



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

FROM The Registrar, Supreme Court of Appeal
DATE 12 December 2014
STATUS Immediate

KLVC v SDI (20334/2014) [2014] ZASCA 222 (12 December 2014).

Please note that the media summary is intended for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal

Today the Supreme Court of Appeal (SCA) delivered a judgment dismissing an appeal against a judgment of the KwaZulu-Natal Local Division and confirming that an unmarried biological father has full parental rights and responsibilities to his minor child.

The appellant (mother) and the first respondent (father) are the biological parents of a minor child S, a boy born in Durban, South Africa on 30 July 2012. The parties were never married to each other, nor did they cohabit or live together in a permanent life partnership. The father has however at all material times consented to being identified as the child's father. On 28 November 2012, and whilst the father was on a brief visit to the United States of America, the mother removed the child from Durban and relocated to England without either informing or seeking permission from the father to do so. At the time the child was four months old.

On 16 May 2013, the father applied to the High Court of Justice, Family Division of the United Kingdom (the English court), in terms of the Hague Convention on the Civil Aspects of International Child Abduction, 1980 (the Hague Convention), for an order directing the mother return S to his habitual place of residence in Durban, South Africa. The basis of the application was that the mother had removed S from South Africa to England in breach of the father's joint parental rights and responsibilities by not seeking his approval before doing so. The mother opposed that application on the basis that, the father had not been exercising 'rights of custody' as defined in the Hague Convention, and that, there was a grave risk that should the child be returned to South Africa, he would be exposed to physical or psychological harm or otherwise be placed in an intolerable situation.

The question which had to be determined by the English court was whether the mother's removal of the child from South Africa without the father's approval was wrongful. That determination entailed determinations whether the removal of the child was wrongful because it was in breach of the rights of custody of the father under the law of South Africa immediately before the removal of the child, and whether the relevant rights of custody were actually being exercised at the time of the child's removal.

The English court was unable to decide the question whether the mother was lawfully entitled in November 2012 to change the place of residence of the child from South Africa to England without the prior permission or consent of the father or an appropriate South African court. Consequently, on 21 August 2013 the English court made an order referring the following question to a South African court for determination:

'In November 2012, was it lawful under South African law, having regard to the circumstances of this case, for the Respondent [mother] to change the place of residence of the child from a place in South Africa to a place in England and Wales without the prior permission or consent of the Applicant [father] or other appropriate South African court?'

On 8 October 2013 the father instituted application proceedings in the KwaZulu-Natal Local Division, Durban (the court a quo) for consideration of the question referred to it by the English court. The court a quo ruled in the father's favour finding that in November 2012, the father had met all the requirements prescribed in s 21(1)(b)(i) to (iii) of the Children's Act 38 of 2005 (the Act), and it held that he had acquired full parental rights and responsibilities in respect of the child as envisaged in the Act. Accordingly, it was necessary for the mother to have obtained the father's consent or permission, alternatively, consent of an appropriate court, prior to applying for a passport for S's removal from South Africa. With leave of the court a quo, the mother appealed against the judgment and order granted by the court a quo to the SCA.

The question before the SCA was whether the father had acquired full parental rights and responsibilities in respect of the child prior to the child's removal from the Republic in November 2012 by the mother. The SCA stated that if this question is answered in the affirmative, it follows that the father had rights of guardianship in respect of the child, and that either the father's consent or permission or that of a competent court was required before the child could be removed from the Republic.

On appeal, the mother contended that the father only met the requirement of consenting to be identified as the child's father, but did not meet the other two requirements, namely, that the father never contributed either adequately or at all or attempted in good faith to contribute to the child's upbringing and expenses in connection with the maintenance of the child; and that even if he did have was not exercising them at the time of the child's removal as he was abroad in November 2012. The SCA rejected the mother's contentions and the basis for her attack of the court a quo's judgment:

that the father had only met one of the three requirements which all had to be met before an unmarried natural father could acquire full parental rights and responsibilities over a minor child.

The SCA held that a determination whether or not an unmarried father met the requirements in terms of the Act is entirely a factual enquiry which required a consideration of all the relevant factual circumstances in respect of which judicial discretion played no role.

The SCA further held that s 21 the Act was specifically intended to provide for the automatic acquisition of parental rights by an unmarried father if he was able to meet certain requirements. Further, that the intention was to also accord an unmarried father with similar rights and responsibilities to the child as the mother, and to promote equality guaranteed in the Constitution, and more importantly, the right of a child to parental care as also envisaged in the Constitution.

After reviewing the facts of the case and judgment of the court a quo, the SCA held that it was satisfied that the finding of the court a quo could not be faulted, that the father had demonstrated sufficiently that he had acquired full parental rights and responsibilities in respect of the child on November 2012, and that the father's consent was therefore required prior to the removal of the child from the Republic.

The SCA upheld the judgment of the KwaZulu-Natal Local Division and dismissed the appeal with costs, holding that it was satisfied that the court a quo was correct in answering the question posed by the English court.

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