IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE HIGH COURT, CAPE TOWN

CASE NUMBER: 22994/2010

DATE: 2010.12.10

In the matter between:

R[…] R[…] S[…]

Applicant

And

D[…] A[…] L[…] Respondent

JUDGMENT

DESAI. J:

The respondent presently resides in England with the minor child, A….., who is 16 months old. The

applicant's permanent place of residence is here in Cape Town.

In these proceedings the applicant, in effect, seeks a declarator that the removal of A….. from the Republic of South Africa was wrongful for the purposes of Article 3 and 5 of the Hague Convention on the Civil Aspects of International Child Abduction 1981 ("the Hague Convention"). In arriving at a conclusion in this regard, this Court is called upon to decide whether the applicant and the respondent were co-holders of parental rights and responsibilities within the meaning of Sections 18(1)(a) - (c) of the Children's Act 38 of 2005 (as amended) (the Children's Act), at the time of A…..'s removal from the Republic of South Africa.

It needs to be stated right at the outset of this judgment that the conduct of both parties has been less than impressive since before, and after, the birth of A……..

The essential facts underpinning this application are, briefly stated, the following.

Both the applicant and the respondent are South African nationals but have also acquired British nationality. They were born in Durban, South Africa, and met in 2005. Subsequent thereto they had an intimate relationship but never married. During the course of this relationship they lived both in England and South Africa. At the time A…… was conceived, they were cohabiting in London. Shortly thereafter, their relationship and cohabitation ended somewhat acrimoniously for reasons which will shortly become apparent.

The respondent gave birth to A….. on 1 August 2…... She chose the name for A….. and registered her under her surname only. The respondent did not include the applicant's name as A…..'s biological father in the UK birth registration documents, though it is not in dispute that he is in fact A……'s father.

It seems that the respondent's hostile attitude towards the applicant was premised upon his initial reluctance to become a father. It is common cause that he urged her to consider an abortion. At about the same time he ended their relationship. On the applicant's version, until about the twelfth week of her pregnancy he urged the respondent to terminate the pregnancy. On her version, he persisted with this attitude until the twenty-fourth week of her pregnancy. At best for the applicant, for the first three months of the respondent's pregnancy he was, to put it mildly, a reluctant potential father.

Furthermore, the applicant left London shortly after hearing that the respondent was pregnant. He visited London for three days in March 2009 and did not, for different reasons, attend a scan of the baby. There is a dispute on the papers as to why he did not do so, but the more likely explanation is his then-reluctance to accept parenthood or his lack of enthusiasm for such status. Moreover, he declined to be the respondent's

"birthing partner", but undertook to fly to London when the baby was born.

After learning of A…….'s birth from a mutual friend, the applicant left South Africa on 2 August 2009 and on 3 August 2009 he proceeded directly from H…. to meet the newborn child. The respondent alleges that he only spent two and a half days with his daughter. On his own version he was in London for five days. He spent a considerable time with A…… - that is in between his other professional engagements - and, perhaps overstating his case, he alleges that he developed a "fledgling but important bond with her".

One further aspect of the applicant's trip to London warrants noting. He states that on this occasion he made it clear to the respondent that he wanted to play a role in A…..'s life. He adds that he also asked

the respondent to provide him with a full budget of costs and finances which were needed to look after A…. so that he could make an appropriate contribution towards her maintenance. Surprisingly, he did not make, or offer to make, any actual monetary contribution at that stage.

On or about 29 August 2009, a few weeks after A…..'s birth, the respondent arrived in Durban, South Africa. The respondent alleges that her return to South Africa was not a permanent one. The applicant contends the contrary, inter alia relying upon the fact that the respondent had sold her flat in London. The respondent alleges that she sold the apartment, as it was no longer suitable for her now that she had a baby and accordingly intended to acquire a property suitable for herself and A…… in due course.

It seems, on her version, that she wished to enjoy the support of her family during her maternity leave as also the domestic assistance that is peculiarly and readily available in South Africa. She sets out in her affidavit several indicators that her sojourn in South Africa was of a temporary nature.

While the respondent resided in Durban, the applicant's mother and extended family regularly spent time with A…… and the applicant himself, who lives in Cape Town, did so sporadically.

The circumstances under which the respondent left South Africa are unclear. On 15 April 2010 the applicant was advised that the respondent and A…… would be leaving for Thailand the next day. Her friend in Thailand, in fact, confirmed that the respondent had arrived safely in Thailand. It later transpired that they had, in fact, left for London. An urgent order in the High Court, Durban, sought by the applicant to prevent the removal of A……. came a few days too late.

