IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN GAUTENG DIVISION, PRETORIA

CASE NO. 6364/13

DATE: 18 FEBRUARY 2014

REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

In the matter between:

THE CENTRAL AUTHORITY FOR

THE REPUBLIC OF SOUTH AFRICA **Applicant**

and

E[…] S[…] R[…] **Respondent**

JUDGMENT

1. The applicant is the Central Authority for the Republic of South Africa, designated as such in terms of the Hague Convention on the Civil Aspects of Child Abduction ("the Convention"), which Authority is the Office of the Family Advocate. The Convention is part of South Africa's municipal law, having been incorporated into the Children's Act 38 of 2005. The Chief Family Advocate delegates her authority to other ad hoc Central Authorities. The applicant is represented in these proceedings by a family advocate in the Authority's Mbombela (Nelspruit) office, adv Bikiwe Mkhize, ("Mkhize"), duly authorised by the Chief Family Advocate.

2. The respondent is Elmarie Sue-Ellen Rail, an adult South African citizen, residing at 5[…] J[…] Street, M[…], M[…], Mpumalanga.

3. The respondent is the mother of a boy, T[…] T[…] M[…], presently five years old, having been born on the […]. ("the child").

4. The father of the child is M[…] T[…] M[…], ("M[…]"), a Zimbabwean national who, when last heard of, was an unsuccessful asylum seeker in the United Kingdom, ("UK"), formerly resident at 2 W[…] Street, G[…], M[…], UK.

THE BACKGROUND

5. The respondent entered the UK during 2004 on a two year working visa. When the visa expired she stayed on in the UK and moved in with friends in Birmingham. She had met M[…] in 2006 and commenced a romantic relationship with him. She fell pregnant in 2008.

6. According to the respondent, M[…] wanted her to terminate the pregnancy,

which she was not prepared to do. Their relationship became stormy and they separated until sometime after the child's birth in Birmingham. According to the respondent she and M[…] separated prior to the child's birth. They reconciled thereafter, lived in council homes depending on social grants, and decided to apply for asylum at M[…]'s suggestion. Their applications were turned down.

7. Their relationship remained stormy, while they lived in Liverpool and later in Manchester, depending on social grants and being accommodated in council homes. The respondent relates that she was often assaulted by M[…] and suffered verbal and emotional abuse at his hands. As illegal aliens neither the respondent nor M[…] could take up employment in the UK, she contended.

8. The respondent made attempts to return to South Africa with the child, but could not obtain M[…]'s consent to remove the child from the UK's jurisdiction. Such consent was required by UK law even though the respondent and M[…] were never married.

9. During February 2012 the respondent obtained valid travel documents from the South African embassy in London, allegedly on the representation made by her to the British Home Office under oath that the child's father's consent could not be obtained, that she was the child's sole custodian and that she was the child's legal guardian.

10. The respondent denies that she removed the child illegally from the UK and claims that M[…] consented, either expressly or tacitly, to the child's removal to South Africa.

11. The respondent arrived in South Africa with the child on the 23rd February 2012 M[…] thereupon laid a charge with the UK police and on the 23rd March 2012

approached the UK Central Authority to obtain the immediate return of the child to what he claimed was the child's habitual residence. The UK Central Authority enlisted the assistance of its South African counterpart on the 27th March 2012.

12. Mkhize, having been tasked to deal with this application, conducted an interview with the respondent on the 26th April 2012 with an eye to effecting the voluntary return of the child to the UK. The respondent refused to accede to this request. She described the conditions under which she and the child were forced to live in the UK as intolerable, given the challenging social milieu in which they were forced to live under the constant threat of violence and abuse from M[…]. The respondent asserts that Mkhize agreed with her that it was not in the child's best interest to be returned to the UK.

13. In this context the respondent emphasised that the child's father had applied on about six separate occasions for asylum in the UK and had been turned down every time. This meant that he was, and remains, an illegal alien in that country, facing an uncertain future.

14. During the interview with Mkhize respondent underlined that the child, a South African citizen, is healthy, happy and well adapted in a positive family environment. She lives with her parents and is employed in the family business. She was and is convinced that the child's best interests will be compromised were he to be returned to the UK.

15. Mkhize took no further action until the end of January 2013. There is no explanation on the papers why she allowed matters to lie fallow until virtually the last moment before the expiry of the one year period determined in Article 12 of the Convention for the immediate return of the allegedly abducted child:

'Article 12

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."

