Online Symposium on Recent Developments in African PIL (VII) – South Africa's Supreme Court of Appeal orders the return of a child under the Hague Child Abduction Convention

As part of the second online symposium on ***recent developments in African private international law****, we are pleased to present the seventh an final contribution, kindly prepared by* ***Solomon Okorley (University of Johannesburg, South Africa)****,* which examines a ***decision of the South African Supreme Court of Appeal ordering the return of a child under the Hague Child Abduction Convention****.*

South Africa's Supreme Court of Appeal Orders the Return of a Child under the Hague Child Abduction Convention: Marital Status of Parents

not Important in Determining the Child's Habitual Residence

1 Introduction

International child abduction[1] refers to the unilateral removal or retention of a child by a parent or guardian in a State other than that of the child's habitual residence, without the consent of the other parent or in breach of existing custodial rights.[2] This phenomenon has increasingly been characterised as both global in reach and growing in prevalence,[3] reflecting the intensification of cross-border mobility, transnational families, and jurisdictional fragmentation in family law. In cases of international child abduction, the left-behind parent seeks judicial relief in the form of a return order, the purpose of which is to restore the status quo ante by returning the child to the State of habitual residence.

South Africa occupies a pivotal position in the adjudication of international child abduction matters,[4] with its judicial decisions exerting significant influence on the development of jurisprudence within the Southern African Development Community (SADC) region.[5] This paper will briefly analyse the recent case of *The Central Authority for the Republic of South Africa v MV and Another*,[6] where the South African Supreme Court of Appeal upheld an appeal for the return of a child who was wrongly removed from Switzerland. The court held that "the minor child (L) be returned forthwith, subject to the terms of this order, to the jurisdiction of the Central Authority of Switzerland".[7]

This case is significant because the case addresses an important factor in international child abduction cases: ascertaining the habitual residence of the child. Consequently, it is a case that other contracting states of the 1980 Hague Child Abduction Convention would find useful when ascertaining the habitual residence of a child in an international child abduction dispute.

2 Facts of the case

The case concerns a minor child (L), born in Italy in May 2021 to unmarried parents. The mother (MV) is a dual South African–Italian citizen, while the father (VL) is an Italian national who later acquired Swiss citizenship. The parents were

engaged and had lived together prior to and after the child's birth. Before the child's birth, the parties resided together in Switzerland, where the father was employed. Following the child's birth in Italy, the parents returned with the child to Switzerland and continued to live together as a family. The father purchased an apartment in Geneva, financially supported the mother and child, and took steps consistent with establishing family life there, including enrolling the child in a crèche and applying for Swiss identification documentation for the child.

In May 2022, the parents and the child travelled together to South Africa to attend the wedding of the mother's brother. Return flights to Switzerland were booked shortly after the wedding. On the scheduled return date, the mother tested positive for COVID-19. As a result, the father returned to Switzerland alone, with the understanding that the mother and child would return once she had recovered. After recovering, the mother did not return to Switzerland with the child. She delayed her return and ultimately decided to remain permanently in South Africa with the child, citing the breakdown of the relationship and the presence of her family support network in South Africa.

The father objected to the child remaining in South Africa without his consent and initiated steps through Italian and Swiss authorities, which culminated in an application by the South African Central Authority for the child's return to Switzerland. While in South Africa, the mother obtained an *ex parte* order from the High Court granting her primary care and parental responsibilities over the child and directing that the child be registered as a South African citizen. The father opposed the order and continued to pursue the child's return through the South African Central Authority by filing a return application at the High Court. As at the time court was adjudicating the case in 2025, the boy was four-year-old.

2.1 High Court Ruling

According to the High court, it seemed that neither the minor child nor MV had settled in the Swiss community and that MV did not intend to remain in Switzerland permanently unless VL married her. The court further found that it is not certain that Mr VL regarded Geneva as the minor child's habitual residence. The court did not believe that the parties had the settled purpose of residing in Switzerland. Consequently, it found that the minor child was not a habitually

resident in Switzerland at the time of his removal to South Africa.[8] The court further held that removing the minor child from Ms MV's care would cause the minor child, serious emotional harm.[9] In the exercise of its discretion, the High Court dismissed the return application. Dissatisfied with the ruling, the Central Authority and MV appealed to the SCA with the leave of the High Court.

