REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

Case No 11592/05

In the matter between:

S Applicant

and

H Respondent

JUDGMENT: DELIVERED 22 DECEMBER 2006

GRIESEL J:

[1] This is an application by an unmarried father for certain declaratory orders as a precursor to the bringing of an application in Switzerland under the *Hague Convention on the Civil Aspects of International Child Abduction 1980* (the Convention)[1] for the summary return of a young boy, *M*, to South Africa.

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[1] Incorporated into South African domestic law by the Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996 (*the 1996 Act*), to which the Convention is attached in a schedule.

[2] This case raises interesting and difficult issues surrounding the interpretation of the Convention and its inter-relationship with our domestic law. Most of these issues are *res nova* in our law, although a vast body of jurisprudence has developed internationally involving various aspects of the Convention. I find myself in a similar position to Dame Elizabeth Butler-Sloss P, who remarked as follows in *Re F (Abduction: Unmarried Father: Sole Carer):*[2]

> *'In an ideal world, I would give myself time to consider with care the careful and erudite submissions of [counsel for the parties]. However, there is no possibility in the last-but-one week of term for a judgment to be ready and handed down before the end of term. It would be unjust to the parties and unjust to the child if I were to adjourn this case for my judgment to be written until the beginning of next term …because this is a Hague Convention application. …Consequently, there is no advantage to waiting and I therefore intend to give an* ex tempore *judgment in which I shall do the best I can.'*

[3] In the present case, the matter was argued before me over two days during the last week of term and the first week of recess. For the same reasons as those mentioned in the above extract, I felt constrained to finalise this judgment before Christmas, doing the best I can in the circumstances.

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[2] [2003] 1 FLR 839.

Factual background

[4] The parties, who were never married, are the biological parents of M, who was born in Cape Town on 9 January 2006. The father is a South African citizen by birth and is a self-employed economist/ researcher, residing in Newlands, Cape Town.

[5] The mother was born and grew up in Switzerland. She matriculated there and went on to obtain a PhD in natural sciences at a university in Zürich. She has dual Swiss and South African nationality, because her mother was born in the erstwhile South West Africa. After visiting South Africa on a few occasions during the period 1996–2002 – sometimes for extended periods – she came to live in Cape Town in 2003, when she started working as a senior research officer at the Science Faculty of the University of Cape Town. She currently resides in Basel, Switzerland, with M.

[6] The parties became involved in a relationship during 2004 and started living together. In June 2004, they bought a house, which was registered in their joint names and where they continued to live as a couple until the break up of their relationship during April 2006.

[7] It was during this period that M was conceived. According to the mother, M was not a planned baby. She claims that the parties had not spoken

of marriage before his conception. Although the father wanted to marry after she became pregnant, the mother's consistent attitude was that she was not in favour of marriage.

[8] The father was present at the birth and stayed in the hospital with the mother and M for four days until their discharge. He also contributed to the mother's financial support. After the birth, the parties continued living together and the father played a significant parental role in respect of their child until some time during April, when the mother terminated the relationship and moved into a flat in Gardens, Cape Town, together with M. (The parties had previously experienced difficulties in their relationship at various stages. In fact, the mother described it as 'a very conflictual relationship'.)

[9] After their separation, the father continued to exercise regular access to M, although he complained that the mother had 'systematically set about placing as many obstructions in my path to forging a relationship with M as she could'.

[10] During June 2006, the mother launched an action in this court (*the main action*)[3] for an order defining the father's rights of access 'while the (mother) resides in Cape Town'.[4] The father opposed the action and, in turn, counterclaimed for co-guardianship and joint custody of M, together with an order that the mother 'shall not remove M from the Republic of South Africa on a permanent basis for a period of five years and any relocation proposed thereafter shall be subject to the (father's) consent being granted'. On 15 September 2006, the mother filed a plea to the counterclaim. The pleadings in the main action are closed. There have been discussions between the respective attorneys with a view to approaching the Judge President for an expedited hearing of the main action some time during February or March 2007. To date, however, nothing has been finalised in this regard. In preparation for the trial, both parties have appointed child psychologists to investigate and report to the court in due course on what future arrangements would be in the best interests of M.

