



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION,
DURBAN**

CASE NO: 10839/14

In the matter between:

**CENTRAL AUTHORITY FOR THE REPUBLIC
OF SOUTH AFRICA**

APPLICANT

Vs

CATHERINE LEA ASHMORE

RESPONDENT

JUDGMENT

Date of hearing: 17 November 2015
Date of judgment: 24 November 2015

D. Pillay J

Introduction

[1] The Central Authority for the Republic of South Africa, the applicant, seeks an order against the respondent, Catherine Lea Ashmore, for the return of her child to Cairns, Australia. The order sought is in terms of Article 12 of the Hague Convention on the Civil Aspects of International Child Abduction, 1980 (the Convention). The respondent raises both defences permitted in art. 13. In terms of 13(a) of the Convention she contends that James Ashmore, her husband and the father of her child, consented or acquiesced expressly, alternatively tacitly to her removing and

retaining the child in South Africa. In terms of 13(b) it would be a grave risk to expose the child to physical and psychological harm or place her in an intolerable situation if the order were to be granted for her return to Australia.

Background

[2] The respondent married Mr Ashmore on 19 July 1997. The child, a girl, was born on 2 June 2009. On 26 November 2013 the respondent and the child left Cairns, Australia with the consent of Mr Ashmore to visit the respondent's ailing father in KwaZulu-Natal, South Africa. The respondent was due to return to Cairns with the child on 7 January 2014.

[3] On 30 December 2013 Mr Ashmore telephoned the respondent and informed her that he no longer wished to be married to her. Devastated to discover that Mr Ashmore was unhappy in their marriage, which to her was a happy one, the respondent set about rearranging her life in South Africa as her permanent residence.

[4] On 17 January 2014 the respondent's attorneys emailed Mr Ashmore confirming that the respondent intended to reside permanently in South Africa with the child. The attorneys also informed Mr Ashmore of the respondent's plans to initiate divorce proceedings, to pursue her vocational career in South Africa and to educate the child at a school in Mtunzini. The letter assured Mr Ashmore of all reasonable rights of contact with the child. It went on to discuss the proprietary arrangements between the respondent and Mr Ashmore.

[5] The respondent enrolled the child at a school. Three days later Mr Ashmore learnt that the child's placement at a school in Cairns had been cancelled.

[6] On 27 January 2014 the respondent returned to Sydney without the child to wind up her affairs. With the knowledge of Mr Ashmore she arranged for the sale of the matrimonial home, two motor vehicles and businesses, two of which she ran

jointly with Mr Ashmore. She packed her personal goods and had them shipped to South Africa. On 24 April 2014 she returned to South Africa.

[7] By letter dated 12 May 2014 the respondent's attorney reiterated to Mr Ashmore that the respondent considered herself domiciled and permanently resident in South Africa and that she had abandoned Australia as her place of domicile and permanent residence. He also reminded Mr Ashmore that the respondent had been given leave on 4 February 2014 to launch the divorce action out of the Durban High Court; a summons was issued on 12 March 2014 and served personally upon him in Cairns on 25 March 2014.

[8] On 4 June 2014 Mr Ashmore authorised the Central Authority of Australia to request the applicant to institute these proceedings. On 1 August 2014 the chief family advocate and designated representative of the applicant in terms of s 276(1)(a) of the Children's Act 8 of 2005 appointed a family advocate, Mr Makhanya in terms of the Mediation and Certain Divorce Matters Act 24 of 1987 to deal with the matters arising from these proceedings.

[9] The applicant launched this application as late as 15 September 2014 and enrolled it for hearing on 4 November 2014. That day the court directed the respondent to deliver her answering affidavit by 18 November 2014 and the applicant its replying affidavit by 2 December 2014. The respondent complied. The applicant delivered its replying affidavit more than eight months later on 16 July 2015. It applied for condonation by way of a supplementary replying affidavit delivered on 24 August 2015. That application prefaces the main application for the return of the child.

[10] This background is substantially facts that are common cause or not in dispute. In the rest of this judgment I shall strive to chart a course that avoids disputes of fact that cannot be resolved on the papers. In so far as I do not deal with disputes such as who was the better care giver, it is because they are unnecessary for my judgment or incapable of resolution on the papers.

Application for condonation

[11] Mr Makhanya deposed to the affidavit in support of the application for condonation. His explanation for the delay proceeds as follows: The voluminous answering affidavit required Mr Ashmore's response. That was not forthcoming before 2 December. Mr Makhanya eventually received it on 4 December 2014. The applicant found Mr Ashmore's responses were 'vague' and 'did not deal with any of the allegations made by the respondent'.¹ On 5 December 2014 the matter was adjourned *sine die*. New counsel had to be engaged on 15 December 2014. She set about obtaining better information from Mr Ashmore. Notwithstanding Mr Ashmore's vague responses counsel for the applicant drafted the affidavit and forwarded it to the Central Authority in Australia on 26 February 2015 for Mr Ashmore's attention. A further two weeks passed before the applicant received Mr Ashmore's response. Further delays arose in securing the affidavit of Mr Makhanya and other officials. Eventually the replying affidavit was finalised on 29 June 2015 and delivered on 16 July 2015. The delay after 29 June 2015 to 16 July arose because the applicant was allegedly unaware that the respondent had initiated divorce proceedings.

