Editorial note: Certain information has been redacted from this judgment in compliance with the law.

# THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Reportable

CASE NO: 489/05

In the matter between :

**J.B.** Appellant

and

**M.C.S.** Respondent

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| **Before:** | **STREICHER, BRAND, NUGENT, VAN HEERDEN & JAFTA JJA** |
| **Heard:** | **5 DECEMBER 2005** |
| **Delivered:** | **8 DECEMBER 2005** |
| **Summary:** | **Jurisdiction – interim custody order inextricably linked to order that child be returned to South Africa – court not able to enforce return order - no jurisdiction to grant such order** |

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## J U D G M E N T

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**STREICHER JA**

STREICHER JA:

[1] This is an application for leave to appeal against para 2 to 5 of an order made in the High Court, Pretoria (quoted in full in para [12] below) in terms of which the court a quo awarded the interim custody of the daughter (K.) of the applicant and the respondent to the parents of the respondent and ordered that K. be returned from the USA to the jurisdiction of the court a quo. The judges who considered the application for leave to appeal, acting in terms of the provisions of s 21(3)(c)(ii) of the Supreme Court Act 59 of 1959, referred the matter to this court for argument and ordered that the parties should be prepared to argue the merits of the appeal should leave to appeal be granted.

[2] The applicant and the respondent were married in 1993. One child, K., was born of the marriage on [date] 1994. During 1996 the parties separated and on [date] 1998 they were divorced. The order of divorce incorporated an agreement of settlement between the parties in terms of which they agreed that the custody of K. be awarded to her mother, the applicant, with whom she had been staying since her separation from the respondent, subject to the respondent's right of reasonable access.

[3] The respondent exercised regular unsupervised access to K. until 2002. During 2002 the applicant unilaterally suspended the respondent's access contending that he was a drug abuser, more particularly that he was a marijuana smoker and possibly a user of hard line drugs, and that he had

exhibited conduct from which the inference could be drawn that he harboured paedophile tendencies. Arising from the applicant's conduct the respondent launched two applications in the High Court, Bloemfontein for the purpose of obtaining access to K.. These applications gave rise to three settlement agreements. At first the respondent was allowed supervised access in the applicant's presence, then he was allowed access supervised by a social worker and in terms of the third agreement, concluded in December 2002, he was allowed unsupervised access.

[4] Subsequent to the divorce both the applicant and the respondent remarried. The applicant's husband is a citizen of the USA. They decided to relocate to the USA but the respondent refused to give his consent, as required in terms of s 1(2)(c) of the Guardianship Act 192 of 1993, that K. be removed from South Africa. During the second half of 2002 the applicant launched an application out of the High Court, Johannesburg in terms of which she sought the consent of that court to remove K. from South Africa. The respondent opposed the application and in January 2003 the applicant and the respondent concluded a written agreement in terms of which they agreed that K. would reside permanently with the respondent subject to defined 'rights of access' on the part of the applicant which she was entitled to exercise in South Africa or in the USA. This agreement was not made an order of court, although the parties erroneously assumed that it had been.

[5] Early in January 2003 K. began residing with the respondent and his wife. On four occasions she travelled to America to visit the applicant. The last occasion on which she did so was on 20 June 2005. She was supposed to return to South Africa on 13 July 2005 but, on 12 July 2005, the applicant obtained an *ex parte* interim order from the Family Court of the State of New York ('the New York Court') in terms of which the respondent was called upon to show cause on 9 August 2005 why that court should not exercise temporary emergency jurisdiction over the matter and award the temporary sole custody of K. to the applicant. The respondent opposed the application but on 10 August 2005 that court made the following order:

'ORDERED AND ADJUDGED that this court has temporary emergency jurisdiction in this matter pursuant to Domestic Relations Law s 76-c; and it is further

ORDERED that petitioner, J.B., shall have temporary custody of K.S., born November 1, 1994, age 10, and that K.S. shall remain in the State of New York with petitioner; and it is further

ORDERED that this order shall remain in effect until such time as the High Court of South Africa , Witwatersrand Local Division or other court of appropriate jurisdiction in South Africa, renders a subsequent decision in the proceeding currently pending before that court pertaining to custody of K.S..'

