2017 ONSC 1488
Ontario Superior Court of Justice

Bolla v. Swart

2017 CarswellOnt 3659, 2017 ONSC 1488, [2017] W.D.F.L. 1951

Andrea Bolla (Applicant) and Alias Swart (Respondent)

Harvison Young J.

Judgment: March 8, 2017
Docket: FS-16-21159

Counsel: Farrah Hudani, for Applicant
James S. Marks, for Respondent

Subject: Evidence; Family; International

Headnote

Conflict of laws --- Family law — Children — Custody — Child removed from jurisdiction by spouse or spouse refusing to return child — Risk of harm

Mother arrived in Ontario with two children from Botswana where she had been living with father — Few days later, mother forged court order providing she had sole custody of children, enabling her to obtain Canadian passports for children and permitting her to travel with children — Children always lived in Botswana — There was non-removal order in place which had been made in course of Botswana divorce proceedings — In Botswana proceedings, children were ordered to live primarily with father for one month — Mother brought application for custody in Ontario — Application dismissed — Children were ordered to be returned to their habitual residence in Botswana — Mother did not establish any risk of serious harm — It was not accepted that there was any physical violence or that negative comments on part of father met threshold for emotional or financial harm — Mother's evidence lacked reliability as result of her unwillingness or inability to acknowledge role that her own conduct played — There was nothing in events surrounding custody proceedings that supported suggestion that either process or judge were corrupt.

Table of Authorities

Cases considered by *Harvison Young J.*:

E. (H.) v. M. (M.) (2015), 2015 ONCA 813, 2015 CarswellOnt 17891, 393 D.L.R. (4th) 267, 341 O.A.C. 359, 70 R.F.L. (7th) 350 (Ont. C.A.) — considered

Isakhani v. Al-Saggaf (2007), 2007 ONCA 539, 2007 CarswellOnt 4805, 40 R.F.L. (6th) 284, 226 O.A.C. 184 (Ont. C.A.) — distinguished

Krisko v. Krisko (2000), 2000 CarswellOnt 3774, 137 O.A.C. 7, 11 R.F.L. (5th) 324 (Ont. C.A.) — considered

M. (M.) v. E. (H.) (2016), 2016 CarswellOnt 9343, 2016 CarswellOnt 9344 (S.C.C.) — referred to

Ndegwa v. Ndegwa (2001), 2001 CarswellOnt 2528, 20 R.F.L. (5th) 118, [2001] O.T.C. 525 (Ont. S.C.J.) — referred to

Rajani v. Rajani (2007), 2007 CarswellOnt 5834 (Ont. S.C.J.) — distinguished

Thomson v. Thomson (1994), [1994] 10 W.W.R. 513, 173 N.R. 83, [1994] 3 S.C.R. 551, 6 R.F.L. (4th) 290, 97 Man. R. (2d) 81, 79 W.A.C. 81, 119 D.L.R. (4th) 253, 1994 CarswellMan 91, 1994 CarswellMan 382 (S.C.C.) — considered

Wentzell-Ellis v. Ellis (2010), 2010 ONCA 347, 2010 CarswellOnt 2981, 78 R.F.L. (6th) 245, 320 D.L.R. (4th) 370, 262 O.A.C. 136, 102 O.R. (3d) 298 (Ont. C.A.) — referred to

Statutes considered:

Children's Act, 2009, No. 8 of 2009
s. 6 — considered

Children's Law Reform Act, R.S.O. 1990, c. C.12
Generally — referred to

s. 22 — considered

s. 23 — considered

s. 23(b) — considered

s. 43 — considered

Treaties considered:

Hague Convention on the Civil Aspects of International Child Abduction, 1980, C.T.S. 1983/35; 19 I.L.M. 1501
Generally — referred to

Article 13(b) — considered

APPLICATION by mother for custody in Ontario.

***Harvison Young J.*:**

Overview

1 On September 16, 2016, Andrea Bolla arrived in Toronto with four-year old Ava and two-year old Henry from Botswana where she had been living with her husband, the respondent, Alias Swart, since about 2010. Their children always lived there.[1] A few days earlier, she had forged a court order providing that she had sole custody which enabled her to obtain Canadian passports for the children. She also forged a document purporting to be a consent from Mr. Swart permitting her to travel with the children. In fact, there was a "non-removal" order in place which had been made in the course of the custody proceedings which were underway in Botswana.

2 Ms. Bolla and the children have been living with Ms. Bolla's mother, Eva, in her Toronto home since their arrival. Eva Bolla's evidence was that she hopes that her daughter and grandchildren can continue to live here with her indefinitely.

3 On October 4, 2016, shortly after Ms. Bolla's arrival in Toronto, she brought an application for custody of the children in this court. Mr. Swart asks this court to decline to exercise jurisdiction in this case.

4 The parties separated when Ms. Bolla left the family home in Pandamatenga on March 29, 2016, with the children. The circumstances surrounding the separation will be discussed further below. In brief, she claims that the father was emotionally, financially and (on one occasion) physically abusive, and that the marriage had completely broken down. Mr. Swart claims that she was an alcoholic and that despite his efforts to persuade her to admit this and get help, she continued to deny this and the marriage broke down as a result.

5 After their separation, Mr. Swart commenced divorce proceedings in the High Court of Botswana in April 2016. Ms. Bolla responded with her own custody claim. A social welfare report had been ordered[2] and social workers had met with the mother and children in Gaborone.[3] An interim report, or memorandum to the court ("Savingram"), dated August 5, recommended that the children be sent to stay with their father for a period of time so that they could similarly be observed with the father in that environment. On September 6, 2016, Madam Justice Solomon, the case management judge, ordered that the children be returned to live primarily with their father for one month (with the mother to have access on weekends). The mother testified that she felt shocked and blindsided by this order, although there was evidence before the court that this order was made on consent. As I will discuss below, I am satisfied that her unhappiness with this order was a major factor in her decision to leave Botswana.

The Issue

6 The central issue in this matter is whether the Ontario courts should accept jurisdiction. It is common ground that this turns on whether Ms. Bolla has established, on a balance of probabilities, that the children will be at risk of "serious harm" if they are returned to Botswana.

The Process

7 The trial was set down on an expedited basis to begin on January 30, 2016. It was scheduled for five days. All evidence in chief was presented by affidavit, although the parties were permitted two additional hours for supplemental oral evidence. By agreement, all the affidavits were admitted provided that the affiants were available for cross-examination.[4] A number of the witnesses testified from Botswana via Skype. Mr. Swart travelled to Toronto for the trial.

8 The evidence was voluminous. There were 25 affidavits, including expert reports on the legal system and law of Botswana and family law in particular, and on domestic violence. The attachments, including many transcripts of text messages, photographs and memory sticks with videos, were also voluminous. In all, the evidence alone filled over two bankers boxes. I read it all before the commencement of the trial.

9 In addition to Ms. Bolla and Mr. Swart, Anthony Bolla was cross-examined in person. Marian Hobarth, Rienalde Elaine

Swart, Fancy Matlhodi and Keitshegile Sechele were cross-examined via Skype.

10 The time line for this expedited process was very short and was no doubt very challenging for counsel; I know of few matters which have gone from the commencement of the application to trial in four months. This is particularly remarkable because of the exigencies of different time zones and technological challenges. I am grateful to counsel for their assistance during the weeks prior to the trial in organizing the matter so that the trial could run smoothly and be completed as scheduled.

The Factual Background

11 I will discuss the facts in detail in relation to the relevant issues to be determined. However, an appreciation for the context of the relationship, litigation and circumstances surrounding Ms. Bolla's decision to leave with the children will be helpful.

12 Ms. Bolla and Mr. Swart met when Ms. Bolla went to Botswana in 2008 to conduct research for her Master's thesis, "The Role of Wildlife in Botswana: An Exploration of Human-Animal Relationships". She interviewed Mr. Swart, a farmer who lived there. She fell in love with Botswana and with Mr. Swart. She returned to Canada to complete her research and they stayed in touch. In 2009 she returned to Botswana to disseminate her research results and her relationship with Mr. Swart developed. They lived together at Pandamatenga for approximately two years before they married in May 2012. Ms. Bolla's evidence was that even then, the relationship was difficult and Mr. Swart was emotionally abusive, putting her down and belittling her.

13 By late summer 2011, Ms. Bolla and Mr. Swart were discussing marriage. Ms. Bolla had suffered a miscarriage in 2010 which, according to the evidence before the court, was a significant loss for both of them and for Ms. Bolla in particular. Mr. Swart's evidence was that by the summer of 2011, he was very concerned about her alcohol consumption and patterns and they agreed that she would attend the Eden Recovery Centre in Johannesburg, South Africa, a leading alcohol rehabilitation facility, for treatment. Ms. Bolla denied that she was addicted to alcohol "then or now", but acknowledged that she would, under stress, "drink in an unhealthy way". Her evidence was that she has only consumed alcohol seven times since entering Eden. She denies that it was Mr. Swart's idea or suggestion that she enter the Eden facility.

