

**FREE STATE HIGH COURT, BLOEMFONTEIN**

**REPUBLIC OF SOUTH AFRICA**

Case No. : 325/2015

In the matter between

**C[...] S[...] V[...] S[...]**

Applicant

and

**J[...] H[...] T[...]**

Respondent

**HEARD ON:** 26 FEBUARY 2015

**DELIVERED ON:** 9 APRIL 2015

**MOCUMIE J.**

[1] On 26 February 2015 this application was heard first on an urgent basis and upon the parties agreeing on a postponement it ran its normal course. On the next appearance, I granted the relief sought without providing any reasons and handed down the order which reads as follows:

“ORDER [As amended]

1. Subject to the rest of this order, both parties have full parental responsibilities and rights in respect of the minor children as contemplated in section 18 of the Children’s Act 38 of 2005 (viz. care, contact, guardianship and maintenance).
2. The primary residence and primary care of the minor children is awarded to the applicant as contemplated in section 18(2)(a) of the Children’s Act 38 of 2005 subject to the condition set out in para 6 of this order.
3. Specific parental responsibilities and rights with regard to contact with the minor children,

as contemplated in Section 18(2)(b) of the Children's Act 38 of 2005 are awarded to the respondent in the following manner:

3.1 The respondent to have contact with the minor children on alternating weekends (if ever possible) upon travelling to Luderitz, Namibia, and to take them with him within the borders of Namibia from Friday 15h00 to Sunday 15h00.

3.2 The respondent to have contact with the minor children on alternating long and short school holidays in South Africa, with Christmas alternating between the parties. In particular respondent to have contact with the children in August/September long school holidays (2015), Thereafter August/September long school holidays to alternate between the parties every second year.

3.3 The respondent to have daily contact with the minor children on Skype or available telephone or other applicable social media and by all other means mentioned in section 1 of the Children's Act 38 of 2005.

4. It is ordered that the children's passports be endorsed so as to allow travel only between Namibia and South Africa.

5. It is directed that the International Social Services (ISS) in Namibia monitors the adjustment of the children in Luderitz, in compliance with this court order, ensure referral of the children to a professional psychologist, only if necessary and critical; and to provide the respondent, through his attorney (Honey attorneys, Northridge Mall, Kenneth Kaunda Street, Bloemfontein 9300), with feedback on the children's adjustment and progress every six months in the first year (2015) and thereafter once every year.

6. It is ordered that the applicant must, within 14 days of the date of this order, launch proceedings and pursue them with due diligence to obtain a mirror order from the appropriate Namibian court in the same terms as this court order.

7. A copy of this order shall forthwith be transmitted by the Family Advocate (Bloemfontein, Free State) to International Social Services in Namibia.

8. Each party to pay its own costs in this application.

9. The respondent to pay the costs of the postponement of the application occasioned on 26 January 2015."

The reasons follow.

[2] The applicant and the respondent are both South African citizens. They were married in 1999. Out of their marriage two minor children were born. They were divorced by this court in 2014. Upon the dissolution of the marriage, this court, with the agreement of respondent<sup>1</sup> and based on an investigation by the Office of the Family Advocate, granted applicant primary residence and care of the minor children and contact rights to respondent. The children are 6 years and 3 years respectively.

[3] In December 2014, applicant, through her attorney, informed respondent that she was marrying a man of Namibian citizenship and was relocating with him to Namibia. She simultaneously applied to this court to grant her permission to remove the children from its jurisdiction and relocate with them to Namibia. Following the order that I will refer to in detail hereafter, she went to Namibia with the minor children and by January 2015 enrolled them in schools in Namibia.

[4] The order of this court granted on 8 December 2014, reads:

“1. Die aansoek word uitgestel na 29 Januarie 2015.

2. Die Gesinsadvokaat word versoek om voor of op die 29ste Januarie 2015 ‘n verslag voor te berei oor die versorging van die minderjarige kinders.

3. Die partye gesamentlik ‘n sielkundige soos aangewys deur die Gesinsadvokaat te Namibië aanstel om die omstandighede van die applikante, haar eggenoot, die aanpassing van die kinders in Namibië en hulle skool te ondersoek en elkeen gesamentlik aanspreeklik is vir die koste van die sielkundige.