[6] In the application to the New York Court the applicant alleged that when K. arrived on 21 June 2005 she was pale, underweight and nervous and that her gums were bleeding. She alleged, furthermore, that during the

course of her visit K. made numerous alarming disclosures of abusive behaviour on the part of the respondent and her stepmother. These disclosures included allegations that her father and stepmother were smoking marijuana on a regular basis; that the respondent insisted that she sit on his lap and hug him repeatedly; that the respondent insisted on seeing her body and feeling her breasts to see how big they were growing; that the respondent came into the bathroom to watch her taking a bath; that the respondent's attentions made her very uncomfortable; that her stepmother was verbally and physically abusive towards her, was aggressive and short-tempered and hit her; and that she was often left in the care of her stepmother or a male gardener.

[7] The applicant also relied on reports obtained from Kate Halliday, a clinical social worker specialising in families and children, and Marne Oshae, a physician, who interviewed and examined K. on 6 July 2005 and on 7 July 2005 respectively. According to Halliday, K. told her that since the respondent had been using dagga he had been acting very strangely. He had recently been coming into the bathroom when she was having a bath and wanted to wash her and touch her in 'wrong places'. He also asked to see how big her 'boobs' were getting and actually 'felt to see'. She had requested her stepmother to ask the respondent to stop coming into the bathroom when she bathed but he did not do so. She also complained that the respondent always wanted her to sit on his lap and give him hugs and

kisses. Asked about her stepmother she complained that she was grumpy, that she shouted at her when she got angry, grabbed her arm and squeezed it very hard and that she once raised her hand as if to hit her. Marne Oshae reported that K. also told her that the respondent touched her breasts.

[8] Upon the New York Court having awarded interim custody of K. to the applicant, pending another decision by a South African court of competent jurisdiction, the respondent applied to the High Court, Pretoria for an order that, pending the final determination of the custody issue, the custody of K. be awarded to him and that the applicant be ordered to return K. to him, alternatively that the custody in the interim be awarded to his father and mother.

[9] The respondent denied the allegations against him; stated that K. had a good relationship with his wife; and denied that K. was ever left alone with the gardener. He annexed an affidavit by a Ms L., K.'s class teacher at the B…P…S…, in which she described K. as 'a happy, cheerful, polite, loving and well adjusted child who is always smiling (and) eager to please'. She stated that K. is well liked by the other learners of her class and that she gained the impression that K.'s stepmother 'is a very caring care giver and furthermore, is actively involved in K.'s education and more particularly ensures that K.'s homework is performed and is "signed off' by her'. She concluded as follows:

‘5 By virtue of what I have indicated hereinabove, I am totally surprised by the Petitioner’s contentions and although I do not wish to contend that they are false I would nonetheless indicate that:-

5.1 my fellow teachers and myself have never had to raise any concerns concerning K. at our weekly meetings; and

5.2 although K. is naturally of a slim build she has never appeared to be undernourished; and

5.3 K. has never complained to any of my fellow teachers or myself in regard to undernourishment and/or that she is being inappropriately touched by the Respondent; and

5.4 K.’s marks do not indicate a child being abused in any manner whatsoever, i.e. abuse in whatever form (physical, mental etc), is invariably apparent with reference to a decrease in marks and a radical change in behavioural patterns i.e. moodiness, aggressiveness and/or withdrawal exhibitions. K. has not indicated any of these changes and in fact, as I indicate hereinabove, her disposition has remained constant and her marks have improved and in certain cases dramatically.’

[10] Ms L. also referred to a report by the principal of the B…P…S… in which he stated inter alia: ‘K. is a loveable and happy child with no evidence of any underlying problems. As a matter of fact she has just shown progress in the time she has been with us.’

