REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

APPEAL CASE NO: A5055/2016
CASE NO: 24108/2016

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

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DATE SIGNATURE

In the matter between:

A L. Appellant

and

THE CENTRAL AUTHORITY FOR First Respondent
THE REPUBLIC OF SOUTH AFRICA
F L Second Respondent

Coram: MEYER J et NICHOLLS J et WEPENER J
Heard: 14 February 2018
Delivered: 20 February 2018

SUMMARY:

J U D G M E N T

WEPENER, J:

[1] This is an appeal against the judgment of Monama J, sitting as a court of first instance, with leave of the Supreme Court of Appeal. The matter concerns minor children and was brought by the first respondent, The Central Authority for the Republic of South Africa, who is the Chief Family Advocate, pursuant to article 12 of the Hague Convention:[1]

> 'Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of commencement of the proceedings before the judicial and 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.
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> 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.'

The second respondent was the second applicant and the father of the two minor boys, who resides in Oslo, Norway. The respondent in the court below, now the appellant, is the mother of the two boys and she currently resides in South Africa with them.

[2] The questions to be answered relate to the provisions of article 3[2] and article 13[3] of the Hague Convention. Only two issues are identified for

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[1] The Hague Convention on Civil Rights of International Child Abduction.
[2] 'Article 3.
The removal or retention of a child is to be considered wrongful where –

consideration on appeal: whether the minor children's habitual residence was in Oslo or Johannesburg during 2015 and whether the second applicant consented or acquiesced to the removal of the children from Oslo, or their retention in Johannesburg. Insofar as the judgment of Monama J deals with other aspects as well, there is no need to consider them in these proceedings and it is to be accepted that the second respondent indeed had a right of custody of the minor children whilst they were in Oslo with their parents. The proceedings were instituted shortly after the two boys were retained in South Africa. Therefore the provision regarding the expiration of one year contained in the Hague Convention does not apply.

[3] For the sake of convenience I refer to the parties as they are on appeal.

BACKGROUND

[4] The appellant and the second respondent met in South Africa during the 2010 World Soccer Cup event. They were married on 11 November 2011 in Johannesburg. Two minor sons were born in Johannesburg, M. on […] November 2011 and M. on […] April 2014. A significant date in this matter is June 2013 when the parties relocated to Oslo. It is undisputed that the appellant was domiciled and resident there. The facts prior to 2013 regarding the parties' conduct, where they travelled and stayed, either in South Africa, Norway or elsewhere, do not impact on what happened from June 2013. The marriage developed some serious problems. During the marriage the parties

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(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly 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 exercised but for the removal or retention. The rights of custody mentioned in subparagraph (a) above, may arise in particular by operation of law or by reason of a judicial administrative decision, or by reason of an agreement having legal affect under the law of that State.'

[3] Article 13 provides that 'a judicial or administrative authority of the requested state is not bound to order return of the child if it is established 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 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.'

travelled regularly to South Africa and stayed in the property in Parktown North, Johannesburg, which property the second respondent donated to the appellant in terms of their ante-nuptial contract. On 15 March 2015 the parties travelled to South Africa at the request of the appellant, who wanted to visit her mother, the latter who was due to undergo medical procedures. The parties would have returned to Oslo after the medical procedures and in accordance with this, purchased return flight tickets for the four family members. On 18 March 2015 the second respondent decided to return to Oslo. On the appellant's version he was evading the service of a divorce summons, issued by her. He was unexpectedly arrested and detained by security guards at the Gautrain station until the Sheriff of the Court arrived to serve the summons on him. After this unpleasant incident he proceeded to Oslo. Shortly thereafter, the second respondent commenced these proceedings in Oslo, which resulted in the matter being heard by Monama J. The order sought was for the return of the minor children to their habitual residence in Oslo.

[5] The appellant contended that the habitual residence of herself and the children was in Johannesburg and further that the second respondent consented or acquiesced in the removal to or retention of the two boys in South Africa.

[6] The following facts are relevant for a decision regarding the minor children's habitual residence immediately prior to their retention in South Africa. They are registered in the Norwegian peoples' registry and are Norwegian citizens. M. attended nursery school at the Tinkern Kovas Kindergarten at the request of the appellant and the second respondent. Both parties assisted to register M. in the Norwegian peoples' register. There is no evidence that the nursery school received notice that he would be leaving for South Africa and would not be returning. M. was accepted at the same nursery school to commence attending there in August 2015. There was no evidence that this intended conduct had been cancelled or conveyed to the nursery school. Both boys received child welfare benefits, which are granted to residents only in terms of the Norwegian Children's Act. A child is

considered resident if a child stays in Norway for more than twelve months. M.'s frequent flyer card was registered to the parties' Norwegian address. M. was attached to Dr Igunn Sundsvold and M. to Dr Jan Stokke, although there is a case made out by the appellant that he was also attached to the same doctor Sundsvold. The relevance hereof is that they had free medical care in Norway.

