IN THE HIGH COURT OF BOTSWANA
HELD AT FRANCISTOWN

Matrimonial Cause No. F104 of 2003

In the matter between

CRAIG ANTHONY COWELL **APPLICANT**

AND

NOLA COWELL **RESPONDENT**

Ms. Muna for the Applicant
Mr. B. Williams for the Respondent

J U D G M E N T

GAONGALELWE J.

This is an application for variation of the custody order granted on 1st March 2004 in relation to minor child of the marriage. On the said date the court granted a divorce decree in favour of the now Respondent and by consent Respondent who was Plaintiff in that divorce action was awarded the custody of the minor child **D. J. C.**. In the same order the now Applicant was granted rights of access which were to include visitation by the child to Applicant. It was further directed in the same order that Applicant would pay maintenance in respect of the child in the sum of P1 000.00 per month which amount is to escalate with the rate of inflation.

On 29th July 2004 Applicant approached the court on a certificate of urgency seeking a Rule Nisi to vary the order in respect of custody. He is claiming custody of the child. That application for Rule Nisi was not only moved on urgency but was also moved ***ex parte***. After service of the Rule Nisi Respondent filed her opposing papers. From the reading of the Applicant's Founding Affidavit the basis for lodging this application for variation of the custody order appears under paragraphs 7, 9 and 10. The said paragraphs read as follow:

> "7. I am now making an application to this honourable court for variation of the court order in so far as it relates to the custody and maintenance of my son, D. on urgency basis in that I am advised and verily belief the same to be true that the Respondent who has now found a new fiancée, wishes to marry him and further leave the country permanently to stay in the United Kingdom where he is employed and has indicated that she is taking my son with her, hopefully to be adopted by the new husband.
>
> 8. .....
>
> 9. It is my respectful submission that should the Respondent leave with my son I would never be able to see him again and this would frustrate my right to visitation in terms of the Order of Court.
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> 10. I am not in anyway against the idea of the Respondent being married, but all I want is that my son should not be allowed to leave the country with her and that I be now given custody of D. whom I can comfortably stay with and look after."

Mr. Williams for the Respondent has submitted that no basis has been shown for the Applicant to vary the order because the only criterion applicable in deciding in matters of custody is the best interests of the

child concerned. The thrust of his argument was that as the Applicant does not state in his Founding Affidavit that it would not be in the best interests of the child if Respondent continues to have its custody even when moving to the United Kingdom the application should fail. The paragraphs extracted from the Founding Affidavit as reproduced above suggest that Applicant is more if not solely concerned with his own convenience of access rather than the best interests of the child. In this case there is the order granted on the divorce date which awarded custody to the Respondent. It is trite that if the custodian parent fails to exercise the right of control of the child to the best interests of such child the non custodian parent must make an application to vary the order. In order to succeed in such application the non custodian parent must show that it is not in the best interests of the child for the other to continue having custody. In other words the onus is in the Applicant to show good cause for variation. The fact that the custodian parent may be planning to move out of the jurisdiction of the court which awarded custody per se does not constitute sufficient cause for variation of the order.

See **Theron v. Theron 1939 WLD page 355** where Solomon J. at page 362 stated that there is no implication in the general right of access that the children who are the subject of the custody order must be kept within the jurisdiction of the court which granted such custody. There

is equally no rule that such children should be necessarily kept within the country of residence of the non custodian parent simply in order to facilitate easy access. The court as the upper guardian of the minor children will no doubt interfere with the rights of the custodian parent to exercise control over the child only in instances where it is satisfied that such parent is acting contrary to the best interests of the child.

See **Segal v. Segal 1971 (4) SALR page 317. See also Laufer v. Shawzin 1968 (4) SALR page 657.**

In this case on the factual situation Respondent admits that she is engaged to a British citizen and that she is about to move to the United Kingdom. She avers in her Answering Affidavit that in fact moving the child to the United Kingdom has not been shown to be contrary to the best interests of the child. She says taking the child to the United Kingdom would give the child greater opportunities and advantages than if the child were to be entrusted to Applicant.

As the Applicant failed to demonstrate or even to simply aver in his Founding Affidavit that it would be contrary to the best interests of the child if it is taken to the United Kingdom by Respondent his application in my view hardly discloses a cause of action. Issues pertaining to Applicant's convenience in exercising his rights of access while the child lives outside Botswana are not sufficient for the court to disturb the

original order on custody. At the commencement of the hearing Respondent made an application seeking an order to strike out certain paragraphs of the Replying Affidavit. I was not minded to grant such application on account of two factors. First as the main application involves the welfare of a minor I was minded to approach the application with a broad mind and not to decide it on technicalities. Secondly I am of the view that the contents of the said paragraphs are not outright offensive in the circumstances of the case. In the premises the Rule Nisi granted on 29th July 2004 is hereby discharged. The application for variation of the custody order is dismissed with costs on party and party scale. There will be no order as to costs in relation to the application to strike out.

DELIVERED IN OPEN COURT THIS 3RD DAY OF SEPTEMBER 2004.

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M. S. GAONGALELWE
JUDGE