REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 10/15111

DATE: 27/08/2010

In the matter between:

THE CENTRAL AUTHORITY FOR THE REPUBLIC OF SOUTH AFRICA Applicant

and

ODIONYE CHARLES IGUWA Respondent

J U D G M E N T

MBHA, J:

[1] This is an application in terms of the Hague Convention on the Civil Aspects of International Child Abduction (1980) ("*the Convention*"), as

incorporated into South African law by the Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996 ("*the Act*"), for an order directing the immediate return of the minor child, CI, to the jurisdiction of the Central Authority in Ireland.

[2] The applicant is a Family Advocate in the Gauteng Province and he has been duly authorised to launch this application on behalf of the Chief Family Advocate, who is the designated Central Authority for the Republic of South Africa for the purposes of the Act.

[3] The respondent, who is the biological father of the minor child, is a Nigerian national and a businessman, and currently resides at 102 Bezuidenhout Avenue, Bez Valley, Johannesburg, Republic of South Africa ("*South Africa*").

[4] The respondent opposed the application on the basis, *inter alia*, that the applicant has not complied with the requirements laid down in the Convention, and that no proper case of a wrongful removal and retention of the minor child in South Africa, has been made.

[5] The matter served before me on 6 August 2010 and, after listening to argument, and in light of the inherently urgent nature of the matter, I made an order as follows:

1. That the minor child, CI, born 23 May , be returned forthwith to the jurisdiction of Ireland.

2. The respondent is directed to forthwith hand the minor child to the applicant and/or his/her duly authorised representative to enable the minor child to be returned to Ireland, and failing compliance by the respondent with the terms of this order by no later than Tuesday 10 August 2010, the Sheriff of this Honourable Court is directed to give effect to this order.

3. The respondent is ordered to pay the applicant's costs of suit.

[6] I said that my reasons for the aforesaid order would follow in due course. These are my reasons.

FACTUAL BACKGROUND

[7] On 8 May 2000 the respondent entered into a marriage relationship with Busisiwe Mlotshwa ("*Mlotshwa*"), a South African citizen at Johannesburg, South Africa. Subsequent to their marriage and during 2001, Mlotshwa immigrated to Ireland and the respondent remained in the Republic.

[8] CI ("*C*") was born in Ireland on 23 May 2002, during the subsistence of the marriage relationship between Mlotshwa and the respondent.

[9] On 31 August 2007 the parties divorced and in terms of the decree of divorce incorporating a settlement agreement, the custody of C was awarded to Mlotshwa. In terms of clause 3 of the settlement agreement, the respondent has the right of access to the minor child on the terms and conditions set out therein.

[10] The minor child has since birth been resident in Ireland. He is a citizen of Ireland and a holder of an Irish passport. He has been residing with Mlotshwa in Ireland at 21 Awbeg Rivervalley, Mallow Co Cork. Mlotshwa is a holder of an Irish Permanent Residence Permit.

[11] On 10 April 2009 Mlotshwa sent the minor child and another minor child, who is not the respondent's biological child to the Republic. From that date onwards, the minor child has been residing with the respondent at the address mentioned in paragraph [3] above.

[12] Mlotshwa contends that she sent the minor child to South Africa in order to visit the respondent for a month. The respondent contends, on the other hand, that Mlotshwa requested him to arrange air-tickets for the two minor children to come and live with him in South Africa. The applicant further contends that respondent consented to wave the custody of C to him.

[13] The respondent has enrolled C at the Eastleigh Primary School, Edenvale, South Africa, and he is presently in Grade 1 at the said school.

[14] The applicant avers that Mlotshwa tried, albeit unsuccessfully, to persuade the respondent to voluntarily return the minor child back to Ireland. As a result, Mlotshwa invoked the provisions of the Convention, and sought assistance from the Central Authority of Ireland in order to secure the return of C back to Ireland. A copy of the application in this regard, including a statement by Mlotshwa and the power of attorney authorising the Central Authority for the Hague Convention, or its agent, to act on her behalf, is attached to the founding affidavit. On 14 January 2010 the Central Authority, Ireland, submitted the application to the Central Authority, South Africa.

