REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

Case No. 2009/34223

DATE: 21/10/2011

REPORTABLE

In the matter between:

MR. B First Applicant
ESSEX COUNTY COUNCIL Second Applicant
CENTRAL AUTHORITY FOR THE REPUBLIC OF SOUTH AFRICA Third Applicant

and

MS. G Respondent

JUDGMENT

MEYER, J

[1] This is a case under the Hague Convention on the Civil Aspects of International Child Abduction 1980 (the Hague Convention). The provisions of the Hague Convention are, in terms of s 275 of the Children's Act 38 of 2005 (the Children's Act), law in this country, subject to the provisions of the Children's Act.

[2] The first applicant is the mother and the respondent the father of a minor child who was born on 12 May 2006 in the United Kingdom and who Satchwell J, on 16 July 2010, held to have been wrongfully removed by the respondent from the jurisdiction of the Chelmsford County Court in the United Kingdom on or about 14 February 2009 when she was brought to this country. Satchwell J granted an order for the immediate return of the child to the United Kingdom under Article 12 of the Hague Convention. The court order also reads:

> 'If counsel are unable to agree (within 10 days of the date of handing down of this order (16th July 2010)) on the form of the order to give effect to that immediate return, and I very much hope they will be able to agree, then the court will receive further submissions (preferably in writing) to be received on or before 6 August 2010 so that the court can rule thereon without the expense of further oral hearing.

This part of the order is clearly aimed at providing for the imposition of conditions designed to mitigate the *interim* prejudice to the child caused by the court ordered return.

[3] In delivering the leading judgment in *Sonderup v Tondelli and Another* 2001 (1) SA 1171 (CC), par [35], Goldstone, J said:

> 'A South African court seized with an application under the Convention is obliged to place in the balance the desirability, in the interests of the child, of the appropriate court retaining its jurisdiction, on the one hand, and the likelihood of undermining the best interests of the child by ordering her or his return to the jurisdiction of that court. As appears below, the court ordering the return of a child under the Convention would be able to impose

> substantial conditions designed to mitigate the interim prejudice to such child caused by a court ordered return. The ameliorative effect of art 13, an appropriate application of the Convention by the court, and the ability to shape a protective order, ensure a limitation that is narrowly tailored to achieve the important purposes of the Convention. It goes no further than is necessary to achieve this objective, and the means employed by the Convention are proportional to the ends it seeks to attain.'

[4] In delivering the leading judgment in the Supreme Court of Canada in *Thompson v Thompson* FN (57) [1994] 3 SCR 551 at 599, La Forest, J said:

> 'Given the preamble's statement that 'the interests of children are of paramount importance', courts of other jurisdictions have deemed themselves entitled to require undertakings of the requesting party provided that such undertakings are made within the spirit of the Convention: see Re L [(Child Abduction) (Psychological Harm) [1993] 2 FLR 401; C v C [(Minor: Abduction: Rights of Custody Abroad) [1989] 1 WLR 654; P v P (Minors) (Child Abduction) [1992] 1 FLR 155; and Re A (A Minor) (Abduction) [1988] 1 FLR 365. Through the use of undertakings, the requirement in Article 12 of the Convention that 'the authority concerned shall order the return of the child forthwith' can be complied with, the wrongful actions of the removing party are not condoned, the long-term best interests are left for determination by the court of the child's habitual residence, and any short-term harm to the child is ameliorated.'

[5] The parties in these proceedings have not agreed on the form of the order to give effect to the court ordered return of the child to the United Kingdom, and such is the relief that the applicants now seek.

[6] On 14 October 2010, Satchwell, J granted the respondent leave to appeal to the Supreme Court of Appeal. The Registrar of the Supreme Court of Appeal, by letter dated 28 March 2011, notified the parties that the appeal had lapsed as a result of the respondent's failure to file the required record of the proceedings. The respondent's legal representatives informed the applicants' legal representatives that the respondent nevertheless intended to pursue the appeal and that the reason for the failure to have

lodged the record of the proceedings with the Registrar of the Supreme Court was their inability to obtain the complete transcript of the proceedings from the officially appointed transcribers. Details of the endeavours made to obtain a transcript of the proceedings are set out in the answering affidavit in these proceedings.

