

SOUTH AFRICA / JUDGMENT

MB v LC and Another (21586/2023) [2024] ZAWCHC 61; 2024 (6) SA 546 (WCC) (29 February 2024)

[2024] ZAWCHC 61

COURT

Western Cape High Court, Cape Town

BEFORE

J Cloete

CASE / FILE NUMBER

21586/2023

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FLYNOTES:

FAMILY – Children – Abduction –
Parents
resided in Australia with their two minor children – Planned
extended holiday and relationship problems emerging
in South
Africa – Father contending that mother unlawfully retaining
children in South Africa and seeking their return
to Australia –
Father consented, alternatively acquiesced, to the children
remaining in South Africa while the parties
tried to resolve their
issues – Children happy in South Africa and mother not
impeding their relationship with father
– Application
dismissed – Hague Convention, art 13.
IN
THE HIGH COURT OF SOUTH AFRICA
(WESTERN
CAPE DIVISION, CAPE TOWN)
Case
No: 21586/2023
In

the matter between: MB
Applicant
And
LC
First
Respondent
THE
FAMILY ADVOCATE, WESTERN CAPE
Second
Respondent
(acting
as delegate of the Chief Family Advocate
appointed
as the South African Central Authority)

Coram: Justice J Cloete

Heard: 1 and 6 February 2024
Delivered
electronically: 29 February 2024

JUDGMENT

CLOETE J:

Introduction

- [1] The applicant (father) and first respondent (mother) are the married parents of two minor children, A and H, both boys who are currently 8 and 6 years old respectively. The second respondent (Central Authority, South Africa) did not provide any report or play an active role at the hearing. The children were represented by Ms Bernstein, an advocate in private practice, in terms of an agreed order of 14 December 2023. She filed a report dated 30 January 2024 and made submissions during argument, providing valuable assistance.
- [2] On 29 November 2023 the father launched an urgent application against the mother in terms of the Hague Convention on the Civil Aspects of International Child Abduction (“Convention”)[1] in this court in two parts. In Part A he sought a further conduct order as well as specified interim contact and a prohibition on the mother removing the children from the Western Cape pending the determination of Part B. That resulted in the 14 December 2023 order (which dealt with the further conduct of the matter). In Part B, which came before me, he seeks the following: (a) an order declaring that the children are being unlawfully retained in South Africa in breach of his rights of custody (as defined in article 3 of the Convention); (b) the children’s summary return to their country of habitual residence, Australia, in terms of article 12; and (c) ancillary relief.

- [3] It is common cause that for purposes of the Convention, if it is found to apply: (a) the father has rights of custody in respect of the children together with the mother; (b) the children's place of habitual residence is Western Australia; (c) this court has jurisdiction since the mother and children currently reside in Cape Town; and (d) the children have allegedly been wrongfully retained for a period of less than one year prior to date of commencement of the proceedings in this court.

The parties' respective cases

- [4] In his founding affidavit the father unequivocally alleged, right at the outset, that he never agreed to the mother bringing the children to South Africa to live here. All that was agreed was that the family would visit South Africa for a temporary period between 4 October 2022 and 1 January 2023. Moreover any 'semblance of possible consent' which the father gave to the mother to remain in South Africa with the children (seemingly after their arrival here) terminated on 1 January 2023, and since then the mother has refused to return the children to Australia. This is important since it was the case the mother was called upon to meet.
- [5] The mother opposes the relief sought on the basis that she has not "retained" the children in South Africa, as envisaged in the Convention (or at all) and that the Convention is accordingly not of application. Alternatively, and in the event that it is found she has so "retained" them here she alleges the father had agreed, when he travelled to Western Australia on 1 January 2023, that she and the children would remain in South Africa while the parties sought to reach agreement regarding their long term plans in respect of residency, the children and their financial affairs. Further, to the extent the father alleges that she "retained" the children in South Africa after 17 January 2023 she maintains that he acquiesced thereto. The reference to 17 January 2023, although not the basis of the father's case as I have illustrated above, was the date of the father's request to the mother to book return tickets to Australia.
- [6] It is against this broad factual background that it is appropriate to first set out the applicable legal principles and thereafter the factual matrix.

