizable harm will be irreparable.

to provide effective relief is compromised (and may be compromised forever), which may render any success on the pending appeal in the Supreme Court of Appeal entirely moot.[51]

[52] Put another way, if the execution order is implemented and the children are removed to Australia, only for the SCA to subsequently uphold the appellant's appeal, and provided the judicial authorities in Australia are somehow persuaded to give effect to that order (something which was not addressed at all by the first respondent and Central Authority before us, as is also often the case concerning the myth of 'mirror orders'), the children would be subjected to a second cross-continental relocation back to South Africa. It is fair to say that exposing children to multiple international dislocations within months creates acute psychological harm, defeating the negative jurisdictional requirement of Section 18(3) that the children will not suffer irreparable harm.[52]

[53] The prospects of success argument has since the hearing of the matter undergone a chameleonic change. The first respondent and the Central Authority relied heavily on the court a quo's finding that the appellant had no prospects whatsoever of success on appeal. The SCA has now granted leave to appeal, and it will hear the matter on 8 December 2026. In any event, the prospects of success cannot be determined solely by a self-affirming conclusion. To treat a court's refusal of leave to appeal as conclusive would render every simultaneous Section 18(3) application an automatic rubber-stamp, destroying the purpose of the Section 17(2)(b) petition process.[53]

[54] Furthermore, if AH's return is reversed, the resulting separation of siblings directly impacts the Article 13(b) (intolerable situation) threshold for the two younger children. Section 18(4) was enacted precisely because interim execution is an extraordinary deviation from the common law. It confers an automatic right of appeal and mandates an automatic suspension of the execution order pending that appeal (section 18(4)(a)(iv)). Here, the appellant is legitimately

[51] It may even "oust" the jurisdiction of our Apex court.
[52] This cannot be seriously disputed.
[53] In every case the jurisdictional threshold must be met.

utilising an automatic statutory remedy to protect her children from cross-border relocation before the SCA determines her appeal.[54]

CONCLUSION

[55] I hold the view that the first respondent has failed to satisfy the strict, cumulative jurisdictional requirements of Section 18(1) and Section 18(3) of the Act. Ponnan JA supports my view to some extent, when he eloquently set out the law and the test to be applied in cases such as these, stating the following:

'…Simply put, the tenth respondent has been losing daily revenue on not being permitted to perform under a lawfully awarded tender. On the other side of the coin, the twenty-second respondent has been benefiting from an unlawfully awarded tender for close to three years and will suffer no judicially cognizable harm whatsoever if the tenth respondent were to perform the services provided in its contract for the remaining little more than one year of its intended duration. The twenty-second respondent does not engage with these factual averments, which are common cause…'[55]

[56] Here, the appellant (and the children) may suffer judicially cognizable harm should the order be put into execution pending the appeal hearing to be determined in the SCA. Thus, in my view, preserving the ordinary statutory suspension pending the expeditious determination of the appellant's appeal before the Supreme Court of Appeal remains the only course consistent with our jurisprudence and Section 28(2) of the Constitution.[56]

[57] Insofar as it may still be necessary to consider prospects of success in the context of whether exceptional circumstances exist in the circumstances of this matter, in my view, the appeal may enjoy good prospects of success in light of the recent order issued by the Supreme Court of Appeal and because any decision pertaining to AH will impact on the Article 13(b) enquiry in respect of HH and BH.[57]

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[54] This cannot be an abuse of the court process.
[55] Tyte Security Services CC v Provincial Government 2024 (6) SA 176 at 186 at paragraph 25 at B.
[56] Again, because of the developments since the hearing this cannot be seriously disputed.
[57] The enquiry for AH is a separate enquiry.

[58] It follows that if AH does not return to Australia, it would impact the younger boys and place them in an intolerable situation, as they would be in their father's sole care, without the appellant and their older brother, with whom they have a close and dependent relationship, and against their wishes. Thus, there are good prospects that if the SCA reaches a different finding on whether AH should be ordered to return, this will affect the outcome of the Article 13(b) shield that has been raised.[58]

[59] Given the aforesaid, the first respondent has failed to show, on a balance of probabilities, that there are exceptional circumstances to justify a deviation from the common law position on a narrow enquiry in terms of section 18(4), and irreparable harm to himself versus absence of such harm to the appellant or the children, if the order remains suspended pending the outcome of the hearing in the Supreme Court of Appeal.[59]

COSTS

[60] Given the developments and that the matter is to be determined in the Supreme Court of Appeal, I take the view that the costs of this Section 18(4) appeal are to be costs in the appeal.[60]

ORDER

[61] I would propose an order in the following terms:

1. The appeal is upheld.
2. The order granted directing the immediate return of AH, HH and BH to Australia is set aside.
3. AH, HH and BH are to remain in the Republic of South Africa pending the decision of the Supreme Court of Appeal on the merits of the appeal.
4. The costs of the application are to be costs in the appeal.

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[58] The enquiry for AH is a separate enquiry.
[59] Tyte Security Services CC v Provincial Government 2024 (6) SA 176 at 186 at paragraph 27 at F.
[60] The SCA will deal with the merits of the case.

WILLE, J

I agree, and it is so ordered:

CLOETE, J

KUSEVITSKY, J (dissenting)

[62] I have read the main judgment and the proposed order and, for the reasons which follow, I hold a different view.

[63] As also indicated in the main judgment, when this automatic appeal in terms of section 18(4)(a)(ii) of the Superior Courts Act, No. 10 of 2013, ("the Superior Courts Act") was heard:

63.1 a petition by the appellant, ("the mother") to the Supreme Court of Appeal of the order of the court *a quo* for the immediate return of the two minor children to Australia ("the Hague Convention order") had not yet been decided; and

63.2 this constituted full bench was seized with an automatic appeal against an order granted by the court *a quo* in terms of a section 18(3)[61] application by the first respondent, ("the father") wherein the court granted an immediate execution order[62] ("the execution order").

[64] This court therefore, after hearing argument in the automatic appeal, postponed this decision pending the outcome of that petition to the Supreme Court of Appeal ("SCA"). It is common cause that the SCA has granted the mother leave to appeal the merits of the Convention order to it, to be heard on 8 December 2026.

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[61] of the Superior Courts Act

[62] The section 18(3) application and the application for leave to appeal (having being dismissed) was heard simultaneously.

[65] What is apparent, given the above, is that as a consequence of the above, there are now two parallel appeal processes under consideration – the Hague Convention appeal and this procedural automatic appeal in terms of section 18(4) of the Superior Courts Act. In my view, this has caused somewhat of an anomalous situation in the prosecution and adjudication of these matters, when these simultaneous appeals serve before different appellate courts and calls for simultaneous adjudication. The effects are self-evident. It creates the potential for uncertainty and delay, with potentially detrimental consequences, when one has regard to the nature of the underlying cause of action or substantive relief being sought.

[66] Given that we are tasked with an automatic appeal. it is trite that it is therefore not for this court to deal with the merits of that appeal. Our automatic appeal is procedural in nature only and to be adjudicated accordingly.