14 In any event, partway through the eight week program, Ms. Bolla discovered she was pregnant. In the meantime, she testified that she had undergone counselling with Cecily West. Ms. West has filed an affidavit in this proceeding in which she states that it was her opinion that Ms. Bolla's relationship with Mr. Swart was "toxic" and confirms Ms. Bolla's evidence in this respect that, until she discovered she was pregnant, she was working up to leaving him. However, Ms. Bolla decided to place renewed hope in the relationship and stay with Mr. Swart. She left the program after four weeks.

15 Ms. West's affidavit does corroborate Ms. Bolla's evidence that, even before they were married, Ms. Bolla was not happy with the relationship and that she complained of emotional abuse. For example, when Ms. Bolla suffered a miscarriage in 2010, she claims that Mr. Swart was entirely unsupportive, telling her to "'get over it'" on many occasions. In fact, it was clear from her evidence that she blames him for causing the miscarriage by driving back to the farm (a drive of many hours) on long back roads which were bumpy. This was clearly a very traumatic loss for her. Mr. Swart denied being unsupportive and stated that this was a loss for him as well. However, he also testified that he was very concerned by Ms. Bolla's increased drinking and that when he said things like "get over it", he was referring to the alcohol abuse.

16 I do not accept Ms. West's affidavit as evidence of emotional abuse. At best, it is evidence that Ms. Bolla felt that she was emotionally abused at the time. I do not rely on Ms. West's affidavit as evidence of any form of abuse, as it is entirely hearsay in this regard. Her opinion was based entirely on Ms. Bolla's version of events, which is to be expected as her role at Eden was that of counsellor to Ms. Bolla.

17 Ms. Bolla and Mr. Swart married in May 2012 and Ava was born June 6, 2012. Ms. Bolla did not drink at all during her pregnancy, and according to Mr. Swart, there were no further alcohol related major incidents until after Henry's birth on June 18, 2014. He did, however, testify at the trial that there were times before that when he suspected she had been drinking, such as occasions when she would stay up later than he did and he thought he smelled alcohol on her. I do not accept Ms. Hudani's suggestion that this is an inconsistency on Mr. Swart's part that I should take into account in finding that Mr. Swart was not a credible witness. By major incidents, he was clearly referring to incidents in which Ms. Bolla drank excessively

and in public. The first major incident he cites after her time at Eden was in 2014 on her birthday when the couple had gone to Victoria Falls with friends. Ms. Bolla does not deny this, but says this happened on only a total of seven occasions.

18 Both parents were overjoyed at the arrival of both children who were loved and welcomed from the start.

19 By 2015, things were getting worse between Ms. Bolla and Mr. Swart. Ms. Bolla's evidence is that the isolation on the farm was difficult, that she did not have many friends or outlets, and that Mr. Swart was physically and emotionally remote. She claims that the abuse escalated and that he was regularly critical of her and belittled her. Ms. Bolla claims that Mr. Swart would often disparage and berate her in the presence of Ava and Henry. She also claims that this included accusations, again in front of the children, that she was an alcoholic. She states that Mr. Swart would refuse to sleep with her, preferring to sleep on the couch, unless he had been out drinking with his friends, in which case he would come home, have too lengthy and less than gentle sex with her, and then go to the couch to sleep.

20 Mr. Swart states that Ms. Bolla's use of alcohol was the constant problem and that he tried everything — even refusing to sleep with her — to try to persuade her to get help. Ms. Bolla denied that there was a recurring issue with alcohol at all.

21 Ms. Bolla also cites Mr. Swart's tendency to video her with his cell phone as an example of abuse. He states that he did this in order to be able to show her the next day how she was behaving in the hopes of trying to persuade her to get help. He states that he loved her very much and that he still does, but that he wanted the alcohol out of his life and the life of the family. His evidence was that there was a clear pattern. Ms. Bolla would drink excessively, sometimes having hidden bottles around the house, then she would sleep it off for a time, then she would be back to normal, and then, at some point, the cycle would start again. He testified that they stopped going to places such as hotels where alcohol was readily accessible, to prevent the temptation that could trigger relapses.

22 Mr. Swart was clear that by March 2015, the dry periods were getting shorter and shorter. This is corroborated by the text messages which include references by Ms. Bolla to drinking episodes. There are, however, many periods during which the text messages are affectionate and include what most people consider messages of ordinary life such as additions to shopping lists.

23 The final incident took place on March 26, 2016. Friends of the family were holding a "braai" (barbeque) at a nearby farm (i.e. 30 kilometers away). Mr. Swart was unable to attend but they agreed that Ms. Bolla would go with the children and would return early in the evening so that the children could be put to bed. In fact, she drove back with the children after midnight, having been drinking heavily. Mr. Swart testified that by the time she returned, he had received a phone call from the hosts that the children were crying and being looked after by others. He greeted Ms. Bolla with his cell phone video camera going. This video, which lasts just under two minutes, was introduced as evidence at the trial. In the video, Ms. Bolla and Mr. Swart argue and Ava is crying throughout. In the video, Ms. Bolla, irritated, says that Mr. Swart will put Ava to bed, despite Ava crying that she does not want this. Then, Mr. Swart accuses Ms. Bolla of staying out with the kids until half past twelve and drinking and dancing. He is heard to say that he had been called and advised that Ms. Bolla was very drunk and unable to look after the children. Ms. Bolla's evidence was that she had stayed at the event until around midnight and that Neodine van Blerk, their neighbour in Pandamatenga, was in the car with her on the drive home while van Blerk's husband was driving ahead of her car. The day following the event, Ms. Bolla sent an apology to the co-host of the braai.

24 Mr. Swart was very angry and upset. On March 28, 2016, Ms. Bolla recorded a number of audios using her cell phone without Mr. Swart's knowledge. This incident is one of the seven incidents in which she admits to having consumed alcohol. The audios which she took illustrate the level of his anger. In the audios, Ms. Bolla and Mr. Swart can be heard discussing the incident on March 26. Mr. Swart calls her "the biggest disgrace in this fucking country" and an alcoholic, and he states that they will get a divorce the next day. Mr. Swart repeatedly asks Ms. Bolla, "Who gave you the booze to drink?" Mr. Swart proceeds to ask Ava, "Ava do you know what booze is?", and then he continues to question Ava, "Booze, booze is that bad medicine. Who gave momma that bad medicine? Do you remember?"

25 Mr. Swart testified that he decided, as of the incident on March 26, 2016, that the marriage was over. He fully admits saying things he shouldn't have said, explaining that he felt at his wit's end. He was consistent in saying that the alcohol abuse and Ms. Bolla's refusal to address it directly was the cause of the end of their marriage. He felt it was destroying their lives and their family. He wanted a divorce, contemplating that both parties would remain involved in the lives of the

children. He stated that she is an excellent mother when sober.

26 On March 29, 2016, Ms. Bolla left Pandamatenga with the children, saying she was going shopping in Kasane. Kasane is the nearest town to the farm, about a three hour round trip away. Her evidence is that she had decided to end the marriage and was not going to return. She checked in to a guest house where she had stayed before. She did not tell Mr. Swart where she was, although as she had stayed there before, and Kasane is a small place, it was not hard for him to figure it out.

27 Mr. Swart commenced proceedings in the Magistrates court in Kasane on March 31, 2016. These proceedings were dismissed for want of jurisdiction on April 8, 2016. On the same day, Ms. Bolla and the children left Kasane for Gaborone. Also on the same day, Mr. Swart filed for divorce in the High Court of Botswana in Francistown. This is the correct court and this is the proceeding that has continued in Botswana.

28 On April 18, 2016, Mr. Swart attended court and obtained essentially a show cause order for interim custody. This was called a "rule nisi", and meant that Ms. Bolla was required to attend court on a subsequent date to show why Mr. Swart should not be given interim custody. Mr. Swart mistakenly understood the "rule nisi" to actually give him interim custody.

29 On April 19, 2016, Mr. Swart attempted to serve Ms. Bolla personally in Gaborone with court materials and take the children into his custody, arriving at her counsel's office without prior warning.

30 On April 27, 2016, the court ordered that Mr. Swart was to get supervised access and the Social Welfare Department was to interview the parties and the children. The basis for supervised access was a fear that he might take the children back to Pandamatenga; it was not based on a fear he would abuse them. The supervisor named was Anthony Bolla, Ms. Bolla's father.

31 These supervised visits took place on May 7, 8, 20, 21, June 4, 5, 18, 19, July 2, 3, 16 and 17. Mr. Swart did not see the children in person again until he arrived in Toronto for this trial.

32 A status hearing was held on August 9. At that time, the court ordered unsupervised access for Mr. Swart. Solomon J. strongly advised the parties to work it out, saying that the children would be spending time with their father. Mr. Swart raised the subject of visitation in the form of a visit to Pandamatenga. Ms. Bolla was opposed to this and there was no resolution on that date. With a status hearing on September 6, 2016, Mr. Swart was to surrender the children's travel documents and neither of the parties was permitted to travel outside Botswana with the children.

