REPORTABLE

IN THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Case No 112/2000

In the matter between:

WARREN DEAN SMITH **Appellant**

and

LISA VIVIENNE SMITH **Respondent**

CORAM: **HEFER ACJ, SMALBERGER ADCJ *et* SCOTT JA**
HEARD : **2 MARCH 2001**
DELIVERED: **16 MARCH 2001**

Hague Convention on the Civil Aspects of International Child Abduction 1980 - acquiescence by wronged parent

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J U D G M E N T

SCOTT JA:

[1] The appellant is the father of two young children who are presently in South Africa with their mother, the respondent. They have been here since 20 January 1999. The appeal is against the order of Foxcroft J in the Cape Provincial Division dismissing the appellant's application for the return of the children to the United Kingdom in terms of the Hague Convention on the Civil Aspects of International Child Abduction 1980. The Convention has the force of law in South Africa by virtue of s 2 of the Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996 ("the Act") which came into operation on 1 October 1997. The appeal is with the leave of the Court *a quo*.

[2] No fewer than five sets of affidavits were filed in the Court below. The appellant embarked upon a scathing attack on the respondent alleging *inter alia* that she was an unfit mother, a lazy housewife and mentally unstable. All this

was stoutly denied by the respondent who in turn accused the appellant of being hypercritical, a "control freak", and lacking all understanding. Much of what is contained in the papers is wholly irrelevant to the relief claimed. The facts giving rise to the application may be stated shortly.

[3] The parties are both South African citizens. They were married in Cape Town on 6 April 1996. For the first six months of their marriage they lived with the respondent's parents in a suburb of Cape Town. In September 1996 the appellant was seconded to his employer's office in the United Kingdom. He applied for and obtained an "ancestry" visa which allowed him in effect to reside and work in the United Kingdom for five years. The respondent was also granted a visa which entitled her to work and reside in the United Kingdom but it was subject to her being married to the appellant and his remaining in the country. Shortly after their arrival the respondent obtained employment as a freelance secretary. However, she fell pregnant and their first child, Jay, was born on 24

June 1997. By this time the appellant had resigned from his employment and had set up his own business as a software engineer. The respondent, too, had resigned and was working at home for the appellant. Jay was apparently a poor sleeper and the respondent was frequently up at night attending to him. The extent of the role each parent played in attending to the needs of Jay is the subject of dispute. Nonetheless, it is clear that the appellant was working long hours and of necessity the bulk of the caring for Jay was left to the respondent. During this period the appellant's mother came from South Africa to stay with the young couple for some 5 weeks. The respondent's parents also came to see the baby. In addition, there were numerous other South African visitors who came to stay. The respondent says she found it all very stressful.

[4] In January 1998 the couple travelled to South Africa for a holiday. The appellant returned after a week but the respondent, who by then was once again pregnant, stayed on with Jay for two and a half months, returning on 9 April

1998.

[5] The couple's second child, Joshua, was born on 11 September 1998. By then, or within a very short time thereafter, the marriage relationship had all but disintegrated. In December 1998 the appellant sought and obtained information regarding divorce proceedings from a solicitor. On 28 December he went on a business trip to Moscow taking with him a woman, Ms Dorfman, whom he said he proposed employing as an au-pair and whose background he wished to investigate. On 1 January 1999 Ms Dorfman moved in to commence her duties as an au-pair. There is a dispute as to how this came about but it need not be resolved. The respondent consulted a solicitor and the parties agreed that the respondent and the children would spend a two-month holiday in South Africa with her parents, whereafter they would return to the United Kingdom on 21 March 1999. She left on 19 January with the children. Jay was then 18 months old; Joshua was a baby of four months. Back in South Africa the

respondent sought professional help and guidance regarding her marriage. She decided that it had come to an end and on 17 March 1999 advised the appellant that she was not returning to the United Kingdom but would remain in South Africa with the children. She consulted an attorney in Cape Town and commenced divorce proceedings in the High Court, Cape Town on 25 March 1999. The appellant has since vacated the former matrimonial home and has moved in with Ms Dorfman with whom he lives as husband and wife.

[6] The object of the Convention is plain; it is to protect children internationally from the harmful effects of their wrongful removal from the country of their habitual residence to another country or their wrongful retention in another country. To this end the Convention establishes a procedure to ensure their prompt return to the country of their habitual residence so that the issues of custody can be adjudicated upon by the courts of that country.

