South Africa: High Courts - Gauteng

Central Authority for the Republic of South Africa v Bronowicki (2008/16120) [2008] ZAGPHC 261; 2009 (1) SA 624 (W) (20 August 2008)

IN THE HIGH COURT OF SOUTH AFRICA
(WITWATERSRAND LOCAL DIVISION)

CASE NO 2008/16120

In the matter between

THE CENTRAL AUTHORITY FOR THE
REPUBLIC OF SOUTH AFRICA APPLICANT

and

STACEY BRONOWICKI **RESPONDENT**

J U D G M E N T

VAN OOSTEN J

[1] This is an application, initially brought by way of urgency, in terms of the Hague Convention on the Civil Aspects of International Child Abduction (1980) (the Convention), as incorporated into South African law by the Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996, (the Act), for an order directing the immediate return of a little girl, M F Bronowicki, (M), to the jurisdiction of the Central Authority in the United States of America. M was brought to South Africa by her mother, the respondent, from their place of habitual residence in Illinois Ohio, United States of America on 13 May 2006. Both she and her mother are still in South Africa, presently living in Benoni. The applicant seeks relief in this application in terms of art 12 of the Convention, which provides for the summary return of a child who has wrongfully been removed from his or her habitual place of residence.

[2] The respondent who is presently 27 years of age, was born and bred in South Africa. Her husband Jeremy Todd Bronowicki (Bronowicki) who is presently 30 years old, is a citizen of the United States of America. They met in the USA in 2002 where the respondent was working as an au pair and Bronowicki studying at a college. In November 2002 the respondent resigned and returned to South Africa. Bronowicki followed her during the college summer recess in July 2003. He however stayed in South Africa for over a year and took up employment as a restaurant manager. They were married to each other at Benoni, South Africa on 2 December 2003. Soon after the wedding they decided to return to the USA. Bronowicki returned to the USA in June 2004 and the respondent, who was then pregnant, followed him there a few months later. M was born to the couple in Elgin, Illinois on 31 October 2004. On 13 May 2006 the respondent left their habitual place of residence in Illinois, USA with the minor child and returned to the Republic of South Africa where she and the child as I have mentioned are presently living.

[3] The reasons for the respondent leaving her husband and returning to South Africa are in dispute. It is necessary to briefly deal with the disputed facts as they relate to the alleged wrongfulness of the respondent's conduct as well as the first "defence" raised by the respondent which is that the father expressly consented to, or at least acquiesced to them leaving the USA. Bronowicki contends that the removal of M occurred without his knowledge or consent and that

it therefore was unlawful. He states that he was absent from home for a week on a military training session at the time. On his return home he found that his wife and child had left. A letter left behind by the respondent informed him that they had left for South Africa, that they would temporary live with relatives and that they would not be returning to the USA. The respondent's conduct he maintains was nothing but a "deceitful plot" to abduct the child. He says she had no reason to leave and had in the past only complained about their poor living conditions and the meagre income they had to live on. Significantly he makes no mention of any problems of the kind referred to by the respondent, which I will refer to later in the judgment. Such problems as there were he played down to those normal difficulties one would expect in a "stable and healthy relationship". As an illustration hereof he refers to the night before she left for South Africa, when she at a romantic candle-light dinner, confirmed her love for him and added that she was already looking forward to his return from the training session. Shortly after she had left, an e-mail bearing the date 2 March 2006 which she had sent to a mutual friend of theirs who lived in South Africa, coincidentally came to his notice. In it she informs her friend that she was thinking of staying behind in South Africa in September 2006, which was when she had planned to attend her brother's wedding, and that it was to be kept secret as her husband, in her words, "won't let me take M". In January 2007 he attended a three year compulsory special military training course in Virginia. In April and again in June 2007 he sought legal advice from different attorneys but they made no mention of the Convention and were of no assistance to him. In August that same year he came to South Africa primarily to see his daughter. The respondent allowed him to visit M after work hours at her residence. During one of these visits an argument flared up between them and she refused him any further access. He instructed attorneys who by way of correspondence attempted to come to an arrangement regarding access. When this came to naught he launched an urgent application to this Court for interim access and obtained an order on 30 August 2007 granting him supervised access to M on specified dates and times until 3 September 2007. In his founding affidavit in the urgent application Bronowicki states that it was his intention to "bring the necessary application in terms of the Hague Convention and seek the necessary relief in order to ensure that the respondent accepts responsibility for her unlawful actions". On 8 September 2007 he reported the matter to the United States Central Authority who on 23 April 2008 No explanation has been furnished for the seemingly inordinate delay. sent their request to the applicant to commence proceedings under the Convention for the return of the child. On 16 May 2008 Adv Kathawaroo of the Family Advocate's office in Johannesburg Who is also the deponent to the affidavits filed on behalf of the applicant in this application.