16. In the founding affidavit Mkhize asserted that the child's habitual residence was the UK before the child was wrongfully removed from the aforesaid jurisdiction. She disclosed that M[…] was '*an* asylum seeker' without dealing with any implication this status might have on his or the child's residence in the UK. The wrongfulness of the alleged removal or abduction was said to lie in the deprivation of M[…]'s parental responsibilities. The Hague Convention therefore dictated that the child should be returned to the UK to determine any dispute that might exist in regard to parental rights and responsibilities regarding the latter.

17. In motivating the applicant's obligation in terms of the Convention to ensure the mandatory return of the child to the jurisdiction of the alleged habitual residence, Mkhize opined as follows:

'If returned to the UK, T[…] will not face the risk mentioned in the Hague Convention such as grave emotional abuse and stress or human rights abuse. UK is a country

which respects the rule of law, and it is a free and democratic State.'

18. The urgency of the application was caused by the need to apply '… *the provisions of the Hague Convention.'* The application was served upon the respondent with no more than two days' notice. The latter's notice of intention to oppose was filed late according to correspondence attached to the respondent's affidavit. On the 5th March 2013 the court ordered the respondent to hand over the child to applicant or its duly authorised representative within twelve hours of having been advised that the travelling arrangements to return the child to the UK had been made. Failing compliance with the order, the sheriff was authorised and directed to give effect thereto.

19. The order was not enforced immediately. On the 2nd August 2013 the respondent launched what was called a counter-application by way of urgency, seeking a reconsideration of the order in terms of Rule 6(12)(c), (the order having been granted by way of urgency in the respondent's absence); the setting aside thereof and an award of costs against the applicant upon the punitive scale of attorney and client. In her affidavit motivating the counterapplication, the respondent sketched the history of her relationship with M[…] already adverted to above. She underlined that her student visa had expired and that her subsequent application for asylum had been turned down. Before she left for South Africa she was therefore, according to her, an illegal alien in the country of her son's birth.

20. She confirmed that Mkhize had met with her and discussed the matter of the child's return to the UK with her. She added, however, that Mkhize had agreed with her that the child's best interests required that the *status quo* be maintained and that his return to the UK would not be advisable.

21. The respondent's application was enrolled for the 13th August 2013. The file was

delivered to the Judge's Chambers on the preceding Thursday to enable reading the file it was evident that the order to surrender the child was fraught with potential harm being caused to the child, were it to be enforced in its existing terms. When the matter was called, it was discovered that the file had been removed from the court room to which it had been taken prior to the calling of the urgent roll. The court's registrar had been informed that the matter had been removed from the roll. The file was traced to the General Office and when it was retrieved it contained a typed document purporting to be a court order. This document purported to record that this court had ordered the removal of the matter from the roll. No such order was ever made and it could not be established who was responsible for procuring the fake order. No notice to remove the matter from the roll was filed at any stage.

22. The court is the upper guardian of all minors. Apart from the fact that a matter had been removed from the court without the court's authorisation or knowledge, the court was deeply concerned that the existing order might be, or had possibly already been, put into operation. Enforcing the order to surrender the child without more could, and probably would, in this court's strong *prima facie* opinion, irrevocably prejudice the child's welfare and best interests. An enquiry was therefore launched to establish the correct state of affairs and to ensure that the child's best interests were safeguarded. The court was indubitably entitled and obliged to act in this fashion as the child's upper guardian and by virtue of section 28 (2) of the Constitution.

23. It emerged that junior counsel, who had no knowledge of the matter, had been briefed on the morning of the 13th August 2013 merely to remove the matter from the court roll, apparently because the applicant intended to oppose the respondent's counter-application and intended to file an answering affidavit in due course. This counsel was responsible for removing the file from the court room after informing the court's registrar that the matter would be removed, without placing his presence on record and ensuring that the court consented to the proposed course of action. In this he was clearly remiss. Had he followed the proper practice and informed the

court of the fact that the matter would be removed by agreement, the court would have raised its concerns about the child's welfare with him before allowing the case to be postponed or to be removed from the roll. The practice manual of the North Gauteng High Court provides as follows for the removal of opposed applications:

'2.*13 A party who has enrolled a matter may not after enrolment, without the leave of the court, file any further documents other than a notice of removal, a notice of withdrawal, a notice of postponement, a practice note and an official document or report.*

2.14 Parties who are in terms of the rules entitled to file documents in matters that have been enrolled shall do so by handing the document to the supervisor who shall stamp it and file it in the appropriate file.

