

# The Hague Convention must be looked at through the eyes of a child

Clarks Attorneys held its fifth Annual Family Law Conference on 4 and 5 October 2018 in Johannesburg. The keynote speaker, Supreme Court of Appeal Judge Halima Saldulker, spoke on civil aspects of The Hague Convention (the Convention). She said when looking at the Convention, it should be looked at through 'the eyes of a child'. She added that the Convention helps in cases when a child is taken out of the country by one parent from the other, especially in countries that are party and signatory to the Convention, however, she added that sometimes the Convention cannot help. She said there are countries reluctant to sign the Convention, because of various cultural and religious problems, which make it difficult for women and children to have their rights enforced.

Judge Saldulker pointed out that much has been written and said about the Convention, with regard to its effectiveness, applications, clauses and its successes. The main focus of the Convention is that its preamble is a return mechanism where the objects are set out to secure the prompt return of children who were wrongfully removed or retained in the contracting country. She added that wrongful removal is when the left behind parent's custody rights have been violated.

Judge Saldulker said the Hague Convention on the Civil Aspects of the International Child Abduction, 1980, was incorporated in South African law by the Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996, which came into operation in 1997. In the Children's Act 38 of 2005 ch 17, ss 274 and 280 deal with child abduction. She pointed out that the domestic legislation of South Africa (SA) provides that the mechanism, which formally adopts the Convention into the jurisprudence, is an exemplary step in the right direction.

Judge Saldulker said in SA the Chief Family Advocate is designated as the central authority who assists in both incoming and outgoing cases. She added a party may submit its submission to the central authority for the return of the child, the central authority also applies on behalf of the applicant to the central authority of the country to which the child has been taken, requesting them to -

- take steps to discover the whereabouts of the child;
- prevent any further harm to the child; and



*Supreme Court of Appeal Judge Halima Saldulker, was the keynote speaker at the Clarks Attorneys fifth Annual Family Law Conference held in Johannesburg.*

- attempt to secure the voluntary return of the child.

Judge Saldulker pointed out that according to research the Western Cape Division, the Gauteng Local Division and North West Division of the High Court, have practice directives with regard to Convention matters. She added that at the Supreme Court of Appeal, she together with the Judge President tried to set up rules - which they are considering putting to the rules board - with regard to how Convention matters will be dealt with at the court and if such matters arise they will be dealt with on an urgent basis.

Educational Psychologist, Doctor Martin Strous, said psychologists who act as expert witnesses are ethically bound to provide information that is impartial and accurate. He, however, added that psychologists often receive disparate advice from legal practitioners and other psychologists as to what is constituted as proper conduct when obtaining permission to assess minor children and when to release information. He pointed out that psychologists conducting care and contact evaluations should thoroughly consult with all participants and must weigh up potentially significant data, opinions, and alternative hypotheses thoroughly and impartially.

Dr Strous added that psychologists should be prepared to articulate the basis for their decisions concerning their methodology and they should be mindful of the pitfalls of simplistic, linear arguments. He said they should consider alternative hypotheses to explain the

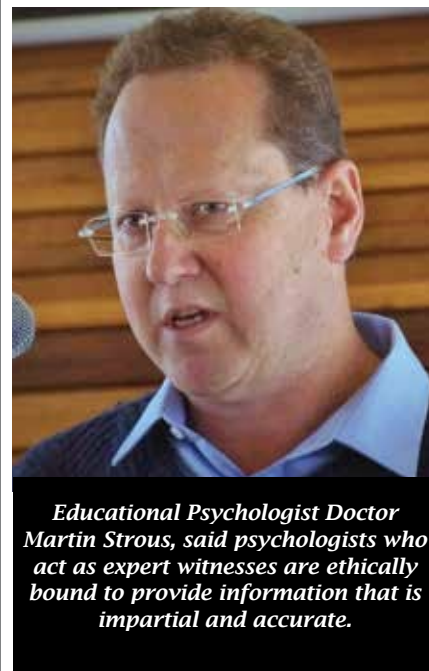
causes of the phenomena they observe. Dr Strous said recommendations should be based on the best interests of minor children and not on feelings of partiality toward one of the parents. He noted that psychologists - nationally and internationally - are often reported to their regulatory bodies for misconduct by unhappy parents in custody-related disputes.

Dr Strous said that it is important for legal practitioners and psychologists to apply their minds to ethical issues. The regulated rules of conduct for psychologists' states that if a psychologist's ethical responsibilities conflict with the law, the psychologist shall make their commitment known with regard to the ethical rules and take steps to resolve the conflict. However, if the conflict cannot be resolved, the psychologist must comply with the requirements of the law.