[11] In the meantime, during August 2006, the mother entered into a contract with the University of Basel in Switzerland to take up an academic post at the university with effect from 1 January 2007. The father was first

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[3] Under case number 6304/06.

[4] This qualification is explained if regard is had to prayer B, which provides: *'The aforesaid access provisions shall be suspended when the plaintiff leaves Cape Town for any reasonable period of vacation and/or purposes of attending work-related conferences and/or meetings.'*

informed of her intentions in a letter from her attorney, dated 15 September 2006. The attorney added that she had taken up a lease on an apartment in Basel with effect from 1 December 2006. The letter concludes as follows:

> *'We will advise you once we are informed of the precise detail of our client's travel plans for the end of the year.'*

[12] The father voiced his objection to the intended relocation, coming as it did ahead of the currently pending determination of his claim for rights of co-guardianship and joint custody.

[13] On Sunday, 15 October 2006, the father arrived at the mother's address in order to exercise access to M, as arranged. He found no one at home. On checking his cellphone, he discovered an SMS message, sent by the mother the previous evening, advising as follows:

> *'Sorry but I have to cancel access tomorrow* [ie Sunday 15 October] *because of urgent matter – will explain. M and I are fine. Alexandra.'*

[14] The next morning he received an e-mail from her, informing him that she and M had to travel to Basel 'at very short notice due to urgent family affairs'. She further stated that 'at this point it is not possible to determine how

long we will have to stay, but I expect to have more clarity by mid-week and will let you know immediately'.

[15] Less than two hours later, he received another e-mail from the mother, informing him that, after consulting with her family, she had decided to stay in Switzerland with M 'on a permanent basis and not to return to South Africa'.

[16] It thus appears from the facts that are common cause that the mother, without any form of prior notification to the father, removed the child from his place of habitual residence and from the jurisdiction of this court.

Relief claimed

[17] The father thereupon launched the present application, claiming the following relief:[5]

'2. That this Court –

(i) having itself acquired rights of custody by virtue of its jurisdiction having been invoked in the main action under case number 6304/06 wherein it is called upon by the parties to determine inter alia *custody rights within the meaning of the Hague Convention on the Civil*

[5] In terms of the notice of motion as amended.

Aspects of International Child Abduction ('the Hague Convention'); and/or

(ii) acting in its capacity as Upper Guardian of M by virtue of pending proceedings instituted under this case number in the main action; and/or

(iii) carrying out its constitutional duty to act in the best interests of M;

Hereby declares:

2.1 that for the purposes of (i) to (iii) above, this Court shall be deemed to be "an institution or any other body" to which rights of custody can be attributed within the meaning of Article 3(a) of the Hague Convention;

2.2 <u>alternatively</u>, that for purposes of (i) above, this Court confirms that it is currently seized with an action under case number 6304/06 which has not been determined to finality in which, inter alia*, this Court is called upon to decide the issue of M's place of residence and in respect of which action no decision regarding rights of custody or guardianship in terms of South African law has yet been made;*

2.3 that Applicant is recognised in South Africa as having an equal parental right to that of the Respondent to determine M's country of residence at the date of his removal from South Africa, which right is recognised as a right of custody in terms of Article 5(a) of the Hague Convention.'

In addition, orders are sought that the mother pay the costs of this application and for 'further and/or alternative relief'.

[18] As I have mentioned earlier, the relief claimed is novel and I have not been referred to any precedent in our law for such relief.