[15] On 17 February 2010 the applicant sent a registered letter to the respondent initiating mediation proceedings with the respondent with a view to secure the voluntarily return of the minor child to Ireland. This letter was sent to the respondent's aforesaid residential address where he currently resides with the minor child. Although no response to this letter was received, the respondent has not disputed receiving the letter.

[16] The applicant alleges that on 3 March 2010, the Family Advocate's Office conducted the required mediation with the respondent with a view to secure the voluntarily return of the minor child to Ireland but that, during such mediation, the respondent repeated that he had no intentions of returning or

voluntarily returning the minor child to Ireland. The respondent disputes that any such mediation proceedings were ever conducted.

RELEVANT PROVISIONS OF THE HAGUE CONVENTION

[17] Before considering the submissions made by the respective parties, it is appropriate to briefly refer to the applicable provisions of the Hague Convention. These read as follows:

1. Article 12 provides:

> "*Where a child has been wrongfully removed or retained in terms of article 3 and, at the date of the 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 forthwith.*
>
> *The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.*
>
> *Where the judicial or administrative authority in the requested state has reason to believe that the child has been taken to another state, it may stay the proceedings or dismiss the application for the return of the child.*"

2. Article 3 provides:

> "*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 any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and*
>
> *(b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention. The rights of custody mentioned in sub-paragraph (a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.*"

[18] Although the provisions of the first part of article 12 are clearly mandatory, any judicial or administrative authority exercising its powers under this provision is nonetheless granted a discretion to refuse to order the return of a child in terms of the provisions of article 13, which reads as follows:

> "*Notwithstanding the provisions of the preceding article, the judicial or administrative authority of 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 –*
>
> (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 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 situation.*"

[19] Article 13 further provides that the judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of majority at which it is appropriate to take account of its views. Furthermore, in considering the circumstances referred to in this article, the judicial and administrative authorities shall take into account information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence. See *Sonderup v Tondelli and Another* 2001 (1) SA 1171 (CC) at paragraph [12].

[20] Article 20 also provides a further ground for refusing to return a child. This article provides that:

> "*The return of the child under the provisions of article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedom.*"

[21] In *Sonderup v Tondelli and Another (supra)*, the court recognised, at para [32], that the exemptions provided by articles 13 and 20 cater for specific types of situations where the specific circumstances might dictate that a child should not be returned to the State of the child's habitual residence. Goldstone J said that these articles "*… are intended to provide exceptions, in extreme circumstances, to protect the welfare of children*". Thus any interested person could, on this basis, oppose the return of the child to the State of the child's habitual residence.

[22] The court also emphasised the paramountcy of section 28(2) of our Constitution, which provides that "*a child's best interests are of paramount importance in every matter concerning the child*". Clearly the paramountcy of the best interests of the child must inform our understanding of the exemptions without undermining the integrity of the entire intent and purpose of the Hague Convention.

[23] An applicant who wishes to secure the return of a child in terms of the Act, must establish:

1. That the child was habitually residing in the requesting State immediately before the removal or retention;

2. That the removal or retention was wrongful in that it constituted a breach of custody rights by operation of law of the requesting State;

3. That the applicant was actually exercising those custody rights at the time of the wrongful removal or retention and would have so exercised such rights but for the removal or retention.

See *Senior Family Advocate, Cape Town and Another v Houtman* 2004 (6) SA 274 (C) at para [7].