[7] The second respondent is a citizen of Norway and he lived there during 2015, at the time of the retention. He visited South Africa on a tourist visa which was only valid for 90 days at a time. It is common cause that the respondent established his businesses in Norway and that he is still conducting business there. M. had a dental appointment for September 2015 and M. a medical appointment set for August 2015. There is no evidence that these appointments, which reveal the parties' intention to stay in Norway, were cancelled.

[8] During the period June 2013 to March 2015 the appellant applied for a family reunification visa in Norway. She also applied to attain a Norwegian identity number. She registered for language classes for purposes of qualifying for permanent residence or citizenship. She was granted a proof of residence in Norway. She took vehicle driving lessons. She opened a bank account. The appellant became a registered taxpayer and tax returns were filed on her behalf in Norway. She applied for, and was granted, a Norwegian lump sum in connection with the birth of M., which payment is only made to residents of Norway. She was also attached to Dr Sundsvold. In November 2014 the appellant prepared an application for employment in a position of compliance officer in Oslo, which employment opportunity was of a permanent nature. In the curriculum vitae which accompanied her application she stated that she was a resident in Norway and that the reason for her former employment in South Africa was 'to give birth to my son and move to Norway'.

APPROACH

[9] The purpose of the Hague Convention is:

> '…directed at ensuring that the court seized with the custody hearing will be the one within whose jurisdiction the child was actually living for a sufficient time to have become acclimatised (to the surroundings and those with whom he or she may interact) and gained both a sense of attachment and belief that it would endure for a relative degree of permanence.'[4]

[10] In the same matter it was held:

> 'The expeditious return of the child minimises the harm he or she may be expected to suffer as a consequence of being uprooted from a familiar environment. Furthermore the court where the child was actually living at the time of removal is generally most suited to entertain a custody dispute and receive evidence in an efficient and cost-effective manner. Imposing an obligation on the relevant judicial or administrative authority to act promptly in securing the child's return may also act as a deterrent.'[5]

This being so, the facts show on a balance of probabilities that the appellant and the two boys, relocated to Oslo in 2013 with the intention to make it their residence. Counsel for the appellant relied heavily on the fact that the parties also had a home in Parktown-North. The circumstances of the donation of the house and its renovations in order to be a child friendly home, is a neutral fact if regard is had to the standard of the home which the parties acquired in Oslo. Indeed, the father's evidence cannot be disputed in many respects and the mother's conduct regarding herself and the minor children leads to the conclusion that the parties settled in Norway during 2013. The finding of the court *a quo* that the two boys' habitual residence was in Norway during March 2015 is, in my view, unassailable.

[11] The only further issue contended for by the appellant is that the second respondent consented or acquiesced to the fact that the children were brought to South Africa and not returned to Oslo in 2015. There is no evidence to substantiate consent. The reliance on the utterance by the second respondent in the heat of the moment that the appellant and the children would not see

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[4] The Central Authority v TK 2015 (5) SA 408 GJ para 38.
[5] Para 13.

him again during a marital dispute and a most unpleasant arrest, cannot, in my view, constitute consent. There is no other evidence proffered to support the reliance on the consent allegedly given by the second respondent. The facts relied upon by counsel for the appellant point the other way. The institution of a divorce action in Norway by the second respondent as well as the institution of the Hague proceedings there 18 days after his return to Oslo claiming that the children should be returned to Oslo, contradict any suggestion that he agreed to or acquiesced to the children remaining in South Africa.

[12] Acquiescence is a concept well-known in our law. A person is said to acquiesce in something if such person by unequivocal conduct, knowing of his or her rights, inconsistently acts with the intention to the contrary and shows that he acquiesced to a set of facts. If such a person has clearly and unconditionally acquiesced in, and abided by, a situation, he or she cannot thereafter challenge it. See *Gentiruco AG v Firestone SA (Pty) Limited*[6] where Trollip J said:

> 'The right of an unsuccessful litigant to appeal against an adverse judgment or order is said to be pre-empted if he, by unequivocal conduct inconsistent with the intention to appeal, shows that he acquiesces in the judgment or order'.

In *Standard Bank v Estate Van Rhyn*[7], Innes CJ said:

> '"If a man has clearly and unconditionally acquiesced in and decided to abide by the judgment it cannot thereafter challenge it."'