Legal framework

- [7] 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.’

[8] 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.

[9] 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.

[10] The question of onus and what needs to be established for purposes of article 3 in Hague Convention cases was summarised by Scott JA in *Smith v Smith*[2] as follows:

‘It is apparent from the foregoing 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.’[3]

[emphasis supplied]

[11] 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. Both articles 13(b) and 20 are not relevant in the present matter since they have not been raised as defences by the mother.

[12] In evaluating whether an applicant and respondent have each discharged the onus resting upon them as outlined in *Smith supra*, the well-established *Plascon-Evans* rule (or test)[4] 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.

[13] A respondent's version in motion proceedings 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.[5]

[14] In *Pennello v Pennello* (Chief Family Advocate as Amicus Curiae)[6] Van Heerden AJA (as she then was) held 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 [i.e. the old Act], 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.'

[15] The crux of the present dispute is whether there has been a wrongful retention in breach of the father's rights of custody. That in turn involves a consideration of whether, applying the legal principles to which I have referred, the mother is in breach of article 3. If that is established but the mother is successful in establishing a defence in terms of article 13 this may result in an order that the children will not be returned.

[16] In *RE: A and Another (minors) (abduction: acquiescence)*[7] Lord Donaldson reaffirmed the purpose of the Convention and the test to be applied:

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. ’

[17] This approach was confirmed by Scott JA in Smith supra[8] 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.’

[18] The approach to establishing the article 13(a) defence of consent or acquiescence was set out by Van Heerden JA in KG v CB[9] 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. ” ’

[19] In *Central Authority for the Republic of South Africa and Another v LC[10] Opperman J* applied the test for acquiescence to the facts of that matter as follows:

[77] In my view the evidence in support of a finding that the second applicant acquiesced in the children’s retention in South Africa is overwhelming. All his outward manifestations of his professed subjective intents are at odds with a contrary finding. I therefore conclude that, even if I am wrong in respect of my finding that the second applicant had on 3 December 2019 consented to the removal of the children to South Africa on a permanent basis, the second applicant acquiesced to the children’s retention by the respondent in South Africa.’

[20] One of the factors that a court may take into account is whether, by delaying in instituting Convention proceedings, an applicant can be taken to have acquiesced: *Family Advocate, Cape Town v EM[11]*. In my view, deliberately concealing steps taken to obtain a return from the party against whom such a return is sought should similarly be regarded as an outward manifestation contrary to a later professed subjective intention. I say this because of the father’s

conduct on this score which I deal with later.

[21] It must also be borne in mind that on the facts before me, this case is not about whether the father consented or acquiesced to the children remaining in South Africa permanently, but rather whether he consented or acquiesced to the children not being summarily returned to Australia. Only if he meets this threshold does article 12 come into play. Put differently, if the father cannot show, applying the *Plascon-Evans* test and on a balance of probabilities, that he never consented or acquiesced to the children remaining in South Africa beyond 1 January 2023 for any period at all (which is his case in the founding papers) then there can be no wrongful retention, and the Convention cannot apply. This does not mean that the

mother somehow acquires rights which exclude or limit those of his, but only that the court which will have jurisdiction to determine the arrangements for the children will be a South African,

and not an Australian, court. Of course this may ultimately involve a permanent return order to Australia.

