CHERISE WHEELER
versus
TIMOTHY EGGLESTONE

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 22 and 29 January 2016

Urgent chamber application

F. Mahere for applicant
S. Njelele for respondent

CHITAKUNYE J: This is an application seeking to interdict respondent from removing a minor child from Zimbabwe to South Africa in terms of an order by a South African High Court.

The applicant was born in Zimbabwe and moved to South Africa in 2006 to pursue education opportunities. She is a Zimbabwean born of a mother who is a South African citizen and a father who is a Zimbabwean citizen. She is apparently a citizen of South Africa as well. Whilst in South Africa she had a child with the respondent. That child is about 2 years and four months old. The two parties stayed together in the manner of husband and wife albeit not married till the child was about a year old. Their relationship deteriorated and they separated. After separation applicant remained with the child. There was however an arrangement whereby respondent had access to the child every alternate weekend.

After separation applicant remained in South Africa as she was employed there. In September 2015 the child was brought to Zimbabwe were applicant's parents reside. In order for the child to come to Zimbabwe respondent signed an Affidavit of consent for the child's travel abroad. The minor child is a citizen of South Africa and travelled to Zimbabwe on a South African passport.

The parties are not agreed as to whether the child had come to visit its grandparents or to stay with them for good. What is clear from subsequent communication between the applicant and the respondent is that the child was expected to return to South Africa so that respondent can exercise his rights of access and also to attend school. This is evident from the

exchange of whatsapp messages between the parties, transcripts of which were attached to the founding affidavit as 'D'. An e-mail message from applicant to respondent dated 15 September 2015 at 5:57 (annexure E7 to respondent's affidavit) states thus:-

> "yes she will be down in November and definitely for xmas. Also when she's back, yes she will be in a new school, one closer to home. I will always contact u when she will be coming down for a visit. Saturday is fine; let me know wat tym as I need to plan my day."

Clearly therefore the child was expected back in November, if that failed then at the latest in December 2015 for Christmas.

When this return did not materialise further whatsapp exchanges show how the respondent ended up approaching the South African High Court for relief out of frustration.

The applicant meanwhile, relocated to Zimbabwe in January 2016. This may have given respondent the impression he will not be able to exercise his rights of access as the father to the child. The applicant was served with the application and was duly represented at the hearing in South Africa.

The order obtained stated, *inter alia,* that:-

1. Pending the final determination of the application in Part B, and Order that:-

   1.1….

   1.2 The Applicant's parental rights and responsibilities in respect of minor child,… .. , are confirmed and restored in terms of section18 and 21 of the children's Act of 2005 and the respondent is ordered to return the minor child, ……., to the Applicant's care with immediate effect, by no later than 09h00 on Thursday, the 21st of January 2016 at Harare International Airport, Zimbabwe and that the primary residence of the minor child, ….. , vest with the Applicant subject to the respondent's reasonable rights of contact as the Honourable court deems necessary pending the outcome of Part B and pending the outcome of an investigation by the Office of the Family Advocate with regards to residence and subsequent contact and to what is in the best interest of the minor child,……..

   1.2.1 ……

   1.3 the matter is referred to the Office of the family Advocate as a matter of urgency for a determination as regards to parental responsibilities and rights, the residence of the minor child, …. , and contact and are requested as far as reasonably possible provide a report by the 16th March 2016.

   1.4 ……...

   1.5 The respondent is to deliver the passport belonging to [the child] and her birth certificate at Harare Airport on 21st January 2016 at 09h00.

   1.6 ….."

The order was served on the applicant via e-mail.

Faced with the above order which required her to take the minor child and its passport to Harare International Airport and surrender her to respondent, the applicant has now approached this court seeking to stop the enforcement of the above order. She seeks an interim relief to the effect that:-

> "Pending the determination of this matter:-
> The Order of the High Court of South Africa under case no 2016/01336 be declared to be inconsistent with the laws of Zimbabwe and therefore unenforceable in this country;
>
> The respondent either himself or in concert with others be interdicted from removing the minor child from the territory of Zimbabwe; and
>
> That the minor child shall remain in the care and custody of the applicant pending the determination with finality the issue of custody."

In her founding affidavit applicant stated that her application is in terms of the Child Abduction Act, [*Chapter 5:05*].

The Child Abduction Act is basically an Act to give effect within Zimbabwe to the Convention on the Civil Aspects of International Child Abduction (herein after referred to as the Convention). Section 3 of the Child Abduction Act states that:-

> "Subject to this Act, the Convention shall have the force of law in Zimbabwe."

The Convention is incorporated as part of the Child Abduction Act.

