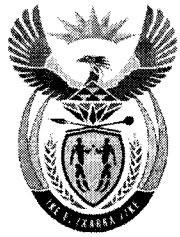

IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE HIGH COURT, CAPE TOWN

Case no: 17845/2012

In the matter between:

N F Applicant

v

M C Respondent

Court: Acting Judge J I Cloete

Heard: 15 and 19 November 2012

Delivered: 27 November 2012

JUDGMENT

CLOETE AJ:

Introduction and legal framework

[1] This application is brought by the applicant father against the respondent mother in terms of the Hague Convention on the Civil Aspects of International Child

Abduction 1980, as set out in the Schedule to the Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996 (*'the Hague Convention'*) for the summary return of the parties' minor child M, a girl currently aged 6 months, to Atlanta, United States of America (*'USA'*).

[2] The applicant also seeks an order that he or an appointee be granted leave in the event that the respondent elects not to return to the USA, to remove M from her care and to return her to the USA, together with the costs of this application.

[3] The basis of the relief sought by the applicant is that he did not consent to M residing in South Africa beyond 29 December 2012 and that accordingly she has been, or will be, wrongfully retained by the respondent if she is not returned to the USA by that date within the meaning of articles 3 and 12 of the Hague Convention.

[4] Article 3 provides that:

> *'The removal or the 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 actually exercised, either jointly or alone, or would have been so 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.'*

[5] Article 3 thus sets out the jurisdictional prerequisites which an applicant is required to establish before a court may consider whether the removal or retention of a child is to be considered wrongful. These are that: (a) the child was habitually resident in the other State; (b) the removal or retention constitutes a breach of custody rights; and (c) the applicant was actually exercising such rights (either jointly or alone) at the time of removal or retention, or would have exercised such rights but for the removal or retention.

[6] Article 12 provides *inter alia* that where a child has been wrongfully removed or retained in terms of article 3 and, at the date of commencement of the proceedings for the child's return, a period of less than one year has elapsed from the date of the wrongful removal or retention, the judicial or administrative authority of the contracting State concerned shall order the return of the child forthwith. In the present matter the applicant alleges that the wrongful retention was conveyed to him on 21 August 2012. He commenced proceedings in this court on 13 September 2012.

[7] The question of onus in Hague Convention cases was summarised by Scott JA in *Smith v Smith* 2001 (3) SA 845 (SCA) at para 11 as follows:

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

[emphasis supplied]

[8] Article 13 provides *inter alia* that notwithstanding the provisions of article 12 the judicial or administrative authority of the requested State 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 applicant was not actually exercising custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or (b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. Article 20 is not relevant to a determination in the present matter since it has not been raised as a defence by the respondent.

[9] What must be borne in mind is that in evaluating whether the applicant and the respondent have each discharged the onus resting upon them as outlined in *Smith supra*, the well-established *Plascon-Evans* rule (*Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635C) nonetheless still applies. Accordingly, in motion proceedings where a court is confronted by disputes of fact, a final order may only be granted if those facts averred in the applicant's affidavits that have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order.

[10] As to a respondent's version in motion proceedings it can only be rejected where the allegations made –

...fail to raise a real, genuine or bona fide dispute of fact...[or] *are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers...*

Practice in this regard has become considerably more robust, and rightly so. If it were otherwise, most of the busy motion courts in the country might cease functioning. But the limits remain, and however robust a court may be inclined to be, a respondent's version can be rejected in motion proceedings only if it is "fictitious" or so far-fetched and clearly untenable that it can confidently be said, on the papers alone, that it is demonstrably and clearly unworthy of credence.' [emphasis supplied]

Fakie NO v CCII Systems (Pty) Ltd 2006 (4) SA 326 (SCA) paras 55-56.