conducted an interview with the respondent, at which her father and legal representatives were present.

The parties disagree as to what was said during the interview. Save for the remarks I make below concerning the interview, I do not consider it necessary to deal with it any further.

The respondent refused to "voluntary return"

Which are the words used by Kathawaroo in the founding affidavit: in the reply he puts it somewhat stronger in stating that "the respondent did not capitulate".

of M to the USA, hence the present application which was launched on 29 May 2008.

[4] The respondent's version is quite different. She contends that her husband consented, either expressly or tacitly to her and therefore the child's return to South Africa. In her answering affidavit she sets out in considerable detail the gradual deterioration of their marriage relationship, which she says was caused by emotional and psychological abuse she had suffered at the hands of her husband, lack of finances, instability in her husband's employment history and the intrusion into their privacy by Bronowicki's mother, who suffered from bipolar disorder and who had lived with them for some time, in what she refers to as "squalid conditions". All this she concludes eventually made cohabitation with her husband intolerable. Two days before she left him, Bronowicki during a heated argument, ordered her as he had done previously, to "pack her things and leave" She told him that she would do so and added that she would not leave M behind, to which he did not respond. Before she left for South Africa she wrote him a letter informing him of the move and that they could be contacted at her parents address in South Africa.

[5] Bronowicki has not been joined as a party to these proceedings. His unattested statement forms part of the request of the Central Authority in the USA to the applicant, to which I have already referred. In the statement he fully deals with the events from the time having met the respondent to eventually reporting the matter for purposes of the application under the Convention. A now signed affidavit by Bronowicki reiterating his version, which was filed in response to the respondent's answering affidavit, forms part of the applicant's reply. The respondent as I have alluded to, has fully set out her version in the answering affidavit. This brings me to a telephone conversation between the respondent and Bronowicki shortly after the respondent's departure. A transcript of the telephone conversation has been handed in. It undoubtedly reflects a troubled marriage relationship and further Bronowicki's admission having

ordered her to leave which is in conflict with his denial having done so in the papers before me. I however do not consider it necessary to traverse the opposing versions of the parties concerning the reasons for the respondent's actions, in any detail. While I am in agreement with counsel for the respondent that there are clear indications of an unhappy marriage relationship and that continued their cohabitation would have led to an intolerable situation, the converse of a ploy to remove the child to South Africa cannot be discarded. These disputes in my view can only be resolved on the hearing of *viva voce* evidence. Similar considerations apply as regards Bronowicki's alleged acquiescence: it is my impression, in particular having regard to the contents of the telephone conversation, that Bronowicki was faced with the inevitable reality that his wife and their child had already left which caused him to resort to all possible means, including making passionate promises to change for the better, in an attempt to persuade her together with their child, albeit some time in future, to return to the USA. It has authoritatively been laid down that consent or acquiescence on such an important matter should not lightly be inferred from a party's conduct. It concerns the state of mind of the person concerned and only conduct or expressions unequivocally consistent with consent or acquiescence would suffice. See *Central Authority v H* 2008 (1) SCA 49 (SCA) at par [20].