Relevant factual background and discussion

- [22] The parties previously resided with the children in Perth, Australia. In September 2021 they began discussing an extended holiday abroad in at least Europe and South Africa. On 22 May 2022 they purchased one-way tickets to Rome for the four of them, and on 25 June 2022 one-way tickets from Cape Town to Perth with a scheduled departure date of 1 January 2023. This was predominantly because they wanted to be in South Africa in early October 2022 for A's birthday and, in order for the father and children to enter South Africa and obtain 90-day visitors visas (since they are not South African citizens), proof of an onward journey (or return flight) within that 90-day period is required.
- [23] After selling their home the family left Australia on 16 July 2022, arriving in Rome the following day. They travelled a few days later to Cassara where they had the use of the house of the mother's godmother. This was their base while they travelled through Europe, including to Sweden, Greece and Croatia. On 1 August 2022 the father disclosed to the mother he had been having an extramarital affair since at least October 2021. According to the mother he also told her that he was experiencing mental health and alcohol addiction issues. The father admits to disclosing the extramarital affair but denies having told the mother he had issues of any sort. He also did not disclose any of this in his founding papers.
- [24] Although the father also initially alleged that the mother brought the children to South Africa from Italy in breach of his rights of custody this was demonstrated to be palpably false, a fact he was forced to concede in reply after the mother produced a string of WhatsApp messages showing that he knew exactly where she and the children were when they travelled on 27 September 2022 from Venice to Cape Town. Previously on 3 September 2022 and while still in Italy the father told the mother he had ended his extramarital affair; they agreed he would travel back to Perth on 8 September 2022 and join them in South Africa for A's birthday in mid-October 2022; and the mother and children would travel to South Africa earlier than anticipated (since the mother did not wish to stay in Italy after her father's return from there to South Africa on 26 September 2022). The father returned to Perth as agreed and subsequently travelled to South Africa on 11 October 2022.
- [25] After his arrival in South Africa the relationship between the parties was very strained. The mother established the father had resumed his extramarital affair while in Perth. She also states she established that he had not obtained help, as promised, for his mental health and alcohol issues. He again denies having any such issues. The family travelled around South Africa and on their return to Cape Town the father lived with the mother and children at her father's home for approximately the last week of October 2022. In the first week of

November 2022 the father told her he wanted a separation and moved out.

Consent as at 1 January 2023

- [26] On 10 November 2022 they started marriage counselling. According to the mother they agreed, with the counsellor, that they would remain in South Africa until they had worked out their long term plans. The father admits having “met with” a marriage counsellor ‘...who had to assist L and me to decide whether we try to save our marriage or separate and, if we were to separate, how we might do so in an amicable way. We saw the counsellor for the first time on 10 November 2022. It was not a beneficial process.’
- [27] He denies it was agreed they would remain in South Africa until their long term plans had been resolved. He withdrew from the counselling process on 18 December 2022. According to the mother, on 13 December 2022 the father told the counsellor he wanted to attend rehabilitation. There were discussions regarding where and when this should take place (i.e. South Africa or Australia). However before this could be agreed the father withdrew from the process. According to the father the mother set an ultimatum that he must attend rehabilitation, otherwise she would not return to Perth with the children. This was one of the reasons he withdrew from counselling.
- [28] On 20 December 2022 the father informed the mother by WhatsApp that he would be leaving South Africa after Christmas, using his flight booked for 1 January 2023. On a reading of his founding affidavit his next WhatsApp communication to her was on 24 December 2022 when he repeated this and also wrote that ‘(a)s for you and the boys, I would like you to come back to Perth but I understand you don’t feel you can, so stay here, I think some space for now would help. Once I have somewhere to live and we have a better plan then we can make better decisions...’. According to him the only reason why he wrote this was in an attempt to calm their heated exchanges whenever he sought to raise the subject of the children’s return to Australia.
- [29] What he did not disclose to the court was that on 21 December 2022 he informed the mother in another WhatsApp that ‘...I need to go home and work on me. And you need to do your own work whatever and wherever you think that is best for you. I hope you will bring the boys back to their home but again I am waiting on you to decide that...’. What he also did not disclose is his admission in his WhatsApp communication of 24 December 2022 of his alcohol and other issues and his plan to address them. The latter is noted not to cast the father in a bad light, but to demonstrate his selective disclosure of relevant information and pattern of falsehoods, not only to the mother but also this court.
- [30] What the father also relied upon in an apparent effort to show that the mother wrongfully retained the children in South Africa on 1 January 2023 was another WhatsApp he sent to her on 29 December 2022 when – contrary to what he had conveyed on two separate occasions in the preceding 8 days, he wrote ‘[w]e have a ticket to go back to Perth on the 1st of Jan which in my eye is a contract, a commitment to do something which you are going back on. How long am I supposed to wait till you decide what to do?’. To the extent that this

could ever be construed as a withdrawal of previous consent (which in my view it simply cannot), yet again the father was selective in his disclosure to this court. As with his WhatsApp of 21 December 2022, the mother also referred in her answering affidavit to another WhatsApp exchange on 29 December 2022 when the father agreed with her proposal to tell the children ‘Dad is going to Perth now and you will be staying here with Mom... Mom and Dad will make decisions together about where we will live next once we are able to’.

