SUMMARY ***REPORTABLE***

CASE NO.: A22/2009

ARLENE BEUKES vs ERICA BEUKES AND ANOTHER

PARKER, J

2009 March 3

Practice - Applications and motions – Rule *nisi* – Rule *nisi* obtained in application brought *ex parte* on urgent basis – Applicant not serving papers on respondent who had earlier acquired entitlement to temporary sole custody of minor child through order of competent court in terms of the Combating of Domestic Violence Act (Act No. 4 0f 2003) – Anticipation of return date of rule *nisi* – Court finding failure to serve papers on such respondent unfairly and unreasonably denied respondent opportunity to be heard – Applicant's conduct constituting violation of *audi alteram partem* rule of natural justice and applicant acted unreasonably and unfairly – Consequently, Court discharging rule *nisi*.

Husband and wife - Reasonable access to minor child – Defining of – Court finding in instant case order of reasonable access extended to non-custodian parent taking minor child away from custodian parent to prescribed place and for prescribed period.

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Held, natural justice and fairness are firmly embedded in Namibia's legal system and its sense of justice and fairness.

Held further, right of reasonable access not confined to non-custodian parent visiting minor child at custodian parent's place of residence, but could in fit circumstances extend to non-custodian parent taking the child away with him, within limits of time and space.

REPORTABLE

CASE NO.: A 22/2009

IN THE HIGH COURT OF NAMIBIA

In the matter between:

ARLENE BEUKES	**APPLICANT**
and	
ERICA BEUKES	**1ST RESPONDENT**
JOHANNES AMILCAR BEUKES	**2ND RESPONDENT**

CORAM: **PARKER, J**

Heard on: 2009 February 4

Delivered on: 2009 March 3

JUDGMENT

PARKER, J:

[1] In the present matter (Case No.: A 22/09), the 1st and 2nd respondents have approached the Court in terms of rule 6 (8) of Rules of the Court so as to anticipate the return day in respect of an order granted *ex parte* on urgent basis by this Court (*per* Hoff, J) against the 2nd respondent on 2 February 2009 (in Case No.: A 22/09).

[2] For the sake of clarity and comprehension of the present matter, I append, hereunder, the aforementioned Order that was granted on 2 February 2009 (hereinafter referred to as "the 2 February Order"):

(1) Applicant's failure to comply with the Rules of this Court is condoned and it is ordered that this matter be heard as one of urgency as envisaged in Rule 6(12) of the Rules.

(2) That a rule *nisi* do hereby issue calling upon the respondent to show cause, if any, to this Honourable Court on 6 March 2009, why an order should not be made in the following terms:

(2.1) directing the respondent to immediately restore the applicant's custody of the minor child born of the marriage between the parties, to wit:
Amilcar Walter Beukes born on 15 June 2004 and that the said minor child be returned to the applicant with immediate effect;

(2.2) that the Namibian Police and/or the Deputy Sheriff be hereby authorised to assist the applicant to obtain the minor child from the respondent and return the minor child to the custody of the applicant;

(2.3) interdicting and restraining the respondent from, in any way whatsoever, interfering with the applicant's custody of the aforesaid minor child;

(2.4) that the respondent be ordered to pay the costs of this application.

(3) The order in terms of sub-paragraphs 2.1 to 2.3 hereof shall serve as an interim interdict with immediate effect pending the finalisation of this application.

[3] It would seem that after the granting of the aforementioned 2 February Order, the 1st and 2nd respondents brought an application to the Court, moving the Court (in case No.: A 27/09) to rescind the said 2 February Order. The Court (*per* Swanepoel, AJ) refused to grant an order rescission, but rather evoked rule 6 (6) of the Rules of Court and made the following Order (hereinafter referred to as "the 3 February Order"):

(1) That in terms of Rule 6 (6) the Court makes no order today.

(2) That leave is granted to the applicants (respondents in the present matter), if so advised, on the same papers to take care of the problems the Court posed to both the first and second applicants and the court once again refers to the Rule in terms whereof a person against whom a court order was granted *ex parte* has the right to anticipate that order with 24 hours' notice.