Jurisdiction of the court

[19] The provisions of the Convention have been discussed in a number of recent cases in our courts.[6] It is accordingly not necessary to repeat that exercise for purposes of this judgment. It is settled law that, for purposes of an application in terms of the Convention for the return of a child wrongfully removed, it is for the court of the *requested* state, not the relevant authority of the *requesting* state,[7] to decide whether the removal was 'wrongful' within the meaning of art 3.[8] However, the question of wrongfulness must be determined

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[6] See eg *K v K* 1999 (4) SA 691 (C) at 700I–702G; *Sonderup v Tondelli & Another* 2001 (1) SA 1171 (CC) paras 10–15; *Smith v Smith* 2001 (3) SA 845 (SCA) paras 6–11; *Pennello v Pennello* 2004 (3) SA 117 (SCA) paras 25–35; *Senior Family Advocate, Cape Town & Another v Houtman* 2004 (6) SA 274 (C) paras 4–17; *B v S* 2006 (5) SA 540 (SCA) paras 16 & 17. See also 2(2) Lawsa (2ed 2003 *sv Children*) paras 142–147.

[7] In Convention parlance, the *requested* State in a case of alleged wrongful removal is the State to which the child has been removed, whereas the *requesting* State is the State from which the child has been removed.

[8] *B v S supra* para 20*; In re D (a child)* [2006] UKHL 51 para 7.

with reference to the statutes and case law of the country in which the child was habitually resident.[9]

[20] It is against this background that the mother contended that there is 'no conceivable legal basis' for the relief that the father seeks and, hence, that this application is 'fundamentally flawed'. In essence, according to the mother, the father seeks to have his 'rights' in terms of the Convention (if any) predetermined in a South African court which, in terms of the Convention, has no jurisdiction to order the return of M. She referred in this regard to art 15 of the Convention, which provides as follows:

> *'The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination.'*

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[9] Andrew Bainham *Children – The Modern Law* (2 ed 1998, Jordan Publishing Ltd) at 586.

[21] She pointed out that the father in the present case cannot rely on art 15 in support of the declarator he seeks, as he has not yet brought a Hague application and the authorities and/or court in Switzerland have not yet requested a determination from this court in terms of art 15. In the absence of any request by a relevant Swiss authority, so it was argued, the application for declaratory relief was premature.

[22] According to the father, on the other hand, the present application is intended as a 'precursor' to a proposed application in Switzerland under the Convention. He considers this to be necessary because, without the declaratory orders sought herein, he will not 'get out of the starting blocks' in a Swiss court, as it was put. This is so, because he has not had his parental rights pronounced upon by this court prior to the removal of the child. Moreover, our domestic legislation *prima facie* does not confer such rights upon him without a pronouncement from this court, or an agreement between the parties. He is accordingly hampered in proceeding directly with a Convention application in Switzerland without first obtaining the declaratory orders presently sought. The father therefore contended that it would be appropriate for this court to make such declaratory orders ahead of any Hague application to be instituted by him in Switzerland for the return of the child.

[23] I am satisfied that the mother's objections to the court's jurisdiction are unfounded. In my considered view, a prospective applicant in a Hague application where the country of habitual residence is South Africa does not have to await a request in terms of art 15 by the courts or other relevant authority of the requested state; he or she is at liberty to be pro-active and to approach a South African court for a declarator, as the father has done in this instance. I come to this conclusion, firstly, by reason of the provisions of art 8 of the Convention, which set out the requirements for a return application. After listing the information which the application 'shall contain' in paras (*a*) – (*d*), the article provides further that the application 'may be accompanied or supplemented by –

> *'(e) an authenticated copy of any relevant decision or agreement;*
>
> *(f) a certificate or an affidavit emanating from a Central Authority, or other competent authority of the State of the child's habitual residence, or from a qualified person, concerning the relevant law of that State;*
>
> *(g) any other relevant document.'*

[24] It is thus clear that an applicant may include a copy of any 'relevant decision' in his or her application. He or she may also include a certificate or affidavit by the Central Authority[10] or any other 'competent authority' of the State of the child's habitual residence 'concerning the relevant law of that State'. Had the father in this instance approached the Central Authority for its certificate concerning the legal position in South Africa, there could have been no objection. Can it conceivably make any difference to the position of the mother that the father saw fit to approach this court – surely a 'competent authority' within the meaning of art 8(*f*) – for its view concerning the relevant law of this country, rather than the Central Authority? I think not. In any event, the application may also be accompanied by 'any other relevant documents'. Surely a judgment by this court, containing declaratory relief, must be a relevant document for purposes of art 8(*g*).