[11] Concerning K.’s grandparents the respondent stated that K. has a warm and loving relationship with them, that they live nearby (approximately 45 minutes by motorcar) and that K. is in regular contact with them. They state in an affidavit annexed to his affidavit, that they are

well able to look after K. and and that they can accommodate her in a spare bedroom. These allegations are not denied by the applicant.

[12] The court a quo, after having heard argument, ordered:

‘2 Pending investigation and report by the Family Advocate, referred to in paragraph 5 below:

2.1 Interim custody of the minor child K. is awarded to the paternal grandparents, Mr and Mrs S..

3 That the minor child be returned to the jurisdiction of this court with immediate effect, and into the said interim custody of the Stones.

4 Applicant shall make arrangements for the minor child to travel to RSA, accompanied by the paternal grandmother, Mrs S., at his cost.

5 A copy of this order shall be served on the Family Court of the State of New York County of Tomkins, which service shall be effected urgently, duly facilitated by the Offices of the Family Advocate.

6 That the Family Advocate is requested to institute an enquiry in terms of the Mediation in Certain Divorce Matters Act and to furnish recommendations to this court in respect of custody as prayed for in paragraph B of the Notice of Motion as a matter of urgency.

7 Costs are reserved.

8 The said Family Advocate enquiry shall include an enquiry and recommendations in respect of Respondent’s counter application for consent for the permanent removal of K. from RSA to USA.

9 Applicant shall inform respondent timeously of the date and time of this arrival in the USA in order to give effect to the terms of this order.’

[13] Unfortunately the judge a quo did not give any reasons for his order. A subsequent application by the applicant to the court a quo for leave to appeal against para 2 to 5 of the order was dismissed with costs. The court a quo held that para 3 to 5 of its order did not dispose of any substantial portion of the relief claimed in the main application and that para 2 of its order was interim in nature. Relying on *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at 532J-533B it held that the orders were for these reasons not appealable.

[14] In *Zweni* Harms AJA said at 536B:

'[G]enerally speaking, a non-appealable decision (ruling) is a decision which is not final (because the Court of first instance is entitled to alter it), nor definitive of the rights of the parties nor has the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.'

[15] In my view neither the interim custody order nor the order that K. be returned was final. Both orders could be reconsidered by the court a quo and will be reconsidered when a final order is made. The position in *Metlika Trading Ltd v Commissioner, South African Revenue Service* 2005 (3) SA 1 (SCA) upon which the applicant relied was different. In that case the court ordered that steps be taken to procure the return of an aircraft to South Africa.[1] Whether or not the aircraft was to be returned to South Africa was not an issue in the action pending which the interdict was

[1] At 11 A-B.

granted.[2] It was not an issue which was to be reconsidered at the trial or on the same facts by the court that granted the order.[3]

[16] However, in my view the order that the child be returned was ineffective in that it could not be enforced by the court a quo. Being ineffective the court a quo had no jurisdiction to make an order in those terms.[4]

[17] In terms of art 12 of the Hague Convention on the Civil Aspects of International Child Abduction (1980)[5], Contracting States to the Convention, which include the RSA and the USA, agree that where a child has been wrongfully removed or retained in terms of article 3 of the Convention the judicial or administrative authorities of the Contracting State where the child is shall order the return of the child forthwith. Article 3 of the Convention provides that the removal or retention of a child is to be considered wrongful where it is in breach of rights of custody attributed to a person under the law of the State in which the child was habitually resident immediately before the removal or retention and where at the time of removal or retention those rights were actually exercised or would have been so exercised but for the removal or retention. The rights of custody may arise by operation of law or by reason of an agreement having legal

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[2] Para [22].
[3] Para [24].
[4] *Steytler NO v Fitzgerald* 1911 AD 295 at 346; *Thermo Radiant Oven Sales (Pty) ltd v Nelspruit Bakeries (Pty) Ltd* 1969 (2) SA 295 at 307; *Ewing McDonald & Co Ltd v M & M Products Co* 1991(1) SA 252 (A) at 259D-J.
[5] As incorporated into South African Law by the Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996, which came into operation on 1 October 1997.

effect under the law of that State. In terms of art 5 ‘rights of custody’ include rights relating to the care of the person of the child and, in particular, the right to determine the child’s place of residence.