33 None of the unsupervised access was exercised by Mr. Swart. He explained that the distance between Pandamatenga and Gaborone made it very difficult to visit for just part of a weekend. He testified that he was hoping that the children would be coming to Pandamatenga for visits, which was discussed for the first time at the August 9, 2016 appearance. However, Mr. Swart did exercise FaceTime access visits over the phone during the period from August 9 to September 5, 2016.

34 On September 6, 2016, the court ordered that the children be taken to live with Mr. Swart between September 14, 2016 and October 14, 2016, with the mother to have weekend access during this period. The parties divorced on September 6.

35 On September 21, 2016, the court issued an ex parte order finding Ms. Bolla in contempt, rendering her liable to imprisonment for six months. Mr. Swart's evidence before the court is that on December 5, 2016, Madam Justice Solomon ordered the order for contempt abandoned and the application for contempt, filed September 19, 2016, withdrawn.

Law and Analysis

36 The parties agree that the issue of the jurisdiction of Ontario courts in this case is governed by s. 23 of the *Children's Law Reform Act*, R.S.O. 1990, c. C.12 (*CLRA*):

> 23. Despite sections 22 and 41, a court may exercise its jurisdiction to make or to vary an order in respect of the custody of or access to a child where,

> (a) the child is physically present in Ontario; and
>
> (b) the court is satisfied that the child would, on the balance of probabilities, suffer serious harm if,
>
> > (i) the child remains in the custody of the person legally entitled to custody of the child,
> >
> > (ii) the child is returned to the custody of the person legally entitled to custody of the child, or
> >
> > (iii) the child is removed from Ontario. [Emphasis added]

37 The context of s. 23 is important to understand. While this matter is not governed by the Hague Convention, the principle underlying ss. 22 and 23 is similar: children should be protected from the harmful effects of their wrongful removal from their habitual residence and their prompt return to the state of their habitual residence should be ensured.

38 This is the general rule. It reflects the presumption that it is generally in the best interests of the child that issues relating to custody and access be adjudicated in the jurisdiction where they have habitually resided. For that reason, the parent who has removed or wrongfully retained the children from their place of habitual residence has the burden of establishing the "serious harm" that permits the Ontario court to accept jurisdiction in such a case: see *Rajani v. Rajani* [2007 CarswellOnt 5834 (Ont. S.C.J.)], 2007 CanLII 38126, at para. 90; and *Ndegwa v. Ndegwa* (2001), 20 R.F.L. (5th) 118 (Ont. S.C.J.), at para. 30.

39 International custody dispute case law dealing with the application of the Hague Convention can be informative since the test in Hague Convention cases is similar to the "serious harm" test in Ontario's *CLRA*. In *Thomson v. Thomson*, [1994] 3 S.C.R. 551 (S.C.C.), the majority decision for the Supreme Court, at p. 596, compared the language in the Hague Convention with that found in a Manitoba act, finding that "the inconsistencies between the Convention and the Act are not so great as to mandate the application of a significantly different test of harm."

40 Harm to the child can be physical or psychological, but it must reach a certain threshold. In *Thomson*, the majority decision for the Supreme Court found, at p. 596, that "the physical or psychological harm contemplated by the first clause of Article 13(b) [of the Hague Convention] is harm to a degree that also amounts to an *intolerable situation*" (emphasis added). Moreover, the Supreme Court in that case, at p. 597, adopted the following reasoning:

> In *Re A. (A Minor) (Abduction)*, *supra*, Nourse L.J., in my view correctly, expressed the approach that should be taken, at p. 372:
>
> > . . . the risk has to be more than an ordinary risk, or something greater than would normally be expected on taking a child away from one parent and passing him to another. I agree ... that not only must the risk be a weighty one, but that it must be one of substantial, and not trivial, psychological harm. That, as it seems to me, is the effect of the words 'or otherwise place the child in an intolerable situation'.

41 Section 43 of the *CLRA* provides:

> Upon application, a court by order may supersede an extra-provincial order in respect of custody of or access to a child if the court is satisfied that the child would, on the balance of probability, suffer serious harm if,
>
> > (a) the child remains in the custody of the person legally entitled to custody of the child;

(b) the child is returned to the custody of the person entitled to custody of the child; or

(c) the child is removed from Ontario.

42 *Serious* harm to the parent, including domestic abuse, can qualify as serious harm to the child. This may include cases where the child is merely exposed to a violent environment as a result of the abuse. There is at least some case law that shows that the deportation or arrest of a parent returning to the foreign jurisdiction may represent serious harm to the child.

43 Here, there is no custody order in favour of either party. That is the subject of the proceedings in Botswana. The heart of the question is whether Ms. Bolla has satisfied the court that there is a risk of serious harm to the children if the Ontario court declines jurisdiction and they are required to return to Botswana.

44 For the reasons that follow, I have concluded that Ms. Bolla has not discharged that onus and that an order must issue returning the children to Botswana where the custody and other matrimonial proceedings between these parties may be continued.

The Parties' Submissions

45 On behalf of Ms. Bolla, Ms. Hudani submitted that the test of serious harm has been met. She submitted that Ms. Bolla has established a risk of serious harm to herself and the children if the children are ordered returned to Botswana. She submits that she has established a long- standing pattern of abusive (emotional, financial and even physical) conduct on the part of Mr. Swart toward her that created a toxic and intolerable situation for Ms. Bolla and the children. Ms. Hudani emphasized that the best interests of the child must also inform the assessment of whether a serious risk of harm has been established. Ms. Bolla was the primary caregiver, Mr. Swart was remote and uncaring and, Ms. Bolla stated in her affidavit material, the children were afraid of him.

46 Ms. Hudani also argues that Ava, who is now four, was demonstrating serious signs of anxiety at the prospect of returning to Pandamatenga to stay with her father and that this shows the serious harm that would result to her if she were forced to return.

47 In addition, Ms. Hudani argues that the legal system in Botswana is corrupt and that Mr. Swart was manipulating the system in his interests and against those of the mother.

48 Mr. Swart paints a very different picture. He led significant evidence to support his position that he and the children have a very good relationship and that it has been threatened seriously, first by the wife's unilateral decision to take the children away (to the nearest town, Kasane, about a 1.5 hour drive from the farm) without advising him that she was doing so (on March 29, 2016) which seriously disrupted his relationship with the children, and second, when she left Kasane on April 8, 2016, and moved to Gaborone, which was a nine hour drive away. He acknowledges the fact that their relationship was a traditional one, that he sometimes worked long hours, and that Ms. Bolla was in charge of the domestic front; he denies any abuse. He argues that the longstanding issue was Ms. Bolla's addiction to alcohol and her refusal to address the issue, which was getting worse and worse. He admits that there were times when, out of frustration, he said things he should not have said. On his behalf, Mr. Marks submits that the children were not exposed to violence, and although they were present or in the general vicinity for some arguments, that exposure to parental conflict did not meet the "high bar" required to establish a risk of serious harm. Moreover, he argues that it was Ms. Bolla who, when drunk, exposed the children to conflict and harm.

49 Mr. Swart also took a number of videos and photographs. Hundreds of photographs (some taken by Ms. Bolla) as well as many videos and a few audios (a few taken by Ms. Bolla) were filed as evidence. In addition, there were many, many transcripts of text messages between the parties which took place over a number of years. Perhaps not surprisingly, each party emphasizes different ones. I have reviewed them all.

Has the Applicant Mother Established a Risk of Serious Harm if the Children are Returned?

50 Ms. Bolla's claims of serious harm are based on three main factors.

51 First, she argues that the proceedings in Botswana were irregular and corrupt, that Mr. Swart had an inordinate influence, and that this creates a risk of serious harm should the children be forced to return. She also argues that the court must consider the best interests of the children and the fact that she has been their primary caretaker should be taken into account as well. I will discuss these in turn.

52 Second, she claims that Mr. Swart has been emotionally, financially and even physically abusive to her and that this constitutes serious harm that can justify the exercise of jurisdiction of this court under s. 23.

53 Third, she submits the anxiety shown by Ava in Botswana when she introduced the subject of her returning to Pandamatenga to stay with her father as another basis for a finding of serious harm.

54 I will address these in turn.

55 Given the dramatically different versions of events that have pervaded this matter, the court's finding of the credibility and reliability of the parties' evidence is of central importance. For that reason, I will discuss it here before addressing the bases of alleged harm.

Credibility

56 I found Mr. Swart to be more credible, straightforward and consistent in his evidence than Ms. Bolla and, in general, I prefer his evidence where their testimony is inconsistent.