- [31] When confronted with all of this the father’s response was telling. He changed tack, claiming that he never agreed the children could remain in South Africa indefinitely (which the mother has never suggested) and that ‘[w]hen I left South Africa, I had accepted that L was refusing to fly back to Australia with the children on 1 January 2023. This was not a consent to her retaining the children in South Africa’. To my mind this is a contrived attempt by the father to provide an explanation, ex post facto, for his very own suggestion to the mother to stay on in South Africa with the children after 1 January 2023, at least while they tried to resolve matters between them one way or the other. It matters not, in this context, whether the father allegedly made this suggestion on more than one occasion out of pure frustration, since there is not an iota of evidence to indicate that even his subjective intention (i.e. consent for the children to remain here on the basis agreed) was anything different.
- [32] It was submitted on the father’s behalf that at the time he made these suggestions he had not yet obtained legal advice and was accordingly unable to give “informed consent” to an “unlawful retention” in line with *KG v CB*.^[12] But in my view this submission, on the facts of this particular case, does not withstand scrutiny. This is because the evidence established that as at 1 January 2023 there was no indication of any wrongful retention of which the father could have been aware. On the contrary the mother has shown that there was an agreement in place for her and the children to remain here albeit not permanently. It follows that the father has failed to establish a wrongful retention at the date upon which he relied in his founding affidavit, i.e. 1 January 2023.

Acquiescence

- [33] In his founding affidavit the father stated that as a result of the mother’s ‘wrongful actions’ he made application to the Australian Central Authority on 27 February 2023 for the children’s return. He set out in some detail subsequent interactions between his Australian attorney and that Authority and thereafter his South African attorney and the South African Central Authority spanning the period 28 February 2023 to 10 November 2023. He annexed a copy of his “Australian”

application and seemingly expected the mother (and this court) to deal with its contents without identifying the portions thereof upon which reliance was placed and an indication of the case sought to be made out on the strength thereof. This is impermissible, as is established in our law.

[13]

- [34] In her answering affidavit the mother alleged that the father continued his extramarital relationship upon his return to Australia on 1 January 2023. She showed that he gave his Australian attorney instructions on 13 January 2023 in respect of divorce proceedings. She thus stated that he clearly had no intention, as earlier indicated by him in one of his numerous communications to her, of finding a suitable home in Australia in the “hope” that she and the children would join him there. On 17 January 2023 the father (as he alleged in his founding affidavit) sent her an email asking her to book airline tickets to Perth ‘as soon as possible’. What he did not disclose in that affidavit is that this email followed his first consultation with his Australian attorney on 13 January 2023.
- [35] The father also alleged that on 26 January 2023 the mother informed him by email that she did not intend to return to Australia. However in the very email he relies upon, and from which he himself quoted a portion, the mother wrote ‘I don’t believe it is in their best interests to uproot them at this time into a temporary situation in Perth. I think it is best for us to stay here while you and I work together to figure out our long term plans’. This cannot reasonably be construed as communicating an intention not to return at all.
- [36] The mother also demonstrated another material non-disclosure by the father. In an email to her on 26 January 2023 he wrote that he would not be proceeding ‘with legal action’ and that although he loved and missed the children dearly ‘...I will leave it to you to let me know what you decide to do’. The mother is thus correct in her assertion that the father at that date accepted she and the children would not be returning to Australia while they tried to resolve their issues. She states that she relied on this communication as having been made in good faith.
- [37] However the father clandestinely intended to proceed with his “Australian” Hague application, having already included this in his instruction to his Australian attorney on 25 January 2023, i.e. the day before he told her he would not be proceeding with legal action. The parties attended (online) mediation from February 2023 until 14 March 2023 when the father again withdrew from that process.
- [38] As far as can be gleaned from the papers (given that the content of mediation sessions is privileged) the mother had no idea at the time that the father had launched his Hague application in Australia on 27 February 2023. Moreover this was at a time when the parties were also communicating directly with each other for purposes of preparing their discussion with the children pertaining to their separation, living arrangements and the father’s contact. The email trail over the period 23 to 25 February 2023, annexed by the mother to her answering affidavit, reflects just that, including arrangements for some of the children’s items to be sent to South Africa. Not a murmur was made by the father in those email exchanges about either an intention to proceed with a Hague application or for the children’s summary return.