[11] In *Pennello v Pennello (Chief Family Advocate as Amicus Curiae)* 2004 (3) SA 117 (SCA) at paras 40-41 Van Heerden AJA (as she then was) found as follows:

'[40] I am in agreement with the argument of counsel for the appellant that the Full Court erred in departing from the well-known Plascon-Evans rule as applied in the Ngqumba case with regard to disputes of fact in proceedings on affidavit. As indicated above, the Convention is framed around proceedings brought as a matter of urgency, to be decided on affidavit in the vast majority of cases, with a very restricted use of oral evidence in exceptional circumstances. Indeed, there is direct support in the wording of the Convention itself for return applications to be decided on the basis of affidavit evidence alone, and courts in other jurisdictions have, in the main, been very reluctant to admit oral testimony in proceedings under the Convention. In incorporating the Convention into South African law by means of Act 72 of 1996, no provision was made in the Act or in the regulations promulgated in terms of section 5 thereof indicating that South African courts should not adopt the same approach to proceedings under the Convention as that followed by other Contracting States. In accordance with this approach, the Hague proceedings are peremptory and "must not be allowed to be anything more than a precursor to a substantive hearing in the State of the child's habitual residence, or if one of the exceptions is satisfied, in the State of refuge itself".

[41] As counsel for the appellant pointed out (correctly, in my view), there is no reason in law or logic to depart, in Convention proceedings, from the usual approach to the meaning and discharge of an onus in civil law and from the application of the Plascon-Evans rule to disputes of fact arising from the affidavits filed in such proceedings.' [footnotes omitted]

[12] The respondent opposes the application on the following grounds:

12.1 Even if the applicant's version is to be preferred the application is premature since it is based on an anticipatory breach. This defence thus only requires consideration if the applicant's version is indeed preferred;

12.2 The applicant consented to M remaining in South Africa until the respondent is granted an O-1 Visa which will entitle her to both live and work in the USA and that such visa has not yet been granted (i.e. article 13(a));

12.3 There is a grave risk that M's return to the USA, at least without the respondent, would expose her to physical and/or psychological harm or otherwise place M in an intolerable situation (i.e. article 13(b)).

[13] As regards the onus that rests upon the applicant to establish the three jurisdictional prerequisites to which I have referred, it is common cause that M was born in the USA on 10 May 2012 and that she travelled to South Africa on 28 June 2012. It is not seriously disputed by the respondent that M was habitually resident in the USA prior to her arrival in South Africa, albeit for an extremely short period, due to her infancy. It is also not in dispute that at the time of her alleged wrongful

retention by the respondent the applicant was jointly exercising his rights of custody with the respondent. The crux of the dispute is whether there has been a wrongful retention in breach of the applicant's rights of custody. That in turn involves a consideration of whether, applying the legal principles to which I have referred, the respondent is in breach of article 3. If that is established but the respondent is successful in establishing a defence in terms of article 13 this may result in an order that the child will not be returned.

[14] In *RE: A and Another (minors) (abduction: acquiescence)* [1992] 1 All ER 929, Lord Donaldson at 941 b - d reaffirmed the purpose of the Convention and the test to be applied. He said:

> *'All this demonstrates the agreed international response to a wrongful removal. The child must go back, the status quo ante must be restored without further ado. That said, the convention does itself enter a caveat which is contained in Article 13. Before I consider whether it applies in this case, it is I think important to emphasise what is the consequence if it does apply. It is not that the court will refuse to order the return of the child to its country or jurisdiction of habitual residence. It is not that the court will assume wardship or similar jurisdiction over the child and consider what order should be made as if the child had never been wrongfully removed or retained. The consequence is only that the court is no longer bound to order the return of the child, but has a judicial discretion whether or not to do so, that discretion being exercised in the context of the approach of the convention.'*

[15] This approach was confirmed by Scott JA in *Smith supra* at para 11 as follows:

'If the requirements of article 13(a) or (b) are satisfied, the judicial or administrative authority may still in the exercise of its discretion order the return of the child.'