[67] As a starting point, it is trite that judicial discretion, an aspect to which I shall return, is absent where a court, without delving into the merits, makes a determination as to whether, for purposes of The Hague Convention, a child that has been abducted, is to be so returned to their place of habitual residence. A court is not concerned with the merits - that is to be decided by the trial court. If the jurisdictional requirements are present, subject of course to any exceptions present under Article 13(b), a court has no discretion – it must order the return of the children, with such conditions as may be necessary.

[68] What then of a section 18(3) execution? The purpose of a s18(3) application is to enforce an order despite an application for leave to appeal. Furthermore, section 18 requires a court to exercise a discretion in determining what factors constitute exceptional circumstances for purposes of a suspension.

[69] Whilst this might be applicable to an order granted in the usual commercial course, I am of the view that different considerations should apply in matters in relation to children subject to the Hague Convention.

[70] What would the consequences be for a court to exercise a discretion as to whether exceptional circumstances exist? In my view, this would be contrary to the purpose of a statutory obligation. I deal with this discussion later. The court is not concerned with the merits – if the jurisdictional requirements are met, a court is enjoined to enforce the order of the return. Discretion should play no part in this evaluation or determination. This is because as it stands, an appeal court exercises a discretion in what it considers exceptional circumstances. This is a value judgment based on subjective considerations, not objective facts.

[71] A potential re-evaluation of the consideration is to be had, in my view, when an an applicant in s18(3) proceedings has to meet the requirements for the enforcement of a return order made pursuant to the Hague Convention. In the normal course, as alluded to earlier, all an applicant has to prove in order to discharge their burden is to prove exceptional circumstances and prejudice and/or irreparable harm to the appellant (being sustained by the appellant) and that the respondent will not.

[72] Thring J addressed the phrase “exceptional circumstances” in general and more specifically in respect of section 5(5)(a)(iv) of the Admiralty Jurisdiction Regulations Act 105 of 1983. There, the learned Judge recorded that where in a Statute, it is directed that a fixed rule should be departed from only under exceptional circumstances, effect will, generally speaking, best be given to the intention of the Legislature by applying strict rather than liberal meaning to the phrase and by carefully examining any circumstances relied on as allegedly being exceptional. The court was therefore alive to this distinction.

[73] Thus what constitutes ‘exceptional circumstances’ in that iteration of the Admiralty Act, as held in *MV Ais Mamas 2002 (6) SA 150 (C)*, is the following summation of the meaning of the phrase, given as follows at *156I – 157C:*

> “What does emerge from an examination of the authorities, however, seems to be the following:
> 1. What is ordinarily contemplated by the words 'exceptional circumstances' is something out of the ordinary and of an unusual nature; something which is

excepted in the sense that the general rule does not apply to it; something uncommon, rare or different; 'besonder', 'seldsaam', 'uitsonderlik', or 'in hoë mate ongewoon'.

2. To be exceptional the circumstances concerned must arise out of, or be incidental to, the particular case.
3. Whether or not exceptional circumstances exist is not a decision which depends upon the exercise of a judicial discretion: their existence or otherwise is a matter of fact which the Court must decide accordingly.
4. Depending on the context in which it is used, the word 'exceptional' has two shades of meaning: the primary meaning is unusual or different; the secondary meaning is markedly unusual or especially different.
5. Where, in a statute, it is directed that a fixed rule shall be departed from only under exceptional circumstances, effect will, generally speaking, best be given to the intention of the Legislature by applying a strict rather than a liberal meaning to the phrase, and by carefully examining any circumstances relied on as allegedly being exceptional."[63] ("own emphasis")

[74] Sutherland J in *Incubeta Holdings and Another v Ellis and Another* [64] found that exceptional circumstances would exist in circumstances where a forfeiture of substantive relief resulted because of procedural delay, regardless of the outcome of the appeal. This is precisely what happened in *casu*.

[75] What then would the practical effect be on an appellant and a respondent in a section 18 application matter subject to the Hague Convention? The nuances in the approach of the two stage appeal process that is created are novel and potentially problematic in matters subject to the Hague Convention.

[76] Section 18 of the Superior Courts Act states:

i) "(1) Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.

ii) (2) Subject to subsection (3), unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order not having the effect of a final judgment, which is the subject of an application for leave to appeal or of an appeal, is not suspended pending the decision of the application or appeal.

iii) (3) A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does

[63] Ibid at para 17
[64] *Incubeta Holdings (Pty) Ltd v Ellis* 2014 (3) SA 189 (GJ) at 196C-197C

not so order and that the other party will not suffer irreparable harm if the court so orders.

iv) (4) If a court orders otherwise, as contemplated in subsection (1)—

(i) the court must immediately record its reasons for doing so;

(ii) the aggrieved party has an automatic right of appeal to the next highest court;

(iii) the court hearing such an appeal must deal with it as a matter of extreme urgency; and

(iv) such order will be automatically suspended, pending the outcome of such appeal…" ("own emphasis")

[77] The court in *Incubeta*[65] held that the test in relation to the provisions of section 18 is two-fold: the requirements are:

(a) Whether or not 'exceptional circumstances 'exist, and

(b) Proof on a balance of probabilities by the applicant of-

(i) The presence of irreparable harm to the applicant/victor, who wants to put into operation and execute the order, and,

(ii)The absence of irreparable harm to the respondent/loser, who seeks leave to appeal.

[78] Put differently,

(a) are there exceptional circumstances which would warrant the court departing from the automatic suspension of the original order?

(b) did the party who applied to the court to order otherwise, prove that the other party will not suffer irreparable harm if the court so orders?

(c) did the party who applied to the court to order otherwise, prove that the other party will not suffer irreparable harm if the court so orders?

[79] In *Incubetha*, the court held that the new threshold test in section 18 was no longer discretionary with an eye to balancing harm. The test requires a finding of fact, not an exercise of discretion. The test must be fact specific. The concept of 'exceptional' is to be applied in a way functional to the objective to the section. It also held that the section was aimed at regulating procedure so as not to prejudice litigants in relation to

[65] *Incubeta* at para 16

uncertain outcomes of an appeal.

[80] The facts in *Incubeta* relate to a restraint of trade. There, Sutherland J however cautioned about importing from one kind of enquiry into another kind of enquiry, an *understanding* of a familiar phrase. A given phrase in any statutory provision has a function specific to that provision and to that specific statute and the primary aim of the interpreter is to discover the function it performs in that specific context. It may perform a different function in another statute and one must avoid being seduced by beguiling similarities.[66] Exceptionality must be fact-specific. The circumstances which are or may be 'exceptional' must be derived from the actual predicaments in which the given litigants find themselves.[67]

[81] The full court, Binns-Ward J (Fortuin and Boqwana JJ (as she then was)) in *Minister of Social Development Western Cape v Justice Alliance of South Africa*[68] agreed that exceptionality was fact specific and that it is derived from the actual predicaments in which the given litigants find themselves.[69] Binns-Ward J found that section 18(3) has introduced an absolute threshold that did not exist at common law: the applicant must prove that the loser will not suffer irreparable harm if the application is granted, and that it will suffer such harm if the application is refused. If it fails to do so, the application cannot succeed whatever the equities of the case might be.[70] The consequence of this is that the nature of the court's discretion has been extinguished.