[25] To my mind, the present case, which raises difficult questions upon which our courts have not yet pronounced, is *par excellence* the type of matter in which it would be appropriate to approach the court for a declarator regarding the legal position.

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[10] For South African purposes, the Chief Family Advocate appointed by the Minister in terms of the Mediation in Certain Divorce Matters Act 24 of 1987 is designated as the Central Authority in terms of s 3 of the 1996 Act.

[26] I am fortified in the foregoing conclusion by the attitude adopted by the English courts in similar matters. Thus, in *Re C (Child Abduction) (Unmarried Father: Rights of Custody)*,[11] Munby J said the following:

> *'In the normal case an applicant who succeeds in persuading this court that a child has been wrongfully removed from this jurisdiction in breach of the Hague Convention, and who seeks declaratory relief, as the father does here, to assist his prospects of obtaining substantive relief from the courts of the requested State, will as it seems to me be entitled as of right to such a declaration and can normally expect to have the court's discretion exercised in his favour.'* [12]

[27] It is true that the above dictum was obiter and was, to some extent, based on the specific legislative provisions in the English statute incorporating the Convention.[13] Nonetheless, I respectfully associate myself with the above approach followed by Munby J which, in my view, is in accordance with the spirit of the Convention.

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[11] [2002] EWHC 2219 (Fam); [2003] 1 FLR 252.

[12] Para 73. See also para 70 of the judgment and other cases referred to therein.

[13] Child Abduction and Custody Act 1985, s 8.

[28] In the circumstances, I conclude that the court does, in principle, have the requisite jurisdiction to grant declaratory relief in circumstances such as the present.

Rights of custody – the father

[29] What is crucial for any application under the Convention is the question whether or not the removal of the child in question was 'wrongful'. In this regard, article 3 provides that the removal of a child is to be considered wrongful where –

> *'(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and*
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> *(b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.*
>
> *The rights of custody mentioned in subparagraph (a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.'*

[30] A clear distinction is drawn between 'rights of custody' and 'rights of access'. For purposes of the Convention, '"rights of custody" shall 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'.[14]

[31] The concept of 'rights of custody' in the context of the Convention is not an easy one. It is, however, fundamental to the operation of the Convention itself. What can be said, is that this concept within the Convention is 'broader than an order of the Court and parents have rights in respect of the children without the need to have them declared by the Court or defined by Court Order'.[15]

[32] In this case, the father's claim rests on a twofold basis. In the first place, it was contended that, on a proper reading of our law, the father did in fact enjoy 'rights of custody', as contemplated by the Convention. Alternatively, it was claimed that this court itself enjoyed 'rights of custody', as being 'an institution or any other body' for purposes of art 3(*a*) of the Convention.

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[14] Art 5(*a*).

[15] See Nigel Lowe *et al International Movement of Children: Law Practice and Procedure* (Jordan Publishing Limited 2004) at 256.

[33] With regard to the father's claim to rights of custody, he is faced by the dilemma that, at common law, rights of custody and guardianship in respect of an extra-marital child, in the absence of any court order to the contrary, vest exclusively in the mother.[16]

[34] The common law position has been ameliorated somewhat by legislation, especially by the provisions of The Natural Fathers of Children Born out of Wedlock Act 86 of 1997 (*the Natural Fathers Act*), in terms of which a father of an extra-marital child can acquire rights of guardianship or custody after the court has determined the matter, on application by the father, with reference to the factors set out in the Act. Until such time as the court has pronounced upon the matter, however, the father has no rights of custody in relation to the child.

[35] The father's counterclaim in the main action is aimed precisely at establishing his parental rights in terms of the Natural Fathers Act. However, the further dilemma for the father in this case is that the mother relocated with the child before his counterclaim could be adjudicated. *Prima facie*, therefore, the father had no rights of custody at the date of the removal of the child.