[24] The question of *onus* was settled in *Smith v Smith* 2001 (3) SA 485 (SCA) [2001] 3 All SA 146 at 850j where Scott JA held that:

> "… (A) *party seeking the return of a child under the Convention is obliged to establish that the child was habitually resident in the country from which it was removed immediately before the removal or retention and that the removal or retention was otherwise wrongful in terms of article 3 …*"

[25] Scott JA further held that once an applicant has discharged the required *onus*, the party resisting the order has to establish one or other of the defences referred to in article 13(a) and (b) or that the circumstances are such that a refusal would be justified having regard to the provisions of article 20.

THE APPLICANT'S CONTENTION

[26] The applicant contends that the minor child's place of habitual residence is Ireland, and that the respondent is wrongfully retaining the minor child. Furthermore, as these proceedings were instituted in less than one (1) year after the wrongful retention, the applicant submitted that the respondent should be ordered to promptly return the minor child to his custodial parent.

[27] It is common cause that the mother of the child, Mlotshwa, has custody of the child by reason of the divorce settlement agreement which was made an order of court and which has legal effect under Irish law. At the time the respondent retained the minor child in April 2009, Mlotshwa actually exercised her rights as a custodial parent and she clearly would have continued to do so but for the respondent's retention of the minor child.

[28] Clearly, the minor child's habitual residence before his retention in the Republic by the respondent, was in the Republic of Ireland. *In Re J (A minor) Abduction: Custody Rights* 1990 (2) AC 562 at 573F-G it was held that:

> "*In determining a child's habitual residence, the question … is: … 'Where does the child have the habit of living?*' *The Oxford English Dictionary gives the meaning of 'habitual' as 'constantly repeated and continued'. It is not the habit of the child's parents nor is it a question of the intentions of one of the parents.*"

[29] I also refer to the case of *Central Authority (South Africa) v A* 2007 (5) SA 501 (WLD) at 509 paragraphs [21] and [22], where Jajbhay J held that where the minor child's parents shared the same intention regarding the child's habitual residence, such intention determined the child's habitual residence; but where they had different intentions, the child's habitual residence is determined with reference to whether the child had a factual connection to the State concerned and knew something of it, culturally, socially and linguistically. If the child is too young to know anything about any State, culturally, socially and linguistically, his habitual residence followed that

of the parent with whom he had a home at the time of his removal or retention.

[30] It is common cause that the child was born in Ireland. It is further common cause that at the time of the minor child's birth, the respondent was resident in the Republic.

[31] Prior to his visit to the Republic in May 2009, the minor child had apparently left Ireland once, for a month at the age of 4 years when he visited the respondent in the Republic. Other than that the minor child has always and at all times resided with Mlotshwa in Ireland.

[32] In the light of the aforegoing, I am satisfied that the applicant has proved that the minor child's habitual residence is Ireland. The applicant has also proved that Mlotshwa has the right to custody of the minor child, has exercised this right before the removal or retention, and would have continued to exercise this right but for the retention of C by the respondent in South Africa since April 2009.

DEFENCES

[33] The respondent contends that the settlement agreement was varied or amended and that he now has custody of the minor child. In support of this contention, the respondent relied on Annexure "CC12" to his answering

affidavit which, according to him, provides sufficient proof that custody was subsequently awarded to him.

[34] Annexure "CC12" is in fact a copy of the settlement agreement that was made an order of court, consequent to the decree of divorce which was granted by the Divorce Court in South Africa on 31 August 2007. This document has clearly been tampered with and the reference to Mlotshwa has obviously been deleted and the respondent has been substituted as the party to whom the custody of C was granted. During argument the respondent's counsel conceded that this was not the position, and that Annexure "CC12" had been unlawfully tampered with. Respondent's counsel further admitted that the original custody order has, to date, never been varied.

[35] As things stand, Mlotshwa still retains her lawful position as the custodial parent of C. The respondent's contention that the settlement agreement was varied or amended is totally incorrect and misleading.

WRONGFUL RETENTION OF THE MINOR CHILD IN THE REPUBLIC

[36] It is perhaps prudent to clarify a distinction between the term "*removal*" from the term "*retention*". The Hague Convention refers to wrongful removal or retention.

