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IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: 22994/2010
DATE: 23 FEBRUARY 2011

In the matter between:

R[...] R[...] S[] Applicant

and

D[...] A[...] L[] Respondent

JUDGMENT
Application for Leave to Appeal

DESAI, J

This is an application for leave to appeal to the Supreme Court of Appeal against the whole of the judgment which was handed down by this court on 10 December 2010

Mr A Stokes, who appears once more on behalf of the respondent, contends that the judgment is not appealable.

That argument is not without merit. This court was requested to determine the wrongfulness or otherwise of the child's removal from South Africa for the purposes of Articles 3 and 5 of the Hague Convention, 1980 It followed upon an order in terms of Article 15 of the Convention by a court in the United Kingdom.

In effect, a declarator without any consequential relief was issued. As Mr Stokes has pointed out, the application is made to further applicant's case in the United Kingdom. This court's decision is not binding upon the court in the United Kingdom and it is at liberty to reconsider the issues which were decided by this court.

The issues upon which this court has pronounced are interlocutory and not final in effect, as the applicant is entitled to reargue the matter before the court in the United Kingdom.

Leave to appeal is. *inter alia*, sought on the basis that this court erred in its finding with regard to the child's permanent place of residence The argument advanced by applicant's counsel. Ms P Weyers SC; centred

largely on the respondent's concession made in the UK proceedings. The issue was argued at length before this court and at no stage did the applicant seek leave to supplement his papers. He was alert to the need to prove habitual residence and in fact sought to prove it by means of the concession and, it seems, acquiesced in this court deciding the issue

In any event, this court had to determine the wrongfulness of the removal for the purposes of Article 3 of the Convention and that article has as a precondition, a determination whether the child was habitually resident in the country from which she was removed. Moreover the applicant knew from the date upon which he received the answering affidavit that the issue of habitual residence was to be argued. The issue was in any event fully ventilated before this court.

With regard to the challenge to the factual findings in this regard, these have been dealt with in the judgment and I do not intend restating the reasons for the court's conclusion in that regard. As Mr Stokes had pointed out, nowhere in the application for leave to appeal or in the argument before this court, did Ms Wevers attempt to explain the applicant's patent dishonesty with regard to the Natwest account. This court was alert to the constitutional rights of the child to parenthood, but was unable to find that the applicant contributed in good faith to the child's upbringing as contemplated in the Children's Act 38 of 2005 for the reasons which are set out in some detail in the judgment.

In the circumstances. I am of the view that there are no reasonable

prospects of another court coming to a different conclusion in this matter, assuming applicant overcomes the hurdle that the matter is not appealable.

THE APPLICATION FOR LEAVE TO APPEAL IS ACCORDINGLY
DISMISSED WITH COSTS.

DESAI, J