[4] In the present matter I will continue to refer to the parties in the same way as they are referred to in the "Notice of Anticipation i.t.o. Rule 6 (8)" filed on 3 February 2009. In pursuant to para (2) of the 3 February Order, the 1st and 2nd

respondents have brought the present application to anticipate the return day of 6 March 2009 of the 2 February Order. On this counsel applied for the striking out of the respondent's answering affidavit. At the beginning of the hearing of the present application, the respondent indicated to the Court that he knew the papers (because he had had sight of the applicant's founding affidavit with him) and that he was prepared to proceed with his argument. Meanwhile, the respondent had already filed an affidavit, and if, as counsel submitted, the respondent had wanted to file further affidavit after the applicant had filed her replying affidavit, he should have made a formal application for leave to file such further affidavit and he should not have commenced arguing his case on the papers then on record. Accordingly, I accept counsel's submission that it is irregular for the Court to accept any further affidavit from the respondent after he had already begun to argue the case on the papers already filed on record and no application had been made for leave to file a further affidavit. The result is that the respondent's answering affidavit is struck out; and for the avoidance of doubt, I do so only because I find that the respondent cannot interpose his argument with an affidavit after he had decided to anticipate the return date and after he had already began to argue his case.

[5] Furthermore, counsel pursued in argument the preliminary objections raised by the applicant in her replying affidavit. I now proceed to deal with them.

[6] I accepted Ms v.d. Westhuizen's submission that the 1st respondent was not a party to the present proceedings and, therefore, had no *locus standi in judicio*: the 2nd respondent is of the age of majority and what is more, no relief is sought against the 1st respondent. That being the case, only the 2nd respondent (hereinafter referred to as "the respondent") was permitted to appear and represent himself. This conclusion disposes of the first preliminary objection (in para 4 of the applicant's replying affidavit).

[7] Counsel also raised the second preliminary objection (in para 5 of the replying affidavit) the so-called "Notice of Anticipation i.t.o. Rule 6 (8)" filed by the respondent "is defective in that it does not state that any anticipation has indeed taken place. Instead the respondent merely informs of his intention to anticipate and that such right of intended anticipation shall be exercised on 4 February 2009 at 15h30. It is, however, not stated to which date the return date is anticipated."

[8] In my view, the aforementioned second preliminary objection relates to a step that amounts to an irregularity or impropriety of form within the meaning of rule 30 of the Rules of Court, and it is my opinion that it would rather have been more efficacious if the applicant had taken the route open to her by rule 30; in which case the respondent would have been given the opportunity of removing the cause of the complaint in terms of rule 30 (2). The applicant did not follow this simple procedure whose efficacy lies in the fact that a party which has taken the irregular or improper step complained of is given the opportunity to remove the cause of the complaint without the immediate intervention of the Court. The Court may enter on the scene to set aside the irregularity or impropriety only if the offending party has failed to remove such complaint; and moreover, in that event, that party is not even permitted to take any further step in the matter unless and until that party has complied with any order of the Court in that regard. If I am wrong, my fallback position is that the step complained of concerns a matter of form and the applicant has not pointed to any prejudice that has been occasioned to her in virtue of that step; and I do not see any. In any case, the applicant was able to file a replying affidavit.

[9] The aforegoing views on the second preliminary objection apply equally to the third preliminary objection (in para 6 of the replying affidavit). However, as respects this third preliminary objection, I find that it was the intention of the

respondent to file the matter with the High Court and for the matter to be heard by the High Court; and that is how the Registrar, who is the Registrar of both the High Court and the Labour Court, understood, and took, it to be because the Registrar did not give the case an "LC" notation, indicating a Labour Court case; but the Registrar gave the case an "A" notation, indicating an application before the High Court. Accordingly, it is my view that the word "Labour" instead of the word "High" is, therefore, an insignificant mistake that can be put down to a typographical error, considering what I have already said about this preliminary objection.