2.15 When a matter is removed from the roll by notice, the supervisor shall stamp the notice of removal, file the notice in the file and return the file to the general office for filing. The supervisor shall also delete the entry pertaining to that matter from the register and sign his or her name next to the deletion with the date of the deletion. Other than this no entry may be removed from the register of opposed motions and no file may be removed from the secure location for any purpose other than to take the files to the senior judge in the opposed motion court.'

These rules apply equally to opposed urgent matters.

The manner in which the purported court order to remove the matter from the roll came to be typed and placed in the file remained a mystery, however.

24. As the court required a number of issues arising from the papers to be addressed by the parties with an eye to the further conduct of the proceedings, the matter was re-enrolled and the parties were requested to proceedings, the matter was re-enrolled and the parties were requested to attend on the morning of the 16th August 2013. When the matter was called counsel appeared for the respondent and Mr

Netshifhefhe of the State Attorney's Office represented the applicant Central Authority. It was common cause that the existing order should not be enforced pending the finalisation of the respondent's application. On behalf of the Central Authority Mr Netshifhefhe placed the following on record:

'…we have agreed with the respondent, that this matter be transferred to the normal court because we have undertaken that we are not going to (enforce the order). I also want to place on record ... there was an email that the reason why we did not get instructions from the central authority ... it was because the central authority are moving offices, they will only be available from the 26th of August to determine the applicant is legally residing in England.'

25. According to Mr Netshifhefhe Mkhize was not aware of the fact that the respondent was also an illegal alien in the UK, but that this question would be raised with their counterparts in England to establish the respondent's present status in the UK.

26. The court then placed seventeen questions on record for the parties to deal with at the next hearing. These questions related to the parties' respective status in the UK, what knowledge Mkhize had of the parties' status when the original urgent application to surrender the child was launched, who would care for the child if he had to be surrendered without his mother being able to accompany him, how the child would be maintained financially, whether the child's father might possibly be deported from the UK as an illegal alien and what fate would befall the child if such a deportation order were be enforced. The parties undertook to address these issues at the next hearing.

27. The matter was postponed to the 25th September 2013, the purported order removing the matter from the roll was set aside and the court's original order of the 5th March 2013 was suspended pending the finalisation of the matter.

28. On the 18th September 2013 the court received a hand delivered letter from Mr Nesthifefe that had been copied to the respondent's attorneys of record, which recorded that the applicant had been unable to obtain '*instructions'* from its counterpart in England or M[…], and that therefore '... we *are unable to file our papers as per Court direction and agreement between the parties.*[1] The applicant thereafter failed to file any affidavit, even though several of the questions dealt directly with the knowledge Mkhize had of the matter before the application to return the child to the UK had been launched. No explanation was proffered under oath why these matters were not addressed.

29. On the 25th September 2013 the respondent was represented by counsel and attorney, but there was no appearance for the applicant. The court caused Mr Nesthifefe to be contacted telephonically to inform him that his presence was required at court. According to the information conveyed to the court by respondent's counsel his reaction was that he was '*too busy*[1] to attend court. (His response was common cause when the matter proceeded at a later date.)

30. The court thereupon issued a warrant for Mkhize's arrest for failing to comply with the court's order of the 16th August 2013 and ordered both her and Mr Netshifhefhe to attend court on 15th October 2013 to show cause why they should not be held to be in contempt of court and be dealt with according to law. Mkhize was further ordered to deal with the questions the court had raised at the first hearing. The matter was postponed to the 15th October

2012. The warrant for Mkhize's arrest was suspended pending the hearing on that date.

31. The parties were ordered to file their further papers on or before the 12th October 2013.

32. On the 11th October 2013 the court received a letter from Mr Netshifhefhe, which was not copied to the respondent's attorneys, in which the court was informed that, as the 12th October 2013 was a Saturday, '…*we are therefore taking the liberty of filing our papers on Monday 14 October 2013*. *We hope the above is in order.'*