[82] The court however emphasized that a court retained a wide general discretion to grant or refuse leave and, if leave be granted, to determine the conditions upon which the right to execute shall be exercised.[71]

[83] The argument is that an order in terms of s18(3) is an extraordinary remedy which the statute envisages will only be deployed in exceptional circumstances. The reason for this is self-evident: The immediate execution of a court order, when an appeal is

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[66] Ibid at paras 19 and 20
[67] ibid at para 22
[68] Unreported, WCC Case No.20806/2013 dated 1 April 2016
[69] at para 22
[70] *Minister of Social Development supra* at para 24
[71] Ibid at para 26

pending and the outcome of the case may change as a result of the appeal, has the potential to cause enormous harm to the party that is ultimately successful.[72]

[84] In *Schuurman*, the Full Bench was seized with an appeal against *inter alia* a declaratory order to make payments of all orders and settlement agreements. Kumalo J dismissed RAF's application for leave to appeal and granted the respondent's a s18(3) order. The RAF petitioned the SCA for leave to appeal the main order and later the SCA granted the RAF leave to appeal the main order. The Full Court was thus seized with the main appeal together with the RAF's s18(4) automatic appeal.[73]

Prospects of appeal

[85] Binns-Ward J in *Justice Alliance* did not follow Sutherland J's approach in the determination of prospects of success. The latter approach considered that the prospects of appeal do not form part of the consideration because leave to appeal inherently carries in it an acceptance that there was a reasonable prospect the appeal might success. Rather, it appreciated that an application in terms of section 18 (3) may arise for determination before an application for leave to appeal is heard or decided; alternatively, after an application for leave to appeal has been refused and a further application for leave has been noted to the Supreme Court of Appeal, but not yet determined. The court held that, whilst acknowledging that leave to appeal may be granted on other grounds, the court's assessment of the prospects of success in the appeal remains a relevant factor in the consideration. This was based on the proposition that the less sanguine a court seized of an application in terms of section 18(3) is about the prospects of the judgment at first instance being upheld on appeal, the less inclined it will be to grant the exceptional remedy of execution of that judgment pending the appeal.[74]

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[72] *Road Accident Fund v Schuurman Van Den Heever & Slabbert Inc and Others* (Appeal) (A300/2024) [2025] ZAGPPHC 530 (28 May 2025) at para 54; *Knoop v Gupta* (115/2020) [2020] ZASCA (19 November 2020)
[73] This was ostensibly done by agreement.
[74] *Justice Alliance, supra* at para 27

[86] But herein lies the distinction. The general proposition proceeds from the basis that a court should be less inclined to order an execution on the basis that a higher court has granted leave to appeal *ergo* there must be good prospect of success. But we know that section 17(1)(a) of the Superior Court Act also grants leave where there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter. Thus, to my mind, to automatically start from the premise that a stay must be automatically granted in light of an appeal, would, as the case law will later reflect, be a dangerous precedent to follow if viewed as a determinative factor alone.

[87] In *University of the Free State v Afriforum*, the Supreme Court of Appeal[75] , in evaluating the role of the prospects of success, rejected the approach adopted by Sutherland J in *Incubeta* and in *Liviero Wilge Joint Venture & Another v Eskom Holdings Soc Ltd*[76]*,* instead reaffirming the position adopted by the full court in *Justice Alliance*.

[88] When adjudicating the s18(4) appeal, *Schuurman* referred to the matter of *Knoop NO supra* on the question of prospects of appeal on the merits. It said this:

> "59] The SCA also had the benefit of the appeal on the merits before it and in this regard stated:
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> i) [50] We had the full record in the main appeal before us and had read it in anticipation of dealing with the main appeal, but the argument on the urgent appeal did not include any debate over prospects of success in the main appeal. Our finding that the three requirements for making an execution order were not established means that we did not have to consider whether there is a discretion once they are present and, if so, whether the prospects of success should affect its exercise. There may be difficulties if the high court takes the prospects of success into account in granting an execution order, because it is not clear that the court hearing an urgent appeal under s 18(4) will always be in a position to assess the weight of this factor. As I have noted, in both *UFS v Afriforum* and *Ntlemeza* the court disposed of the appeal by disregarding the prospects of success on appeal. The urgency of the appeal almost inevitably dictates that in this court and possibly in a full court, the appeal court will not have the record before it and will be confined to assessing the prospects of success in the main

[75] 2018 (3) SA 428 (SCA) at para 14
[76] (17321/2014) [2014] ZAGPJHC 150 (12 June 2014), Satchwell J (Moshidi J concurring) – this court only dealing with a distinct appeal of Makumie J. Another court was constituted to hear the 18(4) application per Satchwell, Van Oosten and Spilg JJ

> appeal from the judgment alone. The usual principle that an appeal court decides the appeal on the record before the high court cannot apply in those circumstances. If the language of s 18(4) confers a discretion, is that a full discretion or a power, combined with a duty to exercise that power on proof of the requirements for its exercise? These issues may warrant a reconsideration of the approach in *Justice Alliance* on an appropriate occasion." ("own emphasis')

[89] The court found that when considering the outcome of the s18(4), the court must have regard not just to the judgment in respect of the s18(3) application, but to the entirety of the appeal record before it.[77]

[90] It is apparent therefore that there is, what seems like a discourse in the operation of s 18 (3) and (4) matters when a simultaneous petition has been made to the Supreme Court of Appeal and where, in fact, such petition has been granted to it or to a full bench. The latter instance, one could argue, is conceivably more pragmatic because that would potentially result in the main appeal being heard together with any s 18 (4) application simultaneously.

[91] The court in *Appolus and Others v Naledi Local Municipality and Others*[78] evaluated the process to be followed in dealing with s18(3) and (4) applications and in circumstances where an application for leave to appeal was filed and leave granted against the main order[79] to the Supreme Court of Appeal. An order to enforce the main (review) order had been granted in terms of s18(3) pending the appeal process. The order to enforce the review order was launched and heard under a different case number to the review order.[80] The court, referring to the Supreme Court of Appeal matter of *City of Tswane Metropolitan Municipality v Vresthena (Pty) Ltd and Others* 2023 (6) SA 434 (SCA) concluded that the interpretation of section 18(4) relating to "the next highest court" does not allow the appellant a second right to automatic appeal to approach the next highest court where a full court has already heard an appeal in terms of section 18(4) of the Superior Court Act. I respectfully disagree with this proposition.