What followed were the Hague proceedings in the UK. Mr Justice Coleridge, sitting in chambers in the

Royal Courts of Justice, Kent, London, on 28 September 2010 made an order requesting the father, that is the applicant herein, to obtain from the relevant South African Court a decision as to whether the mother's removal of the child from South Africa was wrongful for the purposes of Article 3 and 5 of the Hague Convention.

This order was made in accordance with Article 15 of the Hague Convention. It is a procedure resorted to in instances where a Judge seized with a Hague Convention matter is unable to responsibly resolve the issue on the information available to him or her whether the child's removal was wrongful. (See in this regard In re D [2006] UKHL 51).

Article 15 contemplates the applicant obtaining from the authorities of the state of the habitual residence of the child a determination that the removal was wrongful. At issue in this case is whether A…….. was habitually resident in South Africa immediately before the removal. I shall revert to this aspect shortly.

AS MR A STOKES SC, WHO APPEARED BEFORE THIS COURT ON BEHALF OF THE RESPONDENT, HAS CORRECTLY POINTED OUT, THE RELIEF BEING SOUGHT HEREIN IS NOT "PURSUANT TO" THE UK ORDER. IN OTHER WORDS, THE RELIEF SOUGHT IN PARAGRAPH 2.1 OF THE APPLICANT'S NOTICE OF MOTION IS SOMEWHAT MISLEADING. THE ENGLISH COURT DID NOT REQUEST THIS COURT TO DECIDE ANYTHING. IT REQUESTED THE APPLICANT TO OBTAIN A DECISION FROM THE SOUTH AFRICAN AUTHORITIES. IT WAS UP TO HIM TO DECIDE HOW AND WHERE. THE ONLY SUGGESTED BASIS RELIED UPON BY THE APPLICANT IN HIS FOUNDING AFFIDAVIT FOR CONFERRING JURISDICTION, NAMELY THE REQUEST BY THE ENGLISH COURT, IS THUS SUSCEPTIBLE TO SOME CRITICISM.

The date of establishing whether this Court has jurisdiction is the date of the initiation of these proceedings. The proceedings were instituted on 19 October 2010 and by that date the respondent and the child were domiciled in the United Kingdom. With the introduction of the Domicile Act 3 of 1992, the child's domicile is presumed, unless the contrary is shown, to be the home of the parent with whom the child is residing. Thus, as the position stands since this Act was introduced, a child's domicile is no longer necessarily that of the father, rather that of the home of the parent with whom the child is residing. On that basis, as Allegra has never resided with the applicant, she was at no stage domiciled in the Western Cape.

MR STOKES SC FURTHER CONTENDED THAT THERE IS NO JURISDICTIONAL GROUND PRESENT, THE RESPONDENT IS NOT SUBJECT TO THE COURT'S AUTHORITY AND THERE IS NO OTHER LEGISLATIVE PROVISION WHICH HAS CREATED JURISDICTION FOR THIS COURT. IT WAS HIS VIEW THAT THIS COURT HAS NO JURISDICTION OVER THE RESPONDENT OR THE CHILD.

It would hardly be appropriate to dispose of this matter on that basis. As was pointed out by Lewis JA in S v J 695/10 [2010] ZASCA 139 delivered on 19 November 2010, when dealing with jurisdiction and child custody cases, "reliance on formalism and a resort to inflexible rules is to be discouraged" (at para 38) and "...the interests of the child should not be held to ransom for the sake of legal niceties" (see para 43).

The only South African Court's jurisdiction within which the respondent ever resided is Durban. It was not the respondent's case that the action could have been more appropriately adjudicated upon in the High Court, Durban. Their case was that no South African Court has jurisdiction to hear this matter.

This Court is best-placed of the two or three possible courts put up by the respondent to adjudicate on

the applicant's parental rights in circumstances when the applicant is an incola of this Court and there is no better nexus to any other

Court. The facts of the matter are unique and arise by virtue of the provisions of the Hague Convention. There is in any event a sufficient connection between this Court and this matter to enable it to give a judgment which will be res judicata between the parties and moreover the applicant for the declarator is an incola of the Court. See Swanvest 234 (Ptv) Ltd versus Nkwazi Resources Investments (Ptv) Ltd and Another. (It's an unreported case, number 871/2010 Northern Cape High Court).

It appears that in the proceedings in England the respondent's legal counsel, or respondent on the advice of her counsel, conceded that A…… was habitually resident in South Africa. That concession was withdrawn in these proceedings and it was expressly denied that A…… was "habitually resident" within South Africa at the time of her removal.