33. Mkhize's affidavit was filed on the next court day, the 14th October 2013. Inasmuch as its content may be relevant, it will be dealt with below. During the afternoon of the same day, the Judge received a call from Ms Pillay of the State Attorney's Office. She proceeded to inform the Judge that counsel who was to represent Mkhize and Netshifhefhe was unavailable to attend the next day, and that the matter would therefore have to be postponed. Upon enquiry whether the respondent's attorneys were aware of her call she answered in the negative. Her attention was pertinently drawn to the fact that it was unacceptable to contact the Judge directly in the absence and without the knowledge of the other party to the dispute and that, in any event, communications of the nature under discussion needed to be made under oath in an affidavit. In spite of this stern advice Netshifhefhe shortly thereafter called upon the Judge's clerk to deliver a letter containing a similar message, requesting a hearing on the 16th October 2013.

34. The Judge thereupon advised the office of the State Attorney that he could not deal with the matter in the absence of the other party and no decision could be taken without the latter's consent. The Judge's written note was copied to the respondent's legal advisers.

35. The next morning the applicant, represented by Ms Pillay, formally withdrew the applicant's opposition to the rescission application and consented to the order of the 5th March 2013 being set aside. A notice to this effect was filed, but no costs were tendered. The respondent insisted upon an order rescinding the original order of the 5th March 2013 and an award for costs on the scale of attorney and client as well as a finding that Mkhize and Netshifhefhe were in contempt of court. The original order was rescinded and the matter was enrolled for the 5th December 2013 for argument on the remaining issues of costs and the question whether Mkhize and Netshfefe were in contempt. The warrant for Mkhize's arrest was cancelled once there was no issue on the merits left to be decided by the court. (It should be added in parenthesis that there is ample authority that counsel's unavailability is no adequate ground for a postponement, which authorities it is not necessary to refer to at this stage. The court granted the postponement because Mkhize and Netshifhefhe might feel prejudiced if they were represented by someone other than the senior counsel they had consulted).

36. Once the opposition to the rescission application was withdrawn and the original order set aside, the question of any contempt that might have been committed upon the court by Mkhize or Netshifhefhe no longer needed to be addressed in summary proceedings to protect the integrity of the process: S *v Mamabolo (E TV & Others Intervening)* 2001 (3) SA 409 (CC); (2001 (1) SACR 686; 2001 (5) BCLR 449), in particular at par [65], where Kriegler J said: ***'It would be a very serious matter indeed, calling for speedy and decisive action, if the order had actually been defied. The spectre of executive officers refusing to obey orders of court because they think they were wrongly granted is ominous.'***

37. Should the court have been of the opinion that the conduct complained of warranted punishment, the matter must be referred to the Office of the Director of Public Prosecutions for its consideration; see: *Mamabolo, supra* at para [51] and [52].

38. Mkhize filed an affidavit to explain her actions prior to the 5th December 2013, without dealing with the questions the court had posed as set out above. Counsel for the applicant and the two individuals argued strenuously against a finding that Mkhize and Netshifhefhe were in contempt. Relying upon Mkhize's affidavit he submitted that whatever failure to comply with the ethics of their professions, or to comply with the law and practice might be evident from its contents, no intention to insult or scandalize the court could be attributed to them.

39. Turning then to Mkhize's affidavit, the following allegations made therein are relevant:

a) .Mkhize states in par 34 of her affidavit that it was not disclosed in the original application that Mr M[…] was an asylum seeker *'...as this information was not at our disposal..'.* This assertion is in stark conflict with her founding affidavit in the principal application, which describes the child's father as an asylum seeker in paragraph 8 thereof.

b) She adds in par 34 that the applicant could not have known under which circumstances respondent was led to remove the child from the UK as the mother did not oppose the principal application. This statement appears to contradict her allegation in the founding affidavit that she conducted a mediation meeting with the respondent as early as the 28th April 2012. It would appear to be unlikely in the extreme that the reasons for respondent's flight from the UK would not be discussed at this juncture; as indeed testified to by the respondent. The assertion that respondent did not oppose the principal application is incorrect as is evident from the facts already recorded.

c) After obtaining the order to return the child to the UK she met the respondent on the 13th March 2013 to collect the child's travel documents. Upon being informed that no such document existed, she advised the respondent to obtain such as a matter of urgency.

d) She advised the Chief Family Advocate of these developments on the 14th March 2013.