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[77] Ibid at para 60
[78] (UM199/2023; UM53/2003) [2024] ZANWHC 79 (18 March 2024) at para 20
[79] There a court order was granted on an urgent basis reviewing and setting aside the appointment of a Municipal Manager.
[80] Ibid at para 2

[92] With regard to the question of mootness and the seemingly contentious interpretation and application of this piece of legislation, Sutherland DJP (Adams J and Thompson AJ concurring) stated the following in *JAI HIND EMCC CC t/a Emmarentia Convenience Centre*:[81]

> i) "[22] The case is therefore moot. However, it is appropriate that the appeal be decided, notwithstanding that fact. The court has a discretion to deal with a matter, even if moot, if a proper reason exists to do so to address a 'legal issue of importance' or in the 'interests of justice'.
>
> ii) [23] This case ventilates controversies in an area of law that has had, as yet, only a little jurisprudential scrutiny. Few examples of the application of s 18(4) are reported. The facts in this case call for an elaborate examination which illuminates the nuances in the application of s 18, both substantively and procedurally." ("own emphasis")

[93] The court in *Appolus* also highlighted the ostensible confusion to the legal position, where an automatic appeal in terms of section 18(4)(iv) of the Superior Court Act automatically suspends the execution of the order *ex lege*, under circumstances where an order has already been granted to execute the order and where leave to appeal has been granted to the Supreme Court of Appeal. Here, it was contended that the situation was unique in that leave to appeal to the Supreme Court of Appeal had been granted after an appeal in terms of section 18(4) had been noted.[82] I do not however respectfully support the proposition that where a party was awaiting a directive for the constituting of a full bench appeal in terms of section 18(4), that an application for leave to appeal to the Supreme Court of Appeal would grant a party two opportunities to appeal, nor do I agree with the proposition that a court has a discretion in considering whether or not to constitute a full court and that doing so would be nonsensical in circumstances where leave to appeal to the SCA had already been granted, as was found by that court.[83]

[94] I have already indicated that the effect of a section 18 appeal, in conjunction with an appeal on the merits, creates two parallel appellate processes. Different

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[81] Appolus at para 27; See also *Jai Hind Emcc CC t/a Emmarentia Convenience Centre v Engen Petroleum Ltd South Africa* 2023 (2) SA 252 (GJ)
[82] Ibid at paras 29 and 31
[83] paras 36 and 37

considerations apply to the evaluation of each respective appeal. In the appeal before the SCA, the court will, *inter alia*, be seized with the evaluation of the merits of the court a *quo* in granting the Hague order. As stated, this is a merits based enquiry, and a court 's paramount concern is whether or not the mother in the Hague application met the jurisdictional burden of proving an article 13(b) defence, and whether the trial court was correct in its evaluation thereof.

[95] Conversely, this constituted full bench is seized with an automatic s18(4) appeal process challenging the execution order granted in terms of s 18(3). Here, the court is called upon to consider whether exceptional circumstances exist – and existed, as was found by the court a quo in its determination of the s 18(1) and (2) application, and whether the jurisdictional requirements were met justifying an execution order in favour of the father in terms of s 18(3).

[96] In *Ntlemeza v Helen Suzman Foundation and Another*[84], the Supreme Court of Appeal held that the primary purpose of section 18(1) is to re-iterate the common law position in relation to the ordinary effect of appeal processes – the suspension of the order being appealed – not to nullify it. The suspension contemplated therein would thus continue to operate in the event of a further application for leave to appeal to this court, the SCA, and in the event of that being successful, in relation to the outcome of a decision by the SCA in respect of the principal order. Section 18(1) also sets the basis for when the power to depart from the default position comes into play, namely, exceptional circumstances which must be read in conjunction with the further requirements set by s 18(3).

[97] More importantly, as to the question whether, in light of a jurisdictional point raised by General Ntlemeza[85] framed as follows:

> " [17] … In terms of s 18(1), a pending decision on an application for leave to appeal or an appeal was a jurisdictional requirement before a court considering an application to enforce an order was empowered to make an execution order of the kind set out in the preceding paragraph. It was contended that sequentially the application for leave to appeal by General Ntlemeza had been refused before FUL's

[84] (402/2017) [2017] ZASCA 93; [2017] 3 All SA 589 (SCA); 2017 (5) SA 402 (SCA (9 June 2017) at para 28

[85]

> counter-application was upheld and thus the high court was precluded from considering HSF and FUL's counter-application, because the jurisdictional fact of a pending decision in relation to an appeal or an application for leave to appeal was absent."

[98] The court in answer, held as follows:

> "[29] The preliminary point on behalf of General Ntlemeza referred to in para 17 above does not accord with the plain meaning of s 18(1). As pointed out on behalf of HSF and FUL, and following on what is set out in the preceding paragraph, s18(1) does not say that the court's power to reverse the automatic suspension of a decision is dependent on that decision being subject to an application for leave to appeal or an appeal. It says that, unless the court orders otherwise, such a decision is automatically suspended.

[99] That appeal was against a decision of the High Court ordering the execution of an earlier ruling issued by it, pending the finalization of an appeal or an application for leave to appeal. The court found that there could be no doubt that an application by the appellants for leave to execute, had there not been one earlier, could have been brought and would have been competent after the application for leave to appeal was filed to it. Courts must be the guardians of their own process and be slow to avoid a to-ing and fro-ing of litigants. It said that the high court's order achieved that end. The high court reasonably apprehended on the evidence before it that further appeals were in the offing and issued an order that sought not just to crystallize the position but also to anticipate further appeal processes.[86]

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[86] Ibid 414B-D, para 32. At first blush, this seems to an execution order in perpetuity, but the position was subsequently clarified in *Knoop and Another NNO v Gupta* (No. 1) (115/2020) ZASCA 149 (19 November 2020) where, following a judgment for leave to execute, the full court granted the following order:
'*Any present or future appeals, applications and petitions by any party relating to this judgment shall not suspend the operation of the order granted on the 13 December 2019*.' The court held that the order flew directly in the face of the statute, that explicitly says that pending an urgent appeal under s 18(4), the operation of an execution order is suspended; that *Ntlemeza* not only did not provide any authority in favour of the grant of such an order, but was authority against it; and that the inherent power of a court to regulate its own procedure cannot be used to override the provisions of a statute directly governing the issue. Curiously, the court in Koop opined that, other than the fact that the judgment set out s 18 as a whole, including s 18(4), it did not refer to the latter section and did not question that the effect of the section was to suspend the execution order pending an appeal against it. See para 31.

[100] Section 18(3) requires an applicant – the father - for an execution order to establish that the respondent (the mother) will not suffer irreparable harm if the order is granted. In *University of the Free State v Afriforum*[87], the court held that the requirements introduced by s 18(1) and (3) are more onerous than those of the common law. Apart from the requirement of 'exceptional circumstances' in s 18(1), section 18(3) requires the applicant "in addition" to prove on a balance of probabilities that he or she "will" suffer irreparable harm if the order is not made, and that the other party "will not" suffer irreparable harm if the order is made. Thus, if an applicant cannot show that the respondent will not suffer irreparable harm by the grant of the execution order, that is fatal.[88]

[101] I have detailed some cases that dealt with the prospects of success. This was one of the basis upon which the main judgment *inter alia* finds that the application should be dismissed. We know that the SCA granted leave to hear the main appeal, to it. Presumably, it would have had the whole record. It would not have had the benefit of this judgment prior to its granting of leave. But it seems that there is a variance in approach as to when the question of prospects of success plays a role in the determination of a granting of leave *viz a viz* the record of proceedings.