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[16] *B v S* 1995 (3) SA 571 (A) at 575G–H; Brigitte Clark (ed), *Family Law Service* E24 (Issue 42); B J van Heerden *et al Boberg's Law of Persons and the Family* (2ed 1999) at 391–418.

[36] In an attempt to overcome these obstacles, the father referred to the provisions of the Children's Act 38 of 2005 (*the Children's Act*), which Act was assented to on 8 June 2006 and will take effect on a date fixed by the President by proclamation in the Gazette.[17] Not only is the Act not yet in force; it is still incomplete and certain provisions will be inserted by a second Bill, the Children's Amendment Bill 19 of 2006, which will be dealt with in terms of the procedure prescribed by s 76 of the Constitution.[18]

[37] It is clear that an unmarried father will occupy a more advantageous position once the new Act comes into operation. Thus, s 21 of the Children's Act will confer 'full parental responsibilities' on the biological father of an extra-marital child in certain circumstances, *inter alia* if at the time of the child's birth he is living with the mother in a permanent life-partnership; or if he consents to be identified or successfully applies in terms of section 26 to be identified as the child's father ; contributes or has attempted in good faith to contribute to the child's upbringing for a reasonable period; and contributes or has attempted in good faith to contribute towards expenses in connection with the maintenance of the child for a reasonable period. In the event of a dispute between the parties with regard to the fulfilment by the father of the conditions set out above, 'the matter must be referred for mediation to a family advocate,

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[17] Section 315.

[18] See *General Explanatory Note* to the Act.

social worker, social service professional or other suitably qualified person'.[19] Any party to the mediation may have the outcome of the mediation reviewed by a court.[20]

[38] Wishing to avail himself of the more benevolent provisions of the Children's Act, the father invited the court to take cognisance of the intention of the Legislature as set forth in this Act, notwithstanding the fact that it is not yet in operation. This can be done, according to the father, on the basis of the court's power to develop the common law to bring it into line with the Constitution.

[39] I do not agree. First, this was not the case made out by the father in his founding papers. Secondly, and in any event, it is not for this court to 'develop' the common law where the Legislature has already done so – quite elaborately – nor is it for this court to 'implement' certain provisions of the new legislation where the Legislature has decided that it will only be implemented at some future date and where the legislative scheme is still under construction. To do as the father wants the court to do would be to usurp the powers of the Legislature and to act contrary to the doctrine of the separation of powers, on which the whole constitutional scheme is based.

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[19] Section 21(3)(a).

[20] Section 21(3)(b).

[40] As a fall-back position, the father attempted to persuade me that, at the very least, he enjoyed what can be termed 'inchoate rights of custody'. I was referred in this regard to copious international authorities where the concept of 'inchoate rights' of custody had been recognised.[21]

[41] However, in the light of my conclusion with regard to the court's rights of custody (dealt with immediately below) and in view of the need to finalise this judgment as soon as possible, I find it neither necessary nor feasible to express any firm views on this aspect.

Rights of custody – the court

[42] The Convention makes it clear that rights of custody are not necessarily those of a parent. Article 3 refers to rights of custody attributed to '… a person, an institution or any other body, either jointly or alone'. These words have been held to envisage a wide range of holders of rights of custody. Thus, Lord Donaldson MR, in *C v C (Abduction: Rights of Custody)*,[22] held:

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[21] See eg *Re B (a Minor) (Abduction)* [1994] 2 FLR 249 (CA); *Re O (Child Abduction: Custody Rights)* [1997] 2 FLR 702; *Re J (a Minor) (Abduction: Custody Rights)* [1990] 2 AC 562 *sub nom C v S (a Minor) (Abduction)* [1990] 2 FLR 442*; Re W: Re B (Minors) (Abduction: Father's Rights)* [1999] Fam 1 at 11 *sub nom Re W; Re B (Child Abduction: Unmarried Fathers)* [1998] 2 FLR 146 at 155. Also see *Re G (Abduction: Rights of Custody)* [2002] 2 FLR 702; *Re C (Child Abduction) (Unmarried Father: Rights of Custody)* [2003] 1 FLR 252; *Re F (Abduction: Unmarried Father: Sole Carer)* [2003] 1 FLR 839; Lowe *op cit* at 265–272. See also Van Heerden *et al op cit* at 579 n 263.