[7] In terms of articles 3 and 4 the removal or retention of a child under

the age of 16 years is said to be wrongful when it is effected in breach of the rights of custody attributed to any person, institution or body under the law of the State in which the child was habitually resident. Articles 6 and 7 make provision for each contracting State to designate a central authority to discharge the duties imposed upon it by the Convention. (In South Africa the designated central authority is the chief family advocate appointed in terms of the Mediation in Certain Divorce Matters Act 24 of 1987 (see s 3 of the Act). The central authority for England and Wales is the Lord Chancellor's Department.) Article 8 entitles a party claiming that a child has been wrongfully removed or retained to apply to the central authority of the State in which the child is habitually resident or to the central authority of any other State for assistance in securing the return of the child. If the central authority receiving such an application has reason to believe that the child is in another contracting State it is obliged in terms of article 9 to transmit the application to the central authority of the State to which

the child has been removed. Under art 10 the latter central authority must take all appropriate measures to obtain the voluntary return of the child. A party claiming that a child has been wrongfully removed or retained may also in terms of art 29 apply directly to the judicial or administrative authorities of a contracting State for the return of the child.

[8] Article 12 is crucial to the achievement of the Convention's objective. It provides that where a child has been wrongfully removed or retained in terms of art 3 and less than one year has elapsed between the date of removal or retention and the date of the commencement of proceedings before the judicial or administrative authority of the State where the child is, the authority in question is obliged to order the return of the child forthwith. Even if a period longer than a year has elapsed the authority concerned is still obliged to order the return of the child unless it is demonstrated that the child is settled in its new environment.

[9] The return of a child may be refused only on certain limited grounds.

Two such grounds are contained in article 13, which in so far as relevant provides:

> "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 -
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> 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."

A judicial or administrative authority hearing an application for the return of a child is required by art 16 not to decide on the merits of a custody claim until it has been determined that the child is not to be returned under the Convention.

[10] As to the third ground on which the return of a child may be refused, art 20 provides:

> "The return of the child under the provisions of 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."

The signatories to the Convention accordingly acknowledged in this article that in countries such as South Africa where there is a constitution containing a bill of rights the right of an applicant to procure the return of a child may be subject to further limitations. In *Sonderup v Tondelli and Another* 2001(1) SA 1171 (CC) the Constitutional Court had occasion to consider the extent to which an order for the return of a child under the Convention may be affected by s 28 (2) of the Constitution. However, in view of the conclusion to which I have come in the present case it is unnecessary to consider the constitutional issues which may have arisen from the relief sought.

[11] It is apparent from the aforegoing 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 art 3. Once this has been established the onus is upon a party resisting the order to establish one or other of the defences referred to in art 13 (a) and (b) or that the circumstances are such that a refusal would be justified having regard to the provisions of art 20. If the requirements of art 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.

[12] In the present case it was common cause that both children were habitually resident in the United Kingdom at the time of their retention in South Africa and that their retention was wrongful within the meaning of art 3. It was contended on behalf of the respondent, however, that the appellant had subsequently acquiesced in their retention in South Africa and that there was in any event a grave risk that their return to the United Kingdom would expose them to physical or psychological harm or would otherwise place them in an intolerable

situation. The learned judge in the Court *a quo* found that it had been established that there was a grave risk that the children would be placed in an intolerable situation if removed from their mother. He was not satisfied on the basis of the undertakings given by the appellant that there was adequate provision for her support in England and, as the respondent had a very real fear that she might not be permitted to stay in England for any length of time, had no guarantee of employment and the means to stay in England during what might be protracted proceedings, he held that the application had to fail. In the course of his judgment, the judge disposed of the respondent's contention that there had been an acquiescence with the following remarks:

> "... I would be loath to deny [the appellant] the opportunity of placing his argument before me on the basis that he had, on his version, dropped the proceedings for a week or two until being given different advice. I am satisfied that it was always his desire to proceed with a Hague Convention application and that the entry into negotiations after receiving the first advice should not stand in the way of placing his argument before me."

In this Court counsel for the respondent persisted in the contention that the appellant had acquiesced in the retention of the children in South Africa and urged that on this ground alone the appeal be dismissed.

[13] It accordingly becomes necessary to revert to the facts. On learning that the respondent was not returning to the United Kingdom the appellant immediately consulted his solicitor who on 17 March 1999 wrote to the respondent advising that unless the children were returned within the following week their removal -

> "…. will become wrongful and we have advised our client as to the appropriate steps that he can take, if needs be."

The appellant was presumably advised of his rights under the Convention. Indeed, on 26 March 1999, being the day after the respondent commenced divorce proceedings in Cape Town, the appellant's solicitor wrote advising -

> "Our client has therefore issued an Application under the Hague Convention through the Child Abduction Unit of the Lord Chancellor's

Department."

