

SHERRIE HARRIS
versus
MARK HARRIS

HIGH COURT OF ZIMBABWE
MUSAKWA J
HARARE, 30 October, 2008 and 26 February, 2009

Opposed Application

Family Law Division

Mr *P.C Paul* for applicant
Mrs *J. Wood* for respondent

MUSAKWA J: Applicant is seeking an order declaring the continued retention of their minor child, Brett Morris (born 21 October, 2004) by respondent unlawful, that the minor child be returned to the custody of the applicant within seven days of the granting of the order, plus costs of suit.

The parties were married to each other in the United Kingdom in 2004 and the marriage still subsists although the parties are on separation. In her founding affidavit the applicant states that on 24 June 2007 she and the respondent entered into an agreement in terms of the Children Act 1989 of the United Kingdom in respect of the minor child. The agreement permitted the respondent to take the minor child to Harare pending the applicant's fulfillment of the conditions attaching to it. A copy of the agreement was annexed to the founding affidavit.

The crucial part of the agreement provides that-

“AND UPON the mother and father agreeing that Brett shall only reside with his mother as set out below once the mother is able to provide a secure home for Brett which it has been agreed will be once the mother has provided documentary evidence to the father that she has obtained tax credits for Brett, found a nursery place for Brett, found a two bedroom property to live in and found employment in the local area and until this happens and not before 1 September 2007 in any event Brett will continue to reside with the father.”

It is worthwhile to highlight other notable features of the agreement. It states that both parties have parental responsibility for the minor child. There is a provision on the binding nature of the agreement and that it can only be varied by consent in writing or by order of

court. There is also provision for the respondent's access to the minor child during school holidays.

In her founding affidavit the applicant states that she has met the stipulated conditions. Documentary evidence in support of the claim that the conditions were fulfilled was attached to the application. The documents consist of a letter from a nursery, a copy of a lease agreement and proof of employment as well as proof of earnings. She further avers that despite having fulfilled the conditions the respondent has refused to return the child to her. She thus contends that the respondent's continued retention of the minor child constitutes an unlawful retention in terms of the Child Abduction Act [*Cap 5:05*], and in particular, Article 3 to the schedule thereof. In her answering affidavit the applicant made the additional averment that both she and the respondent had joint custody prior to the child being brought to Zimbabwe.

In his opposing affidavit the respondent contends that the child has been in his sole custody since January 2007. He also contends that the applicant has not fully complied with the obligations imposed by the agreement. In particular he points out that the applicant jointly leases residential accommodation with a third party such that if her relationship with the third party was terminated she might not be able to afford the rent for the property. Apart from contending that he is not in breach of the Child Abduction Act the respondent also contends that he did not bring the child to Zimbabwe in terms of the agreement with the applicant but he did so in his capacity as a co-guardian and custodian parent. He is also not satisfied with the contents of the annexures to the supporting affidavit. In addition the respondent also contends that it is not in the interests of the minor child that it be returned to the applicant. The rest of the opposing affidavit deals with the reasons thereto.

It was submitted on behalf of the applicant that the retention of the child is wrongful in terms of Article 3 of the Convention as such retention is in breach of applicant's rights of custody under English law. An uncertified copy of the Children Act 1989 of the United Kingdom was annexed to the applicant's heads of argument. The respondent has taken issue with this and I will revert to it later. It was also submitted that since the current proceedings were commenced eight months after the wrongful refusal the applicant is entitled to the prompt return of the child in terms of Article 12. This is because in terms of Article 12, where proceedings are commenced within one year of the wrongful act the judicial or administrative authority shall order the child's return forthwith. It was also submitted that the respondent has to show that a high degree of harm will result if the child's return is ordered or that a highly

intolerable situation will result. Finally it was also submitted that the purpose of the present proceedings is not to consider the best interests of the child as if the court were determining the merits in a custody suit. Reference was made to the case of *Secretary for Justice v Parker* 1999 (2) ZLR 400 (H).

On the other hand, it was submitted on behalf of the respondent that since the child was not brought to Zimbabwe unlawfully, the applicant has to prove that the retention of the child is in violation of Article 3 (a). Since the purpose of the Convention is to return the child to the country of habitual residence, it was also submitted that the applicant has not proved that the child was habitually resident in the United Kingdom. It was also submitted that the applicant must be bound by what she stated in her founding affidavit as she only raised the issue of joint custody in her answering affidavit. As regards custody of the child whilst in the United Kingdom, it was submitted that it is respondent who had custody during the week, with the applicant only exercising custody during weekends. Reference is made to the agreement which spells out the specific details of the respective custody rights of the parties. Applicant's reliance on the English Children Act has been attacked on the ground that the statute was not adduced in accordance with Article 12. According to this argument, expert evidence is required before any reliance can be placed on the foreign statute. There was also the contention that the applicant failed to prove that the child was habitually resident in the United Kingdom at the time the cause of action arose. As such, the argument was that the Convention does not apply to the facts of this case.

In respect of the terms of the agreement two arguments were advanced on behalf of the respondent. The first one was that the applicant did not provide the tax credits in favor of the child. Secondly, it was contended that the applicant did not provide a secure home for the child. This is because the lease agreement is not in the applicant's sole name. Thirdly, it was also argued that the applicant did not secure employment 'in the local area' as required by the agreement.

There was also the additional argument that it has to be shown that the agreement has legal effect in the jurisdiction of the child's habitual residence for purposes of compliance with Article 3 of the Convention. In this respect, it was submitted that the applicant failed to prove.