[22] [1989] 1 FLR 403 at 413.

> *'This right* [ie to determine the child's place of residence] *may be in the Court, the mother, the father, some caretaking institution, such as the local authority, or it may, as in this case, be a divided right ….'*

[43] Although some judges have expressed misgivings about attributing to the court rights of custody,[23] the principle has become firmly entrenched in Hague Convention jurisprudence in a number of international jurisdictions, namely that where a court is seized with custody proceedings, the pending proceedings could give rise to a right of custody in the court itself.[24]

[44] The leading English authority on the question of a court's rights of custody arising from pending proceedings is the decision of the House of Lords in *Re H (supra).* This case involved the removal of a child from the Republic of Ireland to England, whilst her father's application for his appointment as her guardian and for the determination of his access rights was pending before the Irish Court. Previously the court had made a custody order, by agreement, in favour of the mother and the father had been granted certain

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[23] See eg Lord Prosser in *Seroka v Bellah* 1995 SLT 204 at 210 and Chadwick and Morritt LJJ in *Re H (Abduction: Rights of Custody)* [2000] 1 FLR 201 (CA) at 219 and 222. See also the remarks of Lord Mackay in the last-mentioned case, on appeal to the House of Lords, reported as *Re H (a Minor) (Abduction: Rights of Custody)* [2000] 2 AC 291, [2000] 1 FLR 374 (HL).

[24] In England: *Re H (a Minor) (Abduction: Rights of Custody), supra*; In Ireland: *HI v MG (Child Abduction: Wrongful Removal)* [2000] IR 110; In Scotland: *Seroka v Bellah* 1995 SLT 204; In Australia: *Secretary, A-G Department v T S* [2000] FAM CA 1692 at para 54 *et seq*; *Brooke and Director-General, Community Services* [2002] FAM CA 258; In New Zealand: *Re Olson v Olson* Family Court of New Zealand 1994 FP 37/94; In Canada see: *Thomson v Thomson* [1994] 3 SCR 551 (1995) 119 DLR (4th) 253.

defined rights of access. The matter had been adjourned before the Irish Court and the father was accordingly only exercising certain access rights at the time that the mother, without the father's knowledge or consent, left Ireland with the child. In the absence of the mother, the Irish Court appointed the father as guardian of his child and granted him defined access. The father located the child in England and instituted proceedings for her return to the Republic of Ireland under the Convention.

[45] In the House of Lords, Lord Mackay dealt *inter alia* with the question whether a court can ever be an 'institution or other body' to which rights of custody may be attributed within the meaning of art 3 of the Convention and, if so, in what circumstances. In considering this question, the learned judge pointed out that since the Convention was envisaged to apply under a variety of systems of law 'it is right that it should be given a purposive construction in order to make as effective as possible the machinery set up under it'. Applying that approach, he concluded that a court may be the holder of rights of custody, as defined by art 5, especially bearing in mind that 'the phraseology chosen was deliberately wide'. Moreover, the phrase 'rights of custody' includes the right to determine a child's place of residence. In this context, the above-quoted dictum of Lord Donaldson MR[25] was quoted with approval by

[25] Para [42] above.

Lord Mackay. He also referred to various foreign jurisdictions where the principle of the court's rights of custody were accepted, pointing out the court had not been referred to any contrary decision. He concluded that, for the court to be vested with rights of custody, the application to court must raise matters of custody within the meaning of the Convention, which would require in every case a consideration of the terms of the application. Thus, where an application raises rights of access only, the court will not acquire rights of custody.

[46] I am persuaded by the weight and cogency of foreign authority that I should hold that a court in South Africa may be the holder of rights of custody for the purposes of the Convention.