[10] The last preliminary objection (in para 7 of the replying affidavit) is formulated in the following terms:

> …the respondent was and remains in contempt of an order of this Honourable Court dated 2 February 2009 (annexure "AB 4" to the founding affidavit). To date the respondent has failed to even attempt an explanation in respect of this contempt. I am advised that until such time as the respondent has purged his contempt he is not entitled to seek any relief from this Honourable Court.

[11] Ms v.d. Westhuizen tied up this objection with the argument that the Order granted in favour of the respondent by this Court (*per* Muller, J) on 24 December 2008 (hereinafter referred to as "the 24 December Order") was for access and not for custody. That is not entirely correct; "it is settled law that the right of access is not confined to seeing the child at the custodian parent's place of residence, but could in fit circumstances extend to taking the child away, within limits as to time and place, with a view to the better enjoyment of its (i.e. the child's) company." (*Marais v Marais* 1960 (1) SA 844 (C) at 846G-H) Truly, that is exactly what the 24 December Order provided in favour of the respondent, particularly if paras (2), (3) and (4) of that Order are read intertextually, as they should.

[12] The result is that, in my opinion, when the respondent applied for and obtained an interim protection order, coupled with a temporary custody order, from the learned magistrate in the Windhoek Magistrates' Court on 6 January 2009 in terms of the Combating of Domestic Violence Act, 2003 (Act No. 4 of 2003) (the Act), the respondent was lawfully entitled to reasonable access to the minor child in virtue of the said 24 December Order which extended to the respondent's entitlement to take away the minor child to live with him in the respondent's parents' home in Windhoek, as I have said previously.

[13] In any case, I do not see anything wrong with the learned magistrate granting a temporary protection order, coupled with a temporary custody order. It must be remembered that the interim protection order was granted against Ricardo Martins (as the respondent) and not the applicant; and from the papers it would seem Ricardo Martins (as the respondent thereanent), a close friend of the applicant's. It would have flown in the teeth of logic and common sense if the Windhoek Magistrates' Court had granted only an interim protection order in terms of Act No. 4 of 2003 without an accompanying order of temporary custody; for, how could the respondent protect the minor child if the minor child was not in his custody.

[14] In any case, if the applicant's position has always been that the interim protection order which included a provision of s 2 (i) of the Act, granting temporary sole custody to the respondent, was wrongly sought and wrongly granted by the learned magistrate, the applicant ought, in my view, to have pursued the route open to her by the very Act under which the sole temporary custody order was in the first place granted, for redress by way of an appeal in terms of s 18 of the Act, particularly an appeal against the inclusion of the effect of the provision of s 2 (i) in the interim protection order. Indeed, that is exactly what s 18 (1) is there for. Section 18 (1) provides:

> Where a court has made or refused to make a protection order, or included or refused to include a particular provision in a protection order, the applicant or the respondent may appeal to the High Court, but, the appeal must be lodged within one month of the decision in question.

[15] The applicant did not follow the route of appeal to this Court which, as I say, s 18 of the Act provides. Granted, the applicant was not a party to the application for a protection order in the Magistrates' Court, but she had an interest in the inclusion of the provision of s 2 (i) of the Act, granting interim sole custody of the minor child to the respondent (applicant in respect of the protection order). The applicant did not take advantage of a section of the very Act which the learned magistrate purportedly applied when he or she included the aforementioned provision of s 2 (i) of the Act in the interim protection order. If the applicant had proceeded in terms of s 18 (1) of the Act, the respondent would have been served with the appeal papers and the Court would have had the benefit of determining the appeal on the record. The applicant rather approached this Court (before Hoff, J) via an urgent *ex parte* application; that is, without notice to the respondent.

[16] In her submission, Ms v.d. Westhuizen sought to rely on s 15 (d) of the Act to argue that this Court has the power as "a relevant court" to make another order to supersede the order made by the learned magistrate in terms of s 15 (d). Section 15 provides:

> Unless the court decides otherwise, a final protection order has the following durations -
>
> (d) a provision concerning temporary custody of a child and access to a child remains in force until it is superseded by another order of a relevant court.

