HH 65-2004
HC 226 1/04

KUMALO

versus

KUMALO

HIGH COURT OF ZIMBABWE

MAKARAU J

HARARE 1 and 2 March 2004

Urgent Chamber Application

Ms *E Mushore,* for the applicant
Mr *R Filches,* for the respondent

MAKARAU J: This is an application for leave to execute a judgment pending appeal. After hearing counsel, I granted the application on the turn and indicated that full reasons would follow in a written judgment. These they are.

The applicant and the respondent are husband and wife. They are estranged. They have two minor children, namely K.G. (born [date]) and K.V.(born [date]).

The applicant left Zimbabwe for the United Kingdom further studies in 2002. She left K. and Z. in the custody of the respondent. Up to November 2003, the applicant had visited the respondent and the children on three occasions and the respondent had in turn taken the children to visit the applicant on three occasions. In November 2003*,* the respondent removed the children from Zimbabwe and went to the United States of America. This he did without the knowledge or consent of the applicant and without the leave of this court. In December 2003, the respondent filed divorce summons with this court, in which, as ancillary relief, he prays for the custody of the children.

On 27 January 2004, the applicant obtained an order from this court in which the

removal by their father of K. and Z. from the jurisdiction of this court was declared to be wrongful within the meaning of the Convention on the Civil Aspects of International Child Abduction (commonly referred to as the Hague Convention on Inteniational Child Abduction). The order also compelled the return of the two children to this jurisdiction. On 6 February 2004, the respondent filed a notice of appeal against this judgment. The grounds upon which the appeal was initially brought were as follows:

"1. The honourable court erred in law in failing to hold that he had no jurisdiction to deal with the respondent's application,

2. The honourable court erred in law and in fact in failing to find that the High Court of Zimbabwe would not in the circumstances of this matter be in a position to properly determine the interests ofthe minor children concerned;

3. The honourable judge erred in fact in failing to find that the appellant being the custodian parent removed the minor children from Zimbabwe lawfully;

4, The orders sought in paragraphs 2 and 3 of the draft order were in any event not competent."

Paragraphs 2 and 3 of the order requested the Central Authority in the United States of America to take all appropriate measures to secure the voluntary return of the minor children to Zimbabwe and for the authority to recover its expenses from the respondent.

Following the noting of the appeal, the applicant filed this urgent chamber application, seeking an order to execute the earlier judgment, pending determination of the appeal. The application was opposed and attached to the notice of opposition was a notice to amend the notice of appeal. The amendment to the notice of appeal seeks to introduce two new grounds of appeal. These are:

5. The Honourable Judge a quo misdirected himself in the order made in that the papers revealed there was a risk that the return of the minors would expose them to physical and psychological harm or otherwise place them in an intolerable situation, and the Honourable Judge a quo ought to have refused the application under Article I 3 (b) of the said Convention;

6. In any event, the Honourable Judge a quo misdirected himself in the order in that the papers revealed that the applicant a quo wa~s not actually exercising custodial rights at the time of the minors' removal in that the appellant was *de facto* custodian and accordingly ought to have refused the application in terms of Article 13 ofthe Convention."

At the hearing of the application, Mr. Fitches confined himself to argument on the last two grounds of appeal and conceded that the jurisdiction of this court to determine the matter was not in issue and is not disputed.

The Child Abduction Act *[Chapter 5. 05],* ("the Act"), has incorporated the provisions of the Convention on the Civil Aspects of InternationaiChild abduction into domestic law in Zimbabwe. Section 3 of the Act provides that the Convention shall have the force of law in Zimbabwe. ~ Thus, it is proper to refer to the provisions of the Convention directly, as they are parf of the domestic law.

As indicated at the beginning of this judgment, the application before me is for leave to

execute pending the determination of the appeal noted by the respondent. The approach to be taken by a court in considering an application for leave to execute a judgement pending appeal has been dealt with in many judgements of this court. The approach is well settled. In determining such an application, the court must have regard to the preponderance of equities, the prospects of success on the part of the appellant and whether the appeal has been noted without the bona fide intention of seeking to reverse the judgment but for some indirect purpose e.g. to gain time or to harass the other party:

see *Econet (Pvt) Ltd* v *Tes'ecel Zimbabwe (Pvt) Ltd* 1998 (1) ZLR 149 (H), *Fox & Carney (Pvt) Ltd v Carthew-Gabriel* 1977 (4) SA 970 (R) *ZDECO (Pvt) Ltd v Commercial Careers College* (1980) (Pvt) Ltd 1991 (2) ZLR 61 (H). Leave to execute a judgment pending appeal in therefore in the discretion ofthe court.

