

**Family Advocate Port Elizabeth v Hide
[2007] 3 All SA 248 (SE)**

Division: SOUTH EASTERN CAPE LOCAL DIVISION
Date: 8 May 2007
Case Number: 2330/06
Before: CT Sangoni J
Sourced by: BJ Pienaar
Summarised by: D Harris

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Children – International child abduction – Application for return of child – In terms of – Hague Convention on the Civil Aspects of International Child Abduction – Article 13(a) – The court may in the exercise of its discretion, order the return of the child unless the person who opposes its return establishes that the person who seeks the return was not actually exercising custody rights at the time of the removal or retention or had consented to or acquiesced in the removal or retention.

Editor's Summary

The respondent had given birth to a child out of wedlock. The father of the child was a citizen of the United Kingdom. Shortly after the birth of the child, the couple separated, although the father exercised access rights in respect of the child. In 2006, the respondent came to South Africa with the child, for what was intended to be a visit. However, the respondent then informed the child's father that she no longer intended to return to the United Kingdom with the child.

The above events led to an application by the appellant, for the return of the child to the Central Authority for England and Wales.

In opposing the application, the respondent contended that the child's father had not been exercising his rights of custody at the time of the removal of the child from England. She also contended that the father had consented to the removal of the child for an indefinite period. Finally, the respondent contended that should the child be returned to the father, he risked grave harm.

Held – In terms of article 13(a) of the Hague Convention on the Civil Aspects of International Child Abduction, the court may in the exercise of its discretion, order the return of the child unless the person who opposes its return establishes that the person who seeks the return was not actually exercising custody rights at the time of the removal or retention or had consented to or acquiesced in the removal or retention. The respondent bore the onus of proving that this was the case.

For the removal or retention to be wrongful it must have infringed the rights of custody exercised at the time of removal by the parent seeking return. The Court rejected the respondent's allegation that the father did not have rights of custody. It also found that the father had not consented to the removal of the child as alleged by the respondent.

The allegations of grave harm made by the respondent were examined next. The Court found that the issues raised were not of such a serious nature that the United Kingdom criminal and police systems could not adequately deal with them.

The Court accordingly ordered the return of the child to the United Kingdom.

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Notes

For Children see:

- LAWSA Second Edition (Vol 2(2), paras 58–142)

Cases referred to in judgment

South Africa

Pennello v Pennello [\[2004\] 1 All SA 32](#) (2004 (3) SA 117) (SCA) [250](#)

Smith v Smith [\[2001\] 3 All SA 146](#) (2001 (3) SA 845) (SCA) [250](#)

Sonderup v Tondelli and another [2001 \(2\) BCLR 152](#) (2001 (1) SA 1171) (CC) [251](#)

United Kingdom

B v B (Abduction: Custody Rights) [\[1993\] 2 All ER 144](#) (CA) [252](#)

C v C (Minor; Abduction: Rights of Custody Abroad) [\[1989\] 2 All ER 465](#) (CA) [252](#)

Judgment

SANGONI J:

[1]
This application concerns the removal from the United Kingdom and the retention of the minor child, J, in South Africa. The full names of the child are JA Hide Bowie. J was born on 14 February 2004. Elizabeth Jane Hide, the respondent herein, is the mother whereas the father is Ronald Alexander Bowie ("Bowie").

[2]
The appellant is the family advocate at Port Elizabeth who, in this application, is seeking an order for the return of J to the Central Authority for England and Wales. The application is pursuant to the provisions of the Hague Convention on the Civil Aspects of International Child Abduction (the "Convention"), adopted on 25 October 1980 at the Hague, incorporated into South African Law by the Hague Convention on the Civil Aspects of International Child Abduction Act [72 of 1996](#) ("the Act"). The power to act herein has been duly delegated to the applicant in terms of [section 4](#) of the Act.

[3]
The parents of J are and were never married to each other. Prior to 1 December 2003 in the United Kingdom the mother of the child in such circumstances would have enjoyed exclusive parental responsibility for the child in terms of section 2(2) of the Children Act of 1989. However, in terms of section 111 of the Adoption and Children Act of 2002, introduced on 1 December 2003, the position changed. In terms of that section if both parents are present when the birth of the child is registered under the Births and Deaths Registration Act of 1953, which is the position in this application, even an unmarried father automatically, acquires parental responsibility for the child. The removal or the retention of the child without the consent of another parent where the parents share parental responsibility is wrongful as envisaged in Article 3 of the Convention, hence this application.