57 The most striking problem with Ms. Bolla's evidence is her repeated denial that she has ever had or still has an alcohol addiction. I acknowledge that testing on December 3, 2016, confirmed her evidence that she had not consumed alcohol since March 26, 2016. Her denial that she has had an alcohol problem is not credible given the sheer number of references in text communications she had with Mr. Swart in which she apologizes for her behavior, both in general and with reference to specific incidents, including references to herself as an alcoholic and assurances to him that she will try to "wean my body and mind off of alcohol again." The fact that this was a continuing issue even finds some corroboration in text messages between Ms. Bolla's father, Anthony, and Mr. Swart. It seems that these two men were on good terms until the separation and Mr. Swart testified that he communicated with Mr. Bolla regularly about the alcohol issue and what might be done to get Ms. Bolla professional help. Mr. Bolla repeatedly said he would deal with the issue but did not agree that she should go to a rehabilitation facility. On one occasion on February 19, 2016, the following exchange took place via messages:

> 19 /02/16, 6:46:22 AM: Alias Swart: Think she might be boozing. I don't know.
>
> 19 /02/16, 7:47:28 AM: Tony Bolla: Oh no. Please let me know if you find out anything.

58 Even in admitting that she was drinking "in an unhealthy way" before she went to Eden in 2011, Ms. Bolla denies having an alcohol addiction problem and blames Mr. Swart for her increased drinking in terms of his unsupportive behavior when she suffered the miscarriage. She denies that she went to Eden because of alcohol issues, saying that she decided to leave Mr. Swart as she was "reevaluating the relationship and I didn't feel that our relationship was healthy," and that she went to Eden for counselling "from a neutral party". She stated that she did not have an addiction to alcohol, but that Mr. Swart did accuse her of this on a regular basis

> and reminded me of that at every opportunity . . . he would go on about any one incident for months and it would really break my spirit . . . I don't believe I was an alcoholic. It was breaking my confidence, I was feeling a lot of self-doubt. Whenever I tried to explain anything he would just call me an alcoholic. I came to believe what he was saying about me.

59 Although Ms. Bolla does admit to pursuing the "12 step" program while she was at Eden, the extent that she

minimized the role of Eden as a rehabilitation facility was striking. It remained unclear why she would have taken the initiative to leave Mr. Swart and travel the distance to a well-known alcohol rehabilitation facility in Johannesburg rather than counselling in a less specialized environment if she did not see alcohol as a central problem.

60 I do not accept her version of the circumstances that led to her admission to Eden. While she may have been ambivalent about the relationship, I am satisfied that she went to Eden having accepted that she had an alcohol issue and agreeing with Mr. Swart that if they were to start a family together, this had to be addressed.

61 Similarly, I accept Mr. Swart's evidence that the alcohol issue resurfaced as a recurring problem after Henry's birth in 2014. There are many text messages that reference this in 2015. In July 2015, for example, Mr. Swart tells her she needs professional help and the next day she replies, "I'm addicted and when I start it becomes an obsession." Other texts include statements from Ms. Bolla, such as, "I'm sorry to you and the children. I know how awful it is." Mr. Swart responds the next day, "Did you hear me? Get in touch with your sponsor ASAP." Also in July 2015, Ms. Bolla texts the following, "I'm not angry, depressed, miserable. Nothing. It's the disease. The addiction. I let it in and it takes over. I got too relaxed and thought I could cope with it. I can't." In September 2015, in response to Mr. Swart asking what and where she drank, Ms. Bolla replies, "Wine. At home. So completely stupid. I got so carried away because I was hiding it."

62 Ms. Bolla explains her apparent admissions as having been made in an attempt to mollify Mr. Swart. She stated in her evidence that she felt compelled to admit to things she hadn't done in an attempt to get him off her case. This, she argues, was symptomatic of the abuse and the fact that it was wearing her down and breaking her spirit. She relies on expert evidence tendered by Dr. Aysan Sev'er in support of this, who stated in her affidavit: "Like repetitive movement injury, *'emotional abuse' consists of repetitive neglect, put-downs, name-calling, blaming, rejection, creating doubt, degradation, public embarrassment, and other 'systemic' attempts to erode a woman's self- esteem and self-worth*" (emphasis in original).

63 Dr. Sev'er referenced the end result as "women whose selves are altered/diminished/destroyed by long-term, relentless, cruel and insidious neglect and emotional abuse" (citations omitted).

64 I accept that long-term emotional abuse as defined by Dr. Sev'er may have the effects that she sets out in her report. I do not accept that this is what happened in this case. I do accept that these spouses had arguments, that Mr. Swart said inappropriate things at times, and that the structure of their lives was somewhat patriarchal. I do not find that it was a pattern of abuse that led Ms. Bolla to acknowledge the alcohol abuse in the text messages or that drove her to return to Botswana, marry Mr. Swart and decide to build a life and family there together.

65 I also understand that that life was difficult and isolating on the farm in Pandamatenga for Ms. Bolla and that she was increasingly unhappy in the marriage. That does not meet the test of "serious harm". A finding that it did would seriously undermine the purpose and proper operation of s. 23 of the *CLRA*, and the presumption that the courts where the children are habitually resident are best placed to adjudicate the issues relating to custody and access.

66 Ms. Hudani submits that Mr. Swart should be found to be lacking in credibility because he deleted a number of text messages from a chain of messages, which in her submission amounts to concealing evidence. For example, one text stated:

> I've got more than enough proof that highlights your problem and shows your aggressiveness even in front of the children. Removing you from this family will be a piece of cake.

67 In another, Mr. Swart stated:

> I told your mother then that it's my job to eliminate threats to this family, that included her. Now you're a threat to this family. I'm giving you the opportunity to change that. If not, you too will be eliminated from this family. I suggest you start working on it.

These and some other messages do not paint Mr. Swart in a good light. However, I do not agree that he was "concealing" evidence as Ms. Hudani argues. He is an intelligent man and would have known that it was highly likely that these would

appear in Ms. Bolla's materials. While he did not indicate that he had deleted them from the chain, he did not assert that he had not. His explanation was that he did not think they were relevant to the points being made in his affidavit at that stage.

68 I find that these deletions were somewhat self-serving. But they do not affect my overall assessment of Mr. Swart's evidence as straightforward and honest. When these were put to him, he explained that these statements were all part of his attempts to get his wife to get help. He admits to behaving poorly at times out of frustration and anger at her drinking, which was getting worse. His evidence is borne out by a review of the context of these texts.

69 Mr. Swart in cross-examination was very consistent in his responses that his comments about "eliminating" Ms. Bolla from the family were a reference to the drinking issue. So was his comment about her "problem" and her "aggressiveness even in front of the children". Having read these messages in their entirety, I am satisfied that the texts upon which Ms. Bolla relies as evidence of emotional abuse do not establish serious harm within the meaning of s. 23. I do agree that the comments appear harsh. But I also agree that they are snapshots within a relationship that was troubled, in part due to Ms. Bolla's alcohol issues which were getting worse and which she refused to acknowledge or address.

70 Another concern which gives rise to Ms. Bolla's credibility is her assertion in her affidavits that the children were afraid of their father. This was simply not borne out by other evidence. There has been an inordinate quantity of family photos, videos and, most recently, reports from the Brayden supervised visits, both in person and on FaceTime, and there is no evidence, apart from Ms. Bolla's unsubstantiated assertion, that the children are now or have ever been afraid of him. There are photos of the children playing with him, of Ava fishing with them, of the play structure he put up for them and so on.

71 It is clear, particularly from the March 26, 2016 video and the March 28, 2016 audio taken by Ms. Bolla that the children were exposed to inappropriate behavior at times on the part of both parents. And while Mr. Swart did acknowledge using a wooden spoon as a disciplinary tool, he said that this was very rare, and also that Ms. Bolla did as well, something that she did not deny. In cross-examination, Mr. Marks presented Ms. Bolla with numerous photos and videos of the children engaged and apparently having fun with their father. On each occasion, she admitted that this was the case, but she stated that this was a rare and isolated occurrence. I find that her recollection on these issues was not reliable but was rather coloured by her own personal unhappiness. As a result, she minimized Mr. Swart's role in the children's lives and certainly the positive times.

72 The last visits on FaceTime when the family was in Botswana do show some somewhat strange behavior on the part of the children, but I do not see that it was fear. Rather, they seem distracted and unfocussed on their father.

73 The recent Brayden supervised visits in January and February 2017 show very positive interactions between the children and Mr. Swart. The children appear happy during these visits and seem to enjoy their father's company and the games they play with him. For example, on the January 28 visit, before seeing him, Ava called out for her father. On that day, Ava and Henry interacted with their father and were smiling and laughing. Indeed, they engaged in a variety of play activities. At the end of the visit, the children at first refused to get ready to leave. The visits from January 28, 2017 forward took place in person. These were the first physical visits between the children and their father since July 17, 2016.

74 Ms. Bolla's evidence overall was entirely negative with respect to Mr. Swart. Mr. Swart, on the other hand, is prepared to acknowledge Ms. Bolla's strengths. He has consistently stated that Ms. Bolla has been the primary caregiver of the children, although he does not agree with her characterization of his role as remote and uncaring. He also has consistently stated that she is an excellent mother, subject to the alcohol issues. Moreover the text messages, read as a whole, support his evidence.