What is required is conduct leading to a conclusion of an intention not to assail a factual position. The onus of proof rests on the person alleging acquiescence.[8] The high watermark of the appellant's case is what the second respondent said in a crude manner that she can keep the children. This utterance during a matrimonial dispute is not open for an argument that the second respondent, with full knowledge of his rights, decided to abandon the children.

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[6] 1972 (1) SA 589 (A).
[7] 1925 AD 246 at p 274.
[8] See *Dabner v SAR&H* 1920 AD 583 at 594.

[13] Counsel for the appellant relied on a settlement proposal, which the second respondent had made during 2014 wherein one suggestion was that the appellant and the minor children should return to South Africa. Firstly, the proposal was never accepted or implemented. Secondly, it can never be said that a person acquiesced in advance.

[14] Finally, counsel for the appellant conceded during argument that the appellant acted deviously and surreptitiously when she brought the children to South Africa with the intention of staying here and not returning to Oslo. This deception was planned to mislead the second respondent to think that the family would return to Oslo after a visit to the appellant's ill-disposed mother. Had the second respondent agreed that the appellant and the children could relocate to Johannesburg, the devious conduct of the appellant to surreptitiously keep the children in South Africa, was entirely unnecessary. The conduct supports the opposite to her argument that the second respondent agreed that the children may remain in South Africa.

[15] Indeed, this devious conduct cuts through the entire case and also impacts on the first issue dealt with in this judgment. The parties lived in Oslo and the appellant, in a surreptitious manner, attempted to change that.

[16] The conclusion which I reach is that both grounds of appeal are without merit.

[17] The parties provided the court with an agreed order, should the appeal fail. There can be no objection to the issuing of such an order at their request.

[18] Counsel for the appellant submitted that the costs order given by Monama J should be set aside as this is mainly a matrimonial matter where costs usually fall on each party. Counsel laboured under the incorrect impression that Monama J also allowed the costs of counsel who held a watching brief. That impression is erroneous and counsel who held a

watching brief in that court and this court are not entitled to tax their costs nor did they intend to do so.

[19] The appellant's devious conduct forced the second respondent to institute Hague proceedings. She is solely to blame for the state of affairs. The costs in the divorce action may be another matter, but in this matter the order of Monama J cannot be faulted.

[20] Counsel for the first respondent submitted that the costs of two counsel should be allowed on appeal. The issue was not seriously pursued when questioned why more than one counsel was necessary to argue the two issues on appeal. However, due to the nature of the matter I believe that the first respondent was entitled to take the prudent step to employ senior counsel.

[21] In all the circumstances, the following order is issued:

1. The appeal is dismissed.

2. The appellant is to pay the costs of the appeal, which costs include the costs of one counsel being a senior counsel.

3. The following order is issued by agreement between the parties:

3.1 M. L. and M. L. ("the minor children") be returned to Norway on or before 20th March 2018.

3.2 It is recorded that the appellant is not in possession of a valid Visa for Norway and that the passports for the minor children, both the Norwegian and South African have expired.

3.3 The appellant shall within 5 court days from date of this order, make application for a Norwegian Visa.

3.4 The appellant is authorised to approach the Department of Home Affairs in the absence of the second respondent, to make application for the renewal of the South African passports for the two minor children, M. L. and M. L..

3.5 The appellant is authorised to sign any and all documents necessary to obtain the passports for the two minor children, in the absence of the second respondent. Should the appellant fail to do so, any authorised Sheriff or his duly authorised Deputy of the above Honourable Court is hereby authorised to do so. The appellant shall furnish the second respondent's attorney Shapiro Aarons on email address gordon@shapiroaarons.co.za and the first respondent at smaikoo@justice.gov.za with proof that she has complied with the aforegoing.

3.6 Both parties are to co-operate fully with each other to obtain the necessary:

3.6.1 Norwegian Visa for the appellant; and

3.6.2 the Norwegian passports / temporary passports or travel documents, as the case may be, for the minor children to travel to Norway, (the

minor children, who are Norwegian citizens, will not be granted Norwegian Visas); and

3.6.3 the South African passports for the minor children.

3.7 The appellant shall without delay attend with the minor children at the Norwegian Embassy in order to facilitate the process and provide such documentation that she may have and sign such documentation as may be required for the issue and processing of the minor children's Norwegian passports / travel documents. To the extent that the second respondent pays any costs for obtaining the minor children's Norwegian passports / travel documents, the second respondent shall immediately reimburse her for same.