2.2 Summary of the Judgment of the Supreme Court of Appeal (SCA)

According to the SCA, the core issue was the minor child's habitual residence prior to his alleged unlawful retention in South Africa.[10] The resolution of the core issue will, of necessity entail determining (i) whether the removal of the child was wrongful; (ii) whether the relevant rights of custody were actually being exercised at the time of the minor child L's removal.

In its bid to resolve the issue, the SCA indicated that the applicable Legislative Framework included: the 1980 Hague Child Abduction Convention;[11] the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children;[12] Swiss Federal Act on Private International Law (PILA);[13] the Swiss Civil Code;[14] the Constitution of the Republic of South Africa of 1996;[15] and South Africa's Children's Act.[16]

As an important preliminary issue, the court set out to address the applicability of the Hague Convention.[17] The court noted that Switzerland is a signatory to the 1996 Hague Convention whereas South Africa is a signatory to the 1980 Hague Convention. According to the SCA, "It is the 1996 Hague Convention that enables the determination of the issues that are extra-territorial such as these. Absent the 1996 and the 1980 Hague Conventions, our courts and so is our State would not be able to lean on the international agreements between states on matters involving, amongst others, the international abduction and retention of children."[18] The SCA then made reference to the Constitutional Court case of *Sonderup*[19] where the apex court outlined the purpose of the 1980 Hague Convention, which *inter alia* ensures the prompt return of children to the state of their habitual residence. The SCA thus concluded that the 1980 Hague Convention applies to this case.

According to the court, since the child is Italian and had been registered as such

at birth, his initial habitual residence was Italy. And per the combined effect of Articles 316 and 337 of the Italian Code, both parents had parental responsibility which included joint custody.[20] The court opined that the parental responsibility was not extinguished when they moved to Switzerland by virtue of the 1996 Hague Convention, which is applicable between Italy and Switzerland: "Parental responsibility which exists under the law of the State of the child's habitual residence subsists after a change of that habitual residence to another state."[21]

According to the SCA, the continuity of parental rights where there is a change of habitual residence accords with the best interests of the child principle that the Hague Convention seeks to protect. The court held that the father has custodial rights over the child. Since both parents had custodial rights towards the child in Switzerland, Mr VL's consent to the retention of the child in South Africa was peremptory. The court therefore held that the failure to seek and obtain Mr VL's consent before retaining the child in South Africa was wrongful.

The court had to address the core issue which was the habitual residence of the child. According to the SCA, the high court misdirected itself when it focused on the issue of marriage as an important issue when determining the issue of habitual residence.[22] According to the court, Italy was the child's habitual residence and his birth residence until his parents moved to Switzerland. At that point, the minor child's habitual residence and his parents became Switzerland.[23]

The mother contended that the child's habitual residence was Italy and that she had no intention of residing in Switzerland permanently – a place she had lived for almost two years. The SCA rejected this arguments by relying on the Swiss law definition of habitual residence where it is stipulated that a natural person 'has their habitual residence in the state where they live for a certain period of time, even if this period is of limited duration from the outset'.[24] The court in rejecting the argument by the mother also relied on the dependency model which espouses that the child acquires the habitual residence of his or her custodians. Thus, since the custodians were habitually resident in Switzerland, he acquires the habitual residence of Switzerland and not that of Italy.

An attempt by the mother to invoke an article 13(b) [of the 1980 Hague Convention] defence on the ground that the mental and psychological state of Mr VL poses a grave risk of harm to the minor child also failed. According to the

court, the body of evidence showed that both Ms MV and Mr VL do have some mental challenges and that those challenges will be better addressed by the Swiss Court.[25]

3 Analysis

3.1 Preliminary issue: The territorial scope of the 1980 Hague Convention

Although the SCA was correct in its conclusion that the 1980 Hage Convention was applicable, it is submitted that the approach adopted in the judgment was marked by an unnecessarily circuitous analysis, which generated avoidable doctrinal and interpretive difficulties. Although not mentioned by the SCA, Switzerland is a contracting state to the 1980 Hague Convention, likewise South Africa.[26] The convention is applicable if the abduction took place from one convention state (where the child had his or her habitual residence) to another convention state.[27] Thus, per the territorial scope of the 1980 Hague Convention, this makes the convention applicable to the case simpliciter.