[102] I say this because in *Knoop NO supra*, the court referred to *Justice Alliance* where it was held that a court has a wide discretion to grant or refuse an execution order once the statutory requirements are satisfied and that prospects of success in the appeal have a role to play in considering the exercise of that discretion.[89] It further contended that this approach had been supported in *Afriforum, supra*. However there was a distinguishable feature in that, in both the *Afriforum* and *Ntlemeza* matters, the records in the main appeal were not before the Supreme Court of Appeal and the appeals decided without the full record or any consideration

[87] 2018 (3) SA 428 (SCA) at 433A-435, para 10
[88] *Knoop* NO at para 48
[89] Ibid at para 49

of the merits of the main appeal.[90] In other words, in both of those matters, i.e. the *Afriforum* and *Ntlemeza*, the court disposed of the appeal by disregarding the prospects of success on appeal. In the merits of the urgent appeal against the execution order, that court had the full record in the main appeal, but the argument did not include a consideration of prospects of success in the main appeal. Wallis JA held that there may be difficulties if the high court takes the prospects of success into account in granting an execution order, because it is not clear that the court hearing an urgent appeal under section 18(4) will always be in a position to assess the weight of this factor.[91]

[103] The court highlighted the conundrum, questioning that if the language of section 18(4) confers a discretion, if that is a full discretion or a power, combined with a duty to exercise that power on proof or the requirements for its exercise. Wallis J concluded that those issues might warrant a reconsideration of the approach in *Justice Alliance*.[92] There is thus some uncertainty, despite the commentary to the contrary[93], about whether the approach adopted in *Justice Alliance* regarding the issue of prospects of success is the correct one.

[104] I turn now to consider the automatic appeal and return more specifically in the context of the requirements enunciated by Thring J in *MV Ais Mamas Seatrans Maritime v Owners*, *MV Ais Mamas*[94], *supra* regarding the assessment of what constitutes 'exceptional circumstances', being mindful of the intention of the Legislature, by applying a strict, rather than a liberal meaning to the phrase. It is my view however that this cannot be assessed in a vacuum and that consideration, as a matter of course, must be given to the underlying intention of the foundational piece of legislation which forms the subject of the execution order. Put different, there has to be a distinction between the requirements of, for example, an enforcement of a money judgment, and the requirements for a determination to execute an order

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[90] Ibid at para 49 – fn omitted.
[91] Ibid at para 50
[92] Ibid at para 50
[93] See Erasmus Superior Court Practice, Vol. 1, 2023, D-128, D-130
[94] 2002 (6) SA 150 (C) at 156I-157C; *Ntlemenza supra* at para 37; *Jai EMCC supra* at para 7

pertaining to a return of a child in line with legislation which calls for same on an urgent basis. A court should be mindful of not offending the very purpose and intention of a statute.

[105] The Hague Convention on the Civil Aspects of International Abduction requires contracting states to order a child returned to his or her country of habitual residence upon finding that the child has been wrongfully removed to, or retained in the contracting state. It is an international agreement to which SA acceded on 8 July 1997.

[106] The Constitutional Court in its seminal judgment of *Ad Hoc Central Authority for the Republic of South Africa and Another v Koch N.O. and Another*[95] deals with *inter alia* the statutory imperatives of the Convention, the rights, duties and obligations of contracting states, and the constitutional imperatives of protecting children from the harmful effects of their wrongful removal or retention, to ensuring their prompt return to their state of habitual residence and to secure protection for rights of access. The Convention forms part of our domestic law, having been incorporated into the Children's Act.[96]

[107] The Convention also implicates the rights of a child in section 28 (2) of the Constitution by mandating contracting states to return a child to the country of habitual residence when the child was removed in the circumstances postulated by the Convention. Article 16 of the Convention dictates that a judicial authority of the state to which a child was removed to, or in which they are retained, shall not decide the merits of a custody dispute until such time it has determined that the child is not to be retuned under the Convention. To re-iterate, the return of the child takes place without any comprehensive determination of what the best interest of the child may demand. In the scheme of the Convention, that is the function of the state where the child is habitually resident.[97]

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[95] (CCT 150/22) [2023] ZACC 37; 2024 (2) BCLR 147 (CC); 2024 (3) SA 249 (CC) (27 November 2023)
[96] *Koch* at para 40
[97] Ibid at para 35

What is required of section 18(4) appeal in the context of a Hague matter?

[108] Given my summation of the prescripts of section 18 above, I am of the view that for purposes of evaluating 'exceptional circumstances' in section 18, that where Hague matters are concerned, this should be considered exceptional for purposes of the provision. I say against the backdrop of *MV Ais.* To be exceptional, the circumstances concerned must arise out of, or be incidental to the particular case: The very nature of Hague matters contemplate exceptional, extraordinary and drastic measures and relief consequent to the unlawful abduction of a child and an application for their return forthwith, bar the exceptions provided for in Art. 13.(b)

[109] The circumstances are fact specific, but it is ultimately adjudicated under a regime of return which by its nature is extraordinary. In fact, once the jurisdictional requirements are met for a return, and in the absence of an exception, a court is duty bound to return the child to their habitual residence. There is no consideration of the merits and the exercise of judicial discretion is limited. To my mind, this should, as a matter of course, warrant the matter to be regarded as exceptional for purposes of the Act.

[110] Furthermore, the intention of the legislature is also a guiding principle in the evaluation of what circumstance would be considered exceptional. Hague matters are, by its very nature, urgent. The starting point in an evaluation under section 18(3) is that the law mandates the return of an abducted child. The discretion as to whether it therefore falls into this category is removed. Thus all that a party then has to prove, on a balance of probabilities, is the remaining requirement to convince a court that the other party will not suffer irreparable harm if the court were to so order.

[111] The main judgment referred three issues which I cumulatively sum up, as justifying a finding that the father has failed to satisfy the strict jurisdictional requirements of section 18(1) and (3): a refusal of an order –the hierarchy of the courts; the hardship and psychological trauma to the children and their ostensible wish to remain in this court's jurisdiction, and lastly, the effectiveness of a return order in circumstances where a removal order is upheld and the assertion made,

that once the child leaves South Africa, it loses jurisdiction over the child and any order which will be made in an appeal court will render the matter moot.

[112] The concept of irreparable harm suffered by the party also needs to be distinguished. Whilst in the normal humdrum of litigation, safeguards would always be in place to secure enforcement[98], the context of irreparable harm takes on an altogether different feature when execution orders pursuant to Hague matters are considered. Unlike normal substantive relief, the harm contemplated is generally not by the abducting party. They are generally the ones that have caused the harm by the very nature of abduction. The enquiry starts at the point of abduction – not what has gone before. That is for a merits based enquiry in the domestic forum of the abducted child. In *Pennello v Pennello (Chief Family Advocate as Curiae)*[99] Van Heerden AJA stated as follows:

> i) "The Convention is predicated on the assumption that the abduction of a child will generally be prejudicial to his or her welfare and that, in the vast majority of cases, it will be in the best interests of the child to return him or her to the state of habitual residence. The underlying premise is thus that the authorities best placed to resolve the merits of a custody dispute are the courts of the state of the child's habitual residence and not the courts of the state to which the child has been removed or in which the child is being retained."

