IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT)

CASE:32652/2009

DATE: 22/04/2010

In the matter between:

CENTRAL AUTHORITY OF THE

REPUBLIC OF SOUTH AFRICA 1st APPLICANT

KSG 2nd APPLICANT

And

LG RESPONDENT

JUDGEMENT

MOLOPA - SETHOSA J

This is an application in terms of the Hague convention on the Civil Aspects of International Child Abduction (1980), ("the convention"), as incorporated into South African Law by the Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996, (the

Act"), for the return of the minor child, OG, ("Oliver"), born on 15 October 2007, to the jurisdiction of the Central Authority, of England and Wales.

The first Applicant is the family Advocate employed as such by the Department of justice and Constitutional Development representing the Central Authority of the Republic of South Africa. The power to act herein has been duly delegated to the first (1st) Applicant in terms of section 4 of the Act.

The second Applicant is the biological father of the minor child concerned in this matter, who (2nd Applicant) is resident in the United Kingdom. The Respondent is the biological mother and wife to the second Applicant. The second Applicant and the Respondent were married to one another on 30 June 2003. Oliver is a child born between second Applicant and the Respondent.

The Hague-Convention on the civil aspects of International Child Abduction Act adopted on 25 October 1980 at Den Hague, forms the underlying basis of this application.

The Central Authority of the Republic of South Africa ("the first applicant") received a request from the contracting state, and more specifically the Central Authority for England and Wales, for the return of the minor child, in terms of the convention. The application is premised on Article 3 of the convention. The Applicants contend that the minor child, Oliver, was wrongfully removed from Oliver's place of habitual residence, the United Kingdom, on 3 February 2009 and is retained by his mother, Loni George ("'the Respondent"), in South Africa. This is denied by the Respondent.

It is common cause that the Respondent and the minor child have been living in South Africa under the jurisdiction of this Court since during or about the 3rd of February 2009.

The second Applicant contends that it was agreed between him and the Respondent that the Respondent and Oliver would travel to South Africa on 03 February 2009 to attend a family wedding and would return to the United Kingdom after the wedding on 28 February 2009; refer FA par. 26 pl6 of the paginated papers ("the papers"), second Applicant's statement in Annexure "BM2" to the FA, p30 of the papers.

In his statement aforesaid, p30 of the papers, the second Applicant states as follows: "Approximately early January, Mrs George and I had an argument and separation was discussed. We have had many arguments in the past and when big enough, Mrs George has gone to South Africa to see her parents. Although the flight was booked following this argument we continued with life. The flight was booked with a 6 month return, we did this so she had flexibility for her return as we know that she has many friends and family that she would like to catch up with before coming home. We went shopping together, ate together and everything seemed to have calmed down. On her flight day February 3rd 2009 we drove calmly to the airport, we had bought a new phone so we could talk from either side of the departure gates, had lunch and again all seemed well. I was given the impression that she would be returning following her aunt's wedding which was on 28 February 2009. However she has become despondent and is refusing to return with our son, despite many conversations (mostly heated) and emails. It was only days after she landed that my wife announced that our marriage was over and she would not return with our son. In the meantime it is apparent that this was somewhat orchestrated as personal things like DVD's have been removed while leaving their cases so I did not become suspicious. Mrs George

has been to South Africa several times with our son in the past and has always returned without any issues. "(My underlining).

The Respondent is clearly denying that she contravened Article 3 of the convention in any way or form, and avers that the removal of the child was indeed with the consent and with the support of the second Applicant; refer AA par. 2.1.2 pp64-65 of the papers.

The Respondent contends that during early January 2009 she and the second Applicant indeed had an argument and they agreed that they should permanently separate and they further agreed that she (the Respondent) would then return back to South Africa with Oliver; refer AA par. 9. 2 pp86-87 of the papers.

It is trite that in order to succeed with an application under the convention the Applicants need to convince the court, on a balance of probabilities, that the convention was contravened in that the Respondent "wrongfully removed" the minor child from the state where the minor child was "habitually resident" immediately before the removal there from.

As already stated above, the Respondent is denying that she contravened Article 3 of the convention in any way whatsoever, and avers that the removal of the minor child was indeed with the consent and with the support of the second Applicant. The second Applicant concedes that Oliver was removed from England to South Africa with his consent; refer RA par. 5.3 pl26 of the papers.