The objects of the Convention are to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States. (Art.1)

Article 3 sets out some instances where the removal will be deemed wrongful. These include where the removal 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 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. (emphasis is mine)

As aptly noted by MAKARAU J (as she then was) in *Kumalo* v *Kumalo* 2004 (1) ZLR 248@ 252C- G

> "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 applications brought under the Convention are not inquiries 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 inquiries aimed at determining which court, between the court of the country of habitual 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 of habitual residence in a favoured position such that it is almost akin to a presumption that abducted children will be returned to the jurisdiction of that court unless there are exceptional circumstances making such a return injurious to the best interests of the minor children."

Article 13 of the Convention provides two safe harbour defences which can be used to defeat an application under the Convention.

In casu, it is common cause that the child was habitually resident in South Africa before being brought to Zimbabwe. Both parents of the child were resident in South Africa with the child. Whilst the coming of the child to Zimbabwe was with respondent's consent it is the aspect of retention that led to the dispute between the parties. The principles of custody and of access in South Africa would thus have to be taken into account in determining whether there was wrongful removal or retention as the country of habitual residence.

In this case applicant said her application is in terms of Art(s) 13 and 20 of the convention. These articles pertain to grounds upon which judicial or administrative authority may refuse to grant the request for the return of the minor child. These articles presuppose an application or request for the return of the child has been made. It is in the consideration of such an application that the articles provide that the judicial or administrative authority may refuse to grant the application.

I am of the view that in the absence of an application, say in terms of Art 8, or any other manner permitted, it is rather premature to raise the grounds in Art(s) 13 and 20.

I did not hear the applicant to say any such application had been made. The respondent in his opposing affidavit did not allude to having made such an application at least as at the date of first hearing. It was only later in written supplementary submissions that respondent's legal practitioner stated that such an application had been made. Presumably this was after the commencement of this hearing.

The decision that spurred the applicant to launch this application is in my view a decision that is referred to in Art 8(e) as a decision that may accompany the application.

I now turn to the enforceability of the South African High Court judgement.

As conceded by counsel for both parties a foreign judgement cannot be enforced without invoking internal processes. An individual or entity cannot come into the country

brandishing a foreign judgment and run the breadth and width of the country seeking to enforce or execute the judgment on his own.

The Convention mandates Contracting State parties to designate a Central Authority to discharge the duties imposed by the Convention. In Zimbabwe the designated Central Authority is the Secretary for the Ministry of Justice, Legal and Parliamentary Affairs.

The duties of the Central Authority are enumerated in Art 7. These include *inter alia*, -

To secure the prompt return of the child and to achieve the objects of the convention;

To secure the voluntary return of the child or to bring about an amicable resolution of the issue;

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.

As already alluded to, in this case the respondent did not approach the Central Authority for assistance before seeking to enforce the order. That was irregular and untenable unless applicant was consenting to the return of the child to South Africa.

In the absence of approaching the Central Authority, the respondent could still have approached the High Court seeking the registration of the judgment in order to be able to use internal processes for enforcement. In this regard Art 29 of the Convention 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 authority of a Contracting State, whether or not under the provisions of this Convention."

Counsel for both parties submitted that the judgement in question does not fall within the ambit of the Civil Matters (Mutual Assistance) Act, [*Chapter 8:02*]. The judgments that may be registered in terms of that Act are judgements given in designated countries and sounding in money. Section 2 of the Act defines such judgements as-

> 'a judgement or order given or made by any court or tribunal requiring the payment of money, and includes an award of compensation or damages to an aggrieved party in criminal proceedings.'

The judgement respondent obtained is thus not such judgement. This does not leave respondent without recourse. Section 25 of the Civil Matters (Mutual Assistance) Act provides that:-

> "This Act shall be regarded as additional to, and not as limiting the provisions of any other law relating to the recognition and enforcement of foreign judgments, the service of process or the taking of evidence, whether on commission or otherwise."

The Act does not therefore override the common law principles that govern the enforcement of foreign judgments. In *Gramara (pvt) Ltd & Another* v *Government of Zimbabwe & Others* 2010 (1) ZLR 59(H) at p 67C-D PATEL J (as he then was) had this to say on this provision:-

> "It follows that chapter 8:02 does not purport to override or exclude the operation of any other law, including the common law, pertaining to the recognition and enforcement of foreign judgments. In effect, s 25 accords with the general rule of statutory interpretation that the common law cannot be ousted except by clear language or in express terms."