4. Sodanige verslag soos uiteengesit in paragraaf 3 hiervan aan die Gesinsadvokaat van hierdie Agbare Hof beskikbaar gestel moet word.

5. Verlof word verleen in terme van Artikel 18(5) van die Kinderwet, 38 van 2005 aan appiikante om die partve se minderiarige kinders te verwvder uit die Republiek van Suid-Afrika na Luderitz Namibië vanaf die 24ste Desember 2014 en dat sodanige verlof slegs verleen word tot en met die 29ste Januarie 2015.

6. Die respondent geregtig sal wees om die minderjarige kinders met hom te neem vir die vakansieperiode vanaf 12 Desember 2014 tot en met 24 Desember 2014. (My own emphasis)

7. Die koste oorstaan om bereg te word vir latere beregting.”

[5] Pending an investigation by the Family Advocate, Bloemfontein and the relevant authorities/persons in

Namibia, applicant enrolled the children into a preschool and primary school in Namibia. When it became clear that the Family Advocate investigation and report would not be available on the return date, 29 January 2015, applicant sought indulgence from respondent for the matter to be postponed. Respondent refused to give such indulgence. As a result applicant was forced to apply for a postponement of the matter on an urgent basis. Respondent opposed the application and filed a counter claim in which he sought *inter alia* primary residence and care be awarded to him with reasonable contact awarded to applicant under certain conditions ie the same rights awarded to applicant during the divorce, per the deed of settlement, but reversed to him. On the day of the hearing, just before the urgent application could proceed on an opposed basis as arranged with the registrar of this court, respondent agreed to a postponement. Such agreement was made an order of this court.

[6] In her founding affidavit, applicant alleged that she had to take the minor children as she was relocating to Namibia for better living prospects. She further averred that during the divorce proceedings the respondent had agreed that she was a fit and proper person to be the primary care giver and that was still the case. Because she was living in Luderitz she had to make provision for the children's schooling in time for the commencement of the school year. She refuted all the allegations made by the respondent in his counter claim that she was not a fit and proper person to be the primary care giver.

[7] As indicated earlier on, based on the directive of this court, the Family Advocate, Bloemfontein<sup>2</sup> compiled a report supported by the psychologist who interviewed the family in Namibia as well as a Counsellor. In his report, the Family Advocate in essence supported applicant's view that she was the parent who should continue to have primary care and residence. The Family Advocate, and all experts referred to in his report were all *ad idem* that applicant should remain the primary care giver. The children too were asked for their view<sup>3</sup> and they indicated their preference: To stay with the applicant regardless of where she resided. The Family Advocate made detailed recommendations with regard to respondent's contact rights, how and when such rights should be exercised; adding to the contact rights already granted during the divorce. Respondent, based on the report, subsequently withdrew his counterclaim.

[8] South Africa (SA) has ratified the Hague Convention on the Civil Aspects of International Child Abduction (1980) - see section 275 read with Schedule 2 to the Children's Act 38 of 2005. One of the objects of the Hague Convention is 'to ensure that the rights of custody and access under the law of one Contracting State are effectively respected in other Contracting States'<sup>4</sup>. Article 21 of the Hague Convention deals with rights of access-'an application to make arrangements for organising or securing the effective exercise of rights of access may be presented to the Central Authorities of the Contracting States in the same way as an application for the return of the child.' The Central Authorities of the Contracting States are obliged to cooperate with each other to 'promote the peaceful enjoyment of access rights and the fulfilment of any

conditions to which to which the exercise of such rights may be subject'<sup>5</sup> (article 21 read with article 7). In a proper case, Central Authorities are obliged 'to make arrangements for organising or securing the effective exercise of rights of access.' (article 7(f)).

