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SOUTH AFRICA

HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION

In 1996, South Africa ratified the Hague Convention on the Civil Aspects of International Child Abduction of 1980. Without the benefit of the Convention, it was usual for a child abducted from his parent in South Africa to remain in a foreign country up to 2 years before being returned, often at enormous legal expense.

Dullah Omer, Justice Minister, praised the Convention in that the international cooperation would offer important relief to the custodian parent whose child has been abducted by the other parent.¹

I. Domestic Laws and Regulations Implementing the Hague Convention

A. The Law

The South African Parliament passed the Hague Convention on the Civil Aspects of International Child Abduction Act in November 1996.² The Act, which entered in force on October 1, 1997, made the provisions of the Convention part of the domestic law of South Africa by incorporating it in full.³

However, because of the two reservations taken by South Africa, the country is not bound to assume any costs or expenses arising from court proceedings unless such costs are covered by the South African legal aid system. In addition, it does not accept applications and documents in French, in spite of it being one of the official languages of the Convention.

To fulfill the requirement of the Convention, the Law designates the Chief Family Advocate⁴ as the Central Authority.⁵ In writing, he may delegate his powers to any Family Advocate.⁶ Specific contact information was provided to the Permanent Bureau of the Hague Conference on private international law on July 16, 2002.⁷

¹ Africa News Service of Jan. 27, 1998.

² Act No. 72 of 1996 in STATUTES OF THE REPUBLIC OF SOUTH AFRICA CLASSIFIED AND ANNOTATED FROM 1910 191 (Durban, 1967-).

³ Reg. 65 of 1997 in REPUBLIC OF SOUTH AFRICA GOVERNMENT GAZETTE, No. 18322, Oct. 1, 1997, p. 1.

⁴ The Chief Family Advocate is appointed by the Minister of Justice under the provisions of the Mediation in Certain Divorce Matters Act, 1987.

⁵ *Supra* note 2, art. 3, at 191.

⁶ *Id.* art. 4.

⁷ The Chief Family Advocate, Saambou Building, Private Bag X81, The Chief Family Advocate
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mingoatje@justice.gov.za; contact designated person is Mrs Barbara HECHTER, Advocate, *see* <http://www.hcch.net/e/authorities/caabduct.html>.

Article 5 of the Law authorizes the Minister of Justice to make regulations to give effect to additional provisions of the Convention. Furthermore, such regulations may prescribe fees and provide for the expenditure that is incurred due to the application of the Convention.

The Minister can also prescribe a penalty of imprisonment for a period not exceeding 12 months or of a fine for any contravention or failure to comply with the regulations.⁸ The Law also requires the regulations to be tabled in Parliament within 14 days of publication in the Government Gazette. Any one of these regulations or any of their provisions may be repealed by a resolution passed by both houses of Parliament during the session in which such a regulation has been tabled.⁹

B. Regulation

The Minister of Justice issued the regulation required by the Act, and it also took effect on October 1, 1997.¹⁰ It regulates certain practical aspects of the Chief Family Advocate's duties that are imposed by the Convention.

The Chief Family Advocate is authorized to appoint a Family Advocate or any persons to assist him in discharging his duties that are imposed by the Convention. The appointment must be in writing and should contain the conditions of the appointment. However, in urgent cases an appointment may be given orally with a confirmation in writing made subsequently.¹¹

When a person who has the right to custody applies to the Chief Family Advocate for assistance under the provisions of the Convention, the application constitutes authorization to perform all the duties imposed on him by the Convention. The Chief Family Advocate or the person designated by him may appear on the applicant's behalf in any proceeding to give effect to the provisions of the Convention.¹²

If the applicant does not want to appoint a legal representative and does not qualify for legal aid, “the Chief Family Advocate or a Family Advocate shall appear on behalf of an applicant in any court proceedings that may be necessary to give effect to the provisions of the Convention.”¹³ Any person who obstructs the Chief Family Advocate or a person designated by him to carry out the duties he is charged with by the Convention may be fined or sentenced to imprisonment for a period up to 1 year.¹⁴

If an application for the return of a child or for the right of access to a child is successful, the Chief Family Advocate may recover the expenses or costs incurred by the Advocate or persons assisting him. The fee for the Chief Family Advocate or Family Advocates is 50 *rand* (US\$7.50) per hour and a maximum amount of 300 *rand* (US\$45) per day.¹⁵ If the person who is assisting a family Advocate is not

⁸ *Supra* note 2, art. 5.