e) Meanwhile, the Chief Family Advocate had requested her UK counterpart to ensure that the child's father made appropriate travel arrangements for the child's return.

f) The father has failed to communicate with the applicant or its UK counterpart ever since, apart from sending a message that he had referred the rescission application to his solicitor.

g) This led to the letter of the 18th September 2013 being addressed to the presiding Judge and the respondent's attorneys of record by the State Attorney's Mr Netshifhefhe, which has been quoted above

h) Mkhize's affidavit continues in par 31 thereof:

'For the reasons stated above, on 25 September 2013 there was *no appearance on behalf of the applicant. It would have served no purpose for the applicant to attend Court on the 25th September 2013 simply to inform the Court that the applicant holds no instructions as mentioned in the preceding paragraphs. I am advised that in the circumstances, the Court ought to have granted the respondent the relief sought..'*

i) After quoting the order made by the court on the 25th September 2013, Mkhize continues:

'I *am advised that it is unprecedented for a Court to hold a party to proceedings in contempt for failure to oppose an application. ...I am still dumbfounded by the Order of the Court since I do not know what I did wrong or what part of the Court Order I contravened or failed to comply with. I am a family advocate and not an immigration specialist The*

questions posed by the Court relating to the immigration status of mr M[…] and Immigration Laws of England do not fall within my purview or my area of practice.. .(B)esides, the parties had agreed to remove the matter from the court in order to enable the applicant to investigate the allegations raised in the respondent's affidavit This arrangement was *made in order to alleviate unnecessary costs for the parties and to attempt to resolve the matter out of court. I am advised that it is extraordinary for a court to override the agreement of the parties and order that the matte be heard at the convenience of the Judge especially when the matter is not part heard. '*

j) She concludes that, if contempt of court was raised by the Judge himself, he would be a complainant and would be biased against herself and the State Attorney. She denies any intention of holding the court in contempt. Netshifhefhe did not file any affidavit to explain his actions.

ANALYSIS AND FINDINGS

40. The Convention can only find application if a child has been removed unlawfully from the jurisdiction of the child's habitual residence. (Article 3). The concept of *'habitual residence*' implies a stable territorial link, as set out by N C Erasmus J in *Senior Family Advocate, Cape Town, & Another v Houtman* 2004 (6) SA 274 (C) at para [7] to [11]:

'The father in this matter clearly bears the onus to establish the jurisdictional prerequisites for the summary return of EB to the Netherlands. The question of onus was discussed as follows by Scott JA in Smith v Smith2001 (3) SA 845 (SCA) ([2001] 3 All SA 146) at 850J:

> ***. . (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 art 3. Once this has been established the onus is upon a party resisting the order to establish one or other of the defences referred to in art 13(a) and (b) or that the circumstances are such that the refusal would be justified having regard to the provisions of art 20*.'**

The function of this Court is to decide whether the Convention applies in this matter and if so, whether the limited exceptions that give rise to a discretion not to order the return of the child are warranted.

Habitual residence

[8] The first matter at issue is whether the father has established that the child M/as *habitually resident in the Netherlands at the time of her removal to South Africa, on 19 September 2002. Every case that is brought pursuant to the Hague Convention on the Civil Aspects of Child Abduction requires the Court to determine the habitual residence of the child in question. This concept is key to the operation of all aspects of the Convention, and yet, it is not defined by the Convention itself. Consequently, the expression habitual residence has been interpreted according to 'the ordinary and natural meaning of the two words it contains, [as] a question of fact to be decided by reference to all the circumstances of any particular case'. The intention being to avoid the development of restrictive rules as to the meaning of habitual residence 'so that the facts and circumstances of each case can be assessed free of presuppositions and presumptions'.*

[9] However, the fact that there is 'no objective temporal baseline' on which to base a definition of habitual residence requires that close attention be paid to subjective intent when evaluating an individual's habitual residence. When a child is removed from its

habitual environment, the implication is that it is being removed from the family and social environment in which its life has developed. The word 'habitual' implies a stable territorial link; this may be achieved through length of stay or through evidence of a particularly close tie between the person and the place. A number of reported foreign judgments have established that a possible prerequisite for 'habitual residence[1] is some 'degree of settled purpose' or 'intention'.