[47] As for the stage when a court will become vested with rights of custody, there is not yet complete unanimity. While it seems to be generally accepted that 'the mere issue of proceedings … is not sufficient to invest the court with the rights in question'[26] (ie rights of custody), there are differing views as to the stage that the process must have reached after the issue of proceedings. In *Re W*,[27] Hale J (as she then was) said the following:

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[26] *Re J (Abduction: Declaration of Wrongful Removal)* [1999] 2 FLR 653.

[27] *Re W; Re B (Child Abduction: Unmarried Fathers)* [1998] 2 FLR 146 at 160D.

'I am greatly attracted to the proposition that, where the court is actively seized of proceedings to determine rights of custody, removal of children from the jurisdiction without leave of the court while those proceedings remain pending is a breach of the rights of custody attributable to the court.

…(P)roceedings will obviously be pending for this purpose if interim orders have been made and directions given for a final hearing. In the light of Re B, however, it is doubtful whether the mere issue of proceedings is sufficient. They should probably have been served and it is possible that some action by the court is necessary to vest it with rights of custody. This could be making interim orders or it could be giving directions for the future conduct of the case.'

[48] In *Re H (supra)*, Lord Mackay held:

'…I consider that generally speaking there is much force in using the service of the application as the time which the court's jurisdiction is first invoked. It is true that interim orders may be made before service and special cases may arise but generally speaking I would think it a reasonable rule that at the latest when the proceedings have been served the jurisdiction has been invoked and unless the proceedings are stayed or some equivalent action has been taken I would treat the court's jurisdiction as being continuously invoked thereafter until the application is disposed of.'

[49] To my mind, the test proposed by Lord Mackay is reasonable. It gives effect to the spirit of the Convention and I respectfully adopt these remarks.

[50] Applying that test to the facts of the instant matter, the mother first invoked the jurisdiction of this court when she launched her action on 22 June 2006. Her claim, however, was only one to determine the father's rights of access and did not raise questions relating to custody. That came later, when the father served his counterclaim on 21 August 2006. It is common cause that the counterclaim squarely raises issues of co-guardianship, joint custody as well as an order prohibiting the removal of M from the Republic without the father's consent. What is more, the mother filed a plea to the counterclaim and the pleadings are now closed; in other words, the stage of *litis contestatio* has been reached. In these circumstances, it is clear to my mind that the court is actively seized of the matter and is vested with rights of custody. Moreover, those rights would have been exercised but for the removal of M during October 2006. In the circumstances, the father is, in my view, entitled to a declaratory order to this effect.

Costs

[51] Both parties claimed an order for costs in their favour. Although the father is substantially successful in obtaining the relief which I intend to grant, he has succeeded on the basis of arguments that have not previously been

accepted by our courts. The mother's opposition to the relief claimed cannot, in the circumstances, be described as unreasonable. Furthermore, it cannot be disputed that the relief initially claimed differed quite substantially from the relief as eventually articulated in the notice of motion as amended. In the process, the father created a considerable amount of unnecessary work for the mother's legal representatives. In the circumstances, and also because the case involves rights of custody of a child, this is a matter where I regard it as fair to make no order as to costs.

Order

[52] For the reasons set out above, the following order is issued:

1. It is declared –

    1.1 that this Court is currently seized with an action under case number 6304/06 which has not been determined to finality in which, *inter alia*, this Court is called upon to decide the issue of M's place of residence and in respect of which action no decision regarding rights of custody or guardianship in terms of South African law has yet been made;

1.2 that this Court is deemed to be ‘an institution or any other body’ to which rights of custody can be attributed within the meaning of Article 3 of the Hague Convention on the Civil Aspects of International Child Abduction (‘the Hague Convention’);

1.3 that by virtue of the aforegoing, this court has itself, prior to the removal of M to Switzerland, acquired ‘rights of custody’ within the meaning of art 3, read with art 5(*a*), of the Hague Convention.

2. No order is made as to the costs of the application.

B M GRIESEL
Judge of the High Court