[4]
At the time J was born the parents were living together until they separated in September 2005. The respondent moved out of the place of

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common residence to leave with J while the father continued to exercise the right of access over J. The relationship between the parents, before and after the birth of J, allegedly had its ups and downs. They were abusive to each other and experienced instances of physical violence. J was brought to South Africa on 18 January 2006. According to the father's version, the arrangement was that the respondent and J would return to the United Kingdom after four weeks. An application was brought by Bowie in terms of the Convention for the return of J after it had been communicated to him that the respondent no longer intended to return the child to the United Kingdom.

[5]
The grounds for opposing the application have been aptly summarised in the respondent's heads of argument:

(i)
That Bowie was not, at the time of J's alleged removal to South Africa, actually exercising rights of custody as envisaged by the Convention;

(ii)
That Bowie had, in any event, consented to J's removal and his retention in South Africa for an indefinite period; and

(iii)
That the return of J to England will place J at a grave risk of psychological harm or otherwise place him in an intolerable situation."

[6]
In the alternative, and in the event this Court decides to order the return of J, the respondent prays for a "mirror order" the terms of which will be referred to later in this judgment.

[7]
In terms of Article 13(a) of the Convention the court is not bound to, but may in the exercise of its discretion, order the return of the child if the person who opposes its return establishes that the person who seeks the return was not actually exercising custody rights at the time of the removal or retention or had consented to or acquiesced in the removal or retention. The respondent relies on the provisions of Article 13(a) and (b) for its defence as presented in paragraph [5], (i), (ii) and (iii) above. The onus is borne by the respondent to establish the defences as set out in Article 13.

(*Smith v Smith*¹ 2001 (3) SA 845 (SCA) paragraph [11] at 850–851; *Pennello v Pennello*² 2004 (3) SA 117 (SCA) paragraph [38]).

Rights of custody

[8]
For the removal or retention to be wrongful it must have infringed the rights of custody exercised, either jointly or alone, at the time of removal or retention by the parent seeking return. To establish these rights the applicant finds support from the concept of "parental responsibility". It is defined in section 3(1) of the Children Act as "all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property."

[9]
Given the fact that Article 3 prescribes that rights of custody are to be defined in accordance with the law of the State in which the child was habitually resident immediately before the removal or retention. It is fitting to refer to an extract from the judgment of the Constitutional Court

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in *Sonderup v Tondelli and another*³ 2001 (1) SA 1171 (CC) at 1185B–C. It reads:

"Indeed, art 19 provides that:

'A decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue.'

Rather, the Convention seeks to ensure that custody issues are determined by the court in the best position to do so by reason of the relationship between its jurisdiction and the child. That Court will have access to the facts relevant to the determination of custody."

It follows that in the instant case, as parental responsibility is admitted, the rights of custody cannot be said not to exist.

Consent or acquiescence

[10]

On the issue of consent to or acquiescence in removal or retention I should decide on the available facts. Bowie, the person seeking the return of the child does concede that he gave consent for the child to be removed to South Africa but only for a period of four weeks. On realising that the intention of the respondent was not to return the child to the United Kingdom, he immediately took steps that culminated in the institution of these proceedings. The respondent states in her answering affidavit that she and Bowie discussed the possibility of the respondent and J spending time in South Africa. According to her version the return of J was sought even before the expiry of the four-week period referred to by Bowie. It has however not been denied that the current proceedings were instituted when it had become apparent that the respondent did not intend to honour the agreement regarding four weeks' stay in South Africa. Even before the respondent left for South Africa on 17 January 2006, Bowie, according to the respondent in her answering affidavit, had threatened to lay abduction charges if the respondent did not return to the United Kingdom with J. That dispels the notion that Bowie gave consent for J to travel to South Africa without any conditions.

Grave risk of harm

[11]

The respondent has as indicated above, also raised the so-called Article 13(b) defence. That refers to a situation where "there is a grave risk" that the child would be exposed to physical or psychological harm or otherwise be placed in an "intolerable position", the court may refuse to order the return of the child to the requesting State.