[10] A settled inientionor settled purpose is clearly one which will not be temporary. However, 'it is not something to be searched for under a microscope. If it is there at all it will stand out clearly as a matter of general impression.' Where there is no written agreement between the parties and where the period of residence fails to indicate incontrovertibly that it is habitual, it is accepted that the Court may look at the intentions of the person concerned. In practice, however, it is often impossible to make a distinction between the habitual residence of a young child and that of its custodians - it cannot reasonably be expected that a young child would have the capacity or intention to acquire a separate habitual residence. In Re F (A Minor) (Child Abduction) [1992] 1 FLR 548 at 551 D Butler-Sloss J stated:

> ***'a young child cannot acquire habitual residence in isolation from those who care for him. '***

Consequently,

> ***although it is the habitual residence of the child that must be determined, the desires and actions of the parents cannot be ignored. . . . The concept of habitual residence must. . . entail some element of voluntariness and purposeful design.'***

It then becomes necessary to analyse the parents' shared intentions regarding the child's residence. Where there is contrary expressed parental intent, as in this instance, it then becomes necessary to determine whether the child has a factual connection to the state, and knows something of it, culturally, socially and

linguistically.

[11] It is clear that habitual residence must be determined by reference to the circumstances of each case. '

Fabricius J adopted the same approach in *Central Authority v MR (LS Intervening)* 2011 (2) SA 428 (GNP) at para [20] to [22]:

'[20] What does 'habitual residence' mean in the present context?
This concept is not defined by the Convention itself. It has been interpreted according to 'the ordinary and natural meaning of the two words it contains, as a question of fact to be decided by reference to all the circumstances of any particular case'. The intention thereby is to avoid the development of restrictive rules as to the meaning of 'habitual residence', so that the facts and circumstances of each can be assessed free of presuppositions and presumptions. However, the fact, that there is no 'objective temporal baseline' on which to base a definition of habitual residence, requires that close attention be paid to the subjective intent when evaluating an individual's habitual residence. When a child is removed from its habitual environment, the implication is that it is being removed from the family and social environment in which its life has developed. The word 'habitual' implies a stable territorial link, which may be achieved through length of stay, or through evidence of a particularly close tie between the person and the place. A number of reported foreign judgments have established that the possible prerequisite for 'habitual residence' is some 'degree of settled purpose' or 'intention'. A settled intention or settled purpose is clearly one which will not be temporary. However, it is not something to be searched for under a microscope. If it is there at all it will stand out clearly as a matter of general impression. I do not lose sight of the fact that it is often impossible to make a distinction between the habitual residence of a young child and that of its custodians. See Senior Family Advocate, Cape Town, and Another v Houtman2004 (6) SA 274 (C) paras 8-11.'

41. An asylum seeker is, by definition, a person who is attempting to establish a new residence after her or his flight from danger, violence, oppression or discrimination. They are ' ... *people who claim to be taking refuge in this country from persecution or conflict elsewhere*' (per Nugent J in *Minister of Home Affairs & Others v Watchenuka & Another* 2004 (4) SA 326 (A) at para [1] Pending the finalisation of any process to obtain permission to take refuge in the country the asylum seeker has entered uncertainty must prevail whether residence of any permanence can become reality. It is therefore conceptually difficult to reconcile the transient state of the asylum seeker's presence in the country that is requested to allow him to stay with the stable territorial link that characterises habitual residence. Mkhize has annexed to her affidavit correspondence with the UK Central Authority in which the latter opines that immigration issues have no bearing on Convention applications. This is incorrect. Asylum issues have been considered in several Convention cases in the UK, see e.g. *R & F (Children) (Abduction Removal Outside Jurisdiction)* [2008] EWCA Civ.854, of which the ruling of a three judge bench is recorded as follows: ' ... *return ordered, notwithstanding the period of almost three years spent in the UK. it* was *in the best interests of the children to return to Mozambique, their mother*; a *failed asylum seeker*; *having no realistic prospect of being allowed to remain.'*