In fact it was subsequently on 19 April 1999 that the appellant deposed to an affidavit in support of his application to the Lord Chancellor's Department under art 8 of the Convention. On 22 April the application was transmitted to the chief family advocate in South Africa in terms of art 9 and received by the latter on 30 April.

[14] On 2 May 1999 the appellant travelled to Cape Town where he remained until 10 May. Before leaving for Cape Town he contacted a Durban attorney who, according to the appellant, advised him "that a father has no chance of having such young children returned through the procedures of the Hague Convention and that a father would have absolutely no chance of winning custody of such children." On arriving in Cape Town he consulted an attorney, Mr Gerald Shnaps. He also had several discussions with a friend who is a partner

of another firm of attorneys in that city. Both, he said, gave him similar advice "namely, that a father would not be granted custody of such young children."

[15] As a result of this advice, which the appellant categorized as "incorrect", he gave instructions to Mr Shnaps to inform the family advocate that he was not proceeding with his application under the Convention. Mr Shnaps and the respondent's attorneys entered into negotiations and on 6 May 1999 a so-called round table conference was held which was attended by the attorneys representing both parties as well as the appellant himself and his attorney-friend. On 11 May 1999 Mr Shnaps wrote to the family advocate advising that he had written instructions to the effect that the appellant was no longer proceeding with his application under the Convention and that he had returned to England. On the same day he wrote to the respondent's attorneys informing them of his communication to the family advocate and advising that he would be writing "under separate cover with regard to the action itself". The reference to "the

action" was clearly a reference to the respondent's action for divorce which she had instituted on 25 March 1999. Subsequently the appellant was contacted by another attorney who advised him to launch the present proceedings which he did on 4 June 1999.

[16] There can be little doubt that the acquiescence referred to in art 13 (a) involves an informed acceptance of the infringement of the wronged party's rights. But that is not to say that acquiescence requires full knowledge of the precise nature of those rights and every detail of the guilty party's conduct. As observed by Stuart-Smith LJ in *Re A and another (minors) (abduction: acquiescence*) [1992] 1 All ER 929 (CA) at 940 b:

> "A party cannot be said to acquiesce unless he is aware, at least in general terms, of his rights against the other parent. It is not necessary that he should know the full or precise nature of his legal rights under the convention..."

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.

[17] It is also necessary to observe that art 13 (b) requires no more than that the person seeking relief should have acquiesced. Once he has done so the requirement is satisfied and the fact that he has subsequently changed his mind does not alter the situation. It must be remembered, of course, that an acquiescence in the past does not mean that the court will necessarily refuse to order the return of the child. Its effect is no more than to "unlock the door" (as it is sometimes expressed) to the exercise of the court's discretion under art 13. That discretion is to be exercised "in the context of the approach of the convention." (Per Lord Donaldson of Lymington MR in *Re A and another*, *supra*, at 942 d.)

[18] In several decisions of the Court of Appeal in England a distinction was drawn between active and passive acquiescence. In the case of the former

the uncommunicated subjective intention of the wronged parent was normally regarded as irrelevant while in the latter the subjective intention was regarded as relevant. This distinction was rejected by the House of Lords in *Re H and others (minors) (abduction : acquiescence)* [1997] 2 All ER 225 (HL). Lord Browne-Wilkinson considered that art 13 looked to the subjective state of mind of the wronged parent and that accordingly the true inquiry was simply whether he had in fact consented to the continued presence of the children in the jurisdiction to which they had been removed or had been retained. At 235 e the learned law lord said:

> "In my judgment, therefore, in the ordinary case the court has to determine whether in all the circumstances of the case the wronged parent has, in fact, gone along with the wrongful abduction. Acquiescence is a question of the actual subjective intention of the wronged parent, not of the outside world's perception of his intentions."

And continued (at 235 g):

> "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."

I respectfully agree. Indeed, I can see no justification for importing into art 13 (a) a rule of thumb distinction which is not to be found in the words used.

[19] To the above approach, Lord Browne-Wilkinson added one qualification; that is the case where although the judge is satisfied that the wronged parent did not, in fact, acquiesce his outward conduct was such as to lead the abducting parent to believe that the wronged parent was not going to insist on the summary return of the child. This was because (at 236 f) -

> "[n]o developed system of justice would permit the wronged parent in such circumstances to go back on the stance which he has, to the knowledge of the other parent, unequivocally adopted: to do so would be

unjust."

