

Sneller Verbatim/aj

IN THE HIGH COURT OF SOUTH AFRICA

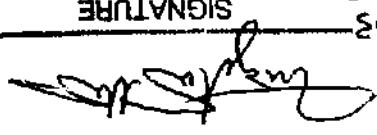
(WITWATERSRAND LOCAL DIVISION)

JOHANNESBURG

CASE NO: 19415/02

2002-12-10

5

DATE	6/01/2003
SIGNATURE	
(1) REPORTABLE YES/NO	YES/NO
(2) OF INTEREST TO OTHER JUDGES YES/NO	YES/NO
(3) REVISED	<input checked="" type="checkbox"/>
DELETE WHICHEVER IS NOT APPLICABLE	

10

In the matter between

15

CENTRAL AUTHORITY FOR THE

REPUBLIC OF SOUTH AFRICA

Applicant

and

DAWN LOUISE DAVID

Respondent

20

J U D G M E N T

WILLIS, J: This is an application in terms of which the applicant, the Central Authority for the Republic of South Africa seeks an order in terms of "The Convention on the Civil Aspects of International Child Abduction Act No. 72 of 1996 in the following terms:

25

1. That the minor children Cieram, Cameron, Erin and Lauren ("the minor children") be returned forthwith to the jurisdiction for the Central Authority for England and Wales.
 2.
 - 2.1 That the respondent be and is hereby ordered forthwith to hand over the minor children to the applicant so as to facilitate the return of the minor children to the jurisdiction of the Central Authority for England and Wales. 5
 - 2.2 That in the event of the respondent's failure to comply with the order in paragraph 2.1 above then the sheriff of this court be and is hereby authorised, empowered and ordered forthwith to remove the minor children from the custody of the respondent or wherever they may be found and to use such force and/or means as may be necessary to do so and to hand over the minor children to the family advocate namely Mr Renay Kathawaroo, so as to facilitate their return to the jurisdiction of the Central Authority for England and Wales. 10 15
 3.
 - 3.1 That the respondent forthwith hand over to the family advocate namely Mr Renay Kathawaroo the travel documents of the minor children. 20
 - 3.2 Should the respondent fail and/or refuse to hand over the travel documents of the minor children to the family advocate namely Mr Renay Kathawaroo then the sheriff of this court be and is hereby authorised, empowered and ordered forthwith to search for and seize the travel documents of the minor children and hand them to the 25
-

family advocate namely Mr Renay Kathawaroo so as to facilitate the return of the minor children to the jurisdiction of the Central Authority for England and Wales.

4. That the respondent be and is hereby ordered to pay the costs incurred in the travelling expenses of the minor children to England. 5
5. That the respondent be and is hereby ordered to pay the applicant's costs of this application on the attorney and client scale in the event of the respondent's opposition. 10
6. Further and/or alternative relief.

It is common cause that Mr Marcus John David, the person on behalf of whom the Central Authority for England and Wales and in South Africa have acted in this matter is the father of the minor children referred to in the notice of motion. Certain of the children were born of the relationship between the father and the mother prior to their marriage whereupon they were subsequently legitimated. The mother of the children is the present respondent. It is common cause that the father and the mother were divorced in the county borough of Bridgend in Wales and that the mother has had what we in South Africa would refer to as the physical custody of the aforesaid minor children. In other words at all relevant time the children have lived mainly with their mother. 15 20

It is common cause that in May of this year the aforesaid minor children were brought by the respondent to South Africa. It is also common cause that in bringing them to South Africa she did so 25

without the consent of their father. It is clear that she plans to make a life for herself here with these children and considers that it would be in the best interests of the children that they were brought up by her living in South Africa.

As I have already indicated the present applicant has brought this application in terms of "the convention" and has done so upon the request of the Central Authority for England and Wales. Article 1 of the convention provides as follows:- 5

"The objects of the present convention are -

- a) to secure the prompt return of children wrongfully removed to or retained in any contracting state and; 10
- b) to ensure that rights of custody and of access under the law of one contracting state are effectively restricted in the other contracting states."

Article 3 provides:- 15

"The removal or the retention of a child is to be considered wrongful where

- (a) it is in breach of rights of custody attributed to a person, an institution or other body, either jointly or alone under the law of the state in which the child was habitually resident immediately before the removal or retention; 20
- (b) at the time of removal or retention his rights were actually exercised either jointly or alone or would have been so exercised but for the removal of the retention." 25

The rights of custody mentioned in sub-paragraph (a) above may arise

in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that state.

Article 4 provides that:-

"This convention shall apply to any child who was 5
habitually resident in a contracting state immediately
before any breach of custody or access rights. The
convention shall cease to apply when the child attains
the age of 16 years."