Ms P K Weyer SC, who appeared with Ms C L Riley on behalf of the applicant, contended that the arguments advanced by the respondent in this regard were contrived and disingenuous. On the contrary, the case for the respondent appears compelling in respect of A…..'s place of habitual residence.

A removal can only be wrongful under the Hague Convention if it is a removal from a country where the child was habitually resident. In this regard the onus is on the applicant (see

SMITH VERSUS SMITH 2001 3 SA 845 AND 850J). THE TERM "HABITUAL RESIDENCE" IS NOT DEFINED BY

THE HAGUE CONVENTION OR BY THE ACT. IT HAS, HOWEVER, BEEN CONSIDERED IN A NUMBER OF LOCAL AND INTERNATIONAL CASES. IN SENIOR FAMILY ADVOCATE CAPE TOWN AND ANOTHER V HOUTMAN, 2004 (6) SA 274 AT PARAGRAPHS 8 TO 10 THE COURT HELD:

> "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 is some degree of settled purpose or intention ... A settled intention or settled purpose is clearly one which shall 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 ... Where there is contrary expressed parental intent, as in this instance, it then becomes necessary to determine if the child has a factual connection to the state and know something of it culturally, socially and linguistically."

In this instance the respondent arrived in the country with a return air ticket. This fact is supported by documentary evidence. Immediately upon her arrival in South Africa she decided that she would leave in the near future. The applicant knew or must have known that the respondent was considering returning to the UK. He says in his affidavit that she never advised him that "she was intending to definitely return to the UK." It seems that at the very least he was aware of the possibility of her returning.

She concluded a one-year lease for a house in Durban. She also provided documentary evidence of her application for a green card - that's to get into the USA - insurances were secured by her and other such matters which all seem to confirm her version that she intended staying in South Africa temporarily as set out earlier in this judgment.

There can be no suggestion that South Africa is a place constituting a social environment in which the child's life has developed. The respondent, in fact, came to this country for a very brief period in the earlier stages of the child's life. This is not the sort of situation which the Hague Convention was intended to cover. The period of the child's visit was brief and there is no evidence that the child has any connection with South Africa. She was not even born here.

Furthermore, while here the respondent did not acquire a home or a car, retained her United Kingdom nationality and took out long-term investments in the United Kingdom. Her prospects of employment as a risk analyst were also better in London than in Durban or even Cape Town. Under the circumstances the applicant has simply not discharged the onus of demonstrating that the child was habitually resident in South Africa at the time of her removal.

Assuming I am wrong in this regard, I deal with the rights and responsibilities of the biological parents of a minor child as set out in the Children's Act. Certain sections of the act became effective on 1 July 2007 and the remaining sections of the act on 1 April 2010. The entire act accordingly had the force of law on 20 May 2010, the date on which A……. was removed from South Africa by the respondent.

As already indicated elsewhere in this judgment, at the time of A…….'s birth her biological parents were not living together in a permanent life partnership as envisaged by Section 21(1)(a).

SUCH RIGHTS AS THE APPLICANT MAY HAVE HAD ON 2 MAY 2010 WERE THUS DERIVED FROM SECTION 21 (1)(B) (I) TO (III). THE APPLICANT MUST MEET ALL THESE REQUIREMENTS TO QUALIFY FOR AUTOMATIC PARENTAL RESPONSIBILITIES IN A MINOR. THE RELEVANT SECTION READS AS FOLLOWS.

21 "Parental responsibilities and rights of unmarried fathers.

1) THE BIOLOGICAL FATHER OF A CHILD WHO DOES NOT HAVE PARENTAL RESPONSIBILITIES AND RIGHTS

IN RESPECT OF THE CHILD IN TERMS OF SECTION 20 ACQUIRES FULL PARENTAL RESPONSIBILITIES AND RIGHTS IN RESPECT OF THE CHILD:

(A) IF AT THE TIME OF THE CHILD'S BIRTH HE IS LIVING WITH THE MOTHER IN A PERMANENT LIFE PARTNERSHIP; OR

(b) if he, regardless of whether he has lived or is living with the mother:

(i) consents to be identified or successfully applies in terms of Section 26 to be identified as the child's father;

(ii) contributes or has attempted in good faith to contribute to the child's upbringing for a reasonable period; and

(iii) contributes or has attempted in good faith to contribute towards expenses in connection with the maintenance of the child."

It seems that Section 21 is based on the premise that, provided the child's unmarried father meets certain requirements, he acquires exactly the same parental responsibilities and rights as the child's mother and a married father in terms of Section 20. What arises for determination in this matter are the rights, if any, which the applicant had in respect of A…… on 2 May 2010. It is the respondent's case that the applicant did not have "rights of custody" under South African law on the date A…… left the country.