3.8 To the extent that the appellant (and in her absence, the second respondent or such other third party who may be travelling to Norway with the minor children) does not have the original unabridged birth certificates of the minor children, they will be permitted to travel with certified copies of the minor children's unabridged birth certificates (whether certified in Norway or in South Africa). Notwithstanding the aforesaid, the parties will fully co-operate with one another and the authorities, both in South Africa and Norway, to ensure the return of the minor children to Norway, as envisaged in this order and to the extent required by the relevant authorities, the parties shall sign all and any necessary affidavits of consent, consent forms and any other documentation necessary to give effect hereto.

3.9 In the event that the appellant is unwilling or refuses to travel with the minor children, then the appellant is directed to hand over all of the travel document(s) of the minor children to the first respondent as soon as the appellant comes into possession of the South African and Norwegian passports / travel documents.

3. 10 In the event of the appellant failing to comply with this order set out in paragraph 1 above, the Sheriff of this court is authorised and directed to forthwith search for and seize such travel document(s) of the minor children, wherever they may be found and hand same over to the first respondent.

3.11 In the event of the appellant being unwilling to accompany the minor children on their return to Norway, such unwillingness the appellant must communicate to both the first and second respondents on or before 21 February 2018.

3.12 In the event of the appellant electing not to return to Norway with the minor children, the second respondent or a representative of the Norwegian authorities, being a registered social worker, or an advocate of the High Court, duly appointed by the Family Advocate, shall be entitled to remove the minor children from the borders of South Africa and travel to Norway with them at the second respondent’s cost.

3.13 In the event the appellant accompanies the minor children to Norway, the second respondent tenders for a period of no less than 6 (six) months from the time of the appellant's return to Norway or until such time as the Norwegian courts determine otherwise whichever is the later, and the second respondent will provide the following assistance to the appellant, namely:

3.13.1 To pay for the costs of flights one way to Norway, the second respondent making allowance for some overweight. The second respondent shall forward details of the flight arrangements to the appellant's attorneys of record who will communicate same to the appellant.

3.13.2 In the event of the appellant being permitted by court order to return to the Republic of South Africa with the minor children, the second respondent shall bear the costs of the flights for the appellant and the minor children.

3.13.3 To provide reasonable accommodation together with the costs of utilities (ie water and lights and heating) in Ullern, in West Oslo, being a two / three-bedroom unit, reasonably furnished, in a safe area, close to public transportation and reasonably close to amenities. The second respondent's attorneys will furnish details of the accommodation obtained by 28 February 2018;

3.13.4 To pay the appellant an amount of NOK5 000-00 per month, NOK3 489.00 towards M.'s maintenance and NOK 4 869.00 towards M. per month, alternatively such amount as determined by the Norwegian courts in respect of the minor children, on the basis that they reside with the appellant in Norway.

3.13.5 The second respondent will pay the said maintenance into an account as nominated by the appellant, which details will be provided to the second respondent upon 48 hours' notice. Such amount will be pro rata the number of days that the appellant and the minor children are in Norway for the first month and thereafter on or before the 1st day of each and every succeeding month.

3.13.6 The second respondent shall make payment of reasonable clothing for the minor children.

3.13.7 The second respondent shall be liable to pay all medical expenses for the minor children that are not covered by the Norwegian medical services;

3.13.8 The second respondent shall be liable for all education expenses to the extent not covered by the Norwegian education system;

3.13.9 At the appellant's election, she may have the use of second respondent's motor vehicle immediately upon her arrival in Norway,

being a Nissan X-Trail 2005 model, in a roadworthy and good condition. The second respondent shall be responsible for insurance, license fees and reasonable Oslo tolls (which the appellant undertakes not to abuse). The appellant shall be responsible for all other expenses.

3.14 The appellant shall cooperate fully with this process to ensure the minor children's return to Norway without delay and forthwith.

3.15 The second respondent is to pay the reasonable costs of one legal representative (i.e. a person equivalent to an attorney/solicitor) in Norway for the appellant in respect of any current custody, access and maintenance disputes or issues regarding the minor children or in respect of a variation of this Order, which costs shall be paid upon receipt of invoice.

3.16 Either party may approach the Norwegian Courts *inter alia*:

3.16.1 for a variation of this Order; and / or

3.16.2 making this order a mirror order of court in Norway.

It is noted that the second respondent undertakes not to initiate any criminal prosecution against the appellant, as regards the Hague Convention or any other criminal offences to date.

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W.L. WEPENER

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree.

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P. A. MEYER

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree.

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C.H. NICHOLLS

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

Counsel for Appellant: S.J. Martin

Attorneys for Appellant: Fiona Marcandonatos Inc.

Counsel for Respondents: F. Foulkes-Jones SC with A. Mofokeng

Attorneys for Respondents: State Attorney, Johannesburg