[12] Article 11 of the Convention compels both judicial and administrative authorities to act expeditiously in proceedings for the return of children. Hence the court prescribed narrow time limits for the delivery of pleadings when the matter was enrolled on 4 November 2014. The explanation for the delay does not show that the applicant's officials and Mr Ashmore appreciated the urgency of the matter. Mr Ashmore's vague answers to the applicant, whom he had mandated to pursue his complaint raises concerns about his credibility. The explanation for the delay is unacceptable. The period of delay is unreasonable. Furthermore, the replying affidavit was not simultaneously accompanied by the application for condonation, which was also delayed until 14 August 2015.

[13] Technically, condonation for the late delivery of the applicant's replying affidavit should be refused. However, in a matter in which the court is grappling with determining the rights of a child it should be slow to exclude the evidence of a parent. To allow form to prevail over substance would not be fair to the child. Neither

¹ Page 642 of the pleadings.

would it accord due importance to the Convention and the sovereignty of nations. Given the seriousness of the matter I allow the late delivery of the applicant's replying affidavit. Nevertheless the delay is a consideration in determining the substantive merits.

The Approach to art 12 Return Applications

[14] The preamble to the Convention read with art 1 emphasise that the aim of the Convention is to protect children internationally from the harmful effects of their wrongful removal or retention and to ensure their prompt return to the State of their habitual residence out of deference for the integrity of the laws of that State. It is also premised on the principle that the best interest of the child is to be returned to their habitual residence. It is then up to the authority in the State of habitual residence to determine access and custody.

[15] Furthermore, art 12 states:

‘Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.’

[16] Article 12 provides for the application to be brought not more than a year after the child has been removed from its habitual residence. If it is brought more than a year later the judicial authority may not order the return of the child if it is shown that the child is settled in its new environment. The rationale underpinning this provision is that it would be disruptive to return a child who has settled in its residence.

[17] To urge the authorities to act expeditiously art 11 provides:

‘If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay.’

[18] The role of the court in considering the return of a child to the habitual residence differs from its role when it determines custody and access to the child. In the former the court, as the judicial authority in the receiving State has to interpret and apply the Convention, leaving the court in the country of habitual residence to investigate custody and access.² Exceptionally, summary return in terms of art 12 is dispensable. Such exception provided for in art 13 has to be approached with due regard to the primary purpose of the Convention to prevent unlawful abduction or removal and retention of children.³ Thus the ‘tender years’ theory alone is not a reason to find that the requisites of art 13(b) are met and to refuse the return, especially as the child returns not to the parent but the authority in the habitual residence.⁴ That authority then has to assess and decide on the best arrangements for the child on its return.⁵ The court can direct what protection should be in place to mitigate the risks for the child.⁶ The meaning of ‘grave’, ‘risk’, ‘harm’ and ‘intolerable’ in art 13(b) had the attention of the SCA in *KG v CB*.⁷

[19] Restoration of the *status quo ante* has to be prompt under the Convention so that the country of habitual residence can determine the custody and access of the child after she has been returned.⁸ The Supreme Court of Appeal (SCA) found in *Smith v Smith* that after two years children of less than two years were unlikely to have any recollection of their habitual home and regarded their new place with their

² *Penello v Penello (Chief Family Advocate as Amicus Curiae)* 2004 (3) SA 117 (SCA) para 46.

³ *Penello* para 45,46, 50.

⁴ *Penello* para 45,46, 50.

⁵ *Penello* para 53.

⁶ *Sonderup v Tondelli and Another* 2001 (1) SA 1171 (CC) para 35.

⁷ *KG v CB and Others* 2012 (4) 136 (SCA).

⁸ *Smith v Smith* 2001 (3) SA 845 (SCA) para 21 and 22.

single parent as home.⁹ Accordingly the SCA declined to order the return of the children.

[20] Affordability of either parent to raise the child must not be a consideration in an art 12 application.¹⁰ Otherwise poor but caring parents would be unfairly prejudiced.

Application of art 12

[21] The rationale underpinning art 12 must remain a consideration even if the application is brought within a year but is being determined after a delay of a year or more. It would be disruptive to return a child who has settled in its residence in the receiving state more than a year after it has been removed from its habitual residence.