[16] The approach to establishing the article 13(a) defence of consent or acquiescence was set out by Van Heerden JA in *K G v C B* 2012 (4) SA 136 (SCA) at paras 37-40 as follows:

'[37] The appellant also raised the defence of consent or acquiescence under art 13(1)(a) *of the Convention, in terms of which the court is not bound to order the return of the child (in other words, it has a discretion in this regard) if the person (or institution or other body) who opposes the return establishes that –*

> "(a) *the person . . . having the care of the person of the child . . . had consented to or . . . acquiesced in the removal or retention.*"

[38] The burden of proof is on the abducting parent and he or she must prove the elements of the defence on a preponderance of probabilities. The consent or acquiescence referred to in art 13(1)(a) *involves an informed consent to or acquiescence in the breach of the wronged party's rights. That does not mean that either consent or acquiescence "requires full knowledge of the precise nature of those rights and every detail of the guilty party's conduct . . . What he or she should know is at least that the removal or retention of the child is unlawful under the Convention and that he or she is afforded a remedy against such unlawful conduct."*

[39] As was pointed out by Hale J in Re K (Abduction: Consent), *"the issue of consent is a very important matter [that] . . . 'needs to be proved on the balance of probabilities, but the evidence in support of it needs to be clear and cogent [because] . . . (i)f the court is left uncertain, then the "defence" under art 13*(a) *fails' [and] it is [furthermore] obvious that consent must be real . . . positive and . . . unequivocal'." In that case, Hale J expressly approved the following view expressed by Holman J in* Re C (Abduction: Consent):

> *"If it is clear, viewing a parent's words and actions as a whole and his state of knowledge of what is planned by the other parent, that he does consent to what is planned, then in my judgement that is sufficient to satisfy the*

> *requirements of Art 13. It is not necessary that there is an express statement that 'I consent'. In my judgment it is possible to infer consent from conduct."*

[40] As regards acquiescence, this court, in Smith v Smith, *agreed with the approach followed by the House of Lords in the case of* Re H (Abduction: Acquiescence). *In that case, Lord Brown-Wilkinson held that:*

> *"Acquiescence is a question of the actual subjective intention of the wronged parent, not of the outside world's perception of his intentions . . . In the process of this fact-finding operation, the judge, as a matter of ordinary judicial common sense, is likely to attach more weight to the express words or conduct of the wronged parent than to his subsequent evidence as to his state of mind. In reaching conclusions of fact, judges always, and rightly, pay more attention to outward conduct than to possibly self-serving evidence of undisclosed intentions. But in so doing the judge is finding the actual facts. He can infer the actual subjective intention from the outward and visible acts of the wronged parent. That is quite a different matter from imputing to the wronged parent an intention which he did not, in fact, possess." '*
>
> [emphasis supplied]

[17] Accordingly whether the applicant consented to M remaining in South Africa beyond 29 December 2012 must be considered on a conspectus of all of the evidence including the applicant's words and actions as a whole.

The factual matrix

[18] The applicant is a US citizen who at the time of institution of these proceedings was employed as an associate professor at the University of Maryland, Washington DC, USA. He shortly thereafter resigned from this employment and states that he is returning to a full time position at the Georgia Institute of Technology, Atlanta, USA (*'Georgia Tech'*) in January 2013.

[19] The respondent is a South African citizen who since her arrival with M in South Africa on 28 June 2012 has been residing at her mother's home in Camps Bay, Cape Town.

[20] During August 2005 the respondent commenced a PhD program at Georgia Tech, having been the recipient of a Fulbright Scholarship. She entered the USA on a J-1 visa which allowed her to complete a PhD and certain post-doctoral work. Upon the expiry of a J-1 visa one is obliged to return to one's domicile of origin for a two year period, which is a condition precedent for any further immigration or work visa application to the USA. The respondent's J-1 visa expired on 1 September 2012.

[21] The respondent states that it has always been her intention to pursue and further her academic career in the USA and to seek employment as an associate professor at an appropriate institution there after completion of her PhD. On 3 November 2009 and prior to her dating the applicant the respondent applied for a J-1 visa waiver of the 2 year home residency requirement in order that she might, upon completion of her PhD, immediately commence such employment. These allegations are not denied by the applicant.

[22] The respondent also states that after meeting the applicant she decided to take a one year post-doctoral position at Georgia Tech so that they would not have to live apart. The parties were subsequently married in Atlanta on 3 April 2011. In July 2011, after she had already commenced her employment at Georgia Tech, the respondent was informed that her J-1 visa waiver request had been denied.