75 Ms. Bolla's testimony entirely denied the alcohol as a factor in this relationship, preferring to see it simply as an abusive one that cast her and the children as victims and Mr. Swart as the abuser causing all the problems. The alcohol issue is the "elephant in the room" of Ms. Bolla's evidence. She was consistent in refusing to see it as an issue and denying that she had a problem. Her blanket denial is simply not credible, and I find that much of her evidence lacks reliability as a result of her unwillingness or inability to acknowledge the role that her own conduct has played in the breakdown of the marriage and in the circumstances she and the children now find themselves.

The Allegations of Corruption and Procedural Irregularities

76 Ms. Bolla suggests that the system in Botswana is corrupt and relies upon two articles. The first is entitled "Botswana: A Minimalist Democracy".[5] Having read this article, it does not support the suggestion that it is fundamentally corrupt or that the rule of law does not prevail. The authors summarize their thesis as follows, at p. 751:

> . . . Botswana was able to construct an electoral democracy against the odds. . . . It will be argued that although the country possesses a functioning electoral democracy, it is one marked by an illiberal authoritarianism and presidentialism that is characterized by an elitist top-down structure of governance.

77 This interesting article examines what it calls the "exceptionality" of Botswana in constructing a democracy in what was "perhaps the ultimate unfavorable structural setting for democratization, not only in geographic, but also in economic and political terms" (p. 750). The second part discusses Botswana's limitations in terms of the "illiberal authoritarianism and presidentialism", but in developing their article, the authors note that

> [Its] exceptionality has actually become less remarkable, opening up greater space for a closer engagement with the realities of Botswana's democratic credentials. (p. 751).

78 This article supports the conclusion that Botswana's democracy does indeed shine on the African continent, although it has limitations and challenges.

79 The second article is entitled "Corruption in Botswana: Some General Comments".[6]Taylor notes that in recent years,

> . . . reports of corruption have entailed more cases of sophisticated white collar crime, and senior private business leaders, politicians and senior government officials have engaged in deals involving their own family's interests.

80 Taylor also notes that while there are reports that irregular payments or bribes are "sometimes" exchanged, "[t]rials are generally free and fair, as there is judicial independence provided by the constitution". Ms. Bolla suggested that Mr. Swart had, in fact, personal connections and influence that had assisted him in this process and in attempting to take the children on April 19, 2016 after obtaining the "rule nisi".

81 I do not find any evidence to support this. Mr. Swart is a farmer in a remote part of Botswana. He initially filed his claim in the wrong court. The first two motions he brought were unsuccessful. Because of the concern that he would try to take the children back, he was granted only supervised access. It was not until August 9, 2016 that he obtained an order for unsupervised access and the prospect of having the children visit Pandamatenga was broached. If Mr. Swart had the connections, and if the system was so amenable to corruption as Ms. Bolla asserts, one would expect that these first few months after the separation would have gone more smoothly for him than it did.

82 Taylor also raises concern about gender bias, particularly in the family law context, but the discussion refers only to magistrates. This matter is proceeding in the High Court. The case management judge, Solomon J., is herself a woman. There is no support whatsoever that there is any gender bias at work in this particular case. Again, the Savingram and the ensuing order was aimed at gathering both sides of the story with a view to making the best decisions possible for these children whose parents could not agree.

83 Moreover, no system is perfect. In Canada, complaints have been raised recently about the extent to which our judicial system is entirely free of discrimination, and particularly gender bias. In the United States, constitutional rights are the subject of intense criticism and debate since the Presidential election in November 2016. The point is that the standard is not one of perfection.

84 Ms. Hudani suggests that there were a number of serious irregularities in the process that led to the September 6 order that the children visit Pandamatenga for a month. She complains that the Savingram was not provided to Ms. Bolla before September 6, but that it was provided to Mr. Swart, and that she had no opportunity to question the person who wrote the Savingram (who was not one of the social workers who interviewed her and the children).

85 According to Mr. Sechele[7], Savingrams do not form part of the court record. They are sent into the court and the registrar sends them to counsel. Mr. Sechele testified that Madam Justice Solomon had received it previously but had not read it in advance. He also testified that he and Ms. Bolla's lawyer were in the same position — they reviewed it with the judge for the first time in chambers. I find that Mr. Sechele's testimony was more complete and consistent with respect to the appearances before Madam Justice Solomon. I do not find this surprising as he is a lawyer. Ms. Bolla was represented, but her lawyer did not provide evidence to this court as to her recollection of the proceedings on August 9 and September 6.

86 According to Mr. Sechele, there was no court reporter present because this proceeding was not a formal hearing but part of the case management process that Madam Justice Solomon was conducting. His evidence was that when the parties appeared on August 9, 2016, Mr. Swart raised the subject of the children coming to Pandamatenga to visit for the first time. Ms. Bolla was opposed to this. Madam Justice Solomon spoke to them about the importance of visitation and encouraged them to reach an agreement. Ms. Hudani asked Mr. Sechele in cross-examination if he was surprised that the judge took the position that the children would be visiting their father at Pandamatenga. He replied that he was not, explaining that he saw it as a reasonable comment, "because in this country you are allowed to have access to your children. Visitation is of paramount importance and in the best interests of the children and is not taken lightly."

87 On September 6, Madam Justice Solomon reviewed the Savingram with the parties. Mr. Sechele agreed that the parties understood the Savingram to suggest a five month period at Pandamatenga with the mother entitled to the same access that the father had been entitled to while she was in Gaborone, i.e. weekends. This is consistent with Ms. Bolla's understanding of the Savingram, although it did not specify a time period on its face. However, Mr. Sechele testified that all the parties thought that five months was too long. Madam Justice Solomon asked the parties to discuss it and they did. Mr. Sechele stated that they agreed to one month and that the judge then made the order on consent.

88 I accept Mr. Sechele's evidence that the Solomon J. order dated September 6 was a consent order. I also agree that in Ontario courts, consent orders normally indicate that they are consent orders. However, even in Ontario it is not hard to imagine that occasionally an order does not so specify. Both Ms. Matlhodi, Senior Social Welfare Officer for the Social Services Department in Gaborone, Botswana and Mr. Sechele testified that the order was made on consent. I prefer their evidence to that of Ms. Bolla. I do not think her recollection was accurate or complete. For example, she made no reference to the discussions or negotiations that took place between the parties with their counsel on both August 9 and September 6.

89 Ms. Hudani was critical of the fact that Ms. Bolla did not have the opportunity to cross- examine the maker of the report on September 6. This, however, was, as Ms. Matlhodi explained, not a report at all, but a request for more time and the opportunity to assess the children in the father's care and residence as they had already been able to do with their mother. Ms. Matlhodi disagreed with the criticism that she had not personally met with the parties, reiterating the point that this was not a report, that she had spoken with the social workers and that she relied on their notes. In fact, the Savingram noted that neither Ms. Bolla's allegations of abuse against Mr. Swart nor his allegations of alcoholism against Ms. Bolla had been substantiated at that point, but that the children appeared comfortable with both parents.

90 The Savingram stressed that these allegations needed to be addressed so that the court could make an informed decision. The Savingram also indicated that the Social Welfare Officer recommended that Mr. Swart be allowed to stay with the children so observations could be made and then compared with those from the period in which the children were with Ms. Bolla. Meanwhile, it also recommended that Ms. Bolla have supervised access during this period.

91 The court appearances on August 9 and September 6 were very similar to what would be called case conferences or settlement conferences in Ontario. When the parties are represented by counsel, as both were in this case, there is generally no court reporter and thus no transcript. As far as the concern expressed about Ms. Bolla having been "blindsided", I am not satisfied that she was. She certainly was aware that visitation would be a live topic on September 6. In addition, there is no evidence from her counsel as to her recollection of what was received and when. In any event, there is no evidence whatsoever that, to the extent that Mr. Swart and/or his counsel were aware of the Savingram before she was, this was

anything more than inadvertence.

92 Ms. Matlhodi testified that the Savingram's main purpose was to ask the court for more time in order to complete its assessment, given the conflicting evidence and to assess the children with their father at Pandamatenga. I note that there was no evidence before this court as to whether the process would be different in Ontario in analogous circumstances where the only conclusions/recommendations were that more time was required in order to conduct a complete and fair assessment of the best interests of the children.

93 Most importantly, there is no suggestion that she raised any concerns about these procedural issues on September 6 through her counsel. Nor is there any evidence at all that she sought to appeal[8] or that she or her lawyer even considered such avenues. Again, there is no evidence from her counsel on this. Rather, the preponderance of evidence supports Mr. Sechele and Ms. Matlhodi's evidence that Ms. Bolla, with the assistance of counsel, agreed to the order that was made on consent on September 6, providing that the children would return to Pandamatenga on September 14.