In this regard, counsel submitted that "there is another order (meaning the 2nd February Order) by the upper guardian of all minors", which is this Court. That may be so; but where a person acquires a right granted by a competent court in

terms of a statute, I think it is fair and reasonable that such a person is given notice of any application to the Court where the Court is moved to take away such statutory right: that, in my opinion, would be obedience to the *audi alteram partem* rule of natural justice which is firmly embedded in our legal system and which underscores our sense of justice and fairness. I do not think it was the intention of the Legislature when it enacted s 15(d) of the Act to give this Court the power to violate natural justice when granting an order superseding a previous order made in terms of the Act – whether such previous order was made by the lower court. Thus, by bringing the application *ex parte* and on urgent basis to the Court (before Hoff, J) on 2 February 2009, as I have mentioned *ad nauseam*, the applicant failed to observe natural justice; and so, therefore, she acted unreasonably and unfairly: she denied the applicant the right to be heard before an entitlement acquired in terms of a statute and in terms of an order of a competent court was taken away from him. As I have demonstrated previously, in terms of the Act, the respondent was entitled to temporary custody of the minor child – even if in the applicant's view the order was wrongly sought and wrongly granted. In any case, the fact remains irrefragably true that when on 2nd February 2009 the applicant moved this Court *ex parte* on urgent basis, the aforementioned magistrates' court order, granting temporary sole custody of the minor child to the respondent was valid in the eyes of the law and, *a fortiori*, uncontested.

[17] Having gone the way of *ex parte* urgent application, the applicant did not serve the respondent, who had a right under a statute, with any papers and yet the respondent was affected by the relief that the applicant sought and obtained. It follows that, in my opinion, the applicant acted unfairly and unreasonably. It matters not that the respondent, according to Ms v.d. Westhuizen, had violated the 24 December Order or had not been open with the magistrate's court when he obtained the sole temporary custody order from that court. One must not lose sight of the fact that it is to deal with this kind of conduct, if a party is aggrieved

by such conduct, that the Legislature in its wisdom and power has provided for an appeal mechanism under the very same Act under which the learned magistrate purported to act.

[18] For all the aforegoing considerations and conclusions, I come to the inexorable and reasonable conclusion that in bringing the *ex parte* application on urgent basis aimed at taking away an entitlement acquired by the respondent in terms of a statute and through a competent court, without notice to the respondent, the applicant failed to observe natural justice and fairness. Accordingly, I think I should refuse to confirm the rule *nisi* granted by the Court on 2 February 2009 (in terms of the 2 February Order), because to confirm the rule is to condone and give judicial blessing to the applicant's breach of natural justice and disrespect of fairness. In virtue of the nature of the case it is just and fair that I make no order as to costs. I hasten to add that if the applicant and the respondent continue unreasonably to haggle over the minor child – a human being – and the matter came before me again and not as a second motion court matter, I will consider placing the minor child in a State-sponsored social welfare care until a second motion court seized with the divorce matter initiated by the applicant orders otherwise.

[19] To the matter of contempt allegedly committed by the respondent's father and the respondent referred to by counsel; in order to distinguish the leaves of the alleged contempt committed by the father of the respondent, who in any case is not a party to these proceedings, and by the respondent from the wood of the essence of the case, I have in this judgment refrained from dealing with the conduct complained of by counsel. But more important, I have refrained from dealing with it because I heard from the 2nd respondent to say that they had written letters to Honourable Judge President about the issuer. In the circumstances, I think it is prudent that I leave the issue in the usually dexterous and competent hands of the Honourable Judge-President, and, moreover, so as

not to take the bow out of the string of the Honourable Judge President's usually efficacious intervention in such issues.

[20] In the result, the Order of this Court is:

(1) that the rule *nisi* issued on 2 February 2009 is discharged.

(2) that there shall no order as to costs.

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PARKER, J

ON BEHALF OF THE APPLICANT: Adv. C v. d. Westhuizen

Instructed by: Conradie & Damaseb

ON BEHALF OF THE 2ND RESONDENT: In person