In the present case the appellant was aware of the Convention and that the respondent's conduct in retaining the children in South Africa was unlawful. He was aware, too, that he was afforded a remedy under the Convention. With this knowledge he nonetheless instructed his attorney to withdraw his application under art 8 of the Convention and to enter into settlement negotiations with the respondent's attorney. These facts clearly justify the inference that the appellant, with knowledge of his rights, in fact intended to go along with the wrongful retention of the children in South Africa. His conduct would certainly have led the respondent reasonably to believe that he was not insisting on their summary return.

[20] Counsel for the appellant, however, argued that there had been no proper acquiescence as the appellant was misled as to his rights under the Convention by the incorrect advice given to him by his legal advisers in South

Africa. I am far from persuaded that in the circumstances outlined above it is even open to the appellant to put in issue the correctness of the advice he received. Quite apart from Lord Browne-Wilkinson's 'exception', it strikes me as quite unfair to require the respondent, who bears the onus, to establish what was said or not said in the course of privileged conversations between the appellant and his legal advisers. Nonetheless I shall assume, without deciding, that it is permissible in these circumstances to enquire into what the appellant was told by his legal advisers. It is important to bear in mind that all three attorneys consulted by the appellant were aware of the appellant's rights under the Convention, as was the appellant himself. The question which confronted them was whether the appellant would succeed in obtaining an order for the summary return of the children and indeed, if so, whether he would ultimately obtain a custody order in his favour. Counsel criticised the advice given (on the basis of the appellant's cryptic version of that advice) because it was founded on an over-

emphasis of the tender age of Jay and Joshua. She pointed out that summary returns are ordered under the Convention even in the case of very young children. That is undoubtedly so, but while age is not necessarily decisive it could well be a weighty factor when considering the exceptions under art 13 (a) and for that matter art 20. I can see no reason for accepting that the advice was anything other than an informed expression of opinion as to the appellant's prospects of success. It is in any event quite clear from the appellant's own evidence that his advisers considered it very unlikely that he would ultimately obtain custody having regard to the age of the children. That advice can hardly be categorised as incorrect or unreasonable and whether or not the appellant would ultimately succeed in the custody proceedings would, of course, have been a vital consideration when deciding whether it was worth persisting in the application under the Convention. I am unpersuaded therefore that the appellant was misled by his legal advisers. Furthermore, he elected to accept their views in preference

to what he claimed in his founding affidavit was contrary advice received from his English solicitor. In my judgment the respondent succeeded in discharging the onus of establishing that the appellant acquiesced in the wrongful retention of the children in South Africa.

[21] There remains the question of the discretion. Counsel for the appellant very fairly conceded that in the event of it being found that there was an acquiescence, the Court should not in the exercise of its discretion order the return of the children to England having regard to the long lapse of time since they were first retained in this country. I think the concession was well made. The Convention envisages a prompt restoration of the *status quo ante* so that the questions of custody or access can be determined by the courts of the country from which the children were removed. Not only is there a statement to this effect in art 1 but art 11 expressly enjoins the judicial or administrative authorities of contracting States to act expeditiously in proceedings for the return of

children. Furthermore, in terms of art 12 the non-discretionary obligation to order the return of children is inapplicable if a year or more has elapsed between the removal and the commencement of proceedings. In the present case the proceedings were anything but expeditious. The application was launched only some two and a half months after the respondent had made it clear that she was not returning. Voluminous affidavits were filed and the matter was set down for hearing on the semi-urgent role on 8 September 1999. (The final set of affidavits was filed by the appellant on 6 September.) The hearing took two days and judgment was delivered by Foxcroft J a little more than a week later on 17 September 1999. An application for leave to appeal was filed on 8 October 1999 but for some reason which is unexplained the application was only heard on 2 March 2000. Leave was granted immediately but it took until 14 July 2000 for the record of the proceedings to be lodged with the registrar of this Court. Finally, it was only when counsel's heads of argument and practice note were

filed on 31 October 2000 that notice was given that the matter was urgent. By then it was too late to place the matter on the roll for November and it was accordingly set down for hearing in the first term of 2001.

[22] The result of all this is that more than two years have elapsed since the children first arrived in South Africa. Joshua was then a baby of 4 months; he is now two and a half years old. Jay was 18 months; he is now three and a half years old. It is unlikely that either child has any recollection of having lived in England. Whatever the reason, their home is now with their mother in Cape Town. I can see no sense at this stage in sending them back to England for the question of custody to be determined there.

[23] It is accordingly unnecessary to consider the defence raised under art 13 (b) of the Convention.

The appeal is dismissed with costs.

D G SCOTT
JUDGE OF APPEAL

CONCUR

HEFER ACJ
SMALBERGER ADCJ