[113] In *Sonderup v Tondelli and Another*[100], Goldstone J warned against turning the hearing of a Convention application proceedings into a custody application, holding that it would be contrary to the intention and terms of the Convention. Article 19 of the Convention provides that a decision under the Convention concerning the return of a child shall not be taken to be a determination on the merits of any custody issue.

[114] Goldstone J then proceeded to consider the question of the harm that an abducted child may suffer as a result of an order that they be returned to the jurisdiction of their habitual residence. He held as follows:

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[98] security provided or a claim for damages as some examples
[99] 2004 (3) SA 117 (SCA) at para 38
[100] [2000] ZACC 26; 2001 (1) SA 1171 (CC) at para 30

i) ‘A matrimonial dispute almost always has an adverse effect on children of the marriage. Where a dispute includes a contest over custody, that harm is likely to be aggravated. The law seeks to provide a means of resolving such disputes through decisions premised on the best interests of the child. Parents have a responsibility to their children to allow the law to take its course and not to attempt to resolve the dispute by resorting to self-help. Any attempt to do that inevitably increases the tension between the parents and that ordinarily adds to the suffering of the children.

ii) The Convention recognises this. It proceeds on the basis that 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. It makes provision, however, in art 13 for exceptional cases where this will not be the case.

iii) An art 13 enquiry is directed to the risk that the child may be harmed by a Court-ordered return. The risk must be a grave one. It must expose the child to “physical or psychological harm or otherwise place the child in an intolerable situation”. The words “otherwise place the child in an intolerable situation” indicate that the harm that is contemplated by the section is harm of a serious nature. I do not consider it appropriate in the present case to attempt any further definition of the harm, nor to consider whether in the light of the provisions of our Constitution, our Courts should follow the stringent tests set by Courts in other countries.’ (“Own emphasis”)

[115] The Supreme Court of Appeal per Plasket and Gorven JJA furthermore in *LD v Central Authority (RSA) and Another* [101] on the question on harm had this to say:

i) “[27] Also in the context of the question of harm, in *Pennello*,**,** this court cited with apparent approval a dictum of Ward LJ in *Re C (Abduction: Grave Risk of Psychological Harm)*:

ii) ‘There is, therefore, an established line of authority that the court should require clear and compelling evidence of the grave risk of harm or other intolerability which must be measured as substantial, not trivial, and of a severity which is much more than is inherent in the inevitable disruption, uncertainty and anxiety which follows an unwelcome return tothe jurisdiction of the court of habitual residence.’

iii) [28] It also commented on the approach adopted by the Constitutional Court to the question of harm in *Sonderup*, stating:

[101] [2022] ZASCA 6; [2002] 1 All SA 658 (SCA); 2022 (3) SA 96 (SCA) (18 January 2022) paras 27 and 28, fn omitted.

(a) 'Despite the litany of alleged incidents of physical and mental abuse of the mother by the 'left-behind' father on which counsel for the former relied in argument before the Constitutional Court in the *Sonderup* case, as well as the report of a South African clinical psychologist to the effect (*inter alia*) that the continuation of the *status quo* in Canada would have a "severely compromising effect on the healthy psychological development" of the child in question, the Court held that the harm to which the child would allegedly be subjected by a court-ordered return was not harm of the serious nature contemplated by art 13, but rather –

iv) *". . . in the main harm which is the natural consequence of her removal from the jurisdiction of the Courts of British Columbia, a Court-ordered return, and a contested custody dispute in which the temperature has been raised by the mother's unlawful action. That is harm which all children who are subject to abduction and Court-ordered return are likely to suffer, and which the Convention contemplates and takes into account in the remedy that it provides".'"*

[116] The *LD* matter *supra*, is distinguishable from the present – there the court held that the return of the child would have the effect of breaking up her family in South Africa. The facts of the matter was that the child had been 4 years old when she was abducted; the parents were never married, the mother had primary residence and the father had rights of visitation and accommodation[102]; the mother married and sought a relocation application to South Africa, which was refused. The court ordered further access to the children. The mother appealed the order and further argument was set to be heard on 30 January 2019. Two further appeals were unsuccessful, and thus a dismissal order granted on 3 October 2018. A last ditch attempt was made by the mother to the Court of Cassation in Luxembourg. She did not wait for the decision. Instead, the following day, on 4 October 2018, she removed the child and fled to South Africa. On 17 October 2018, five judges heard the application and dismissed her further appeal. The SCA, following an emotional assessment done by a psychologist found that the young child did not have the capacity to fully comprehend the implication of her objecting a return to Luxembourg; that ordering her return could potentially lead to an intolerable situation given her young age, that she was attached to her mother, naturally so given her young age, and that she would be separated from her half brother.

[102] The rights were steadily increased over time in terms of orders by the Juvenile Court granted in Luxembourg

[117] In a dissenting judgment, Mocumie JA, referring to *Sonderup and Pennello*, *supra*, on the question as to whether South African Courts should follow the stringent test set by courts in other countries was left open. She proposed[103] that that the correct approach is that adopted by the *United Kingdom Supreme Court in Re E (Children)* (*Wrongful Removal: Exceptions to Return).* That case can be summarized *inter alia* as follows: the risk to the child must be grave. It is not enough, as it is in other contexts such as asylum, that the risk must be real. It must have reached such a standard of seriousness as to be classified as 'grave'. The words physical or psychological harm are not qualified – intolerable is a strong word, but when applied to a child must mean 'a situation which this particular child in these particular circumstances should not be expected to tolerate'; every child had to put up with a certain amount of rough and tumble, discomfort and distress – it is a part of growing up, but there are some things which it is not reasonable to expect a child to tolerate.

[118] Importantly, the following was said in relation to Article 13(b) restrictions. It stated that "*what is abundantly clear is that the 'grave risk' is with reference to the child; not the abducting or left behind parent*." Mocumie JA also reiterated that section 39 of the Constitution of South Africa empowers courts in South Africa to interpret the law in line with international and foreign law where there is no definitive answer or where solutions can be imported, which are not readily available in their jurisdiction, from other jurisdictions, to dispense with Hague Convention applications in a justiciable manner.[104] I fully align myself with these sentiments, an aspect which I shall return to momentarily.