[This was an appeal against my judgment and order in the court *a quo*. Van Heerden JA held as follows concerning my order:

"[26] As none of the exceptions justifying the non-return of N to the Netherlands was established on the papers, the court a quo was obliged in terms of art 12 of the Convention to order N's return to that country. This it did not do, instead ordering the *mother* to return to the Netherlands 'for the purpose of attending and/or opposing the custody hearing in respect of' N, and that only if 'oral evidence is required'. That order clearly does not comply with the Convention and must be set aside." [Emphasis in original text]

I must with respect point out that the order I granted, albeit referring in the opening line of par 1 thereof to the respondent only, was for the return of the mother *and the child* and not merely for the return of the mother. [Emphasis added] In terms of my order (quoted in full in par [3] of the SCA judgment) the respondent was ordered to return to the Netherlands but the father of the child was further ordered to "purchase a return ticket for the respondent *and the minor child*" and to "provide free accommodation for the respondent *and the minor child* at … Zandvoort … for the duration of the respondent's stay…in the Netherlands".[Emphasis added] The reason for my order is stated in my judgment as follows:

"By ensuring the availability of the child and the respondent for all purposes necessary to enable the proper determination of the custody dispute by the Court in the Netherlands in my view would in no conceivable way undermine the integrity of the Convention. As much has been achieved by the draft order presented to me on behalf of the respondent."]

To summarise: the disputes as to the wrongfulness of the removal of the child, consent and acquiescence can only be resolved after the hearing of oral evidence. To receive such evidence would inevitably delay the matter further and therefore defeat the primary object of the Convention which is to ensure the expedient resolution of the application. See *Pennello v Pennello (Chief Family Advocate as Amicus Curiae)* **2004 (3) SA 117** (SCA) at par [40]; *Chief Family Advocate and Another v G* **2003 (2) SA 599** (W) p 616A. I therefore propose to deal with the remaining issues which are capable of resolution on the papers as they stand.

[6] The purpose of the Convention, the Constitutional Court has held, "is to ensure, save in exceptional cases provided for in art 13 (and possibly in art 20), that the best interests of a child whose custody is in dispute should be considered by the appropriate court". See *Sonderup v Tondelli and Another* **[2000] ZACC 26**; **2001 (1) SA 1171** (CC) par [30]; See also *Central Authority v H* supra par [16]. For purposes of the present matter it is necessary to consider firstly, what the appropriate Court would be and, secondly, the nature of the disputes that such Court will be required to determine. The respondent instituted divorce proceedings against Bronowicki in this Court on 15 August 2007. The summons in the action was served on Bronowicki during his visit to South Africa that same month. See par [3] *supra*. He instructed attorneys who on 24 August 2007 delivered a notice of intention to defend the action and thereafter on 29 November 2007 delivered his plea and counterclaim. A "special plea" is raised in the pleading which, far from disclosing a triable issue, rather inelegantly advances some objection to the summons having been served on Bronowicki during his temporary stay in South Africa. But it also contains an admission that the respondent is domiciled within the area of jurisdiction of this Court

The special plea reads as follows: "*It is the Defendant's contention that the Defendant has not been resident or domiciled in the Witwatersrand local division (sic) or resident within the jurisdiction from birth and the Defendant states that the Plaintiff manipulated the service of the summons by luring the Defendant to the Republic of South Africa under false pretences and thus avoiding an application for edictal citation for the service of the summons and the Defendant states that the Defendant is currently and regards the United States of America as his permanent home and that the Plaintiff is domiciled within the area of jurisdiction of the Witwatersrand Local Division and not the Defendant.*"