Accordingly from this date the applicant knew that, upon expiry of her J-1 visa, the respondent would have to return to South Africa for a two year period in order to qualify for an immigration or work visa in the USA. Again these allegations are not denied by the applicant. In fact he concedes that upon expiry of her J-1 visa the respondent was obliged to return to South Africa.

[23] It was at about the same time that the respondent was informed of her J-1 visa waiver refusal that she learned of the possibility of applying for an O-1 visa. This is a non-immigrant visa and although it is available to persons of *'extraordinary ability'* it is granted to few applicants and is certainly not guaranteed.

[24] During August 2011 the parties thus consulted with a US immigration lawyer, Mr Bruce Hake (*'Hake'*). The respondent was advised by Hake that she might well meet the requirements of an O-1 visa and she accordingly signed a contract with him to retain his services. The parties each paid 50% of Hake's retainer fee. The respondent also learned from Hake that one can only apply for an O-1 visa from one's country of origin, thus necessitating her return to South Africa in any event in order for her to process that application.

[25] None of this is denied by the applicant save that he states that his understanding was that the respondent would apply for her O-1 visa before her J-1 visa expired, i.e. prior to her return to South Africa and that *'the transfer between the two visas did not require her to leave the country for an extended period of time'*. This was raised by the applicant for the first time in his replying papers. In addition and

although he does not allege that this was ever agreed or at any stage even contemplated by the parties, the applicant (again for the first time in his replying papers) claims that it is possible for the respondent to return to the USA on a tourist visa (which will enable her to enter the USA for 90 days at a time) and to then apply for her O-1 visa whilst in the USA. Notably the applicant does not allege that it was ever within the contemplation of the parties that the respondent would return to the USA other than to live and work there. Neither of these would be possible if the respondent is not in possession of the requisite visa. It is common cause that a tourist visa will not enable the respondent to either live or work in the USA.

[26] Marriage to the applicant does not waive any of the stipulated visa requirements for the respondent, of which the applicant is fully aware.

[27] The respondent states that it was always her intention to move to an institution other than Georgia Tech after graduating with her PhD. There is a dispute about why the respondent left Georgia Tech. What is not in dispute is that after numerous interviews she was offered a position as an assistant professor at the School of Information, University of Maryland, Washington DC as from 1 January 2013, subject of course to her visa requirements being regularised. Her employment contract was signed on 31 May 2012. It is also not in dispute that the respondent could not begin her application for an O-1 visa until she had secured employment, since the O-1 visa is employment sponsored. It is noted that the employment contact annexed to the respondent's papers stipulates a term of employment from 1 January 2013 until 22 May 2016. The applicant was also successful in securing a position as a professor

at the University of Maryland and commenced his employment there as from August 2012. As I have said the applicant states that he resigned from this employment in September 2012 and that he will be returning to Georgia Tech as from 1 January 2013.

[28] M was born in the USA on 10 May 2012. During the first week of her life she developed symptoms and was diagnosed with Gastro-Oesophageal Reflux Disease (*'GORD'*), an extremely rare condition that includes severe projectile vomiting episodes through the nose and mouth, inability to breathe, inability to lie flat, a hoarse voice from oesophagitis and back pain. Aside from medication three times a day, M requires full-time, around the clock care, comfort and support. She needs small, frequent meals, and must be breastfed between 8 to 12 times per day. To reduce the incidence of reflux after a feed, she must be held upright for a minimum period of 30 minutes for gastric emptying to occur. She cannot lie flat at any time and must sleep at a 30 degree incline.

[29] The respondent states that it was due to M's condition and the respondent's need for assistance in caring for M that she returned to South Africa sooner than planned. Although the applicant states that the respondent could have remained in the USA until expiry of her J-1 visa since he had offered to pay for assistance and that the early return was at the insistence of the respondent and her mother, nothing much turns on this since the fact of the matter is that the parties agreed that the respondent would travel to South Africa with M on 28 June 2012. Importantly, and for the first time in his replying papers, the applicant also states that:

'Furthermore, we anticipated that she would obtain her O-1 visa at least by the latest in December 2012 (coincident with her 1 January 2013 start date at the University of Maryland), thus the decision to purchase return tickets to the USA.'