94 In sum, there is nothing in the events surrounding the custody proceedings that supports the suggestion that either the process or the judge were corrupt as Ms. Bolla suggested. The process in place is remarkably similar to that employed in custody disputes in Ontario courts. There is nothing unfair or corrupt about the process in which these parties were involved and, particularly, nothing improper about the Savingram, which was simply an interim request for time and more investigation. Moreover, there is nothing to support the suggestion that Mr. Swart somehow had the "pull" to get his way in the process since one would expect a finding to have been made in his favour without such an investigative process to begin with if that were the case.

95 There is no evidence that Ms. Bolla expressed any concerns about this order at the time. Rather, she indicated that she was planning to comply. On the basis of the evidence before me, I find that Ms. Bolla had consented to the Solomon J. order dated September 6, 2016, but that she shortly thereafter determined that she would not comply.

96 Ms. Bolla also relies on the fact that Mr. Swart tracked her down in Gaborone on April 19, 2016, in support of her suggestion that he had connections that could assist him in the litigation. I will discuss the April 19, 2016 incident below in the course of the discussion of her allegations that his conduct toward her has constituted "serious harm".

Ms. Bolla's Status to Live in Botswana

97 On behalf of Ms. Bolla, Ms. Hudani suggested that her ability to reside in Botswana will be compromised and also that Mr. Swart would or could use his influence to the effect of denying her a residence permit and or arranging to have her deported. None of this is borne out on the evidence.

98 Rita Keevil testified as an expert witness on the law of Botswana. I found her to be an excellent witness. She was clear and highly qualified. She is a citizen of South Africa but has lived in Botswana for many years and has a residency permit which she has renewed and or modified on a number of occasions. She testified that it is not unusual for foreigners to divorce in Botswana and remain as independent residents. Thabiso Tafila also testified on this issue. Given the fact that the children's ordinary residence and that of their father is in Botswana, that Ms. Bolla could, given her qualifications, seek to work in the tourism industry in Botswana or find other employment, and that she is seeking support from Mr. Swart as well as one half of the large property held in community of property as part of the divorce proceedings under way in Botswana, there is no evidence that this would be a problem for her.

99 Most significantly, there is no evidence that supports the suggestion that Mr. Swart personally could have her deported or have her residency permit revoked. Ms. Keevil specifically stated in cross-examination that he could not.

100 Finally, Ms. Hudani submits that the fact that Mr. Swart obtained a contempt of court order against Ms. Bolla without serving her is an indication of a corrupt process. I do not agree. He obtained this order on September 21, 2016, after she had fled with the children. Appeals exist in Botswana, as in Canada, to redress legal error. Moreover, there is no evidence to support the assertion that Mr. Swart's personal influence or connections had anything to do with getting the order.

Abuse of Ms. Bolla by Mr. Swart

101 I find that Ms. Bolla has failed to establish abuse on the part of Mr. Swart that meets the threshold of serious harm within the meaning of s. 23.

102 While I am satisfied that Ms. Bolla was unhappy in her relationship with Mr. Swart, and considered leaving at various points, I am not satisfied that she has met the onus of establishing abuse that meets the threshold of serious harm within the meaning of s. 23 of the *CLRA*: see *Isakhani v. Al-Saggaf*, 2007 ONCA 539, 226 O.A.C. 184 (Ont. C.A.); and *Wentzell-Ellis v. Ellis*, 2010 ONCA 347, 102 O.R. (3d) 298 (Ont. C.A.).

103 There is no doubt that the abuse of a parent may constitute "serious harm". For example, in *Isakhani*, the motion judge had accepted the evidence of the mother that the father was an alcoholic with a history of serious physical and emotional abuse of the mother to which the children were exposed, and that the test of "serious harm" was therefore met. There were photographs of her injuries, and on one occasion he bit her shoulder with such intensity that it left a bite mark and scar that was visible for several years. The Court of Appeal upheld this decision. Similarly, in *Rajani*, Backhouse J. found that the repeated emotional and physical abuse of the mother by the father, combined with her reasonable fear that he would try to harm her if she returned to Tanzania, met the test of "serious harm" in s. 23. There is no evidence in this case that there is any risk that Mr. Swart will harm Ms. Bolla if she returns to Botswana.

104 As I have outlined above, Ms. Bolla submits that Mr. Swart has been abusive since early in the relationship and that, in these circumstances, creates a risk of serious harm if the children and her are required to return to Botswana. She submits that the abuse has been emotional, physical and financial in nature. Mr. Swart denies any abuse. He does admit making the statements attributed to him, but he insists that they must be taken in the context of Ms. Bolla's alcohol issues.

105 When Ms. Bolla filed her affidavit material in Canada, she included a claim that Mr. Swart had physically abused her on one occasion. This claim was not contained in the earlier affidavits she had filed in the Botswana proceedings. She claimed that in early 2015, during an argument, Mr. Swart, in front of Henry, picked Ms. Bolla up, threw her onto the couch and while holding her face down, punched her right buttock. She testified that she was afraid of how Mr. Swart would react if she had brought it to the court. Under cross-examination, she explained that there was no opportunity to bring up the physical abuse with Madam Justice Solomon, and Ms. Bolla agreed that the documents did not include the allegations.

106 I do not accept this explanation for failing to complain of any physical abuse in the course of her Botswana materials. Rather, I find it more likely that Ms. Bolla, who is a very well educated, intelligent and articulate woman, was aware that physical violence would improve the prospects that a court would make a finding of "serious harm" within the meaning of s. 23 of the *CLRA*. Mr. Swart strongly denied physically abusing Ms. Bolla, claiming that, as one can see from the video he took on March 1, 2016, she was the one who was prone to physical abuse, attacking him and behaving aggressively when she had been drinking.

107 Ms. Bolla relied heavily on the incident of April 19, 2016, when Mr. Swart arrived at her lawyer's office in Gaborone and demanded that the children be handed over to him.

108 Mr. Swart had just obtained a "rule nisi" from the High Court on April 18, 2016. As I have explained above at para. 28, this was effectively a show cause order for interim custody. His evidence was that he understood that this was a temporary or interim order, but he understood (mistakenly) it gave him temporary custody of the children. On that basis, he went to get the children, accompanied by at least one sheriff who apparently also understood the order that way. On April 19, 2016, Mr. Swart attempted to serve Ms. Bolla with court materials, and he found her counsel's office and arrived without prior warning. Ultimately, Ms. Bolla's lawyer explained to him that he did not in fact have such an order. He accepted that evidence and there were no further similar confrontations.

109 Ms. Bolla's position at trial was that this incident documents Mr. Swart's abusive conduct as well as corruption or at least unfairness of the Botswana system of law. She also argues that Mr. Swart was able to manipulate it and that he located them by using his drone and/or other surveillance means. I disagree.

110 As far as locating Ms. Bolla and the children in Gaborone, Mr. Swart testified that he was able to guess where they were staying in Gaborone as it was a place Ms. Bolla had stayed before. He went there and while he ascertained from the

front desk that she was staying there, he also determined that she was not there at that time. He knew who her lawyer was, and knew where the lawyers' offices tend to be in Gaborone, which is not a huge city. He and at least one deputy sheriff drove to that part of town where they saw the family car parked in front of her lawyer's office. Mr. Swart, along with three others, including at least one deputy sheriff, entered Ms. Bolla's lawyer's office and attempted to serve Ms. Bolla with court materials, but he was unsuccessful. Ms. Bolla's lawyer explained to him that the "rule nisi" did not give him custody. Moreover, Mr. Swart testified that they only remained in the parking lot until around lunchtime or earlier.

111 As I have discussed earlier in these reasons, there is nothing in this incident or anything else to support the suggestion that Mr. Swart has connections with the Botswana legal system that can disadvantage Ms. Bolla.

112 The April 19, 2016 incident does not assist Ms. Bolla. Mr. Swart is corroborated by the fact that there were no further attempts on his part to take the children or to even see them except within the terms of the then-existing court orders. It must be noted that, as of April 19, 2016, she had no greater right to the children than he did, as there was no custody or residential order in place. Moreover, Ms. Bolla had left with the children on March 29, 2016, and he had neither seen the children since then nor known where she was living with them. She was afraid that he would take the children away- which he was indeed intending to do because he thought he had a court order entitling him to do so. The fear that he would try to take them again is why she (successfully) obtained an interim order for supervised access by Mr. Swart. There was no basis for a fear on her part that he would harm her or the children.

113 In short, while I do accept that she was genuinely afraid that day that he would find and take the children, I do not accept that she had any reasonable basis to fear that he would harm her or their children.

114 With respect to the financial abuse allegations, Mr. Swart denied that he withheld funds from Andrea in any abusive manner, but he does acknowledge that he was concerned about limiting her access to alcohol and concerned that she would spend money on alcohol. Ms. Bolla relies on the following texts and in support of the financial abuse claim Ms. Bolla stated, "Alias, I'm very concerned. I have P300 left in my account" (the equivalent of about 38 Canadian Dollars), to which Mr. Swart responded, "I'm very concerned. My wife is a total nutcase."