[9] In this case, unfortunately, Namibia has not yet ratified the Hague Convention. As a result there is no Namibian Central Authority through which the Family Advocate as the Central Authority in SA could apply for assistance in investigating the wellbeing of the children or, should applicant ultimately attempt to thwart the exercise by respondent of his contact rights in respect of the children, to assist the respondent in organising or securing the effective exercise of such rights in Namibia. As a result, the Family Advocate sought assistance and co-operation of the International Social Services (ISS) in South Africa to facilitate the process. This process proved to be quite cumbersome but a report was finally compiled and filed with this court and the order set out in para 1 above was granted.

[10] In terms of the court order dated 8 December 2014, the consent given to applicant to remove the children from South Africa was only granted until 29 January 2015. The children were not returned to South Africa before that date. Had Namibia ratified the Hague Convention, the failure by applicant to return the children would have constituted 'wrongful retention' of the children in terms of article 3 of the Convention, viz retention in breach of respondent rights of custody' under South African law, being the law of the State in which the children were habitually resident immediately prior to the wrongful retention. Respondent could then have applied to either the South African Central Authority or the Namibian Central Authority for assistance in securing the return of the children. He could have instituted Hague proceedings in Namibia for the return of the children to South Africa.

[11] In respect of the order I granted previously, in addition to what the Family Advocate had recommended in respect of the contact rights of respondent, I deemed it necessary under paragraph 3.2 of the order to include that 'respondent should bear the travelling costs of the children to be with him during the 2015 September school holidays.' This was so ordered to enhance the enjoyment of respondent's contact rights and to enable him to make proper arrangements prior to the commencement of the school holidays. I am mentioning this because before this judgment could be delivered, respondent filed a Request for Reasons notice in respect of this particular paragraph. In the event that this paragraph is of no consequence to respondent, as he would in any event be ordinarily responsible for the children's travelling expenses when they visit him, in terms of Rule 42 of the Superior Courts Practice, the paragraph will be deleted in the amendment that I will make in this regard. I also take this opportunity to amend the order in so far as paragraph 5 thereof is concerned. The paragraph reads: "in terms of article 21 read with article 7(f) of the Hague Convention on the Civil Aspects of International Child Abduction, the South African Central Authority is directed to co-operate with the Namibian Central Authority to promote the peaceful enjoyment

by the respondent of his contact rights; to remove, as far as possible, all obstacles to the exercise of such rights and, in a proper case, to make arrangements for organising or securing the effective exercise of such rights.”

The deletion of this paragraph does not change the substance of the original order but it is in line with the conclusion I have come to under paragraph 10 above. The paragraph will obviously have no effect in any court or agency in Namibia.

[12] Lastly, the issue of costs. In cases of this nature, costs are usually resolved by each party paying its own costs. I do not see any reason to depart from this general rule, despite the unwarranted allegations respondent made about applicant in his quest to protect his contact rights. These allegations were probably the result of his desperation in realising the impact of applicant’s decision to prematurely register the children in schools in Namibia before the Family Advocate could conduct an investigation as directed by this court. Both parties’ seemingly unreasonable conduct is totally understandable in the circumstances. Thus the order I have made in respect of costs.

[13] This case should serve as a clear indication to the Namibian government that it should seriously consider ratifying the Hague Convention.

[14] In the result, the order as amended set out in paragraph 1 of this judgment was granted.

**B. C. MOCUMIE, J**

On behalf of the applicant: Adv. Snellenburg

Instructed by:

Honey Attorneys

BLOEMFONTEIN

On behalf of the respondent: Adv. Pienaar

Instructed by:

McIntyre & Van Der Post

BLOEMFONTEIN

<sup>1</sup>The parties concluded a Deed of Settlement in which all their rights and responsibilities in respect of the

minor children were set out.

<sup>2</sup>Advocate L Holele, representing the Office of the Family Advocate.

<sup>3</sup>In terms of section 10 of the Children's Act 38 of 2005, 'every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning the child has the right to participate in an appropriate way and views expressed by the child must be given due consideration.' This is line with article 12 of the United Nations Convention on the Rights of the Child, which South Africa ratified in 1995, and article 4 of the African Charter on the Rights and Welfare of the Child, which South Africa ratified in 2000.

<sup>4</sup>Article 1 (b)

<sup>5</sup>Article 21 read with article 7.