[39] The mother also demonstrated with reference to further emails that although the father terminated the mediation process, the parties continued communicating with each other thereafter in relation to money (there is a separate dispute pertaining to the proceeds of the sale of the former common home pending in an Australian court), maintenance, contact, transporting of items to South Africa and the like. During late March or early April 2023 the father accused the mother of stalling their settlement discussions. In an email to him dated 5 April 2023 she reminded him that ‘...you have decided not to mediate and in one of your emails stated you wanted a lawyer to prepare a settlement proposal for us to reach an amicable outcome’. On 5 May 2023 the mother’s attorney sent the father a letter containing a composite settlement proposal pertaining inter alia to care and contact arrangements for the children.

[40] The father responded to her attorney on the same date stating that he was taking advice in respect of that letter. On 19 May 2023 in a further email the father stated that he was ‘in the process of instructing a lawyer to assist me’ and would be in touch shortly. Of course the father had already instructed an attorney but had not informed the mother of this.

Eventually on 23 June 2023, the mother’s attorney received a letter from the father’s attorney. In that letter no response was provided to the settlement proposal. Instead return of the children to Australia was requested, although no date for their return was stipulated. The relevant portion of that letter (which did not form part of the papers before me but was handed in by agreement) reads as follows:

‘Our client does not agree to your client’s wrongful retention of the children in South Africa. He seeks their immediate return to Western Australia...

Your client has failed to properly confer with our client to reach a joint decision with respect to the children’s schooling and any proposed relocation from Western Australia. In the event that the parties were unable to reach agreement on these matters, the correct approach was for your client to bring an application in the Family Court of Western Australia seeking such orders.

In the circumstances, and because of her refusal to return the children to Western Australia our client is taking steps to have the children returned.

We invite your client at this early stage to voluntarily return the children to Western Australia. Our client is prepared to pay any costs associated with their travel and can make himself available to accompany them if required.’

[41] The contents of this letter are a blatant misrepresentation of the true facts. The evidence shows that at no prior stage had the mother refused to return the children at all, and the ‘early stage’ was already four months after the father launched his Hague application in Australia. Equally importantly no mention whatsoever was made of that application already having been launched. Moreover the father was fully aware of all the steps taken by the mother in relation to the children’s schooling, as is evidenced by a number of other emails annexed to her answering affidavit, and he was included in decision-making every step of

the way, despite an allegation elsewhere in his papers that he did not even know which school they were attending. Put simply, the quoted portion of this letter smacks of the father's bad faith.

- [42] Accordingly, even if I am wrong in respect of my finding that the father had already on 1 January 2023 consented to the children remaining in South Africa while the parties sought to resolve their long term plans, he subsequently acquiesced to the children's retention in South Africa by the mother on that basis. It cannot be that a deliberately concealed so-called subjective intention can override a consistent pattern of outward manifestation to the contrary.

Discretion

- [43] Having found that the father consented, alternatively acquiesced, to the children remaining in South Africa while the parties tried to resolve their issues and long term plans, it follows that he did so on the basis that the children would not be summarily returned to Australia. However it is nonetheless necessary to deal with the discretion conferred under article 13 since I may be wrong in my conclusion that in the particular circumstances of this matter the Convention does not apply. Accordingly what follows is based on an assumption that the Convention does apply but that the mother has established the defences of consent, alternatively acquiescence, under article 13(a).

