



UJ INTERNAL MOOT COURT 2019: SET OF FACTS

1.

In October 2004, Steven Warner and Nomzamo Kuse met and fell in love. A year later, they got married in Steven's country of origin, Australia. Nomzamo, a South African citizen attained Australian permanent residence in Australia after the conclusion of their marriage and the couple lived in Australia for the greater part of their marriage. Steven's family did not approve of his marriage to what they termed "a low-class immigrant." Consequently, he became estranged from his family after the conclusion of the marriage. The couple has one child, Thabang who was born in 2005. Thabang is diabetic and his condition is regulated using insulin and regular blood-sugar level monitoring.

2.

At the time of the marriage, Steven was a prominent accountant in Sydney and Nomzamo worked as an *au pair* until Steven gave her a secretarial position at his firm. During the marriage, he took care of all the accommodation and food expenses. He also paid for Thabang's school fees and medical expenses so that his wife could send money back home to her parents.

3.

Two years into their marriage, Nomzamo discovered that Steven was a heroin addict. She tried to persuade him to attend rehab to no avail. On a separate occasion, a well-known drug dealer threatened to harm Thabang after Steven failed to pay his drug debts on time. Nomzamo reached out for help from Steven's family but they refused to intervene and continued to alienate their son and grandson.

4.

On 26 November 2017, Steven was arrested on charges of drug possession after a random search of his car revealed 10 (ten) ounces of heroin. At the trial, Nomzamo testified that Steven had a drug addiction problem and she feared that her child's safety would be compromised as a result of Steven's "shady dealings." Steven was subsequently sentenced to 10 years imprisonment and declared a habitual criminal as this was his second time in prison on the same charge.

5.

In March 2018, after the sentencing, Nomzamo discovered that she was three months pregnant with Steve's child and she made the decision to return to Johannesburg, South Africa, so she could be with her family. She obtained Steven's consent to leave Australia with Thabang. She also promised Steven that she would move back to Australia once the child was born.

6.

Whilst he was in prison, Steven appealed his sentence and the Supreme Court of Western Australia acquitted him of the charges. He was released from prison on the 15th of January 2019. On returning home, he was shocked to find that Nomzamo had still not returned from South Africa and that as she had already given birth in August 2018. When he contacted her, she told him that she could not afford to travel back to Australia. She further explained that she did not want to unsettle Thabang who had grown accustomed to his new home and school.

7.

Thabang is currently enrolled at Hilbrow High school where he is currently doing his Grade 9 studies. Nomzamo's father, Mr Bulani Kuse, works as the Principal at Hillbrow High School.

8.

On the 14th of February 2019, Thabang's best friend, Loyiso was involved in an altercation with one of his classmates, Jerry. Jerry found flirty text messages from Loyiso on his girlfriend's phone and later found the two exchanging valentine's gifts on the school grounds. A fight erupted between Jerry and Loyiso. Jerry pulled out a knife and accidentally stabbed Thabang as the latter attempted to stop the fight.

9.

Thabang was rushed to the hospital and treated for minor injuries to his left shoulder. However, he had to wear a cast for two weeks following the incident. Dr. Khan, the

doctor who treated Steven observed that his blood-sugar levels were abnormally high. Thabang explained that he was diabetic but he had stopped taking his medication as instructed by his grandmother's pastor, Prophet Bushayi. Upon further investigation, Dr Khan learned that Nomzamo and her family were dedicated members of the Healing Light Church.

10.

The leader of the church, Prophet Bushayi, is believed to have healing powers. Thabang's grandmother, Mrs Kuse works at the church office and she arranged a prayer meeting between Thabang and the Prophet. After the meeting, Prophet Bushayi declared that Thabang had been healed and there was no need for him to take the medication which regulates his sugar levels anymore. Thabang confessed to the doctor that he had been suffering from intense migraines and dizziness since he stopped taking his insulin; however the Prophet reassured that he was healed but there were demons that were still following him. Prophet Bushayi gave Thabang "holy water straight from the River Jordan" to chase away the demons.

11.

Steven got in touch with the doctor when he was notified of the school incident. The doctor provided him with a full report of Thabang's medical condition including the Kuse family's refusal to provide Thabang with the necessary medication for diabetes. Dr Khan believes that Thabang still suffers from diabetes and that if he continues to live without insulin, he may well die.

12.

After receiving the medical report, Steven approached the Central Authority of Australia to request the Central Authority for the Republic of South Africa to initiate the institution of judicial or administrative proceedings of the Hague Convention on the Civil Aspects of International Child Abduction, 1980 with a view to obtaining the return his children. The Central Authority of Australia and the Central Authority for the Republic of South Africa have been added as the second and third defendants to these proceedings.