The order appealed against in the matter before me was made under the Convention as read with the Child Abduction Act. The purpose of the Convention, according to its preamble, is to secure the prompt return to the jurisdiction of habitual residence, of children abducted by one parent. Hearings of application brought under the Convention are not inquires into whom as between the feuding parents, should have custody of the child or children whose custody is in dispute. The purpose of such hearings is to determine whether there are any exceptional circumstances why the court of habitual residence of the child or children should not determine the custody issue of the child or children concerned. Such hearings are inquires . are aimed at determining which court, between the court of the country ofhabitual residence and the court of the assumed residence of the abducting parent, is best placed to determine the issue of the custody of the child or children whose custody *is* disputed. The inquiry starts off with the court ofhabjtual residence in a favoured position that it almost akin to a presumption that abducted children will be returned to the jurisdictjon of that court unless there are exceptional circumstances making such a return injurious to the best interests of the minor chi1dren. This is so because the entire purpose of the Convention is to ensure the prompt return of abducted children to the courts of habitual jurisdiction. The legal position relating to abducted children to which the Convention applies in my view is that such children are to be promptly returned to the country of habitual residence unless the court determine the application is satisfied that such a return ~vil1 be injurious to the welfare of the children under the two safe harbour defences provided for under Article 13 of *the* Convention. Apart from these two safe habours, no other defences can defeat an application for the return of abducted children to the country of habitual residence, where an application for their return is made under the Convention.

The Convention provides the exceptional circumstances under which a court hearing an application under the convention may refuse to order the return of the child or children in article 13 of the Convention. I shall deal with these in detail when I consider the respondent's prospects of success on appeal. At this stage, I wish to observe that any considerations of the balance of equities and the prospects of success on appeal in an application as the one before me has to be considered with the import of the Convention in mind so that this is not undermined.

It is my view that the prospects of success of the appeal noted are non- existent.

The appellant argues firstly that the judge a quo misdirected himself in that the papers before him revealed the return of the children to the jurisdiction of this court will expose them to physical or psychological harm or will place them in an intolerable situation. In raising this argument, the respondent seeks refuge under the provisions of Article 13 (b) of the Convention. This provides that a court may refuse to order the return of the if 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 harm that is envisaged in the article is harm to the child attendant upon its return to the jurisdiction of the court of habitual residence and ilot upon his or her return to the applicant parent as the issue of custody is not determined by the court hearing an application under the Convention. The minor children can be brought back to the jurisdiction and remain in the custody of the abducting parent should the best interests of the children so dicthte. Such an order was made by an Israeli Court in an order returning the children in that matter to the jurisdiction ofthis court. (See Kuperman v Posen 2001 (1) ZLR 208 (H) at 209 E).

The issue of what constitutes grave risk of physical and psychological harm to abducted children ordered to return to the court of habitual jurisdiction was before the court in the case of *WS v LS* 2000 (4) SA 104 (C). There a detailed analysis of what would constitute grave risk in terms of si *3* of the Convention was carried out. It was accepted in that case that the normal trauma associated with relocation did not constitute the degree of harm envisaged in the Convention. The court further accepted that the giving of undertakings or guarantees by the parents that the harm to the children will be kept to a minimum is enough to defeat the sting of the defence offered in the Article.

The meaning of the risk referred to in article 13 was also discussed in *Sonderup v Tondell and Another* 2001 (1) SA 1171 (CC). The South African Constitutional Court had this to say on page 1189 para 45:

"An art 13 inquiry is directed to the risk that the child may be harmed by a Court ordered return. The risk must be a grave one."