[22] A material consequence of the late delivery of the replying affidavit is that this application has been delayed to the extent that the child has now resided in South Africa for more than a year. Consequently she has settled comfortably at school and in the home she shares with the respondent and her parents. A social worker engaged to report on her circumstances and the curator who represents her in these proceedings confirm that she is well adjusted to her life in South Africa. Mr Ashmore and the applicant do not contend otherwise.

[23] Furthermore, it is not apparent that the authorities in Australia invoked art 11 to request a statement of the reasons for the delay when the authorities in South Africa reached no decision within six weeks from the date of commencement of the proceedings. This leads to the inference that the authorities were unconcerned about the child becoming settled in South Africa. They might have invoked art 11 if they had cause to expedite the proceedings.

⁹ *Smith v Smith* para 21 and 22.

¹⁰ *B v S* [1995] 4 All SA 392 (AD) at 391-392 commented that 'access [to the child] was granted on the erroneous basis that it was, in effect, in return for the payment of maintenance'. *I v S* 2000 (2) SA 993 (C) at 996C-D indicated that child's welfare takes priority i.e. access cannot be dependent on maintenance.

[24] The delay of more than a year would be dispositive of the application. But it is not the respondent's main defence. In any event I must consider her art 13 defences, which arguably must be read in tandem with art 12. Furthermore, the facts need to be fully investigated. In the nature of matrimonial matters in which the interests of a child arise, the possibility of coaching and undue influence over the child by one parent against the other cannot be excluded. In this instance the antagonism that the child now allegedly shows to Mr Ashmore was inexplicably absent at the initial stages after her arrival in South Africa. Therefore I turn to consider the two defences the respondent raises even though the applicant's non-compliance with procedural rules has substantive effect.

Application of art 13

[25] The respondent bears the onus of proving her defences on a preponderance of probabilities.¹¹ In support of her art 13(a) defence the respondent relies on Mr Ashmore's express or tacit consent. For corroboration she produces transcripts of recorded telephonic conversations with him and their exchange of emails. She also seeks to draw inferences from his delay until June 2014 to initiate the complaint.

[26] Mr Ashmore disputes the authenticity of her recordings, their transcripts and the emails. As for the emails he contends that the respondent had access to his email account because it operated off her server. Emails from her generally arrived late and were no longer forwarded to him after about January or February 2014. He implies that she manipulated the emails to suit her case.

[27] To counter the challenges to the authenticity of her emails and transcripts the respondent had a forensic expert specialising in computer and cybercrime to examine them. He examined her email archive on her computer hard drive. He found the Internet Protocol (IP) which is a unique address assigned to a computer that connects to the internet. He traced the metadata or message headers which are embedded and cannot be edited for the relevant emails to Mr Ashmore's email address. He matched them to IP addresses registered with an Australian registry. In

¹¹ *Smith v Smith* para 11; *KG v CB* para 38; *Pennello v Penello* para 10, 38.

short, he found that the emails bearing Mr Ashmore's address emanated from Australia. As the respondent's email inbox showed no error messages he concluded that the respondent's emails were sent. Thus he was able to confirm the authenticity of the emails exchanged between the respondent and Mr Ashmore. As for the tape recordings he listened to the 'unwanted background noise', found that they were consistent and uninterrupted and concluded that the recordings were also authentic.

[28] Mr Ashmore's objection to the transcripts and emails is unsubstantiated by any objective evidence. At most he shows that the visible parts of an email can be altered; he does not show that the respondent interfered with the IP address or the embedded metadata of the emails. Applying *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634-5, I find that Mr Ashmore does not raise a genuine dispute of fact. The respondent's expert renders a credible account of his investigations. I note that neither the applicant nor Mr Ashmore asked to listen to the recordings to confirm that its transcription is accurate. I accordingly accept the relevant emails and the transcript of the telephonic conversations as authentic and reliable.

[29] The record shows that Mr Ashmore in fact responded to the respondent's email dated 11 January 2014 in which she sent three photographs of the child by emailing her the following day. He responded by email on the same day congratulating the child about her first day at school. Therefore Mr Ashmore is not truthful when he claimed on 18 March 2014 in an affidavit initiating this application¹² that he discovered via Facebook that the child was attending a private school in Mtunzini.