115 This was not a nice comment, but I do not accept it constituted financial or emotional abuse. The text messages have very little to do with money and there is no evidence that this was generally a tool of oppression upon which Mr. Swart relied. Moreover, the fact that Ms. Bolla was able to move twice with the children within Botswana and then ultimately relocate to Canada suggests that she was not entirely financially dependent on him at that point.

116 Ms. Hudani also argues that the text about Ms. Bolla's mother (set out above) and his refusal to permit her to visit again documents Mr. Swart's attempt to isolate Ms. Bolla from her family and that this is another indicia of the ongoing emotional abuse. I do not agree that this is what was happening. There had been a significant conflict between Ms. Bolla's mother and Mr. Swart when she visited them in Pandamatenga. He did not want her to visit again, and although he refused her request, he did indicate at that point that Andrea and Henry might go to Canada to visit her. Again, this may not have been good or "nice" conduct on the part of Mr. Swart, but it did not constitute emotional abuse that met the threshold of serious harm. It is also clear from the record that Ms. Bolla had a difficult relationship with her family over the years. The fact that she had chosen to move to Botswana, marry and have children with a man in a remote part of that country was likely a much greater factor in her feeling of isolation than anything Mr. Swart did or said.

117 In sum, Mr. Swart's conduct toward Ms. Bolla did not reach the threshold that would constitute serious harm. I do not accept that there was any physical violence, and I do not accept that the negative or unkind comments or conduct on the part of Mr. Swart met the threshold for emotional or financial harm set out in the case law.

Has Ms. Bolla established a serious risk of harm to the children if they are ordered to return to Botswana?

118 I am not satisfied that Ms. Bolla has satisfied the onus of establishing a serious risk of harm to the children if they are ordered to return to Botswana.

119 As I have already discussed, I do not find that the children are afraid of their father. I do find that Ms. Bolla has minimized his relationship with the children and his involvement with them. While this was a traditional marriage which left

her primarily in charge of the children and the household, Mr. Swart has been a father who clearly cared about his children and enjoyed time with them. For example, he built them a play structure, a heated pool and clearly took his responsibilities as a father very seriously.

120 While Ms. Bolla's submission relies to some extent on the argument that the children will be exposed to abuse from Mr. Swart, I do not agree. Apart from the evidence of a very occasional spanking with a wooden spoon as discipline (by both parents), there is no evidence that Mr. Swart was ever abusive to the children. The children were, at times, exposed to parental conflict which was inappropriate. Sadly, this parental conflict was of a nature that is not uncommon at the end of a marriage. It was not a pattern of abuse or violence found in cases such as *Isakhani* or *Rajani* where serious physical injury had been repeatedly inflicted.

121 Ms. Bolla also relies on evidence of Ava's anxiety issues which, she asserts, appeared when she attempted to introduce the idea of a visit to Pandamatenga to her. Ms. Bolla attributes Ava's anxiety to the prospect of returning to Pandamatenga and her father pursuant to the September 6, 2016 order. The record does not support this.

122 There is evidence that Ava was suffering from anxiety by or shortly after the September 6, 2016 order of Solomon J. This is shown by Dr. Lottering's letter written after seeing Ava on September 8, 2016. Ava subsequently was referred to Ms. Dabutha, a psychologist, who saw Ava for only about half an hour on September 13, 2016. Ms. Dabutha stated that Ava was playing happily until she mentioned her father and Pandamatenga, at which point she "immediately retreated, entered into a dissociative state, and then proceeded to exhibit signs of anxiety. She began chewing on the collar of her shirt and then went to her mother and cuddled her to seek comfort and security. Her pattern of speech changed . . . and she began to speak in 'baby talk'".

123 There are many reasons that could explain Ava's anxiety by September 2016. Most obviously, Ava's parents were going through a high-conflict divorce and her life had changed dramatically over the previous few months.

124 There was no suggestion of anxiety on Ava's part when the parties lived at Pandamatenga. She was never taken to a psychologist and there is no evidence that her father or the farm caused her any anxiety. This was true despite the fact that she was exposed to arguments and conflict between her parents.

125 Ms. Bolla states that Ava became more anxious after August 9, 2016, when her father began to talk to her during FaceTime visits about coming to Pandamatenga. Ms. Bolla denies knowing anything about the Savingram at that point, but she did acknowledge that she was upset about Solomon J.'s order that Mr. Swart have unsupervised access and the suggestion that there could or would be a visit to Pandamatenga at some point. Again, Ms. Bolla's increased anxiety over her unhappiness with the direction the proceedings were taking could readily explain Ava's anxiety.

126 Against this backdrop, the fact that Ava appeared anxious on September 13, 2016, when Ms. Dabutha raised the subject of her father and Pandamatenga is hardly surprising. At this point Ms. Bolla was very upset about the order that the children reside at Pandamatenga for one month. It would not be surprising if Ms. Bolla, consciously or subconsciously, had communicated this anxiety to Ava.

127 There is a final explanation for Ava's anxiety in early September other than the one proffered by Ms. Bolla. Although Ms. Bolla insists that she did not even begin to think about leaving Botswana until after the September 6, 2016 order, the last FaceTime visit between Ava and Henry and their father took place on September 5, 2016. These FaceTime visits had become increasingly frustrating for Mr. Swart, who felt that Ms. Bolla and her father were not cooperating in encouraging the children to speak with him. On September 5, 2016, Ava is seen to walk away from the camera. Mr. Swart asks her why she does not want to speak with him. She responds that she will not speak with him "until there is snow". Mr. Swart submits that this supports the suggestion that the children were being "prepped" to go to Canada where there would be snow. Having spent their entire lives in Africa, neither child had ever seen snow.

128 I find that Ava was aware of discussions about going to Canada at this point and that this was the root of the "snow" comment. Both Ms. Bolla and her father spoke of the stress involved with their decision to forge the court order giving Ms. Bolla custody as well as a consent to travel from Mr. Swart in the face of a "non-removal" order. In my view, Ms. Bolla had begun to plan her departure shortly after the August 9 court appearance. She opposed the order giving Mr. Swart

unsupervised access and was particularly unhappy about the suggestion that the children would or might visit Pandamatenga. The stress of this as well as the prospect of yet another move could well be a full explanation of the anxiety on Ava's part at this time. Moreover, Ava could well have sensed or overheard negative conversations about her father between Ms. Bolla and her father Anthony who was staying with them throughout this period.

129 The September 5, 2016 FaceTime call to which I have just referred was the last time that Mr. Swart spoke to the children in Botswana. The calls scheduled for September 10 and 12 did not take place. On September 10, the call was answered but no one was visible. On September 12, the call was not answered. I find it more likely than not that Ms. Bolla did not want the children to talk to Mr. Swart for fear that they would "spill the beans" about the impending trip.

130 In short, I find that Ms. Bolla was at least beginning to plan her departure by September 5, and probably in August after the court appearance when she began to realize that Mr. Swart would have unsupervised visits with the children and that they would be going to Pandamatenga as part of the social welfare assessment. She took Ava to the doctor and psychologist in an attempt to justify her refusal to comply with the September 6 consent order. This is in sharp contrast to Ms. Bolla's reply, on July 15, 2016, (only about two months earlier) to Mr. Swart's suggestion that Ava see a professional,

> Therefore, it seems that your remaining concern is your proposal that Ava be taken to a Child Psychologist to determine why she is not using the toilet during visitations. In my estimation this action is not warranted as I do not agree that it is necessary to involve a Child Psychologist in this matter.

131 I do not find that Ava's anxiety in September was attributable to fear of returning to Pandamatenga. There is no evidence to show that a return to Pandamatenga would constitute "serious harm" on her part, or on the part of Henry. Ms. Bolla's request for added time, which purported to be based on the concerns about Ava were, in fact, a decoy to take attention from them while they fled the jurisdiction.

Best Interests of the Child

132 Ms. Hudani emphasizes the relevance of the best interests of the child in considering whether there was a risk of serious harm to the children. However, the expert evidence (of Ms. Keevil and Mr. Tafila) was that the best interests of the child is the applicable test in Botswana. While Ms. Hudani is critical of the fact that "economic security" is a factor that might favor Mr. Swart unfairly, Ms. Keevil stated that this is counterbalanced by the duty to pay support. In other words, this is very similar to Canadian law. The best interests test in Botswana, as Mr. Tafila indicated, also emphasizes the importance of visitation on the basis that children should generally have strong relationships with both parents. Again, this is very similar to Canadian and Ontario law.

133 The legal context in Botswana is quite different from the situation which the court faced in *E. (H.) v. M. (M.)*, 2015 ONCA 813, 393 D.L.R. (4th) 267 (Ont. C.A.), leave to appeal refused, [2016] S.C.C.A. No. 63 (S.C.C.). There, the Ontario court accepted jurisdiction pursuant to s. 23 of the *CLRA* rather than order the return of the mother and children to Egypt. An Egyptian court would not have determined custody based on the best interests of the child. The Court of Appeal noted that

> [t]he first stated purpose of Part III of the *CLRA* . . . is "to ensure that applications to the courts in respect of custody of, incidents of custody of, access to and guardianship for children will be determined on the basis of the best interests of the children": s.19(a). (at para. 28)

134 Similarly, in *Krisko v. Krisko* (2000), 137 O.A.C. 7 (Ont. C.A.) "it was not clear that any custody dispute would be resolved according to the children's best interests nor that both parents would have equal rights before the court": at para. 9. Here, it is clear from all of the evidence before the court, including expert evidence from Mr. Tafila and Ms. Keevil, that the best interests of the child principle governs custody and access determinations in Botswana.

