

## VAN DEN BERG v LE ROUX [2003] 3 All SA 599 (NC)

### Headnote : Kopnota

The matter before the Court was an application (“the main application”) for variation of the custody order pertaining to the Applicant's child with the Respondent, which order had been granted on the dissolution of the parties' marriage by divorce. The application could not be resolved on the papers and the matter was referred for oral evidence and the Family Advocate was ordered to make a report to the Court. The report recommended that custody be awarded to the Applicant subject to the Respondent's right of reasonable access to the child.

The Applicant then brought an urgent application (“the urgent application”) for the variation of the existing custody arrangement. The Court ordered that, pending the resolution of the main application (which had not yet been resolved) the Applicant was to have custody of the child, subject to the Respondent's right of reasonable access to the child, which right could be curtailed on reasonable grounds by the psychologist treating the child.

During the course of the main application the Family Advocate had recused herself as Counsel for the Applicant insofar as the cross-examination of two of the Respondent's witnesses was concerned (a decision taken in agreement with both parties' representatives), on the basis that she was not properly able to refute allegations of bias made against her by the Respondent. The Court heard the evidence of witnesses including expert witnesses, called by both parties.

*Held* – The granting of the urgent application had been ill-advised as the order awarding custody to the Respondent was still in existence, and this status *quo* had been preserved when the Applicant had illegally deprived the Respondent of custody at an earlier date. Absent any substantial change in the circumstances of the Respondent and an inimical effect of such change on the child, the status *quo* ought not to have been varied. The granting of the urgent application had had the effect of having the child “shunted around” between homes. Further, the urgency of the matter had been contrived and the urgent application had in fact been an attempt to legalise the Applicant's resort to self-help and contempt of court by failing to return the child to the Respondent after a school holiday visit to the Applicant. The result of the granting of the urgent application had been to render the original and subsequent orders of the Court nugatory.

As far as the role of the Family Advocate was concerned, the Court noted that Family Advocates derived their powers from the Mediation in Certain Divorce Matters Act 24 of 1987, and that the Court was not empowered (as had been suggested) to make a blanket prohibition on Family Advocates appearing as Counsel where they had had prior involvement with a particular matter. The Court should adopt a flexible approach and regulate the involvement of Family Advocates according to the peculiar circumstances of cases before them.

In the present matter, the Court adopted a flexible approach to the incidence of the onus on the parties, owing to the fact that the child had already been

moved about several times, as well as the Applicant's conduct in obtaining the interim custody order, which had obfuscated the issue of the onus. The order that fell to be considered and varied or not, by the Court, was in reality the original custody order and not the interim order (*McCall v McCall* 1994 (3) SA 201 (C) followed). The onus therefore fell on the Applicant to show cause why the order should be varied, which he had failed to do.

The application was denied, the original custody order confirmed and certain ancillary orders regarding access, dispute resolution and the conduct of the parties made.