42. Mkhize was clearly aware of M[…]'s status as asylum seeker. Before she launched the urgent application she consulted the respondent. The latter declares under oath that she disclosed the full circumstances of the conditions that led to her returning to South Africa. Absent a denial by Mkhize, and in any event on the overwhelming probabilities, the court must hold that Mkhize was also aware of the fact that the respondent was a failed asylum seeker when she swore to her founding affidavit. By the same token she must have been aware through her discussions with the respondent that M[…]'s applications for asylum had failed. There can exist no shadow of doubt that she was in duty bound, as an officer of the court, as a member of the office of the Family Advocate and as a deponent on behalf of an organ of State litigating against a single mother, and most importantly

in the interests of the child who was the object of the application to fully disclose these facts The mere recording of these circumstances would have conveyed to the court hearing the application that significant threats to the psychological, emotional and physical health of the child could arise if the child were to be ordered to be returned to the UK, as the boy of tender years might very well be forced to travel without his mother to be met by a father who himself faced an uncertain future. By the same token Mkhize was in duty bound to investigate the question whether an asylum seeker, especially one whose repeated applications had been refused, could be said to have established any residence at all in the UK, let alone a habitual one. She was further clearly obliged to point out to the court at the hearing of the application that the applicant might not have made out a *prima facie* case that the Convention was applicable to the present set of circumstances. She was equally in duty bound to earnestly consider whether the order she sought ought not to be made subject to appropriate conditions to ensure the child's safety and emotional, psychological and physical integrity.

43. Even if Mkhize did not appreciate all the implications of the child's parents both being unsuccessful asylum seekers in the UK, she must have been aware that this unusual feature might have an impact on the child's best long term interests, which must be served in every Convention application: *Sonderup v Tondelli & Another* 2001 (1) SA 1171 (CC), in particular at para [26] to [35]. Goldstone J held that the child's best short term interests might be impaired by ordering his or her return to the jurisdiction of the habitual residence. Such a limitation of the rights enshrined in section 28 (2) of the Constitution was, however, justifiable in terms of section 36 thereof as the long term interests of the child's custody and access would best be served by allowing the courts of the habitual residence to determine custody and other issues relating to the child's wellbeing; always provided that there was no proof to the contrary as envisaged in Article 13 of the Convention:

'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. /*4s *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.'*

44. The questions which this court posed after the matter had been re-enrolled were in a large measure directed at highlighting these problems. Apart from the fact that Mkhize ought to have appreciated their import prior to launching the urgent application, her comment upon the reasons why the court reenrolled the matter on the 16th August is misplaced. The court was not afforded the courtesy of having a copy of the respondent's letter recording the parties' agreement to postpone the matter filed of record. Once a matter has been enrolled the court must be advised if it is to be removed other than by notice filed in good time and served on all parties to the dispute. Had this practice been followed the court would have been able to raise its concerns as explained above.

45. Our courts have often, as they are entitled and, indeed, often obliged to do, required parties to supplement their papers and to provide further facts and argument to enable the court to fully understand the matter at hand, and, in particular, to enable the court to protect the interests of vulnerable individuals, especially children. The dangers posed to the child by the unqualified order sought and granted in March 2013 ought to have been self-evident. At the very least, the court might have wished to be advised why a rider should not be added to the order that the child ought not to be surrendered unless and until there was proof that M[…] had established permanent residence in the UK. This was part of the purpose of the questions put to the parties. It is very difficult to lend credence to Mkhize's protestations that she had no knowledge of immigration law and was unable to deal with the court's questions regarding asylum. If she was indeed unable to understand the import of the position

M[…] and the respondent found themselves in, she was obliged to obtain expert advice on the potential implications their status might have on the health and happiness of the child before launching the urgent application.

46. Her further suggestion that the court was holding her in contempt for failing to oppose an application and was taking an unprecedented step by so doing, and that the court should merely have granted the (by now unopposed) application for rescission of the original application is a misrepresentation of the facts. As at 25 September 2013, the applicant had not consented to the setting aside of the original order, or abandoned its opposition to the counter application for its rescission. That step was only taken in October 2013 as set out above. It would appear that the applicant was hoping that if it and its legal advisers played possum on the 25th September 2013, the uncomfortable questions posed by the court would go away through a default rescission judgment being granted in the applicant's absence. Mkhize does not state whether she and Netshifhefhe appreciated that the court had issued an order that must be complied with. As officers of the court they must have been fully aware that court orders have to be implemented, however irksome, irrational or wrong these orders may be, until the orders are revoked or overturned on appeal. As Froneman J (as he then was), writing for the unanimous court, stated in Burchell v Burchell case No 364/2005 (ECD) (not reported) at par 10:

> *'Compliance with court orders is an issue of fundamental concern for a society that seeks to place itself on the rule of law. The Constitution states that the rule of law and supremacy of the Constitution are foundational values of our society. It vests the judicial authority of the state in the courts and requires other organs of state to assist and protect the courts. It gives everyone the right to have legal disputes resolved in the courts or other independent and impartial tribunals. Failure to enforce court orders effectively has the potential to undermine confidence in recourse to law as an instrument to resolve civil disputes and may thus impact negatively on the rule of law.' (Footnotes*

omitted)

The failure to give effect to the court order may *prima facie* be contemptuous of the court. Contempt is only such if there is a deliberate intention to insult or scandalise the court. Given Mkhize's and Netshifhefhe's lackadaisical approach to law and practice it is possible that they simply failed to apply their minds to what they were about when they attempted to avoid the unpleasant consequences the ill-advised application for the order to surrender the child had caused, by doing as little as possible. Much as their actions fail to meet the standards of their professions, it is not possible to conclude that the intention to commit contempt is the only reasonable inference to be drawn from their behaviour. There will therefore be no referral of this matter to the National Director of Public Prosecutions.

47. Unfortunately the neglect to obey the court's order was not the only failure on the part of the applicant and its attorneys to observe the Rules and practice of this court and the ethics of their professions. In the first instance it was in stark conflict with the Rules and practice to send a letter on the 18 September 2013 to the court to inform it that no affidavits would be filed in spite of the court's order to do so. Rule 27 is clear:

'27 Extension of Time and Removal of Bar and Condonation

(1) In the absence of agreement between the parties, the court may upon application on notice and on good cause shown, make an order extending or abridging any time prescribed by these Rules or by an order of court or fixed by an order extending or abridging any time for doing any act or taking any step in connection with any proceedings of any nature whatsoever upon such terms as to it seems meet

(2) Any such extension may be ordered although the application therefor is not made until after expiry of the time prescribed or fixed, and the court ordering any such extension may make such order as to it seems meet as to the recalling, varying or cancelling of the results of the expiry of any time so prescribed or

fixed, whether such results flow from the terms of any order or from these Rules.
(3) The court may, on good cause shown, condone any non-compliance with these Rules.'

48. There has been no explanation for the failure to observe the Rule. It is probable, given the history of this matter, that the applicant and its legal advisers were again playing possum by failing to take the court into their confidence under oath. Such approach to the court and its Rules is regrettable, to say the least. The same applies to Netshifhefhe's letter unilaterally extending the deadline for the filing of Mkhize's affidavit.

49 The same must clearly be said of Netshifhefhe's refusal to attend court, even when expressly called to do so. His answer that he was too busy was rude and unbecoming of an officer of the court. It might under different circumstances indeed be held to amount to actual contempt.

50. Pillay's action in contacting the judge directly, without the knowledge and consent of her opponent, is a flagrant transgression of the professional ethics. It is a fundamental principle of the adversarial system that no party my approach the court on its own, least of all without the other party's knowledge.

"A judge is unjust who hears but one side of a case, even though he decide justly." Seneca (4 BC- AD65)'

Her telephone call placed the court in a difficult position. It might have prejudiced the entire hearing.

51. This litany of failures on the part of Mkhize and the State Attorney's officers to observe both law and practice fills one with disquiet. The principal application should never have been launched in the manner in which it was presented to court. The health and happiness of an innocent child was potentially jeopardised

and both the court and the respondent and her legal advisers were put to unnecessary trouble and inconvenience, The respondent was needlessly caused distress and forced to incur unnecessary costs, aggravated by additional hearings, all through the neglect of officers of the court employed by organs of state to properly fulfil their professional obligations. It is only fair that the applicant be ordered to pay all of the respondent's costs. This expense will have to be funded by the hapless taxpayer. Should failures of the nature highlighted in this judgment occur again on the part of the applicant or the State Attorney, serious consideration will have to be given to hold the individuals concerned liable for the wasted costs in their personal capacity, *de bonis propriis.*

ORDER:

1. It is confirmed that the order surrendering the child T[…] T[…] M[…] to the UK in terms of the Hague Convention on the Civil Aspects of Child Abduction granted on the 5TH March 2013 has been set aside.
2. The applicant is ordered to pay the respondent's costs of the entire proceedings on the scale of attorney and client.

Dated At Pretoria on this 18th day of February 2014.

E Bertelsmann
Judge of the High Court