⁹ *Id.* at 193.

¹⁰ *Supra* note 3, reg. No. 1282 of 1996, at 2.

¹¹ *Id.* § 3, at 3.

¹² *Id.* § 2.

¹³ *Id.* § 5.

¹⁴ *Id.* § 4.

¹⁵ *Id.* § 6.

an officer in the public service, such as a tracing agent, the fee for locating the child is 280 *rand* (US\$41.90) plus expenses.

II. Domestic Laws Regarding Child Abduction and Parental Visitation

A. Custody and Parental Visitation Rights

Under South African law, custody of children vests in both parents, unless they are divorced or separated. Courts must settle the custody issue before they can grant a divorce.¹⁶

Parents may conclude a custody agreement, which has to satisfy the court to be incorporated in the divorce decree. In the absence of such an agreement, the court makes the custody order by taking into consideration the best interests of the child. A custody order does not deprive the non-custodian parent of all his rights. He is entitled to reasonable access, unless the court finds that it is in the child's best interest to deny it.

The non-custodian parent can obtain access to his child by an arrangement with the custodian parent. In the absence of an agreement, the court can make an order regarding visitation rights and lay down its particulars. The access order may be given when the high court is granting a divorce decree or when a parent applies for it.¹⁷

B. Parental Child Abduction

If a non-custodian parent abducts his child, he may be held in contempt of court. A custodian parent whose child has been abducted may apply to the court for the child's return. "In such a case a court may order that the child be returned to the custodian spouse or it may order that the sheriff take possession of the child in order to deliver it to the custodian spouse..."¹⁸ At present, South Africa does not have a special penalty for parental abduction.

C. Obstruction of Parental Visitation

If a custodian parent obstructs the visitation rights of the other parent in any way, he may be held criminally responsible and may be liable to a fine not exceeding 200 *rand* (US\$30) and/or to imprisonment for a period not exceeding 1 year.¹⁹ A custodian parent is required to notify the other parent of any change in his residential address in writing. Otherwise he may be liable to a fine not exceeding 100 *rand*.²⁰

¹⁶ *Supra* note 2, Act 70 of 1979, § 6(1) at 425.

¹⁷ W. A. Joubert ed., 16 THE LAW OF SOUTH AFRICA, 170-172 (Durban, 1998).

¹⁸ *Id.* at 176.

¹⁹ *Supra* note 2, Law No. 93 of 1962, § 1(1), at 181.

²⁰ *Id.* § 1(3).

III. Court System and Structure – Courts Handling the Hague Convention

A. Court System and Structure

The South African court system consists of general courts and special courts. General courts are the Constitutional Court, the Supreme Court of Appeal, the High Courts including any high court of appeals, and the Magistrate Courts. Special courts include the labor courts, land claims courts, family courts, tax courts, water Courts, and equality courts.

The Constitutional Court consists of a President, Deputy President, and nine Members. This Court is the highest court on constitutional matters. The Supreme Court of Appeal consists of a Chief Justice, a Deputy Chief Justice, and as many Members as determined by an act of Parliament to meet the need of the Court. It is the highest court of appeal except for constitutional matters.²¹

The High Court may decide on any matter that is not assigned to another court because of its nature or the amount involved. However, “the judge president...may at any time direct that a matter be heard by a full court consisting of as many judges as he may determine.”²² The Magistrate Court is a lower court with only a limited jurisdiction. The High Court is the court of first instance that will hear cases when brought under the provisions of the Convention. It is also the court that determines the custody of minor children and the visitation rights of the non-custodian parent.

B. Court Decisions

*LS v. AT and another*²³– Decision was rendered on December 4, 2000 to return a child to Canada.