[12]

The salient points raised by the respondent in support of her contention of "grave risk" of exposure to "physical or psychological harm" as well as "an intolerable situation" relate to the alleged stormy relationship between the parents of J which manifested itself, it is alleged, in physical violence and often in instances of verbal abuse against each other in the presence of J; the use of drugs by Bowie and the financial distress the respondent suffered in the United Kingdom. The respondent captures the relationship in her own words as follows:

"Looking back on the stormy relationship which existed between Bowie and myself, I have reached the conclusion that I must have been mad to have

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taken all his threats, torments and bad mouthing for so long a time. He made my life hell and therefore J's life too. I have always done my best for my son. If it hadn't been for him, I would have been able to leave Bowie more easily. I never wanted to leave the UK or to give up my job and leave my friends. I had been in the United Kingdom for seven years and the UK had become a part of my life. To leave the country was a big sacrifice for me. However I had little choice - J was unhappy from being carted around all the time, he needed a settled secure environment and I could not handle the countless threats from Bowie in respect of my own life; the arguments which never ended. Our financial situation was beyond repair and I could not afford to pay rent for the accommodation in Maidenhead and live off my small salary. Bowie never paid a single cent to me in respect of child support or maintenance and I was destitute."

[13]

There are two incidents of physical violence mentioned. They are admitted by Bowie. In one case Bowie kicked the respondent on the shin during an argument, in another he pushed the respondent out of his way after she kned him in his groin. These are not condoned but do not appear to be of such gravity that would forewarn one of the "grave risk" of "physical or psychological harm". On the available evidence it appears the most serious incident of verbal abuse was the threat to kill the respondent which was apparently done in a heat of anger.

[14]

It appears to me that all the issues raised under the article 13(b) defence are not of such a serious nature that the United Kingdom criminal and police systems cannot adequately deal with. In addition most concerns can easily be addressed in the mirror order sought. In terms of the *Sonderup* judgment (*supra*) I referred to above, the risk referred to in Article 13 must be a grave one and the harm contemplated be of a serious nature. The "severe degree" of harm and

“high degrees of intolerability” envisaged in *C v C (Minor; Abduction: Rights of Custody Abroad)* [1989] 2 All ER 465 (CA) at 473, and *B v B (Abduction: Custody Rights)* [1993] 2 All ER 144 (CA), have not been established in this case. This aspect of the defence then falls to be rejected.

[15]

Should I decide to order the return of J to the United Kingdom the respondent seeks that the order should incorporate the certain conditions which are contained in a letter from her attorneys to the State Attorney. The conditions anticipate the return of J to the United Kingdom in company of the respondent whereupon she seeks that an order be processed in a court of competent jurisdiction in the United Kingdom to address a number of her concerns relating to the following, *inter alia*,

- travelling expenses and transfer costs;
- accommodation and furniture in the United Kingdom for J as well as the respondent;
- mortgage bond payments for the property;
- maintenance in respect of J and the respondent.

[16]

The draft order prepared by the applicant significantly addresses quite a number of the issues raised in the respondent’s proposed mirror order. The order I will issue is on the basis of that draft order. After all, whatever the respondent seeks to achieve that is permissible within the law of England, she will be free to take it up with the relevant court or tribunal through the Central Authority, England and Wales and the order for the

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return shall be stayed until the relevant court processes have been exhausted.

[17]

I thus make the following order:

1. The respondent is ordered to return the minor child to the jurisdiction of the Central Authority, England and Wales, forthwith and within 10 days of date of this order and subject to the terms of this order, and in accordance with the provisions of the Hague Convention on the Civil Aspects of International Child Abduction Act [72 of 1996](#) (“the Hague Convention”).
2. Ronald Bowie, the father of the minor child (hereinafter referred to as “Ronald Bowie”) shall, within 1 month of the date of this order, launch proceedings and pursue them with due diligence to obtain an order in the appropriate Court in Berkshire, Reading, England, in the following terms:
 - 2.1 Ronald Bowie is ordered to pay the travelling expenses of the minor child (per economy air ticket), and including all transfer costs and taxes pursuant to the return of the minor child from Port Elizabeth to Berkshire, England, and in compliance therewith he will provide and purchase the necessary economy air and economy rail tickets.
 - 2.2 Ronald Bowie is ordered to arrange, and to pay any required deposit for, suitable, two-bedroomed furnished accommodation for the respondent and the minor child in Berkshire, England, in a similar neighbourhood to that in which the former matrimonial home is situated, namely 27B Wargrave Road, and pay all the rentals

or tariffs for such accommodation timeously and in full. Ronald Bowie shall provide documentary proof to the satisfaction of the Central Authority for England and Wales, prior to the departure of the respondent and the minor child from South Africa, of the nature and location of such accommodation, and that such accommodation is available for the respondent and the minor child immediately upon their arrival in Berkshire. The Central Authority for England and Wales shall in consultation with the applicant and Mr David Geard, or any such duly appointed legal representative of the respondent, decide whether the accommodation thus arranged by Ronald Bowie is suitable for the needs of the respondent and the minor. Should there be any dispute between the parties in this regard, the decision of the Central Authority for England and Wales shall be binding on the parties.