Article 5 provides:- 10

"For the purposes of this convention -
(a) 'rights of custody' shall include rights relating to the
care of the person of the child and, in particular the right
to determine the child's place of residence;
(b) 'rights of access' shall include the right to take a 15
child for a limited period of time to a place other than the
child's habitual residence."

Article 12 contains the following provision:-

"Where a child has been wrongfully removed or retained
in terms of article 3 and at the date of the 20
commencement of the proceedings before the judicial or
administrative authority of the contracting state where
the child is a period of less than one year has elapsed
from the date of the wrongful removal or retention the
authority concerned shall order the return of the child 25
forthwith."

Article 13 provides *inter alia* as follows:-

"Notwithstanding the provisions of the preceding article the judicial or administrative authority at the requested state is not bound to order the return of the child if the person, institution, or other body which opposes its return establishes that - 5

- a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or 10 subsequently acquiesced in the removal or retention; or
- b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable 15 situation."

It is common cause that the children affected by this application were habitually resident in Wales before they were brought to South Africa in May of this year. It is also common cause that their father enjoyed rights of access to them. 20

The court has received the benefit of a report by a London barrister one Debbie Taylor in which she advised that in terms of the Child Abduction Act of 1984 in the United Kingdom it is a criminal offence for a parent to take or send his child out of the United Kingdom without "appropriate" consent which means the consent of 25 either the child's mother or the child's father (if he has parental

responsibility for them), which in this case means the consent of Mr David as the father of the children. I did not understand Ms Fine who appears for the respondent, to contest the contention that the children had indeed been brought to South Africa in contravention of the Child Abduction Act of 1984.

5

I did not understand Ms Fine to submit that there would be any grave risk to the children in returning them to Wales or that they would be exposed to physical or psychological harm or that the children by returning to England would be placed in an intolerable situation. In essence the argument of Ms Fine was that the father did not have rights of custody and accordingly the bringing of the children to South Africa was not in contravention of the Hague Convention.

10

Article 5 makes it clear that "rights of custody" include rights relating to the care of the person of the child and in particular the right to determine the child's place of residence. It is indeed common cause that parental rights in the United Kingdom have in essence been determined by the Children Act of 1989 in the United Kingdom. This Act does away with the concept with which we in South Africa are familiar, namely "custody" and refers rather to "parental responsibility". In terms of the Act, parental responsibility entails not only rights but duties and powers. There is no dispute that according to the law of the United Kingdom these powers and duties include *inter alia* the right to be heard concerning arrangements for a child's emigration.

15

20

In other words it is quite clear that the father of these particular children would have the "rights of custody" as referred to in the

25

Hague Convention in so far as they relate to his rights to determine their place of residence. Furthermore as Mr Naidoo who appears for the applicant pointed out, the father not only had rights of access to the children but rights of access are specifically protected in the various articles to which I have referred.

5

In the case of *Sonderup v Tondelli and Another* 2001 (1) SA 1171 (CC) at para [28] Goldstone, J giving the unanimous judgment of the Constitutional Court referred with approval to what was said by Donaldson MR in *Re F (Minor: Abduction: Jurisdiction* [1990] 3 all ER 97 (CA)) at 99J where he, in turn, agreed with views given by Balcombe, LJ :-

10

"That in normal circumstances it is in the interests of children that parents or others shall not abduct them from one jurisdiction to another but that any decision relating to the custody of the children is best decided in the jurisdiction in which they had hitherto been habitually resident."

15

The Constitutional Court also refers to article 19 of the Hague Convention which provides that

"A decision under this convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue." (see para [30].)

20

In other words, it is not for this court to determine the merits of whether or not it is better for the children to be brought up in South Africa living with their mother here or whether or not it is better for them to continue living in Wales with their mother being under some

25

compulsion to live there. The important principle is that it is the courts in which children are habitually resident which must determine their best interests and determine whether there should be any variation of custody or whether the children should be allowed to be removed from the particular country in which they lived.

5

Even if I am wrong in my conclusion that the father of these children had "custody" as provided for in the Hague Convention and I therefore would have a discretion in the matter, I wish to record that I would exercise my discretion in favour of ordering the return of the children to England and Wales. The United Kingdom of England and Wales is a friendly state; it is a fellow member of the Commonwealth and comity among nations requires, in my view, that children unlawfully removed from one country with whom we have friendly relations should be returned to that country with all the assistance of the authorities in South Africa, including the courts. I wish to commend the applicant in this matter for the rigorous and efficient and internationally co-operative manner in which it has gone about its duties in this particular regard.

10

15

In my view the applicant has made out a case for the relief sought in paragraphs 1 to 4 of notice of motion. In so far as costs are concerned I do not at this stage propose to penalise the respondent with a costs order. An order is made in terms of paragraphs 1, 2, 3 and 4 of the notice of motion. It is further ordered that the costs of this application are reserved until further order by the court upon the application of either party.

20

25