[18] In the present case the applicant wrongfully retained K. within the meaning of ‘wrongfully retain’ in terms of the Convention in that she breached the agreement with the respondent that K. would reside with the respondent on a permanent basis i.e. that the respondent could determine K.’s place of residence and thus had ‘rights of custody’ within the meaning of the Convention. The applicant also wrongfully retained K. in that she acted contrary to the provisions of s 1(2)(c) of the Guardianship Act. That section provides that unless a competent court orders otherwise, the consent of both parents shall be necessary in respect of the removal of a minor child from the Republic by one of the parents. Although the respondent did consent to K. leaving South Africa on 20 June 2005, he did so on the basis that she would be returned on 13 July. By failing to return her to South Africa on that date, the applicant in effect breached s 1(2)(c).

[19] K. is in the USA under the judicial guardianship of a foreign court. It is, therefore, for the judicial and administrative authorities in the USA to order the return of K. to South Africa and to determine under what conditions the return should take place. This may well necessitate further orders having to be made by a South African court at that stage, either in

the form of a mirror order or otherwise. In this regard Goldstone J said in *Sonderup v Tondelli* 2001 (1) SA 1171 (CC) para [35] at 1186D-E:

'[T]he court ordering the return of a child under the Convention would be able to impose substantial conditions designed to mitigate the interim prejudice to such child caused by a court ordered return. The ameliorative effect of art 13, an appropriate application of the Convention by the court, and the ability to shape a protective order, ensure a limitation that is narrowly tailored to achieve the important purposes of the Convention.'

[20] A court with appropriate jurisdiction in the USA and not a South African court is, therefore, the appropriate court to order the return of K..[6] In the light of the fact that the court a quo had no jurisdiction to order the return of K. the order is appealable for the following reasons. It has been held by this court that the dismissal of an exception on the ground that the court hearing the exception does not have jurisdiction to hear the matter, constitutes a final appealable judgment.[7] It follows logically that an order by a court based on an assumption that it has jurisdiction to grant the order should be considered to be an order which is appealable on the ground that the court did not have jurisdiction to make the order. The appeal in respect of par 3 to 5 of the order of the court a quo should therefore succeed.

[21] The sole object of the interim custody order made by the court a quo was to make provision for the care of K. upon her return to South Africa

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[6] See also *Di Bona v Di Bona* 1993 (2) SA 682 (C) at 695E-F;and *Matthews v Matthews* 1983 (4) SA 136 (SE) at 139H.

[7] *Du Toit v Ackerman* 1962 (2) SA 581 (A) at 587D-E; *Steytler NO v Fitzgerald* 1911 AD 295 at 305; *Maize Board v Tiger Oats Ltd* 2002 (5) SA 365 (SCA) para [9] and [14].

pending the final determination of whether the applicant or the respondent should have custody. In the light of the fact that the order that K. be returned to South Africa was ineffective there was no need for the interim custody order. The interim custody order is therefore inextricably linked to the return of K. to South Africa and cannot stand if the order that K. be returned is set aside. It follows that the interim custody order is, like the return order, appealable and that it should, like the return order, be set aside. The court a quo should have dismissed the application for interim custody. Until such time as K. returns to South Africa there is no need for an interim custody order in favour of her paternal grandparents. Should she return accompanied by her mother there would likewise be no need for such an order.

[22] The following order is made:

(a) The application for leave to appeal is granted with costs;

(b) The costs order made by the court a quo in respect of the application for leave to appeal in that court is set aside;

(c) The respondent is ordered to pay the costs of the application for leave to appeal in the court a quo;

(d) The appeal is upheld with costs;

(e) Paragraphs 2 to 5 of the order of the court a quo are set aside.

STREICHER JA
JUDGE OF APPEAL

CONCUR:

BRAND JA)

NUGENT JA)

VAN HEERDEN JA)

JAFTA JA)