[emphasis supplied]

[30] The respondent claims that it was expressly agreed between the parties that she would remain in Cape Town with M until she is issued with an O-1 visa to allow her to return to the USA to take up her position as assistant professor at the University of Maryland. At the same time the applicant is well aware that if she does not obtain the necessary O-1 visa, she will have to apply for an immigration or work visa. This being the case she will be unable to return to the USA for at least a two year period and will thus obviously not be in a position to take up any USA employment during that time.

[31] The applicant denies any such express agreement. On the contrary, he alleges that it was expressly agreed that the respondent and M would not remain in South Africa beyond 29 December 2012. What the applicant however fails to explain is why, on his own version, the return tickets were purchased by him for respondent and M for 29 December 2012 only because it was anticipated, not agreed, that the respondent would obtain her O-1 visa at least by the latest December 2012.

[32] The applicant's explanation for why the return tickets were booked for 29 December 2012 appears consistent with the respondent's allegation that at the time the tickets were booked the parties were unaware of how long it would take for her to obtain her O-1 visa, and since her employment at the University of Maryland

was due to start on 1 January 2013, it was felt prudent to book the tickets for December 2012 on a *'wait and see basis'*.

[33] The respondent states that there are a myriad requirements in order to submit a successful application for an O-1 visa, and that she, together with Hake, are in the process of accumulating the vast array of documentation and information that is required. Given the time constraints and the full time attention that M requires, she will only be able to make the application in January or February 2013. She states that she was accordingly left with no option but to inform the University of Maryland that she would not be able to take up the position on 1 January 2013 and it has now been agreed that, subject to the respondent being issued with the appropriate visa, her employment will instead commence with the University of Maryland on 23 August 2013. The revised contract annexed to the respondent's papers reflects that she signed this document on 31 July 2012 and that it was signed by the university's representative on 20 August 2012. The revised term of employment commences on 23 August 2013 but still terminates on 22 May 2016.

[34] However also annexed to a supplementary affidavit filed by the respondent is a letter from Hake's office dated 3 October 2012 detailing the instructions for the O-1 visa. It has not escaped my notice that despite the respondent claiming in her earlier answering affidavit that she was in the process of accumulating the documentation and information required for the application, the aforementioned affidavit was deposed to on 2 October 2012, i.e. a day before Hake's letter of instruction arrived. In addition and in response to a communication from Hake's office dated 22 June 2012

informing the respondent that work had started on her *'instructions package'* the respondent informed Hake's office that:

> *'Secondly, there is no additional rush on my side on the petition* [i.e. the visa] *as my daughter requires time to heal from her current condition and I am going to use the time in my home country to take advantage of family support. My job currently starts on 1 January 2013 but I can push the start date back if necessary, depending on how long the visa process takes (and how my daughter's condition improves).'*

[35] It seems therefore that the respondent did not consider that it was incumbent upon her to act promptly after her arrival in South Africa to take the necessary steps to process the O-1 visa application in the hope that it would be issued by 29 December 2012. On the one hand this may be indicative of the respondent deliberately dragging her heels; however on the other, and from certain communications to the respondent from the applicant himself, it appears that although ideally he would have liked the respondent and M to return on 29 December 2012 there was no suggestion that if the respondent did not return with M by that date she would be in breach of any agreement between them.

[36] The communications to which I have referred are as follows:

36.1 On 19 July 2012 the applicant wrote:

> *'In general, it would be really nice if you can keep me a bit more up to date on what is going on with you. I would like to know when you plan to file the visa paperwork for your return so that I can plan housing arrangements for us in DC, as well as sorting out other things, such as cars, finding a nanny for M, sorting out insurance, etc.'*

36.2 On 21 July 2012 the applicant wrote:

'Hope you can get the visa a bit sooner. Maybe you can start in the beginning of next summer.' [i.e. approximately May 2013]

36.3 On 26 July 2012 the applicant wrote:

'Hope you can come back by December.'