2.3

Ronald Bowie is ordered to pay maintenance for the minor child from the date of the minor child's arrival in Berkshire at the rate of £75,00 per week, or such other amount as may be ordered by the appropriate Court responsible for such matters in England. The first such payment shall be made to the respondent prior to the day upon which she and the minor child will arrive in Berkshire, and thereafter weekly in advance on the Monday of every week. Such amounts shall be paid into such account that the Central Authority for England and Wales

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may direct, the first payment being made prior to the departure of the child to the United Kingdom.

2.4

If so ordered by the said Court, Ronald Bowie shall pay maintenance for the respondent in the amount and period ordered by the said Court.

2.5

If so ordered by the said Court, Ronald Bowie shall pay any reasonable medical and dental expenses incurred by the respondent in respect of herself and the minor child.

2.6

Ronald Bowie is granted reasonable access to the minor child which access shall include, where possible and reasonable, access to the minor child every second weekend from the Friday at 5pm to the Sunday at 5pm and every Wednesday evening from 5pm to 7pm, pending such further determination as to access as may be made by a court of a competent jurisdiction in England. Mr Bowie will personally fetch the minor child from and return the minor child to the respondent's residence on all access occasions.

2.7

Ronald Bowie is interdicted and restrained from in any way assaulting, threatening, harassing or abusing the respondent and from entering any residence occupied by her or any place of employment obtained by her; it being noted that Ronald Bowie makes no admission that he has in the past engaged in any such conduct in respect of the respondent.

2.8

Ronald Bowie shall not prefer charges or institute any action against the respondent for the removal of the minor child from the jurisdiction of England, it being recorded that the respondent denies that such removal was without the consent of the said Ronald Bowie.

2.9

Ronald Bowie and the respondent are ordered to co-operate fully with the Central Authority, England and Wales, any Court of law, and any professionals who conduct an assessment to determine what future custody, care and access arrangements will be in the best interests of the minor child.

2.10

Ronald Bowie is ordered to provide sufficient documentary proof to the Central Authority, England and Wales and to the Registrar of the said Court, that he is able to satisfy his monetary obligations as set out in this order, failing which the respondent shall be absolved from returning the minor child to England.

2.11

The papers in this application shall be presented to the said Court by Ronald Bowie, together with any other papers filed in the launching of the proceedings to obtain the order referred to herein.

2.12

Any further representations or submissions by the respondent if so deemed appropriate by the respondent, shall be presented to the applicant within 1 month of date of this order, and presented to the said Court by the applicant through the Central Authority, England and Wales, prior to the granting, if any, of the order sought.

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3.

The order for the return of the minor child to Berkshire, England, shall be stayed until the said Court has made an order in the terms set out in paragraphs [2.1]–[2.10] above, and further until the applicant has been satisfied, by the submission to her of all relevant documents, that such leave has been granted, and that such an order has been made.

4.

Pending the return of the minor child to England, as provided for in this order, the respondent shall not remove the minor child from the district of Port Elizabeth without the written permission of the Family Advocate Mrs Marisa van Rooyen, which permission shall not be unreasonably withheld. The respondent shall further at all material times keep the Family Advocate Mrs Marisa van Rooyen informed of her physical address and contact telephone numbers.

5.

The Family Advocate Mrs Marisa van Rooyen is directed to seek the assistance of the Central Authority for England and Wales in order to ensure that the terms of this order are complied with as soon as possible.

6.

Pending the return of the minor child to Berkshire, England, Ronald Bowie is to have reasonable telephonic access to the minor child.

7.

There shall be no order as to costs.

8.

A copy of this order shall be served by way of facsimile on all ports of exit from South Africa, as also on the Central Authority for England and Wales at the instance of the applicant.

For the applicant:

GG Goosen SC instructed by *State Attorney*, Port Elizabeth

For the respondent:

BJ Pienaar and G Gajjar instructed by *Boqwana Loon & Connellan*, Port Elizabeth

Footnotes

Footnote

x

Also reported at [2001] 3 All SA 146 (A) – Ed.	1
Footnote	x
Also reported at [2004] 1 All SA 32 (SCA) – Ed.	2
Footnote	x
Also reported at 2001 (2) BCLR 152 (CC) – Ed.	3