- [44] The evidence shows that the children presently have no home to return to in Australia and there is not even clarity on whether, if their return was nonetheless ordered, they would even reside in Perth, since it is common cause that when they left Australia in July 2022 the parties were considering other options in Australia and even possibly elsewhere (although the latter is in dispute) to set up their new home. The father has put up no evidence about where the

mother (who will not remain here without them) and the children should live or how their living and other costs will be funded, at least pending finalisation of all the other disputes, including those pertaining to maintenance and the proprietary aspects.

- [45] The evidence also shows that the father has not visited the children in South Africa despite the mother's request. She invited him to spend Christmas 2023 with the children in South Africa but he told

them he would not do so. The children asked him to come here for their respective birthdays in April and October 2023 but were met with a similar response. The mother has nonetheless ensured the father has regular video contact with the children (on average three times per week); in May 2023 and of her own accord, she arranged for gifts and cards to be sent to the father from the children for his birthday to be opened during one of these video calls; and she regularly keeps him updated about their progress at school, their sporting and other activities and sends him photographs of them. The children too engage with their father on these aspects during their video contact.

[46] The evidence also shows that although the children miss their father dearly, and are confused, in particular why he has not visited them, they are adjusting to their current situation. In this regard I can

do no better than quote from the report of their legal representative, Ms Bernstein:

‘A and H are delightful and I enjoyed meeting them. They are confident, friendly, well-mannered and articulate boys. They were able to follow my questions and communicated very well. If they did not understand a question or a word that I used they asked me to clarify and they were happy to engage with me. They are mature for their ages but still young.

I commenced... by explaining that I had been appointed as their legal representative and the role that I played.[14]The first question I asked them was whether they knew why they were meeting with me. They had very limited information other than to say that it is about their father and mother breaking up. They did not know any more details and did not know that I wanted to establish whether they objected to returning to Australia...

Both boys were clearly very happy in South Africa. They expressed to me that they enjoyed staying in South Africa and were happy in school. I interrogated them on this and asked them to compare their life in South Africa to Australia. I tried to establish exactly why they were happy here and asked them to list what they liked about South Africa. A conveyed to me that Australia was “a lot more strict”. When I asked him if he was referring to his parents he said “no the people in Australia and school”. He told me that he did not really like going to school in Australia. In contrast he liked schooling in South Africa, the workload was easier and he described it as “a lot more free”. He said that schools in Australia did not offer sport like in South Africa, he described the sport in South Africa as “proper”. He told me that he preferred home schooling to Australian schooling but that his schooling in South Africa was best. He told me that he enjoyed being around his grandfather, uncle, aunt and cousin.

H told me that he was bullied in school in Australia and that is why he did not like going to school there. He was happy in his school in South Africa and, like his brother, told me that school in South Africa was better than Australian schooling and home schooling. He spent quite some time telling me about the bully who belonged to a gang. He told me that he had retaliated against the bully and that as a result he was sent to the deputy headmaster. Other than that, he did not really list the reasons why South Africa was better than Australia.

I then asked A whether he preferred staying in Australia or South Africa. Without hesitation he answered South Africa. When I asked him why he told me that “we have more support here with my mom’s family”. When I asked him why he needed support he told me “because we are going through a hard time”. He told me his view would not change if he was not going through a hard time nor did it change if his father was not able to stay in South Africa. He told me that he would go and visit his father during the holidays. It is not clear to me that he fully understood the concept of “support” and he could not distinguish between why his family in South Africa could lend better support than his family in Australia (a grandmother and uncle and aunt). This may be an adult concept which he has heard or that has been conveyed to him. Although he did not fully

understand the meaning of the concept it did not appear to me that he had been influenced to convey this to me. H told me that he too preferred to stay in South Africa but was unable to tell me what support he received from family in South Africa. A tried to help him come up with an explanation and he reminded H that he received help dressing and getting ready for school and that their grandfather did the school lifting.

Next, I asked the question slightly differently and asked them both how they would feel about leaving South Africa and moving back to Australia with their mother (albeit they would not live together as a family with their father and mother). H once again told me that he would tell his mother he would want to stay in South Africa. A initially felt the same way. When I tried to gain insight into why they would still want to stay in South Africa, A seemed a little less certain about his answer and said that he would go back with his mother, but that he still prefers South Africa. He also said that he may need more time to think about it. He said he misses his father, Australian family and friends but did not think he would want to remain in Australia “forever”...