[119] The main judgment refers to the psychological trauma ostensibly suffered by the children in the event of a return, together with the possibility of further cross-Atlantic travel back to Australia. However, all of this harm is self-created by the first respondent. The children enjoyed a shared joint contact arrangement with the father. This was summarily taken away by the mother when she secretly sold her home, was duplicitous in taking the children out of school under the pretext of a holiday; confiscated their cellular phones for weeks and barred their access to social

[103] at para 46
[104] at para 47

media to evade being located. The trauma to the older child must have been overwhelming given that he has a girlfriend at home in his habitual residence and he was barred from calling her or home. When the father eventually located them in South Africa, she sought an interdict against him, preventing his access to the children. One must bear in mind that both parties are divorced and have since remarried and that, up until the abduction, the father exercised week-long alternate contact with the children without demure. In Re C (a minor) (abduction) [1989] FCR; sub nom C v C[105], the court held as follows:

> i) Is a parent to create a psychological situation and then rely upon it? If the grave risk of psychological harm to the child is to be inflicted by the conduct of the parent who abducted him, then it would be relied upon by every mother of a young child who removed him out of his jurisdiction and refused to return. It would drive a coach and four through the Convention at least in respect of applications relating to young children. I, for my part, cannot believe that this is in the interests of international relations.'

[120] Furthermore on this point, it was held that the courts are also anxious that the wrongdoer should not benefit from the wrong; that is the person removing the children should not be able to rely on the consequences of that removal to create a risk of harm or an intolerable situation on return[106]. That is precisely what the mother in *casu* claims. In my mind, she has not crossed the threshold of harm.

[121] Finally, I turn to the question of the court's jurisdiction in the event of an execution order being granted and the question of mootness. This issue was central in the decision of *Chafin v Chafin*, 568 U.S. 165 (2013) where a unanimous United States Supreme Court decision holding that the return of a child to a foreign country under The Hague Convention does not render an appeal of that return moot.

[122] The facts of the case are the following: The petitioner Lee Chafin was a citizen of the United States and member of the US army. Whilst stationed in Germany, he met and married the respondent, Lynne Chafin, a citizen of the United Kingdom. Their daughter EC was born the following year. Soon thereafter, Mr. Chafin was deployed to Afghanistan and Ms. Chafin took their child to Scotland. Mr.

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105 Re C (a minor) (abduction) [1989] FCR 197 at 205; [1989] 2 All ER 465 at 471; reported as sub nom C v C; LD supra at para 48
106 TB v JB (abduction; grave risk of harm) (2001); LD at para 49

Chafin was eventually transferred to Alabama US and in February 2010, Ms. Chafin travelled to Alabama with their child. Soon thereafter Mr. Chafin filed for divorce and for child custody. Ms. Chafin was deported for immigration violation, and the child remained in the care of Mr. Chafin for several more months.

[123] Ms Chafin filed a petition under the Convention and the International Child Abduction Remedies Act, 42 U.S.C 11601 (ICARA) which implements the convention. The District Court concluded that E.C.'s country of habitual residence was Scotland and granted the petition for return. Ms. Chafin immediately departed for Scotland with E.C. Ms. Chafin then initiated custody proceedings in Scotland and was granted interim custody and a preliminary injunction prohibiting Mr. Chafin from removing E.C. from Scotland. Mr. Chafin appealed the District Court's order, but the Eleventh Circuit Court dismissed the appeal as moot on the ground that once a child has been returned to a foreign country, a US court becomes powerless to grant relief. On remand, the District Court ordered Mr. Chafin to reimburse Ms. Chafin for court costs, attorney fees, and travel expenses.

[124] The court held that the return of a child to a foreign country pursuant to a Convention return order does not render an appeal of that order moot. On 19 February 2013, Chief Justice Roberts delivered his judgment. Justice Ruth Bader Ginsberg wrote a separate concurring judgment.

[125] The reasoning of the judgment is as follows: The court was seized with The Hague Convention on the Civil aspects of International Child abduction, which requires courts in the United States to order children to the countries of habitual residence if the courts find that the children have been wrongfully removed to or retained in the United States.

[126] The question was whether after a child is returned pursuant to such an order, any appeal of the order is moot. As of the time of writing, that court counted 89 nations party to the convention, and approximately, in the 2009 fiscal year, 324 children removed or retained in other countries were returned to the United States under the Convention, while 154 children removed to or retained in the United States were returned to the countries of habitual residence.

[127] As stated, the Scottish court had granted Ms Chafin interim custody and a preliminary injunction prohibiting Mr. Chafin from removing E.C. from Scotland. In the meantime, Mr. Chafin had appealed the District Court to the Court of Appeals for the Eleventh District. In February 2012, the Eleventh Circuit dismissed Mr. Chafin's appeal as moot in a one-paragraph order citing *Bekier v Bekier, 248* F.3d 1051 (2001). That court held that the Eleventh Circuit had concluded that an appeal of a Convention return order was moot when the child had been returned to a foreign country, because the court became powerless to grant relief. In accordance with *Bekier*, the Court of Appeals remanded the case to the District court with instructions to dismiss the suit as moot and vacate its order. On remand, the District court did so and ordered Mr. Chafin to pay Ms. Chafin's costs.

[128] Meanwhile, the Alabama State Court dismissed the child's custody proceedings initiated by Mr. Chafin for lack of jurisdiction. The Alabama Court of Civil Appeals affirmed, relying in part on the US District Court's finding that the child's habitual residence was not Alabama, but Scotland. The Supreme Court then granted a review of the judgment of the Court of Appeals for the Eleventh Circuit. The court stated that a case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party. *See Knox v Service Employees,* 567 U.S. (2012).

[129] It was argued there that if an event occurs while a case is pending on appeal, that makes it impossible for the court to grant any effectual relief whatever to a prevailing party, the appeal must be dismissed. *See Smalls v Green*, 159 US 651, 653 (1895). As long as the parties have a 'concrete interest', however small, in the outcome of litigation, the case is not moot. *Knox supra*

[130] The court held that the dispute was still very much alive. Mr. Chafin continued to contend that his daughter's country of habitual residence was the United States, while Ms. Chafin maintained that E.C's home is in Scotland. Mr. Chafin also argued that even if EC's habitual residence was Scotland, she should not have been returned because the Convention defences to return apply. The court held that the

Chafins continuously to vigorously contest the question of where their daughter will be raised. These were not a hypothetical state of facts as found in *Lewis v Continental Bank Corp, 494 US 472,477 (1990)*. There was also not the slightest doubt that there continues to exist between the parties that 'concrete adverseness' which sharpen the presentation of issues. Ms. Chafin argued that the case is moot because the District Court lacks the authority to issue a re-return order, either under the Convention or pursuant to its inherent equitable powers.

[131] But the court said that that argument, which goes to the meaning of the Convention and the legal availability of a certain kind of relief, confuses mootness with the merits. Mr. Chafin's claim for re-return under the Convention itself or according to general equitable principles, cannot be dismissed as so implausible that it is insufficient to preserve jurisdiction. *See Steel Co. v Citizens for Better Environment*, 523 US 83,89 (1998).

[132] The court also found that his prospects of success are therefore not pertinent to the mootness inquiry. As to the effectiveness of any relief, Ms. Chafin asserted that even if the habitual residence ruling were reversed and the District court were to issue a re-return order, that relief would be ineffectual because Scotland would simply ignore it, a situation contended in *casu*. But even if Scotland were to ignore a US re-return order or decline to assist in enforcing it, this case would not be moot.