3.2 Habitual residence of the child

A central concept underpinning the Hague Convention is that of the "habitual residence" of the child. However, the term is neither expressly defined in the Convention itself nor in South Africa's Children's Act. The question of whether a person is or is not habitually resident in a specified country is a fact-specific inquiry, where the essence of a 'stable territorial link' is established through length of stay or through evidence of a particularly close tie between the person and the place.[28]

Judicial efforts to give content to the notion of habitual residence have crystallised into three dominant models of analysis: the dependency model, the parental rights model, and the child-centred model.[29] In terms of the dependency model, a child acquires the habitual residence of his or her custodians. Applying the facts of this case to this model, the parents are habitually resident in Switzerland. *Ipso facto*, the child is also habitually resident

in Switzerland.

The parental rights model proposes that habitual residence should be determined by the parent who has the right to determine where the child lives, irrespective of where the child actually lives; and where both parents have the right to determine where the child should live, neither may change the child's habitual residence without the consent of the other. Per the facts of this case, both parents have the right to determine where the child lives, thus, only the mother cannot determine the habitual residence of the child.

In terms of the child-centred model, the habitual residence of a child depends on the child's connections or intentions and the child's habitual residence is defined as the place where the child has been physically present for an amount of time sufficient to form social, cultural, linguistic and other connections. From the facts of the case, the child has been present for a considerable amount of time in Switzerland before the mother wrongly removed him. The parents had agreed for him to be enrolled at a crèche in Switzerland and Mr VL had also applied for the minor child to be issued with an official Swiss identity document. All these also point to the fact that the child's habitual resident in Switzerland.

The South African Courts have adopted a hybrid of the models in determining habitual residence of children which is based upon the life experiences of the child and the intentions of the parents of the dependent child.[30] The courts have further held that with very young children the habitual residence of the child is usually that of the custodian parent.[31] Also, following this hybrid approach of the South African courts, it leads to the same result that the child is habitually resident in Switzerland: the intention of the parents is for the child to be habitually resident in Switzerland. This is evinced in the enrolment of the child in crèche; the application for a Swiss identity document; and the return air ticket to Switzerland that was purchased.

From a comparative perspective, in *Monasky v. Taglieri*,[32] the US Supreme Court enunciated a stricter threshold in determining the habitual residence of the child. The court, in uniformity with the decisions of the courts of other contracting states of the 1980 Hague Convention held that "a child's habitual residence depends on the totality of the circumstances specific to the case." This threshold is higher than the one espoused by the South African court in the *Houtman* case where it stated that the habitual residence "must be determined by

reference to the circumstances of each case".[33] It is submitted that the South African court in determining the habitual residence of the child should apply the "totality of circumstances standard". In this case, it is clear that the SCA took into consideration the entire circumstances of the case in arriving at its decision,

4 Marital status of parents and the habitual residence of the child

In all of the crystallised models analysed in the immediate preceding paragraph, it is clear that marital status is not a determinant of the habitual residence of the child. In a more recent case, *Ad Hoc Central Authority for the Republic of South Africa and Another v DM*,[34] which also involved unmarried parents, in determining the habitual residence of the child, the court did not take into account the marital status of the parents.

Marital status (e.g., married, divorced, separated, or never married) does not appear in the text of the 1980 Hague Convention as a criterion for return decisions, exceptions (like grave risk under Article 13(b), child objection, consent, or non-exercise of rights), or any other core determination. The Convention is deliberately status-neutral to promote uniformity across signatory countries. However, marital status can have indirect relevance in limited ways, depending on the law of the child's habitual residence. In some jurisdictions, married parents automatically share joint custody rights from birth, making it easier for either to establish a breach of those rights. For unmarried parents, the rights of custody are not always automatic. In some countries, an unmarried father may need to establish paternity legally, obtain a court order for custody/access, or meet other requirements to have enforceable "rights of custody". If no such rights exist under the law of the habitual residence of the child, the removal might not qualify as "wrongful" under the Hague Convention. This is a question of domestic law in the country of the habitual residence of the child, not the Convention itself imposing a marital status test. In this instance case, although the parents were unmarried, based on Italian Family Law, the father had custody rights.