I think it is important for me to mention that I got the sense that A and H are confused about why their father has not visited them. They seemed hurt by it and did not understand why he had not done so. A told me that his father had told him that he could not visit and that “it was complicated”. They both expressed the view that he may not want to visit them. I think this needs to be addressed soon before it affects their relationship with their father. I did not get the impression that it had been suggested to them that their father did not want to visit but rather that they were battling to understand why he had not visited them...

In conclusion it was clear to me that neither boy expressed a firm objection to returning to Australia but both undoubtedly had

expressed a preference to remain in South Africa. This preference has to however be seen in the context of them both being relatively young...’

[47] I have quoted the above to convey that the children appear to be coping and adjusting fairly well despite how much they miss their father and are confused why he has not visited them. During her address to the court Ms Bernstein confirmed that both children communicate very effectively; are adamant that they love South Africa and the schooling here; and it was very clear to her that the mother is not impeding their relationship with the father. Taking all of the above factors into account I am of the view that even if I am wrong in my other findings, in the exercise of my discretion it would not be appropriate to nonetheless order the children’s summary return to Australia.

Costs

[48] In the ordinary course, the court, in a matter such as this, would order each party to pay their own costs. However I agree with counsel for the mother that the father’s conduct in this litigation has

been particularly egregious. Time and again he has been caught out on material non-disclosures and falsehoods, thus demonstrating his ability to be economical with the truth when it suits him. The mother has incurred substantial costs (including a court hearing over two days).

[49] There is thus considerable merit in the submission made by counsel for the mother that the father should be mulcted with a punitive costs order. However I do not wish to be perceived as setting the stage for all of the other litigation which is pending and possibly more that will follow this judgment. In particular, I am mindful that

the Family Court of Western Australia has suspended proceedings there on the issue of its jurisdiction in light of concurrent Hague

proceedings in South Africa and Australia. In the circumstances it is my view that the father must pay the mother's costs but on the party and party scale.

[50] The following order is made:

1. The application is dismissed.
2. The applicant shall pay the first respondent's costs on the scale as between party and party as taxed or agreed, including any reserved costs orders and the costs of one senior counsel.

J I CLOETE

For applicant: Adv J Anderssen

Instructed by: Mandy Simpson Attorneys (Ms A M Simpson)

For 1st respondent: Adv J McCurdie SC

Instructed by: Catto Neethling Wiid (Mr A Neethling)

For 2nd respondent: Adv M Edwards

For the children: Adv J Bernstein

[1] Incorporated as schedule 2 to the Children's Act 38 of 2005 by virtue of Chapter 17 thereof.

[2] 2001

(3) SA 845 (SCA) at para [11].

[3] Article 20 provides that a return under 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.

[4] Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd

[1984] ZASCA 51; 1984

- [3] SA 623 (A) at 634E-635C.
- [5] Fakie NO v CCII Systems (Pty) Ltd [2006] ZASCA 52; 2006
- [4] SA 326 (SCA) at paras [55] to [56].
- [6] 2004
- [3] SA 117 (SCA) at paras [40] to [41].
- [7] [1992] 1 All ER 929, at 941 b – d.
- [8] At para [11].
- [9] 2012
- [4] SA 136 (SCA) at paras [37] to [40].
- [10] 2021 (2) SA 471 (GJ) at para [77].
- [11] 2009 (5) SA 420 (CPD) at para [41].
- [12] fn 9 above at para [38].
- [13] Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa 1999
- [2] SA 279 (T) at 324F-G, since followed consistently in a long line of cases.
- [14] In terms of s 275 read with s 279 of the Children's Act; see also Central Authority for the Republic of South Africa and Another v B 2012 (2) SA 296 (GSJ). The judicial or administrative authority might refuse to order the return of the child if it finds that the child objects to be returned and has attained an age and degree of maturity at which it is appropriate to take account of its views: Ad hoc Central Authority for the Republic of South Africa and Another v H N K NO and Another [2021] JOL 49972 (WCC).

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