[37] The applicant's first visit to South Africa after the respondent's return was on 18 August 2012. Three days after his arrival and on 21 August 2012 the respondent caused a summons commencing a divorce action issued out of the Western Cape High Court, Cape Town to be served on him by the sheriff. This came as an utter shock to the applicant and he was devastated. On the same day and after he had composed himself he approached the respondent. He states that she informed him that she did not intend to return to the USA and she did not intend to return M to *'her home in Atlanta'.* In this regard it is noted that at that stage it had been the intention of the parties to reside together, not in Atlanta but in Washington DC, which is where they had both secured employment. The respondent denies that she at any stage informed the applicant that she did not intend to return to the USA. She also points out that she would not have mentioned Atlanta since it was no longer to be their place of residence.

[38] The applicant returned to the USA about four days later. On 28 August 2012 (i.e. a week after he had received the respondent's divorce summons) the applicant himself instituted divorce proceedings out of the Superior Court of Fulton County,

Georgia. In the aforementioned petition the applicant:

38.1 incorrectly claimed that the respondent sought custody of M in the South African divorce proceedings (the respondent in fact sought orders that the parties would remain co-holders of parental responsibilities and rights albeit that she would be the parent of primary residence);

38.2 stated that the respondent had advised him that she did not intend to return to the USA as his wife (something quite different to the allegation made in his papers in the present matter that the respondent had advised him that she did not intend to return to the USA at all);

38.3 sought both temporary and *'permanent legal custody'* of M;

38.4 claimed that he is entitled to *'temporary child support'* from the respondent pending a determination of *'permanent child support"*; and

38.5 sought an order that M immediately be placed in his primary care in the USA.

[39] There is not a single allegation to be found in the applicant's petition to the effect that the respondent has breached any agreement, let alone an express agreement that no matter what the respondent would ensure M's return to the USA on 29 December 2012. On the contrary, the applicant says the following in the petition:

At paragraph 8 thereof:

> *'The Petitioner shows that some time in late May, 2012 the parties discussed the prospect of the respondent travelling to Cape Town with the Minor Child for an extended visit with her mother and family. As a result of the discussion the parties obtained two round trip tickets from Atlanta to Cape Town for the Respondent and the Minor Child. The tickets were for a June 28 departure and a December 29 return…'*

At paragraph 12 thereof:

> *'Stunned by the Sheriff's delivery* [i.e. the service of the South African divorce summons] *the Petitioner retreated to a room in his mother-in-law's home where he could consult with members of his family by telephone. After approximately two hours on the telephone, the Petitioner emerged from the room and Petitioner spoke directly to his wife. It was at this time that she advised him that she did not intend to return to the United States as his wife and that she did not intend to return the Minor Child to her home in Atlanta…'*

And at paragraph 17 thereof:

> *'Upon information and belief Petitioner now believes that the Respondent fraudulently induced him to permit her to remove the Minor Child from her home in Atlanta without the Respondent having any intention of returning to the United States and carrying on the marriage….'.*

[40] Two weeks after instituting divorce proceedings in the USA the applicant launched the present application. He states that it was only upon receipt of the respondent's answering affidavit that he became aware that she had signed a revised contract with the University of Maryland, extending her start date to August 2013. This is denied by the respondent who states that it was with the applicant's full knowledge and consent, obtained on 26 July 2012, that she signed the revised contract. Although there is no written record of the applicant's consent, he himself

states that since 28 June 2012 and at least until the South African divorce summons was served on him, he and the respondent maintained not only email contact but also telephonic and Skype contact.

[41] Furthermore and on 21 August 2012 (i.e. the date upon which the South African divorce summons was served on him) the applicant called Hake's office and told him that she (i.e. the respondent) required him to stop working on her visa application and requested a refund of the retainer fee paid. The applicant admits having contacted Hake's office but claims that he advised Hake's secretary that he wished to have only his portion of Hake's retainer repaid to him. He also claims that he subsequently called Hake *'to clarify'* his request to have his portion of the retainer refunded and to ensure that the respondent's application was still proceeding.