[37] As I have already pointed out, the minor child is a citizen of Ireland and a holder of the Ireland passport.

[38] *In Re: S (Minors) (Abduction: Custody Rights)* 1991 (2) AC 476 at 486 B-C, it was held that removal occurs when a child is taken away from his or her State of habitual residence to another State; retention occurs where a child who had previously been outside his or her State of habitual residence has not returned after a period has expired.

[39] The respondent submits that he has not retained or removed the minor child from Mlotshwa and that Mlotshwa voluntarily returned the minor child to him in April 2009.

[40] It is not in dispute that Mlotshwa consented to the minor child's visit to the respondent in South Africa in April 2009. The respondent appears to misconstrue this fact to be a consent as contemplated in article 3, that is, consent to retain the child. To the contrary, the applicant submitted that Mlotshwa, in attempting to persuade the respondent to return the child, even despatched a letter from C's school in Ireland, which stated that the minor child had to return to school in September 2009. A copy of this letter is attached to the applicant's founding affidavit. Significantly, the respondent does not address the allegation concerning this letter from the school in Ireland regarding the date in which the school expected the minor child to return, except for a bare denial.

[41] The fact that Mlotshwa consented to the minor child visiting the respondent in South Africa, in April 2009, does not negate the fact that the child was expected to return to Ireland and neither does it waive her right to custody.

[42] In the light of what I stated above, it follows that the respondent's contention that Mlotshwa voluntarily returned C to him has no basis and must fail. Furthermore, the respondent's continued retention of C is clearly wrongful.

[43] The respondent contends that the minor child has settled in his new environment. He sought to support this contention by placing reliance on a progress report prepared by the minor child's current school in South Africa. He then made the bold allegation that the minor child "*is performing and adjusting well into his new school environment*".

[44] A perusal of this school report shows beyond any doubt that the minor child's performance at his school is actually poor. It in fact shows that the minor child is far from being settled.

[45] The respondent also contends that the child has expressed an objection to be returned to Ireland and threatened on more than one occasion to commit suicide. Counsel for the respondent also proposed that a family advocate should investigate the child's wellbeing and furnish a report.

[46] If it is true that the child has uttered these words, considering his age, degree of maturity and the nature of the alleged objection, the child's view should not be entertained.

[47] The suggestion that the proceedings should be delayed in order to procure a family advocate's report is also not acceptable. I say so for the following reasons:

1. In cases of this nature, the court should be guided by the primary objective of the Hague Convention. Its purpose, clearly, is to secure the prompt return of children wrongfully removed to or retained in any Contracting State.

2. The convention's primary purpose is to restore, as soon as possible, the *status quo ante* the removal or retention of such children.

[48] The respondent, on his own version, first saw the minor child in July 2002, two months after his birth when he visited Ireland for three weeks and the second and last time he saw the child before the wrongful retention was in July 2006. The child has lived almost all his entire life in Ireland separately from the respondent. All his siblings, schoolmates, friends are in Ireland. In the light of this fact, I find it highly unlikely that the minor child could have adjusted in his so-called new environment as suggested by the respondent.

[49] There is nothing that shows that the child would be exposed to any harm, physical or otherwise if he were to be returned to Ireland.

[50] In the light of all that has been stated above, I have come to the conclusion that it is in the minor child's best interests that he be returned to his habitual residence in Ireland.

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B H MBHA
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

DATE OF HEARING	: 6 AUGUST 2010
DATE OF ORDER	: 6 AUGUST 2010
REASONS FURNISHED ON	: 27 AUGUST 2010
COUNSEL FOR APPLICANT	: N MANAKA
INSTRUCTED BY	: STATE ATTORNEYS
COUNSEL FOR DEFENDANT	: R R NTHAMBELENI
INSTRUCTED BY	: MAMATHUNTSHA INC.
JUDGMENT DATE	: 27TH AUGUST 2010