The learned judge considered the general requirements for recognition and enforcement of foreign judgments and cited with approval the words of CORBETT CJ in *Jones* v *Krok* 1995 (1) SA 677(A) at 685 B-E whereat the learned judge summarised the requirements in the following manner:-

> "As is explained in Joubert…., the present position in South Africa is that a foreign judgement is not directly enforceable, but constitutes a cause of action and will be enforced by our courts provided (i) that the court which pronounced the judgment had jurisdiction to entertain the case according to the principles recognised by our law with reference to the jurisdiction of foreign courts(sometimes referred to as 'international jurisdiction or competence'; (ii) that the judgment is final and conclusive in its effect and has not become superannuated; (iii) that the recognition and enforcement of the judgment by our courts would not be contrary to public policy; (iv) that the judgment was not obtained by fraudulent means; (v) that the judgment does not involve the enforcement of a penal or revenue law of the foreign state; and (vi) that enforcement of the judgment is not precluded by the provisions of the protection of Businesses Act 99 of 1978 as amended."

It is thus trite that a foreign judgment or order is not directly enforceable but constitutes a cause of action.

From the above it must be clear that the respondent could not enforce the High Court of South Africa Order directly. He has to firstly comply with the relevant law as outlined above.

The next point to consider is whether this failure by respondent to comply with the relevant legal processes entitles applicant to the relief sought.

It must be borne in mind that an interim interdict is an extra ordinary remedy, the granting of which is at the discretion of the court hearing the application. The requirements

which the applicant must satisfy before such interim relief can be granted may be stated as follows:-

i. That the right which is the subject matter of the main action and which she seeks to protect by means of interim relief is clear or if not clear, is prima facie established though open to some doubt

ii. That, if the right is only *prima facie* established, there is a well grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing his right;

iii. That the balance of convenience favours the granting of the interim relief; and

iv. That the applicant has no other satisfactory remedy.

(see *Airfield Investments (Pvt)Ltd* v *Minister of Lands & Others* 2004(1)ZLR 511(S).

The applicant's counsel argued that applicant has met the above requirements for the grant of the interim relief. Respondent's counsel argued otherwise.

In ascertaining the matter it is important to look at the relief being sought Clause one of the draft is no longer being pursued.

Clause two of the relief sought is for a declaratory order to the effect that the Order of the High Court of South Africa is inconsistent with the laws of Zimbabwe and therefore unenforceable in this country.

Zimbabwe as a Contracting State in terms of the Convention is obliged to co-operate with fellow Contracting States in fulfilling the duties under the Convention. In determining whether a child was wrongly removed or retained the laws of the country of the child's habitual residence is of primary consideration (Art 14). In this case the South African law grants rights of access and responsibility to parents of a minor child. It is these rights that the order seeks to reinstate. The decision will just be part of the evidence in an application or request for the return of the child to South Africa. It would be premature to declare the order as inconsistent to Zimbabwe laws before it has even been tendered in a proper application by the respondent or the requesting state.

The third clause is for an order interdicting respondent himself or in concert with others, or through his agents or assigns from removing the minor child from Zimbabwe.

As with the above clause, this clause, in my view, has to take account of the provisions of the Convention. The grounds upon which the judicial or administrative body may refuse a request for the return of a minor child to the country of habitual residence are spelt out in Art (s) 13 and 20.

It is my view that these are defences to the application or requests.

The last clause seeks an order that the minor child remains in the care and custody of the applicant pending the determination with finality the issue of custody.

In a way, and by virtue of the final order sought, the applicant seeks that the issue of custody be dealt with in this country. This is contrary to the spirit of the Convention.

The Convention is clear that preference is for the issue of custody to be dealt with by a court of the child's country of habitual residence.

It would thus be premature to deal with issue of custody before an application and determination has been made on whether the child should be returned or not.

Whilst the applicant has shown that she has rights to protect *vis- a-vis* the minor child, I am of the view that this should take into account the provisions of the Convention under which she made this application. I am of the view that applicant can raise the available defences to the removal of the child back to the country of habitual residences in terms of the Convention whenever an application for the removal is made. The removal of the child without a proper hearing and ascertainment of the key issues in terms of the applicable law would not be in the best interest of the child and applicant has reason to seek such protection.

What can currently be provided, and which should be adequate is that the child cannot be removed without following the appropriate processes in terms of the Convention or other available law.

I am thus disinclined to grant the order as per draft. Instead I will grant an order allowing applicant to retain custody pending the determination of a proper application for the registration or enforcement of the South African judgment in terms of the Convention or a lawful internal process respondent chooses.

The respondent should nevertheless be granted access to the minor child whenever he is here as may be arranged by the parties and in the presence of the applicant.

Accordingly it is hereby ordered that:-

1. Applicant shall retain custody of the minor child, Hailey Egglestone, born 04 September 2013 pending the determination of an application for the return of the child

to South Africa in terms of the Child Abduction Act, [*Chapter 8:02*] or the registration of the judgement of the High Court of South Africa in terms of the law.

2. The respondent shall enjoy rights of access to the minor child whenever he visits Zimbabwe in such manner and place as the parties may agree.

Scanlen and Holderness, applicant's legal practitioners
Honey and Blanckenberg, respondent's legal practitioners