In any event, determining the child's habitual residence is a necessary antecedent to any analysis of whether the applicable law confers custody rights on an unmarried father. It is submitted that reliance on the marital status of the parents in determining a child's habitual residence is conceptually misplaced. The Hague

Convention adopts a distinctly child-centred approach; accordingly, an examination of the parents' marital status introduces adult-centred considerations that are extraneous to the Convention's underlying objectives.

It is therefore submitted that marital status should not be a factor to consider in determining a child's habitual residence in international child abduction cases. At most, it may serve as a contextual evidential factor in assessing shared parental intention and family stability, but the decisive inquiry must remain anchored in the child's lived reality, social integration, and factual circumstances.

5 Conclusion

This decision reflects the South African Supreme Court of Appeal's firm commitment to the prompt return of children to their State of habitual residence, in line with the objectives of the 1980 Hague Convention. The High Court's attempt to introduce marital status as a "novel" determinant of habitual residence was correctly rejected on appeal. The SCA's refusal to endorse this approach is commendable, as elevating parental marital status to a determinative factor risks transforming child abduction proceedings into an adult-centred inquiry, thereby undermining the child-focused framework and core objectives of the Convention.

Previous contributions:

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[1] Formerly known as 'legal kidnapping' or 'childnapping'. See Dyer "The Hague Convention on the Civil Aspects of International Child Abduction – Towards Global Cooperation: Its Successes and Failures" 1993 *The International Journal of Children's Rights* 273 275.

[2] Baruffi and Holliday "Child Abduction" in Beaumont and Holliday (eds) *A Guide to Global Private International Law* (2022) 481.

[3] Freeman and Taylor "Domestic violence and child participation: Contemporary challenges for the 1980 Hague child abduction convention" 2020 *Journal of Social Welfare and Family Law* 154.

[4] See INCADAT which currently contains 21 reported South African child abduction decisions in its database.

[5] https://www.sadc.int/member-states

[6] [2025] ZASCA 197.

[7] *The Central Authority for the Republic of South Africa v MV and Another* (n 6) par 87.

[8] *The Central Authority for the Republic of South Africa v MV and Another* (n 6) par 13.4

[9] *The Central Authority for the Republic of South Africa v MV and Another* (n 6) par 13.5.

[10] *The Central Authority for the Republic of South Africa v MV and Another* (n 6) par 29.

[11] Articles 3, 5, 12, 13, 16, 18, and 19 of the 1980 Hague Convention.

[12] Articles 3 and 17 of the 1996 Hague Convention.

[13] Articles 14, 20 and 82 of PILA.

[14] Article 296 of the Swiss Civil Code

[15] Section 28 of the 1996 Constitution of South Africa.

[16] Chapter 17 of the Children's Act 38 of 2005.

[17] *The Central Authority for the Republic of South Africa v MV and Another* (n 6) par 41.

[18] *The Central Authority for the Republic of South Africa v MV and Another* (n 6) par 43.

[19] *Sonderup v Tondelli and Another* 2001 1 SA 1171 (CC).

[20] *The Central Authority for the Republic of South Africa v MV and Another* (n 6) pars 48 and 51.

[21] Article 16(3) of the 1996 Hague Convention.

[22] *The Central Authority for the Republic of South Africa v MV and Another* (n 6) par 67.

[23] *The Central Authority for the Republic of South Africa v MV and Another* (n 6) par 62.

[24] Article 20(b) of the PILA.

[25] *The Central Authority for the Republic of South Africa v MV and Another* (n 6) par 77.

[26] See the status table of the 1980 Hague Convention.

[27] Kruger *International Child Abduction: The Inadequacies of the Law* (2011)

112.

[28] *Senior Family Advocate, Cape Town, and Another v Houtman* 2004 (6) SA 274 (CPD) par 9.

[29] *Central Authority for the Republic of South Africa and Another v C* 2021 (2) SA 471 (GJ) par 63.

[30] *Central Authority for the Central Republic of South Africa and Another v C* 2021 (2) SA 471 (GJ) par 63.

[31] *Central Authority for the Central Republic of South Africa and Another v C* 2021 (2) SA 471 (GJ) par 63.

[32] 140 S. Ct. 719 (2020).

[33] *Senior Family Advocate, Cape Town, and Another v Houtman* 2004 (6) SA 274 (CPD) par 11.

[34] [2024] ZAWCHC 170.