which constitutes a jurisdictional fact for this Court exercising jurisdiction. In terms of s 2(1) of the Divorce Act no 70 of 1979. Counsel for the applicant was unable to advance any arguments to the contrary. In his counterclaim Bronowicki seeks an order for both parties to have co-guardianship of their child; that the child's place of primary residence be with the mother and that he be granted certain specified rights of access to the child. As provided for in s 18 of the Children's Act no 38 of 2005. In his affidavit forming part of the applicant's reply Bronowicki, somewhat belatedly I should add, rather unconvincingly attempts to steer away from the import of his plea and counterclaim. In my view he should be held to the pleadings in the divorce action which clearly define the issues between the parties: the Court hearing the action will in essence only have to determine his rights of access to M as it is common cause between the parties that her primary place of residence is to be with the respondent. I have not been informed of any other proceedings pending in regard to these issues nor has either Bronowicki or the applicant given any indication of an intention to institute such proceedings in the USA. It accordingly follows that this Court already being seized of the matter, is in a better position to resolve the issues between the parties.

[7] I turn now to the "defences"

It is perhaps more appropriate to refer to the "defences" as "exceptions" which is the terminology used by Van Heerden JA in *Central Authority v H* supra.

raised by the respondent. Firstly, she relies on the fact that a period of more than one year has expired after the removal of the child before commencement of these proceedings, and that the child has now become settled in its new environment, for the contention that this Court should exercise its discretion against an order for the return of the child. Secondly, she states that the return of the child will place her in grave risk of physical harm or otherwise intolerable situation as contemplated by art 13 *(b)* of the Convention. The Convention provides for the mandatory or non-discretionary return of a child if a period of less than one year has expired from the date of removal of the child to the date of commencement of the proceedings for the return of the child. After the expiration of the one year period, art 12 provides

Art 12 provides as follows:

"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 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.
Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child."

that the return of the child shall also be ordered "unless it is demonstrated that the child is now settled in its new environment". Notwithstanding these provisions the Court in terms of art 18 remains vested with a discretion to order the return of the child.

[8] The proceedings in this matter commenced almost two years after the date of removal of the child. Counsel for the applicant submitted that Bronowicki should not be prejudiced by the delay resulting from his ignorance concerning his rights under the Convention which was exacerbated by the lack of proper advice by the attorneys he consulted and further for the delay that was caused by the requesting State forwarding the request to the applicant more than seven months after Bronowicki's reporting it to them. Making allowance for these delays counsel concluded, would steer the commencement of the proceedings within the one year period. This argument is simply not acceptable on a proper reading of art 12 which clearly makes no allowance for a discretionary determination of the one year period. I accordingly hold that the proceedings in this matter commenced outside the one year period provided for in art 12. That leaves for determination whether the child is now settled in its new environment. It is the respondent's version, as will become apparent that M is well settled in her present environment. Neither the applicant nor Bronowicki has taken issue with the respondent on this aspect. When I raised the absence of a dispute on the settlement of the child with counsel for the applicant at the commencement of the hearing before me, she sought a postponement of the application which she submitted would afford the applicant the opportunity to fully investigate the present circumstances of the child. Such investigation counsel informed me may well include psychological testing of the child. Counsel for the respondent opposed the application for a postponement. I refused a postponement and the hearing proceeded. My reasons for the refusal are these: the postponement was sought at a seemingly late stage in the proceedings which by then had already been pending for two months: it has always been the applicant's view that this matter was extremely urgent. The applicant moreover has been in possession of the respondent's answering affidavit with annexures thereto, in which the settlement of the child is pertinently raised and dealt with, since 12 June 2008 and in the almost six weeks available to it, has made no attempt to address this aspect. Counsel for the applicant moreover was unable to show that such

further investigation would provide any positive results other than perhaps affording the applicant an opportunity to embark upon a fishing expedition.