After arguments had been presented in this matter I directed respective counsels to file additional heads of argument on the issue of whether the application is properly before the court. This has been adequately answered by respondent's counsel. Although she did not file

supplementary heads of arguments, in her note to the Registrar she pointed out that the issue is covered by Article 29 of the Convention. I am indebted to counsel for pointing out that provision which states that-

“This convention shall not preclude any person, institution or body who claims that there has been a breach of custody or access rights within the meaning of Article 3 or 21 from applying directly to the judicial or administrative authorities of a Contracting State, whether or not under the provisions of this Convention”.

The Child Abduction Act gives effect to the Convention on the Civil Aspects of International Child Abduction. The convention is incorporated as a schedule to the Act. Article 3 of the Convention provides that-

“The removal or the retention of a child is to be considered wrongful where-

- (a) it is in breach of the 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; 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 subparagraph (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.”

I am not persuaded by the argument advanced by the respondent’s counsel that for purposes of resolving the present dispute it must be accepted that the country of habitual residence of the minor child is Zimbabwe. The agreement between the parties clearly states that they had joint custody of the minor child. Those rights of custody would have continued to be exercised jointly in the United Kingdom had the child not been brought to Zimbabwe. In this respect see Article 3 (b) of the Convention. I agree with Mr *Paul*’s submission that the term habitual residence must be accorded its ordinary meaning. I also agree with his submission (in the context of the facts of the present case) that it does not follow that where one leaves one’s country of habitual residence then one loses that residence. It can not follow therefore, that the habitual residence of the child is Zimbabwe for purposes of determining whether the child has been wrongfully retained in terms of Article 3.

I agree with the submission that the issue for determination here is not the custody rights of the parties. That issue is for the jurisdiction of the country of habitual residence of the child. As I understand it the purpose of the present proceedings is to secure the prompt return of the

child to a Contracting State if it is proved that the child has been wrongfully retained. In this respect see Articles 1 and 3. The matter cannot be determined on the basis of the best interests of the child. In this respect I agree with the reasoning of DEVITTEE J in the case of *Secretary for Justice v Parker (supra)*. Having made reference to Article 1 of the Convention, the learned judge had this to say at page 405-

“The clear purpose of the Convention, as the preamble and article 1 indicate, is to provide a mechanism to deal with situations where children are wrongfully removed from a jurisdiction in which they are habitually resident. I am bound therefore to endeavor to give maximum force to the purposes of the Convention.”

It was also submitted by respondent’s counsel that the foreign law availed by applicant has not been authenticated in accordance with the provisions of the Child Abduction Act. She submitted that this was the procedure that was followed in Parker’s case (*supra*) where the Lord Chancellor’s Department provided an authenticated copy of the relevant statute when an application was made to the Secretary for Justice.

I agree that no reliance can be placed on the uncertified copy of the Children Act 1989 of the United Kingdom. However, to overcome this handicap Mr *Paul* sought to rely on sections 24 and 25 of the Civil Evidence Act. He submitted that in respect of section 24 (3) the court can take judicial notice of any fact that is not the subject of reasonable dispute. In this respect he cited *Halsbury’s Laws of England*, third edition as authority for the proposition that both applicant and respondent had parental responsibility in respect of the child in accordance with English law.

Mr *Paul* further submitted that the provisions of the Civil Evidence Act should be read in conjunction with Article 14. He further submitted that Article 14 should prevail over the provisions of the Civil Evidence Act. In this respect, he submitted that the Convention is concerned with the expeditious resolution of disputes concerning children. Mr *Paul* also submitted that in terms of section 24 of the Civil Evidence Act, the court may take judicial notice of certain matters that are not the subject of reasonable dispute. Thus, he urged the court to take into account *Halsbury’s Laws of England*, Third Edition in respect of the law in the United Kingdom regarding custody rights.

The first paragraph of the agreement clearly states that both parties have parental responsibility over the child. This is a feature of English law as stated in *Halsbury’s Laws of England (supra)*. In the case of *Chief Family Advocate And Another v G* 2003 (2) SA 599(W)

the parties were married according to South African law. They had one child. They moved to Britain where they subsequently separated, with the child staying with the father. Without the mother's knowledge the father took the child back to South Africa where he promptly enrolled it at a school. The mother then obtained an order from the Family Law Division of the High Court to the effect that the child remained a ward of the court.

SPILG AJ held that according to the Children's Act 1989 of the United Kingdom each parent has parental responsibility over a child born their marriage. The learned judge also noted that in the United Kingdom parent-child relations are no longer founded on basis of control but on the assumption of responsibilities. He further noted that this was well set out in *Halsbury's Laws of England* Vol. 5 (3) 4th Ed.

Although the respondent contends that the applicant has not fully complied with the conditions of the agreement, there appears to be no basis for such argument. The agreement in respect of accommodation requires the applicant to secure a two bed roomed property. It is immaterial that the applicant shares the property with her partner. In any event that is an issue for determination by the court that determines who should have sole custody of the child should the dispute between the parties take that route. As regards the condition that applicant must secure employment in the local area where she lives, the letter from applicant's employer states that she works from home on a full time basis. In respect of child tax credit, the explanation is that the applicant cannot claim that until she starts living with the child. Apart from a generalized challenge, the respondent has not rebutted that explanation by way of any other contrary proof.

The return of a child may also be refused in terms of Article 13 which provides that-

“Notwithstanding the provisions of the preceding Article, 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 person, institution or other body having the care of the person of the child was not actually exercising the 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.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence."

The respondent did not invoke this provision and confined himself to the contention that the applicant did not comply with the terms of the agreement they signed.

In the circumstances I am satisfied that the requirements of the Convention have been met. The application is therefore granted in terms of the draft order.

Wintertons, applicant's legal practitioners

Atherstone & Cook, respondent's legal practitioners