It is significant to state further that, the relief claimed by the Applicants, can only be granted if the Applicants can show, that the relief sought in terms of Article 12 of the convention, as is

required in Article 3 of the convention, has the effect, that the minor child is being withheld, in contrast with the "rights the second Applicant had, by way of legislation, alternatively rights actually exercised". In terms of Article 3 of the convention, "The removal or retention of a child is to be considered wrongful where-

a. it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the state in which the child was habitually resident immediately before the removal or retention; and
b. at the time of removal or retention those rights were exercised, either jointly or alone, or would have been exercised but for the removal or retention. The rights of custody mentioned in sub-paragraph a above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State. "

In terms of Article 13 of the convention, "notwithstanding the provisions of the preceding Article fi.e. Article I2f, the judicial or administrative authority of the requested state, [therefore the Republic of South Africa in this case], is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that:

a. the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal of retention; or
b. there is a grave risk that the child's return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. "

Basically, the Respondent relies, amongst others, on the provisions of Article 13(a) and (b) for her defence. The onus is borne by the Respondent in this regard; refer Smith v Smith 2001 (3) SA 845 (SCA) at 851[par 11]; Pennello v Pennello 2004 (3) SA 117 at 138 [par 38].

If one has regard to the facts/evidence set out in the papers/affidavits, including the second Applicant's statement aforesaid, set out on page 30 of the papers, the following facts can be established:

■ That the parties frequently had arguments, and mostly "heated" as declared by the second Applicant.

■ That the Respondent frequently travelled with the minor child, for extended periods to South Africa, especially after the "heated" arguments between the parties.

■ That during all this time the minor child was solely under the care of the Respondent.

■ That shortly before the Respondent left for South Africa, more specifically in or around January 2009, the parties had an argument and discussed their separation.

■ That according to the second Applicant himself, the Respondent's flights were booked immediately following the argument aforesaid [after the parties had discussed separation], with a six (6) months' return, allegedly so that she (the Respondent) had flexibility for when she needed to return. This evidence is contradicting the evidence of the first Applicant, in paragraph 26 on page 16 of the papers where it is stated as a fact that the Respondent would return after her aunt's wedding on 28 February 2009.

■ That the second Applicant had no problem in at least agreeing on being separated from the minor child, for a period of at least six (6) months.

■ That the second Applicant was under the "impression" that the Respondent would return, as she always returned in the past after she had come to South Africa following an argument between the parties.

The second Applicant's evidence aforesaid as such, somewhat supports the Respondent's evidence; refer to par. 4.14 p78 of the papers, where the Respondent declares as follows:

"The second Applicant and I regularly had heated arguments and on or about early January 2009 we decided to separate and divorce one another. The second Applicant indicated that he is of the view that I should institute the proceedings in South Africa as I would be returning to my country of birth, with our son. This fact was never in dispute. The second Applicant knew all along that I felt trapped, never settled in the UK and always wanted to return to my country of birth. "

The Respondent further avers that it was always her clear intention that she and the minor child, would be returning to South Africa on a permanent basis, and the Second Respondent is the one who paid for their tickets; refer par 4.15 pp 78-79.
According to the Respondent- the second Applicant accepted this, at that point in time, and she contends that he therefore consented in no uncertain terms to the Respondent removing the parties' minor child with her. The Respondent denies ever having returned to South Africa under "false pretence".

The Respondent avers that she initially booked her airplane tickets as this so called "open ended" tickets, with a six (6) months' window as this costs the same as a one way ticket. She declared that this was never done as a sign or fact that she would be returning, but was done, in her view, because of the practicality and further that she had stated that if she at any stage should agree to reconcile, the return might be possible.

It is clear from the facts that the Second Applicant in the first place consented to the child being removed by the Respondent. It is clear, from the papers that the Second Applicant only realized, that no reconciliation would be possible, after the Respondent had left the UK.

It is common cause that sometime in March 2009 the second Applicant and the Respondent discussed divorce [through skype], and even agreed on the division of their assets and custody of Oliver; refer AA par. 2.3.3, p67, par.4.19-4.23, pp81-83 of the papers, RA par. 8.1-8.2 pl28 of the papers. The Respondent contends that the second Applicant clearly consented to the removal of the minor child, on a permanent basis, after agreeing to a divorce.

The Respondent annexed confirmatory affidavits to the effect that her parents were also aware about the fact that if no reconciliation would be possible, she would be permanently resident in South Africa, with the minor child. Also that her parents heard when she and the second Applicant discussed the divorce and settlement issue on Skype.

The Respondent avers that as instructed by the second Applicant, she consulted an Attorney, Mr Van Wyk, in Klerksdorp, and that the attorney had a telephonic discussion with the second Applicant. She further avers that at no stage did the second Applicant allude to any of the allegations made in his application, nor did he indicate to attorney Van Wyk that he was not satisfied with the arrangement or that the Respondent had allegedly "abducted" the minor child; refer AA par. 4.23 on p83.