[9] I turn now to consider the evidence before me concerning M's settlement in her present environment. The respondent states that she and M have become settled in a townhouse, which on her description thereof quite adequately provides for their needs. M attends a nursery school, she is involved in various extra-mural activities, has made friends and often socialises with her family. A report on M by a forensic social worker with some forty years' experience, filed by the respondent, is before me. She has conducted an in-depth investigation into and evaluation of M's present circumstances. Her findings and conclusions are not disputed. It is therefore not necessary to repeat the contents of the report in this judgment. Suffice to say that the conclusion to which she has come, *ie* that M is "settled and secure and should continue to be afforded the permanence that the respondent affords her" is properly motivated and justified. No arguments to the contrary have been advanced. Applicant's counsel merely submitted that the report should carry little weight as the social worker has not had an interview with Bronowicki. I do not agree. The report was not compiled for purposes of determining a custody dispute. It serves to show what M's present circumstances are, and how she has adapted thereto. An interview with Bronowicki would not have taken this aspect any further. This is more so since he has not in any way disputed any of the findings the social worker has made relevant to the enquiry. Bronowicki it must be remembered did visit her when he was in South Africa and I think one can safely assume that had there been anything untoward, he would have raised it. For these reasons I conclude that M is now settled in her new environment and that in the circumstances of this case I should exercise my discretion to refuse an order for her return to the USA.

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

[11] It remains to consider the costs of this application as well as the costs earlier reserved to which I will revert later. After the filing of a full set of affidavits the applicant enrolled the matter for hearing in the urgent Court where it came up for hearing before Blieden J on 19 June 2008. The learned Judge referred counsel appearing for the parties to the Deputy Judge President in order for him to allocate a date and Court for the hearing of the matter. It was then rolled over to the urgent Court for the next week, commencing 23 June 2008 and heard by Jajbhay J. The

parties addressed the Court on the urgency of the matter. The learned Judge held that the application was not urgent and ordered that the matter be removed from the roll, and that costs be reserved. The applicant again enrolled the matter for hearing on the ordinary opposed motion roll for the week commencing 29 July 2008. It was argued before me on 31 July and 1 August 2008. Having had the benefit of comprehensive heads of argument on behalf of the parties as well as full argument, for which I am indebted to counsel on both sides, I decided in order to ensure expedience and in the interests of the parties, to immediately make my order known. I consequently made the order appearing at the end of this judgment and informed the parties that my reasons for the order would be delivered at a later date. Counsel for the applicant immediately from the bar informed me of the applicant's intention to apply for leave to appeal against the order and I consequently enrolled the applicant's application for leave to appeal and postponed it *sine die*.

[12] As for the costs reserved by Jajbhay J, I am of the view that the applicant should bear those costs. The applicant's enrolment of the matter in the urgent court was clearly unjustified. The learned Judge held that the matter was not of such urgency for it to be heard in the urgent Court. There is no reason why the applicant could not have enrolled it on the ordinary motion court roll, which would not have resulted in any undue delays. In these circumstances it is only just and fair that the respondent should be compensated for the wasted costs occasioned by the hearing in the urgent Court.

[13] As regards the costs of the remainder of this application, counsel for the respondent very fairly (correctly, in my view) did not press for an order for costs against the applicant. The most equitable outcome therefore would be for each party to pay his or her own costs.

[14] Before concluding this judgment I consider it necessary to say something about the role adopted by the Family Advocate in this matter. In applications under the Convention s 3 of the Act designates the Chief Family Advocate (the Family Advocate) to discharge the duties imposed by the Convention. The Family Advocate is obliged by the Convention to co-operate with the Central Authority of the requesting State to take the "appropriate measures" *inter alia* to "initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child". Article 7(f) of the Convention. In this regard Goldstone J remarked in *Sonderup v Tondelli and Another Supra*, par [14]. that

"Contrary to the neutral role that the Family Advocate takes in domestic matters, the Family Advocate may be obliged to adopt an adversarial role and oppose the wishes of the parent opposing such return."