135 Under Botswana law, in any decision concerning a child, their best interests is the decisive test and the standard

against which choices are weighed. The best interests of the child is the dominant principle, and it finds its basis in both common law and in statute. Under Botswana's *Children's Act, 2009*, No. 8 of 2009, s. 6, the following factors are relevant in determining a child's best interests:

> (a) the need to protect the child from harm;
>
> (b) the capacity of the child's parents, other relative, guardian or other person to care for and protect the child;
>
> (c) the child's spiritual, physical, emotional and educational needs;
>
> (d) the child's age, maturity, sex, background, and language;
>
> (e) the child's cultural, ethnic or religious identity;
>
> (f) the likely effect on the child of any change in the child's circumstances;
>
> (g) the importance of stability and continuity in the child's living arrangements and the likely effect on the child of any change in, or disruption of, those arrangements;
>
> (h) any wishes or views expressed by the child, having regard to the child's age, maturity and level of understanding in determining the weight to be given to those wishes or views; and
>
> (i) any other factor which will ensure the general well-being of the child.

136 Moreover, as Mr. Tafila stated in his affidavit:

> The concept of reasonable access to the child by the non-custodial parent recognizes and acknowledges that ideally children must be raised by both parents jointly under one roof. Reasonable access is intended to balance the equilibrium in the best interests of the children and provide them with exposure to both parents as much as possible.

137 In addition, while the best interests of children is a relevant consideration in the question of whether serious harm has been established, it is clear that the "harm" must be more than just the risk of harm resulting from being taken away from their primary caregiver. Although dealing with the Hague Convention, as previously discussed, the majority decision for the Supreme Court in *Thomson*, at pp. 597-598, found that the removal of a child (despite leading to psychological harm) from the primary caregiver parent does not usually result in harm sufficient to reach the required threshold.

Supervised Access

138 Ms. Bolla seeks an order for the exercise of supervised access for Mr. Swart while in Canada. I see no basis for an order of supervised access, having reviewed the Brayden visit transcripts. There is absolutely no indication of any risk to the children. There was a need for supervised visits initially to document the interactions but also so that there was assistance in the reintroduction of Mr. Swart to the children because he had not been with them personally since July 17, 2016. This has been very successful, and in my view it is in the interests of these children that their relationship with their father not suffer further unnecessary disruption.

Conclusion

139 In conclusion, I have found that the applicant mother has not established any risk of serious harm to the children within the meaning of s. 23. Accordingly, the children are ordered to be returned to their habitual residence in Botswana within 30 days so that the proceedings that were begun there almost a year ago may continue.

Undertakings

140 Mr. Swart has made a number of undertakings in relation to the return of the children to Botswana. Because I have found that there has been neither abuse nor unfair use of a court system by Mr. Swart, the undertakings he proposed are appropriate to mitigate any "short term" harm. Indeed, the majority decision for the Supreme Court in *Thomson* stated, at p. 599, "Through the use of undertakings . . . the long-term best interests of the child are left for a determination by the court of the child's habitual residence, and any short-term harm to the child is ameliorated."

141 Mr. Swart has proposed numerous undertakings. Mr. Swart has outlined separate undertakings based on one scenario where Ms. Bolla and the children return and on one scenario where only the children return.

142 Mr. Swart has made the following undertakings in the event that Ms. Bolla returns with the children:

- Mr. Swart proposes to pay for the children's airfare and accompany them back to Botswana.
- He will come to Toronto for two weeks to spend an increasing amount of time with the children to help them transition back to their life in Botswana.
- He will rent accommodations for Ms. Bolla and the children in Kasane or Francistown and will contribute up to 6,000 Pula towards rent until custody is determined.
- Ms. Bolla will have the use of a family vehicle (subject to the installation of a Breathalyzer, paid for by Mr. Swart) or Mr. Swart will hire her a driver.
- Mr. Swart will purchase necessities for the children and stock the rental accommodation with items needed for the children and provide maintenance.
- He will have the children treated for psychological or behavioural issues at Mindscope Psychology Practice in Francistown or other counselling as agreed by the parties or as ordered by the High Court of Botswana.
- Mr. Swart also undertakes to do everything in his power to have the contempt order set aside.
- Lastly, the litigation and custody investigation will resume.

143 If the children return without Ms. Bolla, Mr. Swart has made the following undertakings:

- He will pay for the children's airfare.
- He will come to Toronto for four weeks to spend an increasing amount of time with the children to help them transition back to their life in Botswana.
- Mr. Swart and his mother will take the children back to Botswana. He has hired a foreman to oversee the farm so that all of Mr. Swart's time will be devoted to the children and the home.
- Upon arrival in Pandamatenga, they will reside with his sister's family, and his mother will travel to and stay in Pandamatenga for two weeks per month (she may move there permanently).
- The court appointed social worker will regularly check on the children.
- The children will slowly be reintegrated with their friends.
- He will have the children treated for psychological behavioral issues at Mindscope Psychology Practice in Francistown or other counselling as agreed by the parties or as ordered by the High Court of Botswana.

- The children will have access to their doctors in Botswana.

- The children will visit family in South Africa.

- Mr. Swart also undertakes to do everything in his power to have the contempt order set aside.

- Ms. Bolla will have 15 minute (or longer if the children so desire) FaceTime visits up to 4 times per week, and the children will be able to call her whenever they want, once internet is established.

- Ms. Bolla is to have physical access to the children when she visits Botswana, subject to a court appointed supervisor. Lastly, the litigation and custody investigation will resume.

144 The proposed undertakings are reasonable and orders will issue so as to provide for the transition of the children back to Botswana, depending on whether Ms. Bolla decides to return with the children or not. Any orders made incorporating the undertakings are, of course, subject to any further orders to be made in the course of the Botswana proceedings.

145 There has been no suggestion that Ms. Bolla will not choose to return to Botswana with the children. As Mr. Swart readily acknowledges, she has been their primary caregiver and is an excellent mother. She and the children are closely bonded to one another. It would be best if the court in Botswana has the option of providing Ava and Henry time with both parents, something that is virtually impossible for children of this age if they are separated by continents. As I have said, both Botswana law and Canadian/Ontario law recognize the importance of contact with both parents as a factor in the assessment of the best interests of children. It also recognizes the importance of each parent supporting the relationship of the children with the other parent.

146 I am also satisfied, on the basis of the evidence given by Ms. Keevil, that Ms. Bolla has rights under Botswana law that will enable her to obtain an appropriate residency permit (or a variation of the one that she presently has that does not permit her to work) as well as support and property rights that will be fairly adjudicated in the course of this matrimonial litigation.

147 Orders will issue accordingly. I may be spoken to in order to settle the order promptly if necessary.

Costs

148 If the parties are unable to agree as to costs, they are to serve and file brief written submissions and bills of costs within 45 days of the release of these reasons upon a timetable to be agreed to between counsel.

Application dismissed.

Footnotes

[1] Both children were actually born in South Africa. They are citizens of South Africa, as is Mr. Swart. His mother, Rienalde Elaine, lives in South Africa, and the children, according to plan, were both born in a hospital near her home. The children have South African passports.

[2] The purpose of this was to assess the best interests of the children with respect to the custody and access arrangements. On the basis of the evidence before the court, this appears to be very similar to what, in Ontario, would be done through the appointment of the Office of the Children's Lawyer, with a view to ultimately making recommendations to the court as to the custodial and access arrangements that would be in the best interests of the child or children. The non-removal order is dated August 9, 2016. The High Court also ordered that Mr. Swart surrender the children's South African passports before he could exercise unsupervised visitation. This did not happen before Ms. Bolla and the children left Botswana.

[3] When Ms. Bolla left Pandamatenga on March 29, 2016, she and the children went to stay in Kasane which is the nearest shopping town, about a 90 minute drive from Pandamatenga. They moved shortly thereafter to Gaborone, the capital and largest city of

Botswana, which is about a 9 hour drive from Pandamatenga.

4 Counsel advised me that a few witnesses would not be available for cross-examination, and accordingly I did not take those affidavits into account. Although a number of other witnesses, such as Dr. Sev'er and Ms. West were made available, Mr. Marks chose not to cross-examine them. I have reviewed and considered those affidavits.

5 Kenneth Good & Ian Taylor, "Botswana: A Minimalist Democracy" (2008) 15:4 Democratization 750.

6 Ian Taylor, "Corruption in Botswana: Some General Comments".

7 Mr. Sechele was cross-examined via Skype.

8 As Mr. Sechele and Ms. Keevil testified, she could have.