The requirement that the applicant has consented to be identified as the child's father is not in issue. In order to have full parental rights and responsibilities in respect of A…… the applicant will have to satisfy both of the remaining requirements of Section 21(1)(b) as well. Insofar as the applicant contends that he has made a contribution to the child's upbringing in accordance with the provisions of Section 21 (1)(b)(ii), the sum total of his evidence is that he has spent some time with the child, exercising sporadic access over a period of some six or seven months.

Ms Weyer SC submitted that the applicant cannot be faulted in the light of the objective evidence presented in this matter for failing to make every attempt to continue to contribute to Allegra's upbringing. The respondent acknowledges that he visited A…… on multiple occasions in the period between her return to South Africa and later departure for London.

Ms Weyer SC also refers to the emails attached to the applicant's papers which she avers clearly demonstrate attempts not only to see Allegra, but also to play a meaningful role in her life. In the Commentary on the Children's Act, C J Dowell and A M Skelton, the authors comment that "where the father has contributed to a child's upbringing for a reasonable period it's not a straightforward matter. For the point at which a period becomes reasonable is a relative matter on which the child's parents' view may differ widely".

Where there are such differences the matter must be referred for mediation. In this instance neither party has sought such an order, nor is it practical to do so in the present circumstances.

Upbringing is defined in the Concise Oxford Dictionary as:

> "The treatment and instruction received from one's parents through childhood."

APPLICANT'S CONDUCT HARDLY FALLS IN THIS CATEGORY. PERHAPS THE CHILD WAS STILL TOO YOUNG FOR ANY MEANINGFUL ROLE IN HER UPBRINGING. HOWEVER, AS MR STOKES SC CORRECTLY POINTED OUT, THE HIGH-WATER MARK OF THE APPLICANT'S CASE IS THAT OVER A PERIOD OF ABOUT SIX MONTHS HE VISITED THE CHILD ON A FEW OCCASIONS. AND GIVEN THE CONTEXTUAL SETTING OF THE REQUIRED CONTRIBUTION, THESE FEW VISITS OVER A RELATIVELY SHORT PERIOD OF TIME IN THE CHILD'S LIFE WHILST STILL LIVING WITH THE RESPONDENT CAN HARDLY QUALIFY AS A CONTRIBUTION TOWARDS THE CHILD'S UPBRINGING.

The applicant's case with regard to a good faith contribution towards expenses in connection with the maintenance of the child, (Section 21 (1)(b)(iii)), is even less convincing. It is common cause that he has not actually paid any expenses in connection with the maintenance of the child either for a reasonable period or at all. He makes a pathetic attempt to show that he did pay something, namely that on the day when they went shopping he bought some items.

The suggestion that he attempted to pay maintenance is incapable of fair-minded support. Why did he simply not make a contribution to the child's maintenance? He was aware of the respondent's bank account details and could easily have transferred some money into it. He failed to do so. He says that he was waiting for a breakdown from the respondent as to expenses, yet on his own version the respondent told him that she needed R1 500 per month for food and R400 per week for medical aid contribution. He failed to pay these amounts or any lesser amount he felt was reasonable.

The applicant's attempt to rely on the NatWest account opened in his own name and in respect of which no-one was informed, borders on the ridiculous. The annexure comprising the bank account shows a deposit of £65 320. What the applicant fails to disclose is that the first deposit in the amount of about £65 320 was from an entity called Granadilla Ltd. A further large amount was deposited as payments for an invoice. Thereafter R70 000 was transferred to his mother.

In the respondent's affidavit in the High Court in Durban dated 4 May 2010, five months after the account had been opened, he said in paragraph 54(c):

"She has indicated that if I wish to make a contribution to such expenses I can place the funds in an account which can be utilised at a later stage in her life by making arrangements to set up an offshore account into which I will deposit funds on a monthly basis for the benefit of A……. I therefore submit that I have attempted in good faith to contribute towards A…….'s maintenance expenses

Quite patently the applicant did not have the NatWest account in mind when he deposed to this affidavit. The applicant simply did not make bona fide attempts to contribute to A……'s maintenance. The objective evidence does not support any other conclusion.

Applicant accordingly did not acquire parental responsibilities and rights in respect of the child as contemplated in Section 21 of the Children's Act. I accordingly find that the mother's removal of the child, A……., from South Africa was not wrongful for the purposes of Articles 3 and 5 of the Hague Convention.

The application is accordingly DISMISSED WITH COSTS.

DESAI, J