NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT, PRETORIA)

DATE: 9 December 2010

CASE NO: 54790/10

In the matter between:

THE CENTRAL AUTHORITY APPLICANT

(THE REPUBLIC OF SOUTH AFRICA)

VS

MICHELLE GOOSEN RESPONDENT

JUDGMENT

BOTHA J:

This is an application in terms of the Hague Convention for the return of the child J A K (J) to the United Kingdom. The respondent, who is the mother of the child, removed the child from the United Kingdom on 29 May 2009. The child was born on 23 November 2008 from a relationship between the respondent and Mr P.W Keenoy. The child was

removed without the consent of Mr Keenoy. At the time of the removal the child was habitually resident in the United Kingdom.

It was argued that the child has now been in the Republic of South Africa (the RSA) for almost 18 months and that article 12 of the Hague Convention does not apply. The argument loses sight of the fact that article 12 refers to a situation where a period of less than one year has elapsed "from the date of the wrongful removal or retention". In this case the respondent initially indicated her willingness to return with the child to the United Kingdom, albeit if certain condition were met. It was only recently that she adopted the attitude that she was in any event not prepared to return the child to the United Kingdom.

In any event the respondent did not adduce sufficient evidence that the child is so settled in her new environment that she should not be returned to the United Kingdom as provided by the Hague Convention.

The point is that there should be compliance with the Hague Convention. It is based on comity, that is mutual trust and reciprocity between nations. It is based on an implicit acceptance that the same level and quality of justice will be dispensed in the courts of all signatory states. On a practical level, it is aimed at discouraging self-help, very much as is the purpose of our common law remedy of the mandament van spolie. It has the same underlying principle that the unlawful act must be reversed before the merits of a disputed right can be adjudicated. The merits need not be entertained because there is absolute confidence in the judicial system of the requesting state. As I have pointed out in argument, I am perfectly convinced that an English court would be as disposed to make an order in favour of the respondent as I would be.

As I have said, the respondent has not provided sufficient evidence to show that J has become so settled in her new environment that a return to the United Kingdom would be harmful to her. In the original answering affidavit there was virtually no evidence relating to the present environment of J. In a supplementary affidavit, lodged whilst the matter was standing down in order to enable the parties to agree on the terms of the court order, the respondent gave more particulars of J's present environment. It is enough to say that there is still no compelling evidence that the removal of Jessica will be to her detriment. She is only two years old. Her mother is the main person in her life. She will remain with her mother.

I gave the parties ample time to agree on the practicalities of an order. They could not agree on all the issues, in the end I had, as it were, to lay down the law. I have assembled an order composed of elements emanating from both drafts submitted to me. Mostly I have followed the applicant's draft. I shall shortly give my reasons for rejecting some of the respondent's proposals.

In paragraph 1 the respondent wanted to insert a condition that her application for legal aid must have been approved before she would be obliged to return the child. Such a condition can only unnecessarily protract the matter. It has already been established that the respondent is eligible for legal aid in the United Kingdom. She has already applied for it. Even though she must appear in court within 7 days of her return, I have no doubt that a court will not ride roughshod over her rights if her application for legal aid is still pending.

In paragraph 2.1 she wanted to add a provision to the effect that she would be entitled

to return immediately to the RSA if Mr Keenoy did not comply with his obligations. Such a provision would allow a circumvention of the courts in the United Kingdom.

In paragraph 2.5 she wanted the inclusion of an interdict prohibiting Mr Keenoy from contacting her and from coming within one kilometre of the home in Lower Clapton Road. In my view she can obtain protection in the United Kingdom from the appropriate authorities if the need arises. I do not think that it is appropriate to grant an interdict on the strength of a situation that obtained 18 months ago.

In paragraph 2.8 she wanted the words "and other necessary documents" to be inserted after the word "visa". I simply cannot visualize what other documents Mr Keenoy will have to pay for apart from the visa.

Paragraph 2.5 is a combination of the applicant's draft and the respondent's draft. To the respondent's draft (the undertaking to let the respondent and J stay in his home) I have added the words "provided that Mr Keenoy will be released from this undertaking if, by allowing the Respondent and J to stay there in his absence, he would forfeit his right to occupy the home". The reason for this addition, clumsy as it appears at the end of a long sentence, is that there was a suggestion that Mr Keenoy would forfeit his right as a tenant if he ceased to live in the property. It is not clear to me why he should forfeit his right if a child of whom he is the father were to stay there, but if it will have that result, I cannot compel him to provide that accommodation.

At the end of paragraph 3 I inserted, at the request of the respondent, the words "provided the condition in paragraph 2.8 above has been complied with". It simply means that the visa fee will have to be paid before the application for a visa can be

considered, as is the requirement of the High Commission of the United Kingdom.

Having explained how I have assembled the order I will make the following order:

The order marked "X" is made an order of court,

C. BOTHA

JUDGE OF THE HIGH COURT