[30] From his emails it is clear that he was aware that the child had been enrolled in school and that the respondent had procured a pony for the child. These developments signal that the child was now permanently resident in South Africa as claimed in the respondent's attorneys letters to Mr Ashmore. The clearest indication that he consented to the child living in South Africa appears from the transcript when

¹² At paragraph 12 Page 290 of the pleadings.

in a conversation on 25 January 2014 with the respondent he acknowledged that the child would live in South Africa.¹³

[31] The applicant points to a spate of emails that Mr Ashmore dispatched between 11 and 14 March 2014 enquiring about the child's return. The respondent contends that these emails were precipitated by her receiving and retaining a consignment of goods that he had ordered. This could be a reasonable inference but perhaps not the only inference. However, the moment for Mr Ashmore making plain that he did not consent to the child's permanent residency in South Africa is when he received the letter from the respondent's attorneys dated on 17 January 2014 annexed to the founding affidavit. At least twice the words permanent residence or home is mentioned in the letter. It records that Mr Ashmore consented to the child obtaining a South African passport. The letter went on to discuss contact with the child via Skype taking account of the time differences with Australia. There is no evidence that Mr Ashmore protested timeously or at all to these propositions. It is also not Mr Ashmore's case that he was unaware of his rights when he consented to the child leaving and remaining in South Africa.¹⁴

[32] Mr Ashmore knew that the respondent had returned to Cairns to finalise her affairs there. He knew she that she had shipped her belongings back to South Africa. He should have been in no doubt that she was relocating to South Africa. Her attorney told him so. He did not question how her relocation would impact on access to the child by both of them.

[33] Mr Ashmore was aware that she had been recording their telephonic conversations. In parts of the transcripts he chose to be evasive. He was also evasive in responding to the applicant's request for information. Although it is unusual to make credibility findings in an application it is possible to do so in this case. Mr Asmore is not convincing.

¹³ At page 107 of the pleadings.

¹⁴ *Smith v Smith* para 16.

[34] Consequently I find that the respondent discharges her onus by proving that Mr Ashmore consented to the respondent retaining the child in South Africa. This finding is dispositive of the application. Nevertheless I turn to the art 13(b) defence.

[35] Mr Ashmore's and the applicant's delays have resulted in the child settling well in South Africa. The applicant's delay for which Mr Ashmore was partly responsible, the vagueness of his responses, the unconvincing nature of the evidence he produced for this application and ultimately the finding above that he consented to the child remaining in South Africa results in the further finding that he is abusing his rights of custody in art 5 by initiating these proceedings. I am not convinced that he is genuinely seeking to exercise his rights of custody or that he puts the child's interests before his own. Accordingly, it would create a grave risk of psychological harm to return the child to Australia; it would also place her in an intolerable situation.

[36] Returning the child without the respondent compounds the risk. She requests Mr Ashmore to cover her costs of her travel with the child to Australia if this application is granted. With full knowledge of Mr Ashmore the respondent moved all her belongings to South Africa. Her businesses failed. Her parents supported them financially during their marriage. Consequently, she cannot afford to return to Australia and resettle there. Mr Ashmore has not acceded to her request. Nor has he tendered any accommodation or maintenance for her if she were to return with the child. In contrast to the respondent, Mr Ashmore has not tendered to relocate to South Africa if this application is refused.

[37] In the circumstances the application falls to be dismissed.

Costs

[38] On the issue of costs the court notes that once the jurisdictional requirements in art 8 are established the applicant must act expeditiously. It acts as an agent of the state to give effect to South Africa's international obligations to respect the integrity of the laws of other states. Furthermore, the Convention prioritises the protection of children. Article 26 restrains the applicant from requiring payment of the

costs of the proceedings from Mr Ashmore. However, the applicant is vulnerable to the machinations of parents embroiled in matrimonial conflicts. Diagnosing whether the 'wronged' parent is abusing the process by for example, using the child as a bargaining tool to settle proprietary interests is not easy for the applicant. Once litigation is initiated then the risk of costs falls on the applicant if it is unsuccessful.

[39] Nevertheless the applicant has an opportunity to intervene between the parties in terms of art 7. It refers to this process as mediation before instituting these proceedings. During this process it has an opportunity to make every effort to resolve the issues in dispute if that is not only in the best interest of the child and the integrity of the Convention but also in the applicant's interest in avoiding the costs of litigation. It must also be open to the applicant to join a parent who adduces false evidence. In these ways it may be possible to deflect the costs it has to bear as the unsuccessful party. The applicant has not availed itself of any of these options in this instance. Having regard to the letter of the respondent's attorneys and Mr Ashmore's silence in response, the applicant should have been on its guard about the merits of its application. This court is not apprised of any reservation in terms of art 42 read with art 26 regarding costs. Not to award costs against the applicant would impose an undue hardship on the respondent.

[40] In conclusion, I am grateful to counsel for the respondent for his helpful bundle of authorities. The application is dismissed with costs.

D. Pillay J

APPEARANCES

Counsel for the Applicant	:	Advocate N. Bhagwandeem
Instructed by	:	Mr K. Bhagwan
		State Attorney, Kwazulu-Natal

Tel: (031) 365 2525

Ref: 472/000027/14/B/P16

Counsel for the Respondent : Advocate S. I Humphrey
Instructed by : Benita Ardenbaum Attorneys
Tel: (031) 202 2490
Ref: Mrs. B Ardenbaum/II

Curator ad Litem : Advocate S.P Anderton