Whether a breach has been established

[42] The question that now needs to be answered is whether against this background the applicant has met the jurisdictional prerequisite of a breach of his rights of custody in the sense of a wrongful retention. Inextricably linked to this enquiry is whether the probabilities favour the version of the respondent since in accepting her version above that of the applicant's there can be no wrongful retention and thus no breach of the applicant's rights of custody.

[43] Inherent in the applicant meeting this jurisdictional prerequisite is him being able to satisfy this court that it was expressly agreed between the parties that, irrespective of the circumstances in which the respondent found herself pertaining to

her visa application, M would be returned to the USA on 29 December 2012. Even on his own version and at best for the applicant, it was not agreed, but only anticipated, that the respondent would obtain her O-1 visa at least by the latest in December 2012. Further it is common cause that the respondent cannot live and work in the USA without such a visa unless she waits out the two year home residency period which will expire in June 2014. It has also not been suggested by the applicant that it was ever within the contemplation of the parties that in the event of the respondent not obtaining her visa by 29 December 2012: (a) she would return to the USA on a 90 day tourist visa which does not permit her to work there; and (b) M, who would have only been about 6 weeks old when she travelled to South Africa on 28 June 2012 would have been handed over by the respondent to the applicant on 29 December 2012 despite her fragile state of health and the round the clock care that she requires. In addition, the allegations made by the applicant in his papers in the present application regarding the crucial issue of what was conveyed to him by the respondent on 21 August 2012 (i.e. an alleged blanket refusal to ever return to the USA) are entirely at odds with what was contained in his divorce petition issued only a week after that communication (i.e. that the respondent had advised him that she did not intend to return to the United States as his wife and that she did not intend to return M to her home in Atlanta).

[44] These factors, taken together with the respondent's version as detailed above and the undisputed content of the applicant's own communications to her of 19, 21 and 26 July 2012, which clearly indicate that it was also within the applicant's contemplation that the respondent might not return with M on 29 December 2012,

lead me to conclude that the applicant's contention that there was an express agreement that M would return to the USA on 29 December 2012 is without merit.

[45] Rather, the picture that emerges is that the applicant's conduct subsequent to 21 August 2012 was really a knee-jerk act of retaliation against the respondent for having issued divorce proceedings against him.

[46] In accordance with the approach set out in *KG v CB supra* it is my view that more weight should be attached to the express communications and conduct of the applicant in order to infer consent than to his subsequent evidence (as set out in his papers in the present application) as to what he now claims was his state of mind.

[47] It is for these reasons that I find that the application must fail.

Costs

[48] The respondent's counsel submitted that when one has regard to the totality of the evidence, the applicant's assertions of abduction are patently false. These are very serious allegations with far-reaching consequences, not least of all an attempt by the applicant to bolster his position in the USA divorce proceedings. It is noted that in his founding papers the applicant stated:

> *'In the event of this Honourable Court ordering the return of our daughter to the USA I undertake to continue to pursue the issues of custody and contact in regard to our child as indicated in my Petition for Divorce.'*

[49] There is nothing to indicate that the applicant intends changing his stance and I agree with the respondent's counsel that the allegations that he has made indeed have far-reaching consequences for the respondent, not only in regard to the pending proceedings in the USA but also in regard to her application for an O-1 visa.

[50] That having been said however I am not satisfied that a punitive costs order is warranted. Time and again our courts are confronted with serious allegations and counter-allegations made by parties in disputes relating to their children. The seriousness of those allegations is invariably scrutinised in some detail but it is only in the most extreme cases of blatant untruths and misconduct that a court will be inclined to make a punitive costs order. It is my view that the present matter does not fall within that category. However there is no reason why the costs of this application should not follow the result.

Conclusion

[51] **I accordingly make the following order:**

> ***'The application is dismissed with costs, such costs to be paid on the scale as between party and party as taxed or agreed.'***

J I CLOETE