Later, on the same page, the court considered that the harm that the minor child in the inquiry before it would suffer upon return to the country where her custody would be determined, was not of a serious nature but was harm "which is the natural consequence of her removal from the jurisdiction of the Courts of British Columbia, a Court-ordered return. and a contested custody dispute in which the temperatures had been raised by the mother's unlawful action." That harm, the court held, is the harm that all children who are subject to abduction and Court-ordered return are likely to suffer and it is not enough to make a court refuse to order the return of the child.

The points that emerges from the decided cases in my view are firstly, that the grave risk envisaged in the Article must relate to the bringing of the child back into the jurisdiction of habitual residence and not necessarily into the custody of the applying parent. A distinction between the two is in my view to be made, as they do not necessarily mean the same. Secondly,

the risk of harm must be a grave one and it must be objectively tested. The harm must i~an~~nd the ordinary trauma that the child will

suffer upon being separated from the abducting parent. Undertakings by the parents that the children will not come to any harm or that the harm to the children will be minimised is enough to defeat the defence and finally, the harm must be as a result of the court ordered return.

In *casu,* the respondent does not allege that there is any grave risk that the return to this jurisdiction in itself would expose K. and Z. to physical or psychological harm. His allegations are that the applicant threatened him with physical harm upon her return from the United Kingdom on one of her visits. There is no allegation that she has physically abused the children during the periods she has been in contact with them. In any event, the order by this court does not grant the applicant custody of the children but simply compels their prompt return to the jurisdiction of this court. The implied allegation that the children are not safe in the vicinity of the applicant is belied by the respondent's own admission that he will allow her to have access to the children whilst they are in the United States as she used to have in Zimbabwe.

On the basis of the foregoing, it is my view, that there is no merit in the respondent's fifth ground of appeal.

Secondly, Mr Fitches for the respondent argued that the applicant was not the *de facto* custodian of the minor children and the judge a quo ought to have refused to make the order under s 13 (a) of the Convention. This paragraph allows the court to refuse to order the return of the child if the applicant was not actually exercising the custody rights in respect of that child at the time of removal.

Again with respect, the respondent misconceives the protection that is afforded under the Convention. The protection afforded under the convention is not confined to those having physical control over the child at the time of removal. The protection is afforded to all those who have rights and responsibilities towards the child under the municipal laws of the court of habitual residence. The test is whether the applicant retains rights to be consulted over the welfare of the child, including the removal from the jurisdiction of habitual residence of the child. (See *Chief Family Advocate and Another v* G 2003 (2) SA 599 (W)). In our law, both parents of children born to a marriage have the right to determine the place of residence of the children of their marriage. Thus, the consent of each parent has to be sought before the children leave the jurisdiction and it is only when consent has been unreasonable withheld that leave of this court, as upper guardian of all minors, is sought.

In the circumstances of the matter before me, the applicant could have applied under our domestic laws for an order barring the respondent from removing the children from the jurisdiction had she known of his intentions in this regard. The parties are still married. They enjoy joint custody and guardianship over their children. No competent court has made an order as to the custody of the children. The respondent has in his divorce suit, prayed that custody be granted to him.

On the basis of the above it appears clear to me that the applicant was thus enjoying rights of custody as envisaged under the Convention.

In my view, the appeal by the respondent was clearly noted to buy time to enable the children to settle in the United States before the custody issue is resolved on appeal or by the divorce court. The grounds of appeal as initially framed are clearly without merit. The amendment to the grounds of appeal, designed as they are to enable the respondent to rely on all the possible defences under the Convention, give the impression that the appeal was noted solely for the perceived temporary advantages it may bring the respondent in suspending the order compelling the return of K. and Z. to this jurisdiction.

Weighing all the above together, it appeared to me that the preponderances of equities are in favour of granting the leave sought by the applicant. The best interests of the children are best served by allowing the judgment in favour of their return to this jurisdiction pending determination of the appeal. An order to the contrary would defeat the spirit in which the Convention was concluded, to ensure the prompt return of children to the jurisdiction of their habitual residence for a due inquiry into their welfare by the cotwts best placed to do so. It is clearly hi the best interests of the children that the issue relating to their custody be settled at the earliest and this is partly achieved by their prompt return to the court that is seized with their custody dispute.

For the above reasons, I granted the applicant's application on the turn and indicated that my reasons would follow,

Kantor & Immerman, applicant's legal practitioners

Gill Godionton & Gerrans, respondent's legal practitioners