[133] The court stated the following: The US courts continue to have personal jurisdiction over Ms. Chafin; may command her to take action even outside the United States; and may back up any such command with sanctions. *See Steele v. Bulova Watch Co*. 344 US 280,289 (1952). No law of physics prevents EC's return from Scotland. Abrogated on the grounds by *Abbott v. Abbott* 560 US (2010), and averred that Ms Chafin might decide to comply with an order against her and return EC to the United States. *See Larbie v Larbie* 690 F.3d 295, 303-304 (CA5 2012). After all, the consequence of compliance presumably would not be relinquished of custody rights, but simply custody proceedings in a different forum.

[134] The court further held that enforcement of the order may be uncertain if Ms Chafin chooses to defy it, but such uncertainty does not typically render cases moot. Courts often adjudicate disputes where the practical impact of any decision is not assured.

[135] For example, courts issue default judgments against defendants who fail to appear or participate in the proceedings and therefore seem less likely to comply. Similarly, the fact that a defendant is insolvent does not moot a claim for damages. Courts also decide cases against foreign nations whose choices to respect final rulings are not guaranteed.

[136] The courts have also heard the government's appeal from the reversal of a conviction, even though the defendants had been deported, reducing the practical impact of any decision. The court concluded that the case was not moot because the defendants might re-enter on their own and encounter the consequences of the ruling. So too here, the court said. A re-return order may not result in the return of EC to the United States, just as an order that an insolvent defendant pay 100 million dollars may not make the plaintiff rich.

[137] But it cannot be said that the parties here have no 'concrete interest' in whether Mr. Chafin secures a re-return. See Knox 567 US. However small that concrete interest may be due to potential difficulties in enforcement, it is not simply a matter of academic debate, and it is enough to save this case from mootness. The court stated that Miss Chafin was correct to emphasize that both The Hague Convention and ICARA stress the importance of the prompt return of children wrongfully removed or retained.

[138] The court was alive and sympathetic to the concern that shuttling children back and forth between parents and across international borders may be detrimental to those children. But courts can achieve the ends of the Convention and ICARA - and protect the well-being of the affected children- through the familiar judicial tools of expediting proceedings and granting stays where appropriate. There is no need to manipulate constitutional doctrine and hold these cases moot. As an

aside, in a South African context, courts have regularly granted mirror orders to their contracting counter-parts as a protection mechanism.

[139] The court opined that indeed, by doing so may very well undermine the goals of the treaty and harm the children it is meant to protect. If these cases were to become moot upon return, courts would be more likely to grant stays as a matter of course to prevent the loss of any right to appeal. In cases in which a stay would not be granted but for the prospect of mootness, a child would lose precious months when she could have been readjusting to life in a country of habitual residence, even though the appeal had little chance of success. Such routine stays, due to mootness, would be likely but would conflict with the Convention's mandate of prompt return of a child's country of habitual residence. The court opined that if losing parents were effectively guaranteed a stay, it seems likely that more would appeal, a scenario that would undermine the goal of prompt return and the best interest of children who should in fact be returned.

[140] A mootness holding here might also encourage flight in future Hague Convention cases, as prevailing parents try to flee the jurisdiction to moot the case. Courts should apply the four traditional stay factors in considering whether to stay or return order. One, whether the stay applicant has made a strong showing that he or she is likely to succeed on the merits; two, whether the applicant will be irreparably injured absent a stay; three, where the issuance of the stay will substantially injure the other parties interested in the proceedings; and four, where the public interest lies.

[141] In summary, the finding in *Chafin* was that The Hague Convention mandates the prompt return of children to their countries of habitual residence, but such return does not render the case moot. There is a live dispute between the parties over where the child will be raised, and there is a possibility of effectual relief for the prevailing parent. The courts below therefore continue to have jurisdiction to adjudicate the merits of the parties' respective claims.

Conclusion

[142] There is no doubt that any delay in the return of the abducted children to their home will cause the father and more especially the children irreparable harm. The longer the children remain abducted, the more entrenched they become which would make a return that more complicated. The rights of the father have been expunged by the self-help actions of the mother.

[143] If a party in a Hague application succeeds in defeating a return order, the practical effect of that would mean that one parent is in their habitual home and the matter proceeds to merits since the Hague application is not a merit inquiry. The effect of that would mean that a parent guilty of abduction would have defeated a claim for the return of the children to the place that they are habitually resident, and as a matter of obvious consequence, the merits of the application would not feature, if not appealed.

[144] This, therefore, lends credence to the objective intention of the Convention, that all a court is required to do is to evaluate objectively the jurisdictional requirements of return. It is not final in nature because it is subject to the determination of the merits in the country of origin, if unsuccessful. That decision would be subject to appeal. An unsuccessful determination would mean that the children remain in the country, and thus a s18(3) enforcement order would find no application, because logic dictates that the enforcement of the order, that is the dismissal of the application, would have the practical effect that the children would remain.

[145] Enforcement orders therefore only feature where applicants have been successful in a Hague application and where the return of the abducted children are ordered. This could be open to abuse with dire unintended consequences for the abducted children. As the court held, a deviation from the norm in such circumstances would warrant the circumstances exceptional for purposes of the Hague Convention.

[146] If the appeal is upheld, the children remain in the country, various orders to the contrary are ignored, and a parent's inherent parental rights are *mero motu*

removed. If the appeal is dismissed, the children are returned to their habitual residence and the merits of the matter fully ventilated in that country's jurisdiction. The practical effect, therefore, of an order of non-enforcement having the unintended consequence of depriving a parent of exercising contact and removing their parental rights, would, in my view, elevate a party's threshold to cross the exceptional circumstances threshold.

[147] The sad consequence of this matter is that the mother has forced the children to pick sides. Children should never have to be put in such positions because of the actions of parents who break the law and then use any emotional and psychological fallout as reason to bolster their disobedience. The children are of age or old enough to determine for themselves. But herein lies the problem. The children have been placed in the middle of an intolerable situation as a result of the mother's unlawful actions. She now expects the children to choose between the two. The mother had no difficulty in the father exercising joint control prior to her abduction of the children. Any reliance of alleged abuse and subjecting the children thereto is misguided. The parties are not married, do not live together, and have respective spouses, even if one were to accept that this alleged aggression was a feature of their previous relationship. This sentiment is echoed by the majority in its support for an order that the threshold was not met by the first respondent. But this is not supported by the evidence. The evidence shows that, one, the mother tried to bolster a justification for abduction based on the father's employment history. We know that despite this fact, the parents were no strangers to that domestic court process in their habitual jurisdiction.

[148] In the above evaluation, I would have found that the first respondent satisfied the requirements of exceptional circumstances and would have ordered the return of the children with conditions. However, given the fact that the appeal on the merits is but four weeks away, the interest of justice and taking into account the welfare of the children at this juncture of proceedings, the circumstances which have now evolved demands that, despite my finding that the first respondent has met his burden, that the order cannot be effected until the ventilation and adjudication of the merits appeal in the SCA.

DS KUSEVITSKY

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