The Respondent contends that the second Applicant might have subjectively placed his hopes on reconciliation, despite his consent. She further contends that the fact that he (the second Applicant) declares that he was under the "impression" that the Respondent would

return, and did not know this as a fact, supports the contention of "consent".

Further grounds for opposing the application have been set out by the Respondent, amongst others, as follows [more particularly on grave risk of harm:

"...the Second Applicant in fact did not fulfil the role of primary caregiver to our child, and never has..... our minor child does not have a very close bond with the second Applicant, and received very little attention from him. " Refer par.2.2.3 p66 of the papers.

The Respondent further contends that it would not be in the minor child's best interest if he were to be placed in the care of the second Applicant in that the second Applicant would not be able to care for the minor child physically, nor emotionally; also that Oliver would suffer grave psychological harm if he were to be removed from her care, it would be traumatic for him (Oliver). Refer par.4.27 p85 of the papers.

The Respondent further contends that the minor child would suffer grave psychological harm and would be placed in an intolerable situation, in that (as summarized in the Respondent's heads of argument):

■ The minor child is still of tender age.

■ The second Applicant has never cared for the minor child.

■ The second Applicant would not be able to care for the minor child physically.

■ The second Applicant has formed no emotional bond with the minor child whatsoever.

■ The Respondent has always been the minor child's primary caregiver and caretaker, and no emotional bond exists between the second Applicant and the minor child.

■ The second Applicant has no support system whatsoever to enable him to care for the minor child.

■ The second Applicant refused all along to contribute financially to the minor child's maintenance needs.

These accord with the evidence set out by the Respondent in her Answering Affidavit ("AA"). The following appears from the second Applicant's Replying Affidavit ((RA");

In the RA par 8.1 on pl28 of the papers, the second Applicant avers that he did concede that the parties should obtain a divorce although he (the second Applicant) states that he was emotionally charged; the Respondent contends that it cannot be disputed that the second Applicant accordingly acquiesced to the retention of the minor child.

The second Applicant avers in the RA par 8.4 on pl29 of the
papers that in matters regarding the Hague-convention, the best interest of the minor child test is "not applicable ". In the matter of Senior Family Advocate Cape Town and another v Houtman 2004 (6) SA 274 at 286, NC Erasmus J held:
"Two points can be made in this regard. Firstly South African courts are compelled to place particular emphasis on the best interest of the child, not only because of their role as upper guardian of all minors but also because of the constitution Act 108 of 1996. Section 28(2) of the Constitution states that: A child's best interests are of paramount importance in every matter concerning the child.

The drafters of the convention have made provision for the reference to the law of independent states with the insertion of Article 20, which states that:

the return of the child under the provisions of Article 12 may be refused if this would not be

permitted by the fundamental principles of the requested state relating to the protection of human rights and fundamental freedoms ". Compare Sonderup v Tondelli and another 2001(1) SA 1171 (CC) at ppl 184-1186.

The Applicants maintain that the minor child was "habitually resident" in the United Kingdom, refer RA par. 11.4, pl30. According to the second Applicant this is based upon the fact that the minor child was born in the United Kingdom and has lived there all his life. The Applicants further contend that the Second Applicant was exercising custody at the time the minor child was removed from the UK in that the parties are still married to each other and both have parental responsibility to the minor child.
The Respondent contends that she (the Respondent) was the primary caretaker and that she (the Respondent) has lived apart from the second Applicant during numerous periods of their marriage, as the parties' marriage was in turmoil and the Respondent often returned to South Africa [with Oliver, when their arguments were "big enough" per second Applicant].

In the matter of Senior Family Advocate Cape Town and Another v Houtman 2004(6) SA 274 (C) at 282 it was held that "it is clear that habitual residence must be determined by reference to the circumstances of each case "; that "the word 'habitual' implied a stable territorial link; this may be achieved either through length of stay or through a particular close tie between the person and the place and connoted something which will not be temporary. " Refer also Central Authority (SA) v A 2007 (5) SA 501 (W) at 510 where it was held that "habitual residence...is dependent on the habitual residence of the parents. Where the parents do not have a common habitual residence, the habitual residence of the child follows that of the parent with whom he has a home at the time. "

The second Applicant further contends on page 130, that he has a strong bond with Oliver, In this regard he annexed to his RA statements by his colleagues and friends to confirm this, as evidence, however, such statements are not under oath and thus cannot be regarded as evidence but merely as hearsay evidence.