13.

Nomzamo now seeks an order against Steven in terms of Article 12 of the Hague Convention on the Civil Aspects of International Child Abduction, 1980. She further contends that in terms of 13(a) of the Convention, her husband had consented or acquiesced expressly, alternatively tacitly to her removing and keeping the children in South Africa and in accordance with section 13(b), if the order were to be granted for the return of the children to Australia, the children would be exposed to the risk of physical and psychological harm. She has also notified Steven that she is instituting divorce proceedings against him in the High Court of South Africa, Johannesburg Local Division.

14.

Nomzamo and the children moved into Prophet Bushayi's home in Hilbrow after he had a dream that "God wanted him to take her as his wife." Prophet Bushayi asked Nomzamo to leave her job so that she can take care of the house and the children

“because that is what the Lord wants.” He now pays for Thabang’s school fees and the children’s other expenses.

15.

Thabang has expressed his interest to move back to Australia. He is unhappy with his current living conditions and he does not have a good relationship with his mother’s new partner. Thabang has complained on numerous occasions about the unbearably long church hours that are observed by the family. Every morning and evening, the family attends prayer meetings at the Healing Light Church and weekends are spent on community outreach programs and church services. This leaves little time for Thabang to study, as a result, his marks have dropped so drastically that even his teachers are concerned.

The following excerpts are taken from court documents filed in this matter:

16.

Nomzamo argues that:

16.1 Steven cannot have care of the children as he does not have suitable accommodation for the children. Furthermore, due to the estranged relationship that Steven has with his family, the children would have no contact with their extended family if they returned to Australia.

16.2 The children have a good relationship with their maternal grandparents and Prophet Bushari who is currently responsible for maintaining the children.

16.3 Steven only started providing financial support for the children after he learned that Nomzamo was instituting divorce proceedings.

16.4 Initially, Steven refused to acknowledge paternity when Nomzamo fell pregnant.

16.5 Steven has a drug-addiction problem and on several occasions, he physically assaulted her when he was high.

16.6 Steven has not maintained any contact with his children ever since he was released from prison.

16.7 She receives support from the Healing Light Church which is now paying for her children's living expenses. She is considering enrolling Thabang and the new-born child into the Healing Light Church's educational wing which caters for children from birth to grade 12. The Church has a center which is registered as a private education provider. Their teaching is based on the approved syllabus supplemented with spiritual instruction and guidance.

16.8 Nomzamo further argues that she is exercising her right to religion by opting for spiritual healing for Thabang over "western medicines."

17.

Steven argues that:

17.1 He was unemployed for a long time after his release from prison. However, he recently started an accounting firm with his friend and it has become reasonably successful. Although, he is currently living in a one-bedroom apartment, he intends to move into a bigger space once the children return to Australia.

17.2 He is better suited to take care of the children as he now has a stable job while Nomzamo is unemployed.

17.3 The Kuse's cared for Nomzamo during her pregnancy but they also advised her not to get any pre-natal medical care but to attend the "spiritual protection and monitoring classes" offered at the Healing Light Church. Therefore, the Kuse's endangered his unborn child.

17.4 Nomzamo has subjected Thabang to unproven faith-based treatments and if Thabang is put in the care of his mother then his life will be in danger as she refuses to put him on the medication necessary to regulate his diabetic condition

17.5 He has not taken drugs since his arrest and after he started working, he sent money every month for the maintenance of his children.

17.6 Steven argues that he talks to Thabang regularly even though he has not seen his children in person since his release from prison.

17.7 He is concerned that his children are not safe with their mother following the incident at Thabang's school. Thabang has also informed him that such incidents are not uncommon at his school and gang-related violence is prevalent in Hilbrow where they are currently staying.

Nomzamo Kuse seeks an order in the following terms before this Honourable Court:

1. A decree of divorce
2. An order in terms of Article 12 and 13 of the Hague Convention on the Civil Aspects of International Child Abduction, 1980 that the children have settled in

South Africa and the return of the Children to Australia would not be in their best interests.

3. Care and guardianship of the children.
4. The payment of maintenance by Steven Warner in regard to the minor children in the amount of R 3000, 00 per month per child.

Steven Warner is opposing Nomzamo Kuse on the following terms:

1. A decree of divorce cannot be obtained in South Africa because the parties concluded their marriage in Australia.
2. An order under article 12 of the Hague Convention on the Civil Aspects of International Child Abduction for the return of his children to Australia.
3. Care and guardianship of the children.



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