Advocate, Beverley Fourie, discussed the role, relevance and purpose of expert evidence. She said there are three issues with regard to expert evidence namely -

- the role of an expert in court;
- the relevance of expert evidence; and
- the purpose of the expert evidence.

Ms Fourie said the primary duty of an expert witness is to give the court the benefit of its expertise. She added that the responsibility of an expert witness is to provide the court with an objective and unbiased opinion, based on its expertise. She pointed out that it is not a hired gun who dispenses their expertise



*Educational Psychologist Doctor Martin Strous, said psychologists who act as expert witnesses are ethically bound to provide information that is impartial and accurate.*



*Advocate, Beverley Fourie, discussed the role, relevance and purpose of expert evidence at Clarks Attorneys fifth Annual Family Law Conference in October 2018.*

for a particular case, nor do they assume the role of an advocate. She pointed out that an expert witness is a witness of the court assisting the court in its determination and adjudication of any issues in the matter, which requires specialist expert knowledge. She added that an expert does not belong to any party, the expert is a court's witness and the expert's professional duty is to the court, not to the party who pays them.

### **Development in Lesbian, Gay, Bisexual, Transgender, Intersex and Questioning rights**

Professor at the University of Cape Town, Pierre de Vos, said in 2005 the Constitutional Court (CC) in *Minister of Home Affairs and Another v Fourie and Another (Doctors for Life International and Others, Amici Curiae); Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others* 2006 (1) SA 524 (CC), the court held that the denial of 'marriage like rights' to same sex couples was infringing on the Constitution and it unfairly discriminated against such couples. He added that in the wake of that, Parliament passed the Civil Union Act 17 of 2006. He pointed out that in another matter, *Gory v Kolver No and Others (Stark and Others Intervening)* 2007 (4) SA 97 (CC), the CC heard a case of a same sex couple where one partner passed away, the question was whether one party could inherit from the other, because there was no Will.

Prof de Vos noted that the CC said that they had done everything they could by adding words in the legislation to remedy the constitutional defect where discrimination against people based on their sex-

ual orientation took place. He added that the CC said all the legislation where the legislature included phrases like 'same sex partners' or 'same sex life partners', will remain, unless Parliament amends the legislation.

Prof de Vos said if one looked at surveys statistics they are a bit depressing. He added that there was a survey done in 2008 on social attitudes, which asked if people thought homosexuality is always wrong or right or sometimes wrong? He pointed out that 82% of respondents said they thought homosexuality was always wrong. Another survey from 2013 showed that 61% of respondents said they believed that homosexuality should never be accepted. He said a more recent study done in 2016, found that 72% of people that responded, believed same sex relationships are morally wrong, but interestingly, over 50% responded that same sex couples should have the same rights as heterosexual couples. He added that the argument was that South Africans want to give the rights, but personally they prejudice against one another.

Prof de Vos said the above shows how people would be treated if they are in a same sex relationship, when their case is going to be heard in court, when there is a divorce or when a person in a heterosexual relationship has decided that they would rather be in a same sex relationship and the judge has to decide who gets custody of the children or when it comes to adoption who gets to adopt. He pointed out that those decisions are not always captured in legal judgments and that is where the problem lies, because the extent to which legal protection translates to social acceptance depends on many factors, such as class, race, gender, where one lives and so on.



*Professor at the University of Cape Town, Pierre de Vos, spoke about the development in Lesbian, Gay, Bisexual, Transgender, Intersex and Questioning rights since the advent of democracy at the conference.*



*Advocate, Elizabeth Nieuwoudt, spoke about children's participation in court proceedings.*

### **Child participation**

Advocate, Elizabeth Nieuwoudt, said the subject of child participation can be found in s 28(h) of the Constitution where it states that every child has the right 'to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result.' She added that s 7 of the Children Act 38 of 2005 (Children's Act) tried to give a guide explaining the term 'best interest of the child'. She pointed out that s 10 of the Children's Act says how and when a child will participate in proceedings. She added that this is a test that looks at the age, maturity and development of the child.

Ms Nieuwoudt said legal practitioners and courts like to use phrases and terms, which people do not understand. She added that a court once tried to put a meaning to 'substantial injustice' and when it occurs. In the case of *HG v GG* 2010 (3) SA 352 (ECP) at 361 F-G, the court held that '[b]y all accounts the children are of an age and maturity to fully comprehend the situation, and their voices cannot be stifled, but must be heard'. She pointed out that further sections in the Children's Act refer to child participation, s 14 states that every child has the right to bring and be assisted in bringing a matter to a court, provided that matter falls within the jurisdiction of that court. Ms Nieuwoudt also discussed when a child can participate in court proceedings and other sections that refers to children's participation in matters involving them.

*Kgomotso Ramotsho,  
Kgomotso@derebus.org.za*