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IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION – PORT ELIZABETH

Case No: 3245/14
3454/14

Not Reportable

In the matter between:

THE FAMILY ADVOCATE

Applicant

And

[P.....] [M.....] [F.....]

Respondent

And

[P.....] [M.....] [F.....]

Applicant

And

[J.....] [K.....] [F.....]
(Born MALINOWSKA)

First Respondent

THE FAMILY ADVOCATE
PORT ELIZABETH

Second Respondent

MARISA DU TOIT N.O.

Third Respondent

RONEL HERMAN N.O.

Fourth Respondent

In re: [N.....] [R.....] [F.....]

JUDGMENT

REVELAS J

[1] In this urgent application the applicant seeks the immediate implementation of a judgment in terms whereof it was ordered that the minor child in question (“N”) be returned to the jurisdiction of the Central Authority for England and Wales and be handed over to her mother (in London) within seven days of granting the order. Certain ancillary relief was also granted. N had been brought to South Africa by her father, the respondent herein, during August 2014.

[2] On 12 November 2014 an application brought in terms of The Hague Convention of the Civil Aspects of International Child Abduction brought by the applicant was argued. The respondent opposed the application. The judgment, sought to be implemented in these proceedings, was delivered on 28 November 2014. The respondent sought leave from the Supreme Court of Appeal to appeal against the judgment of 28 November 2014. The respondent’s petition was dismissed in February 2015 on the basis that there were no reasonable prospects of success on appeal.

[3] The respondent has indicated on 2 March 2015 (in a letter to the applicant) that he intends to bring an application for leave to appeal to the Constitutional Court. The main ground advanced by the respondent in his notice for leave to appeal is that the order he obtained in the Regional Court, Port Elizabeth (on an ex parte basis) appointing him as N’s primary caregiver, pending the outcome of the divorce proceedings he had instituted in the same court. As a result, the order (sought to be implemented herein) that operation of that order be suspended pending the outcome of the custody proceedings in England, was impermissible and it was in the public interest that it be argued in Constitutional Court.

[4] N has not seen her mother (the complainant) since August 2014. In my view, the respondent's application to the Constitutional Court, irrespective of its prospects of success, will only extend this period to the detriment of N's relationship with her mother. No child should be deprived of a mother's society and comfort for a six months' period because the litigation concerning him or her has reached the present proportions. This is particularly so where there is no evidence whatsoever which suggests that the mother is an unfit parent.

[5] The complainant, who has arrived in South Africa to fetch her daughter, has given an undertaking that if the respondent is successful in the Constitutional Court, she would see to it that N is returned to South Africa. She has also initiated mediation proceedings under the auspices of the applicant in an attempt to reach agreement on a co-parenting plan in view of the impending divorce proceedings in the Regional Court. The complainant has also given an undertaking that the respondent will have reasonable contact with N when he visits N in England in the interim. The respondent has a brother and a sister in London with whom the respondent could stay when he visits N in England. The complainant still has contact with them and such visits N would therefore not present any practical problems.

[6] For the reasons set out above, I conclude that it is in the best interests of N that immediate effect be given to the court order dated 28 November 2014.

Costs

[7] In my view, the respondent has acted in what he believes to be, the best interests of his daughter and therefore, in keeping with matters of this nature, he should not be mulcted in costs.

[8] In the result the following order is made.

1. That the non-compliance with the rules be condoned at that the matter be heard as urgent in terms of Uniform Rule 6(12)(a).
2. That the orders granted in the judgment of 28 November 2014 (hereinafter referred to as “the Order”) be implemented forthwith, and the minor child, [N.....] [R.....] [F.....] be returned to the jurisdiction of the Central Authority for England and Wales.
3. That the minor child is to be handed over to her mother, [J.....] [M.....], at Port Elizabeth immediately upon the granting of this order.
4. That in the event of the respondent not cooperating with the applicant and refusing to hand over the minor child:
 - 4.1 The applicant be authorised to direct the Sherriff and/or the South African Police Services Child Protection Unit to remove the minor child from the care of the respondent and facilitate the hand over.
 - 4.2 That the applicant be granted leave to approach this Honourable Court on the same papers, duly amplified, for such further appropriate relief as may become necessary

E REVELAS
Judge of the High Court

Counsel for the applicant, Adv Jooste, instructed by the State Attorneys.

Counsel for the respondent, Adv Mullins, instructed by Bester Attorneys.

On behalf of N, Adv Coertzen, instructed by Legal Aid.

Date Heard: 9 February 2015

Date Delivered: 11 February 2014