In matters under the Convention the Family Advocate acts in a representative capacity. The Convention recognises and safeguards the paramountcy of the best interests of the child. I have no doubt that it is for this very reason that the Family Advocate was designated to represent the Central Authority in South Africa. In the discharge of its Convention duties

Art 7 of the Convention provides: *"Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention.*

In particular, either directly of through any intermediary, they shall take all appropriate measures –

a.

to discover the whereabouts of a child who has been wrongfully removed or retained;

b. to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures;

c. to secure the voluntary return of the child or to bring about an amicable resolution of the issues;

d. to exchange, where desirable, information relating to the social background of the child;

e. to provide information of a general character as to the law of their State in connection with the application of the Convention;

f. to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organising or securing the effective exercise of rights of access;

g. where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers;

h. to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child;

i. to keep each other informed with respect to the operation of this Convention and, as far as possible, to eliminate any obstacles to its application."

the Family Advocate must ensure that the objects of the Convention are achieved. The office of the Family Advocate was established in terms of the Mediation in Certain Divorce Matters Act no 24 of 1987, *inter alia* to assist the Court in safeguarding the interests of minor children in divorce and related proceedings. That being so, the Family Advocate in the performance of its duties, even where it is necessary to adopt an adversarial role in regard to one of the parents,

must above all remain objective and should therefore not take sides. Nor should the Family Advocate assume the role of an advocate for either of the parents of the child. It is true that the "left behind" parent does not become a party to the proceedings under the Convention. But, he or she is entitled to join or to be joined as a party to those proceedings and of course to legal representation. In the present matter the Family Advocate did not adhere to these norms and appears to have misconceived its role:

In the replying affidavit Adv Kathawaroo states that he had "specially advised" the respondent during the interview of 16 May 2008 [par [3] above] "…that I act in the capacity of the Central Authority of RSA, far removed from the statutory duties of a Family Advocate…" which in view of what I have said concerning this aspect, is clearly wrong.

the initial interview held with the respondent displays an absence of objectivity which perpetuated itself into the affidavits of Adv Kathawaroo, containing comments and argumentative matter concerning the respondent's version in an attempt to discredit her, which were not only inappropriate but also should not have been included in an affidavit.

[15] Another unsatisfactory aspect should not escape the censure of this Court: very little attention has been given to the conditions our courts Cf *WS v LS* **2000 (4) SA 104** (C) p114B, *Central Authority (South Africa) v A* **2007 (5) SA 501** (W) par [30] and the cases referred to above. normally impose to mitigate the interim prejudice to the child caused by a return order. *Sonderup v Tondelli and Another* supra par [35]. Except for an "undertaking" in general terms made by Bronowicki in an affidavit, to "comply with any and all Orders made" by this Court and to "meet any undertakings which my representative gives on my behalf in the matter", I have not been provided with any information or firm undertakings in regard to the respondent's or the child's welfare in the event of a return order being made. *In casu* the conditions requiring consideration include the desirability of the respondent companying the child tot the USA, the provision for payment of the costs of flight tickets to and from the USA, provision for accommodation and maintenance while they are in the USA and finally if proceedings are contemplated and if so, when, where, in which Court and the anticipated duration thereof. In the present matter the Family Advocate has simply not properly addressed these aspects. Bronowicki's undertaking in those wide and general terms without any factual foundation is clearly insufficient for this Court to properly consider these aspects.

I should not be understood to hold that these shortcomings would have led to a dismissal of the application.

It is hoped that the shortcomings I have referred to in this judgment, will receive the Family Advocate's prompt and proper attention.

[16] In the result I make the following order:

1.

The application is dismissed.

2. The applicant is ordered to pay the costs reserved by Jajbhay J on 23 June 2008.

3. In respect of the remainder of the application no order for costs is made.

4. An application for leave to appeal by the applicant is enrolled and postponed *sine die*.

_____

FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

COUNSEL FOR APPLICANT ***ADV (Ms) URD MANSINGH***
APPLICANT'S ATTORNEYS