1. Facts

The mother was born in South Africa and the father in Italy. They were married in South Africa in June 1989, and lived for some years in Italy; in July of 1997, they emigrated to Canada, and resided in British Columbia. In July 1999, a consent paper was made an order of the Supreme Court of British Columbia, granting the mother sole custody of the child and the father visitation rights. Following their divorce in May 2000, the parties consented that the issues of custody and visitation would be further investigated and that the mother (the defendant) would be allowed to travel to South Africa with the child for a 1 month period. The parties further agreed that the father would have sole custody of the child in the event that the child was not returned to British Columbia. The mother and the child left for South Africa and did not come back. Upon the father’s request the British Columbia court ordered the mother to deliver the child to the father who gained sole custody and guardianship and to arrest the mother if she breached the order. In addition, the court requested that the South African family advocate ensure the prompt return of the child to British Columbia.

2. Decision of the Constitutional Court

The Court rejected the claim that the Hague Convention contradicted the South African constitutional principle that a child’s best interests are paramount in every matter concerning the child.

²¹ *Supra* note 2, Law No. 108 of 1966, §§ 167, 168, at 1291.

²² *Supra* note 2, at 103.

²³ 2001(2) BCLR 152 (CC); 2000 SACLR Lexis 90.

The Court held: “the purpose of the Convention is ... to ensure, save in the exceptional cases provided for in article 13 (and possibly in article 20), that the best interests of a child whose custody is in dispute should be considered by the appropriate court. It would be quite contrary to the intention and terms of the Convention were a court hearing an application under the convention to allow the proceedings to be converted into a custody application 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.” The Court further concluded that the facts were “insufficient to support a finding that the return of the child to British Columbia involves the grave risk of the harm referred to in article 13 of the Convention.”

The Court ordered the return of the child to Canada under the condition of several undertaking taken by the parties, including the mother having de facto custody pending the final adjudication and determination of the Supreme Court of British Columbia on the issues of custody, access, and care.

IV. Law Enforcement System

As explained above, in the absence of voluntary compliance with a court order in regard to the return of an abducted child, the court may order the sheriff to take possession of the child in order to deliver him to the custodian parent. Denial of visitation rights is an offense in South Africa, and the offender may be prosecuted to force him to comply with the court order. In addition, the penalties prescribed by the regulation for obstructing the Chief Family advocate helping the return of a child or securing visitation rights under the Convention is a serious deterrent.

V. Legal Assistance Programs

The Legal Aid Act²⁴ establishes the Legal Aid Board with the objective of rendering legal aid to indigent persons and providing legal representation at state expense.²⁵ The Act does not define an indigent person. However, the Board lays down "a means test" which it revises from time to time.²⁶ The Board appoints legal aid officers who work under the supervision of the Director of Legal Aid. When an application for legal aid is made to one of the legal aid officers, he considers whether an applicant qualifies for aid under the guideline established by the Board. Qualified applicants are referred to an attorney whose fee is paid by the state.

VI. Conclusion

The Hague Convention was ratified by South Africa because of the enormous legal expense and time spent for the return of an abducted child to his custodian parent in South Africa. In the opinion of the South African Justice Minister, international cooperation due to the Convention would offer important relief to such parents.

South Africa has taken full advantage of the Convention. There has been a considerable number of outgoing applications for the return of the abducted children to South Africa. However, the number of incoming applications has been small. The *LS v. AT* decision summarized above reflects the commitment of the South African Constitutional Court to implementation of the law in that case. A study

²⁴ *Supra* note 2, Act. No. 22 of 1969, at 343.

²⁵ *Id.* § 3.

²⁶ *Id.* § 3(d), at 343(1).

of future additional court decisions will be necessary to reach a general conclusion on the South African courts approach to enforcement of the law implementing the convention.

South Africa was well aware of the advantages of the Convention when it ratified it. However, it has tried to reduce its financial burden by taking reservations to court costs and language. Thus, expenses arising from court proceedings must be born by the applying parent unless they are covered by the South African legal aid system, and all submitted documents must be in English or Afrikaans, so that there will not be any translation costs.

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