IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case Number: 3574 / 2021

In the matter between:

S.M.G.G.T Applicant

And

C.S.T Respondent

Coram: Wille, J
Heard: 25 January 2023
Order: 27 January 2023
Reasons requested: 13 February 2023
Delivered: 16 February 2023

REASONS

WILLE, J:

Introduction:

[1] This was an opposed application for a declarator. The application launched was initially for an order holding the respondent in contempt of court for the breach of an extant court order. This relief changed because of the answering papers filed on behalf of the respondent. The applicant formally sought an amendment to his notice of motion at the inception of the hearing of this matter, to which the respondent had no objection. The amendment was granted.

[2] After the matter was heard, I delayed the granting of an order for a few days to once again consider the material before me, and after that, I issued an order in the following terms:

1. That the applicant's non-compliance relating to the manner of service, the prescribed notice periods and enrolment are with this condoned.

2. That it is declared that the 'suspensive conditions' in paragraphs two (2) and nine (9) of the amended court order dated 22 June 2021, have been met.

3. That the respondent is ordered forthwith to comply with the terms and conditions as set out in the court order dated 22 June 2021.

4. That the application for 'contempt of court' at the instance of the applicant is postponed sine die.

5. That the applicant is given leave to apply on these papers, supplemented in so far as may be necessary to re-enrol the application 'for contempt of court' if the respondent fails to with the order dated 22 June 2021, read with this order. At least fifteen (15) court days' notice of any subsequent re-enrolment of the contempt of court application shall be given to the respondent. The respondent is also granted leave to supplement her papers to oppose any re-enrolment of the contempt of court application. The costs of and incidental to the applicant's application for contempt of court shall stand over for later determination.

6. That the respondent's counter application is dismissed with costs (including the costs of senior counsel, where so employed) on the scale between party and party as agreed.

7. That the respondent shall be liable for the costs of the 'variation' application (including the costs of senior counsel where so employed) on the scale as between party and party as taxed or agreed.

Context:

[3] The parties were married to each other and were living abroad in Switzerland with their minor son. He is now three years old. Sometime ago the parties came to visit the respondent's parents who live in Cape Town. The respondent then decided to extend her visit with their minor son. The respondent made it known that she no longer intended to return to Switzerland with their minor child as planned and brought an urgent application for the court to authorize her retention of their minor child in South Africa.

[4] The applicant launched a discrete application seeking the return of their minor child in terms of the provisions of the Hague Convention on the Civil Aspects of International Child Abduction (1980). Both applications were settled by agreement. It was agreed that their minor son would be returned to Switzerland accompanied by the respondent once certain conditions were fulfilled in the order granted by the agreement between the parties. This initial order was later further amended by agreement.[1]

[5] The 'conditions' which ostensibly stayed the operation of the order for the respondent to return their minor child to Switzerland were the following, namely: (a) that the respondent is granted leave (or has been advised that no such leave is required) by the Swiss immigration authorities, the Switzerland Central Authority or a Swiss immigration attorney ('the relevant Swiss authority') to enable her to enter Switzerland and, (b) that the respondent has received confirmation or advice from the relevant Swiss authority, that, provided she follows certain prescribed conditions, she would be able to remain in Switzerland until at least the final adjudication and determination, by the Swiss courts, of the issues of parental rights, care and contact in respect of their minor child (such adjudication to include a determination of his future country of residence), including any appeal.

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[1] On 22 June 2021 ("the order").

[6] Initially, the applicant's case was that these suspensive conditions had been met and that the respondent was in contempt of the order as she refused to return the minor child to Switzerland. The respondent contended that these 'conditions' had not been met and that she was therefore not obliged to return the minor child to Switzerland.

The applicant's case:

[7] The applicant launched an application to hold the respondent in contempt of court to secure the respondent's compliance with the agreed order. The application was opposed and was postponed as the respondent delivered her answering affidavit on the day set down for the hearing. This is how the application found me.

[8] The applicant contended that the respondent had been provided with confirmation from the Swiss Immigration Authorities advising her that she and the party's minor son would be issued a residence permit valid for a specified period.[2] Regarding this confirmation, the respondent would only have to undergo a preliminary examination and register personally at the registration office of the municipality where she would be residing in Switzerland.

[9] Before the application was launched, the applicant's attorneys sought the respondent's compliance with the extant order and addressed a letter to her previous attorneys of record. The respondent's erstwhile attorneys alleged that the conditions in the extant order had not been complied with. The explanation was that the respondent's residence right was linked to that of the applicant and was not guaranteed as the applicant's residency right was predicated on his being employed by a specific company abroad and that this company no longer employed him. The applicant's attorney brought it to the respondent's attention that neither the leave so granted to her, nor the terms of the order, provided for any condition relating to the applicant's employment. It was also confirmed that the applicant remained employed abroad.

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[2] Until the end of December 2026.

The respondent's case and counter-application :

[10] The respondent disputed that the confirmation of the permission received from the immigration authorities constituted compliance with the extant order on two grounds. The first ground was that applicant's right to remain a resident was linked to his employment. The respondent contended that as the applicant was no longer employed and refused to disclose his current employer's identity, his residency right remained threatened. The respondent's case was that her residency rights were entirely dependent on and linked to the applicant's residency rights.