It is important to note that the second Applicant contradicts his own evidence, in denying that he ever agreed to separate and divorce, refer RA par. 12.6 on page 131, whilst in par. 8.1 p 128 he concedes that he did agree.

It is also important to note a significant factor, that the second Applicant has denied the Respondent and the minor child, which he professedly so deeply cares for, and has such a strong bond with, any funds whatsoever for subsistence. The second Applicant avers that he has been advised by "a solicitor'" in England not to send the Respondent any maintenance for the minor child. The Respondent contends that such advice can in no terms be regarded as being in the best interest of the minor child, that it is indicative of the lack of bona fides and commitment by the second Applicant, and should be considered with suspicion.

Having regard to the totality of the evidence before this court, and on the facts before this court as well as on the authorities referred to by the parties, which I have duly considered, I am satisfied that the minor child's habitual residence before coming to South Africa with his mother on 03 February 2009 was in the United Kingdom (UK), where he resided with both his parents. Further, I am prepared to accept that the parties having been married and having lived together with Oliver in the UK as at 03 February 2009 aforesaid, the second Applicant, if one adopts the English concept of custody in convention matters, viz. parental responsibility towards the child, enjoyed custody in terms of the provisions of the convention, in that there is

no evidence that he did not contributed to the maintenance of Oliver while the Respondent and Oliver were still in the UK. This in my view amounts to parental responsibility.

However, from the facts it is clear to this court that prior to the Respondent and the minor child leaving the UK for SA, there was an agreement to separate, followed by an agreement to divorce; further I am satisfied on the facts set out above that the second Applicant had consented to Oliver living permanently in South Africa with his mother.

It is appalling that these proceedings were initiated by the second Applicant merely a day after he had spoken to the Respondent's then attorney of record confirming the terms of the divorce, which he had agreed with the Respondent, including that the Respondent would take custody of Oliver. The fact that the second Applicant also contradicts himself on this aspect, as already stated above, is indicative of the fact that he is not playing open cards with the court. He may have harboured hopes that "as usual" the Respondent would return to the UK despite the parties having finally agreed on separation and divorce, including Oliver' custody; this, however, does not detract from the fact that they had agreed on the terms of the divorce and he had confirmed these with Van Wyk. Nowhere during these discussions did the second Respondent raise the issue of "abduction" and/or his objection to the minor child being in South Africa with his mother. The second Applicant, in my view, is not genuine in these proceedings.

Interestingly, even if one were to accept that the parties had not agreed to separation, divorce and custody issues as alleged by the second Respondent, he, on his own version, was prepared to stay away from his son, who was only 17 months old at the time, for at least six (6) months. This is not indicative of the "close bond" he alleges to have with Oliver.

I find it disturbing that the First Applicant states in her Replying Affidavit that "the second Respondent is under extreme stress and anxiety as a direct result of the retention of the minor child in South Africa." Refer RA par 5.2 pi 19. how can this be so since the Second Respondent, on his own version was prepared to stay for at least six (6) months without seeing his young child! I think that it is imperative that the Central Authority represented by the first Applicant herein should strive to stay as objective as possible in these matters, and not create an impression that he/she is subjective. Basically the fight in these matters is between the parties concerned and the first Applicant is merely a facilitator in terms of the convention.

The other worrying factor raised in the papers, the first Applicant contends in her FA that during mediation proceedings the Respondent agreed to voluntarily return Oliver to the UK, which aspect is vehemently denied by the Respondent and her former attorney. There is mention by the Respondent of a social worker who was present during the mediation process, the first applicant is silent on this aspect, despite having had the opportunity to deal with this aspect in her RA, she simply did not deal with it, no confirmatory affidavit/reports from the social worker, to whom the first Respondent had access, were annexed to the papers. This makes the court wonder if the first Applicant was being candid to the court.

Be that as it may, returning back to the issues before court, on the facts before court I am also satisfied that the minor will be exposed to grave risk of harm if he were to be returned to the second Applicant. The second Applicant does not portray the best interests of this child at heart. Also, there is undisputed evidence that since the child has been in South Africa has health has improved tremendously; this is of utmost importance and cannot be

ignored.

On all the facts before court I am not satisfied that the Applicants have made out a case for the order sought in terms of the convention.

In the result the application is dismissed with costs. Such costs, including the costs of the previous postponements are to be borne by the second Applicant.

L M MOLOPA-SETHOSA

JUDGE OF THE HIGH COURT