[7] I interpolate by first referring to three matters, which are the enrolment of this matter in the urgent motion court, the appointment of a legal representative for the child, and the extraordinary delay in the finalisation of the Hague Convention proceedings in this instance.

[8] The present application was issued as an urgent one on 22 September 2011 and it was enrolled in the urgent motion court before me on Tuesday, 27 September 2011. The only grounds of urgency are stated in paragraph 29 of the founding affidavit, which reads:

> 'Urgency
> 29. I respectfully submit that the matter is to be heard as urgent by virtue of a directive of the Deputy Judge President, South Gauteng dated 23 March 2009, paragraph 8, a copy of which is attached as annexure 'FP14'.'

[9] The relevant paragraph of the practice directive on which the applicants relied provides that '[a]s a matter of cause matters under the Hague Convention are to be dealt with as urgent in nature.' This is undeniably correct. However, in order to facilitate that Hague Convention matters are dealt with expeditiously, the relevant practice directive provides a specific 'route' which such a matter should follow after its issue. It requires that:

> 'The court file is to be taken to the Deputy Judge President, who is to allocate a judge to case manage the matter and ultimately hear it when it is ripe for hearing, irrespective of the court in which that judge is doing duty when the matter becomes ripe for hearing.'

[10] Practitioners should know that Hague Convention matters should accordingly not ordinarily be enrolled in the urgent court. The file in this matter ought to have been taken to the Deputy Judge President for its special allocation to a judge. This matter was also not ripe for hearing when it was called in the urgent motion court. The respondent had had insufficient time to file an answering affidavit.

[11] On 4 October 2011, the matter was allocated to me by the office of the Deputy Judge President. I understood from counsel that Satchwell J was unable to hear further argument and I know that she is presently abroad. The child was not legally represented. S 279 of the Children's Act reads:

> 'A legal representative must represent the child, subject to section 55, in all applications in terms of the Hague Convention on International Child Abductions.'

[12] The submission by CJ Davel and AM Skelton: *Commentary on the Children's Act*, at p 17 – 21, that '…in cases where very young children are involved, the role of the legal representative would be more akin to that of a *curator ad litem*, while with older children, the legal representative would take instructions from the child, act in accordance with those instructions and represent the views of the child', is, in my view correct. Both parents and the Central Authority agreed to the appointment of Mr. J.H. van Schalkwyk, who is a practicing attorney at the Legal Aid of South Africa, Johannesburg. Mr. van Schalkwyk, in his role akin to that of a *curator ad litem* due to the young age of the child in this instance, prepared a written report and he reported

back to this court on Tuesday, 18 October 2011. He recommends *inter alia* that the minor child '…ought not to be relocated to her father until such time as the appeal is finalised and the cloud surrounding the allegations of molestation is clear.'

[13] There has been an extraordinary delay in the finalisation of the Hague Convention proceedings in this instance. The child was brought to this country on 16 March 2009, and the Hague Convention application for her immediate return to the United Kingdom was launched on 13 August 2009. It is now more than two years later. Kerby J, in *De L v Director–General, NSW Department of Community Services* (1996) 187 CLR 640 made the following remarks, with which I agree, in a matter where there was a delay of more than 18 months to complete a Hague Convention matter:

> 'No one could contest the objective record of the substantial time which had passed since the unilateral removal of the children and the orders under appeal. The assumption is that the return of a child to a foreign jurisdiction, if concluded within a very short time, will not ordinarily cause irreparable harm to the child. The longer the delay, the greater the potential for harm to the child. Similarly the longer the delay, the more likely is it that a counsellor's report or the impression of the primary judge (even if directed to the correct issue) would become invalid as a basis for decisions of the judicial authority at a later time. Amongst the many reasons which explain the urgency reflected in the language of the Convention and the Regulations are:
>
> [i] There is a need, by prompt response, to deter those parents who might be tempted to take the law into their own hands and to bring home to those advising such parents that, ordinarily, such conduct would not avail them.
>
> [ii] There is also a need to prevent an abducting parent from gaining the benefit of delays by profiting from their wrongdoings by invoking the legal system of the country of resort. If such action were to succeed it would undermine confidence in the Convention and in the municipal laws designed to give it effect.
>
> [iii] A child removed from one parent and taken to a country different from that in which the child was habitually resident (Art 3) is then likely to be subject to the concentrated influence of the custodial parents. Unless firm steps are taken to ensure the prompt implementation of the Convention procedures, in a prolonged separation from a parent his or her influence on the child would have a tendency to wane. Time would favour the abductor.

> [iv] The parent remaining in the place of the child's habitual residence, from which the child is taken, would ordinarily be at a considerable disadvantage in litigating a contested claim for custody and access (or equivalent orders) in the courts of another country rather than those of the place of habitual residence. Few persons can readily afford litigation in their own jurisdiction, still less contemplate the prospect of participating in courts (or administrative authorities) far away, where the legal system may be different, laws and even language unfamiliar, costs substantial and facilities for legal assistance difficult to obtain or non-existent.
>
> [vi] Time may also affect the operation of the Convention or the Regulations. What may have been no more than a "preference" at the time of abduction (as here, in February 1995) or at the time of the preparation of a counsellor's report (as here, in October 1995) or even at the time of the trial before the primary judge (as here, in November 1995) may have matured into an objection twelve or eighteen months later (by the time of final appellate review). This might be so by reason of nothing more than the passage of time, the advancing age of the child or children concerned and the establishment, during critical childhood years, of bonding with a custodial parent, that parent's family, school friends, teachers and others. Particularly as the child approaches the age of 16 years, the longer the interval of time between abduction and decision, the more likely is it that the child will have "attained an age and degree of maturity at which it is appropriate to take account of its views".'

[14] A considerable part of the delay in finalising this matter is attributable to the inability of the respondent or her attorneys to have obtained a transcript of the proceedings before Satchwell, J earlier on. I was informed by the respondent's counsel that a transcript of such proceedings had finally been obtained on Thursday, 6 October 2011. Insofar as parts of the recorded proceedings ought to be included in the record of the proceedings to be lodged with the Registrar of the Supreme Court of Appeal, no attempts have been made to reconstruct the record and to reach agreement thereon. The rest of the record is in the form of an application and the judgment of Satchwell, J, is a written one that she handed down. I afforded the respondent the opportunity to have her application for condonation and the reinstatement of her appeal as well as the

record of the proceedings duly lodged with the Registrar of the Supreme Court of Appeal and served upon the applicants' attorneys of record before 20 October 2011.

[15] I consider it appropriate to suspend the present proceedings pending the determination by the Supreme Court of Appeal of the respondent's application for condonation and the reinstatement of her appeal. Satchwell J, in granting leave to appeal against the whole of her judgment on 14 October 2010, must have concluded that the respondent has a reasonable prospect of success on appeal. I also accept that the respondent's application for condonation and the reinstatement of her appeal will be finalised expeditiously. To stay the present proceedings will, in my view, mitigate the short-term disruption and other potential prejudice which the child may suffer should she forthwith be returned to the United Kingdom before a decision is taken on her mother's application to the Supreme Court of Appeal. The child, according to her *curator ad litem*, is very settled in her present environment.

[16] I accordingly make the following order:

The determination of the minor child's conditions of return to the United Kingdom in order to give effect to her court ordered return is suspended pending the determination of the respondent's application for condonation and reinstament of her appeal by the Supreme Court of Appeal.

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P.A. MEYER
JUDGE OF THE HIGH COURT

21 October 2011

Dates of hearing: 27 September 2011, 4 October 2011, 11 October 2011, 18 October 2011, and 21 October 2011.

Date of judgment: 21 October 2011

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