[11] The second ground relied upon by the respondent to contend that there needed to be compliance with the conditions of the extant order was that the residence permit on which the applicant placed reliance was only valid for a limited period. In this connection, the court order indicated as follows:

'…*until at least the final adjudication and determination, by the Swiss courts, of the issues of parental rights, care and contact in respect of the child (such adjudication to include the child's future country of residence), including an appeal…'*

[12] This point was a relatively belated point taken by the respondent for the first time in her answering affidavit and the respondent never advanced that she held this view prior to the deposing of her answering affidavit. In her counter-application the respondent sought an order that a clinical psychologist be appointed to investigate and report on: (a) whether it would be in the best interests of the minor child to be permanently relocated at this stage and (b) what residence and care arrangements would be in the minor child's best interests.

Consideration:

[13] The applicant demonstrated that his residence permit was not inextricably linked to his employment status. His residency permit remained valid for five

years, irrespective of his employment status, and therefore, the respondent's residency right was unaffected by the applicant's employment status.

[14] It was so that the respondent's residency rights were limited by time which would expire in about four years hence. The applicant put up the evidence of a practising attorney who confirmed that the final adjudication of the pending case in Switzerland dealing with the parental care and residency issues (including any appeal process) should be finalized within these four years. This was not engaged with at all by the respondent.

[15] The period afforded to the respondent was sufficient to allow for the finalization of the court processes abroad. In addition, the applicant had the right to apply for his permanent residency at the end of the four-year period, which would extend the respondent's right to remain abroad with their minor child indefinitely.

[16] The respondent launched a counter-application that sought to avoid the terms of the extant order and undermine the Hague Convention's provisions. This by the appointment of a clinical psychologist to investigate and report on: (a) whether it would be in the best interests of the minor child to be permanently removed and relocated at this stage and, (b) what future residence and care arrangements would be in the minor child's best interests. The first enquiry was essentially whether the minor child had become settled in his new environment.

[17] In the second part of the counter-application, the respondent sought an entire reconsideration of the extant order granted by agreement between the parties. Thus attempting to convert these proceedings into a hearing to determine the issues of parental care and residency. This is the very same enquiry that is pending abroad.

[18] The applicant advanced that the counter-application was an abuse of process because it sought to undermine the primary purpose of the Hague

Convention. On this, I agreed. I say this because the very purpose of the Hague Convention is to secure the prompt return of children wrongfully removed or retained in any contracting state. The Hague Convention aims to restore the *status quo ante* as soon as possible so that parental care and similar issues in respect of a minor child can be adjudicated upon by the state of the child's habitual residence.

[19] The respondent attempted to rely on the second part of article 12 of the Hague Convention, which provides that if an application for the return of a minor child to his habitual residence *is only made after a year* from the wrongful removal or retention of the minor child, then a court shall order the return of the child unless it is demonstrated that the child is now settled in his new environment.

[20] I needed help to discern how the second part of article 12 applied to the counter-application. I say this because an enquiry as to whether a child has become settled in his new environment and the discretion to not order the return of the child because the child has so become settled, only arises if the application for his return was made after the lapse of one year.[3]

[21] The application for the return of the minor child was made within one month of his unlawful retention in South Africa. Accordingly, there was no basis for an enquiry as to whether or not the minor child had settled in his new environment. Further, the respondent sought an order to allow the minor child to remain here as she contended that it would be in his best interests to do so. Upon receipt of the expert's recommendations, the respondent envisaged a fresh determination of residency and parental care issues. These are the same issues to be determined abroad and pending in the external court.

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[3] *KG v CB and Others* 2012 (4) SA 136 (SCA).

[22] The following penchant remarks were made in *Central Authority*[4] concerning some of the jurisdictional facts to be considered where a court in similar circumstances is faced with an application for the determination of residency and parental care issues:

'….*the court where the child was actually living at the time of removal is generally best suited to entertain a custody dispute and receive evidence in an efficient and cost-effective manner…'*

[23] Given the content of the agreed extant court order, I formed the wholesale view that the minor child should be returned to the jurisdiction of his habitual residence pending the outcome of the already pending proceedings abroad. My views in this regard were fortified by how our courts are enjoined to apply the provisions of the Hague Convention within our constitutional framework. I say this because the order did impose 'conditions' to mitigate the interim prejudice that the minor child might suffer, and it was to that end that it was agreed that the respondent would return with him abroad (by agreement).

[24] The balance that must be sought to be achieved in cases such as this was eloquently described in *Sonderup*[5] in the following terms:

'…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…'

[25] I found that this court had no jurisdiction to entertain the respondent's counter-application, which in real terms amounted to a conversion of these

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[4] *Central Authority v TK* 2015 (5) SA 408 (GJ) at para [13] at G.
[5] *Sonderup v Tondelli and Another* 2001(1) SA 1171 (CC) para [35] at C-D.

proceedings into a fresh determination of the issues of the minor child's parental care and future residency. The only issue that remained for my determination was whether the 'conditions' for the minor child's return (as agreed) had been met and whether the applicant was entitled to a *declarator* that they had been met. The applicant had been separated from his minor child for a considerable period because the respondent unilaterally chose to settle in a country that was not the child's habitual residence. I held that it was in the minor child's best interests that the uncertainty surrounding these issues be settled expeditiously and finally once he had been returned to the country of his habitual residence where litigation regarding his parental care and future residency was pending. These were then my reasons for the order granted.

E.D. WILLE

Judge of the High Court

Cape Town