TRISTAN JOHN PEACOCK **APPLICANT**

AND

ANTOINETTE MAREE STEYN **RESPONDENT**

IN THE HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 29 JULY 2010 AND 5 AUGUST 2010

Mr Majoko for applicant with applicant
Advocate T. Cherry for respondent

MATHONSI J: This is an application in terms of the Hague Convention on the Civil Aspects of International Child Abduction. That Convention is applicable to Zimbabwe by virtue of the Child Abduction Act, [Chapter 5:05].

The Applicant seeks the immediate release of the minor children Liam Peacock, aged 10 years and Jordan Paul Peacock, aged 9 years. The two boys are enrolled in grades 4 and 3 respectively at Grey Junior School in Port Elizabeth South Africa. They were taken from school by their mother, the Respondent, at the beginning of the school holiday ostensibly to spend some time with them during the holiday which ended on 12 July 2010.

At the end of the school holiday the Respondent did not return the children to school. Instead she has argued that she is entitled to retain their custody as she is the sole legal guardian and custodian of the children by Zimbabwean law given that the children are illegitimate.

The genesis of the matter is that the Applicant is a South African citizen while the Respondent is a Zimbabwean citizen. The two met in 1998 and had a relationship. They cohabited until 2002 when they broke up but not before their relationship had resulted in the birth of the two boys outside wedlock. At that time the children were aged 2 and 1 respectively.

Since then the parties have virtually shared custody of the children they having alternated between each of the parents over the years for one reason or the other.

After the parties broke up the Applicant continued providing material support for both the Respondent and the children. Their arrangement to share custody culminated in a concrete agreement at the beginning of year 2009 in terms of which the parties agreed the Applicant would take the children to South Africa, where he is based and enrol them in a boarding school there. They further agreed that the Applicant would provide for the children while they are in South Africa and that during the school holidays he would facilitate their return to Zimbabwe for them to be with their mother.

That arrangement worked very well for both the parties and the children as it is only during one of the 6 school holidays since they went to South Africa, that they did not return to their mother. It would appear that problems arose when Applicant started dragging his feet about facilitating the children's travel to Zimbabwe for the school holiday and insisting that the Respondent should also play at part by footing the travel bills and also collecting the children from school. This did not impress the Respondent who, after collecting the children in June 2010, decided not to return them to South Africa for the opening of schools on 12th July 2010.

Currently the children are not at school but have been put at a little school called Foggy Pont to receive tuition while awaiting formal enrolment.

The Applicant then made this application which was brought on a certificate of urgency because the Applicant is seeking the release of the children for them to return to Grey Junior School before they are further prejudiced by non-attendance at school.

There is no doubt that the children went to school in South Africa by agreement of the parents, that whilst there the Applicant had full custody and responsibility over them by

agreement of the Respondent and that the said agreement was reached for the benefit of the children. I therefore find that the children were lawfully in South Africa to attend school and were clearly habitually resident in that country only returning to Zimbabwe for holiday. I also find that Respondent never surrendered her custody right to the Applicant but only agreed to share that right with the Applicant to facilitate the children's attendance at school.

It is also clear that the children have been well looked after in South Africa as shown by even the Respondent's admission and happiness expressed in correspondence with Applicant's wife where on 26 June 2009 she wrote:-

> "Hi there Nats (for Natalie Applicant's wife). How you all doing? Finally managed to get all sorted out with yoafrica so ended up with stakes of emails, fabulous. Loved all the pictures wow they are so awesome. Those pics of Mike are gorgeous and Jords playing rugby are fabulous going to print some of them for their room. Thank you Nats for always keeping me up to date with the boys and well just for being a great mom to my boys. Lots of love to all those fabulous kiddies, kisses and cuddles to all."

Having said that, the first issue to be determined is whether this matter falls under the provisions of the Hague Convention which has in Zimbabwe, the force of law by virtue of section 3 of the Child Abduction Act [Chapter 5:05]. For the matter to come under the ambit of the Convention its article 3 must be satisfied.

It provides:-

> "The removal or the retention of a child is to be considered wrongful where-
> (a) It is in breach of 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 or retention; and
> (b) At the time of removal or retention, those rights were actually exercised, either jointly or alone, or would have been exercised but for the removal or retention.
>
> The rights of custody mentioned is 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 have already said that the Applicant had joint custody of the children with the Respondent to the extent that the children remained in South Africa and this was by agreement of the parties. *Mr. Majoko* who appeared for Applicant argued that what is being sought is the immediate return of the children who were lawfully removed by agreement of the parties but are now being wrongfully retained in breach of that agreement.

I tend to agree with *Mr. Majoko* because by relinquishing custody rights to the Applicant while the children attended school in South Africa, Respondent could not unilaterally vary or terminate that arrangement.

Once the children were well settled at school in South Africa under his control the question of accusations and counter accusations between the parties paled to insignificance *Kuperman v Posen* 2001(1) ZLR 208(H) at 211 C-D. The Applicant was therefore entitled to be consulted before they could be retained in Zimbabwe. The matter then falls under the provisions of the convention.

It matters not that under Zimbabwean Law, the father of an illegitimate child has no inherent right over such child *Douglas v Meyers* 1991(2) ZLR (H) as argued by *Advocate Cherry* for the Respondent. The father was already enjoying rights of custody. Therefore I make the finding that the retention of the minor children was wrongful in terms of article 3 of the Convention.

In trying to bring the facts of this case within the exception in article 13 of the Convention, it was half heartedly argued in the opposing affidavit that returning the children to South Africa would place the children in psychological harm and put them in an intolerable situation merely because they have to learn Afrikaans as a secondary language. That argument is not sustainable because it is common cause that Grey Junior School is a good school and by

Respondent's own admission the children have been well taken care of in South Africa by the Applicant and his wife Natalie. *Advocate Cherry* correctly did not pursue that line of argument in his submissions.

The clear purpose of the convention as appears on the preamble and article 1, is to provide a mechanism to deal with the situation where children are wrongfully removed, shall I add, retained, from a jurisdiction of their habitual residence. *Secretary for Justice v Parker* 1999(2) ZLR 400(H) at 405 B-C. It is only in very exceptional circumstances that the court will have a discretion to refuse to order their immediate return as the convention has in mind a high degree of harm to the child and a high level of intolerability, see *Khumalo v Khumalo* 2004(1) ZLR 248(H) at 253 F-G.

It should also be understood that in this matter we are not dealing with the issue of custody of the children but merely the enforcement of the Convention. Custody has already been determined by the agreement of the parties and the Respondent has not lost her right over the children. Therefore in giving effect to the Convention the Applicant will have to comply with the agreement including facilitating the return of the children to their mother during all school holidays and also collecting them at the end of such holiday.

Accordingly the application succeeds and the following order is made:

(1) That the Respondent should forthwith, and in any event not later than 48 hours from the date of this order, release the children Liam Peacock and Jordan Paul Peacock to the applicant to take the said children to school in South Africa.

(2) In the event that the Respondent, for any reasons, fails to comply with Clause 1 above, the Deputy Sheriff be and is hereby directed and authorised to remove the children from the Respondent's control and custody and hand them over to the applicant.

(3) That the Applicant is directed to facilitate the return of the children to the Respondent at the end of every school term and to collect them at the end of every school holiday and return them to school as long as they remain in school in South Africa.

(4) That the Respondent shall bear the costs of this application.

Messrs. Majoko and Majoko, applicant's legal practitioners
Messrs Webb Low & Barry, respondent's legal practitioners