KENNETH DONALD ARRAND
versus
LARAINE JEAN ARRAND
(formerly PAPACOKKINOS, NEE PITMAN)

HIGH COURT OF ZIMBABWE
MWAYERA J
HARARE, 11 February and 9 June 2016

Opposed Application

Applicant in person
R.M Fitches, for the respondent

MWAYERA J: This application is for variation of a consent paper entered into by the parties in 2009. The consent paper was part of the applicant and respondent's divorce settlement upon which they obtained a consent divorce order incorporating the terms of their agreement. The applicant seeks variation of the order of 2009 so as to have Lot 41 of Britannia in the District of Nyangu returned to the applicant. The applicant recounted that the property for which he seeks for variation was obtained through the applicant's mother's inheritance money and as such was of sentimental value. Further the applicant sought variation or modification of the order on the basis that he had experienced large salary deductions and was therefore facing hardship in sustaining himself.

The brief background of the matter is outlined as follows:

The parties were married on 5 March 1988 and divorced on 6 August 1999. At their divorce on 6 August 1999 the parties had entered into a consent paper, which was incorporated as part of this court's order HC 2008/09. The parties were granted divorce, financial provision, post-divorce, maintenance and proprietary claims of the parties were to be in terms of the consent paper. The parties shared their matrimonial assets as per the consent paper. The applicant got Flat No. 1 Lausanne Court Warren Close Greendale Harare and the respondent was to relinquish directorship and ownership of the holding company of the said flat per clause 2 (a) of the consent paper. The respondent got sole title of Lots 40 and

41 Britannia, the former Matrimonial home per clause (b) of consent paper. The applicant was to sign all documents to facilitate sole ownership by the respondent. The consent paper spoke of sharing of all the matrimonial assets, post-divorce maintenance and costs of suit. It is evident from papers that the applicant at some stage applied for variation of the maintenance clause and by consent in HC 2800/99 and the post-divorce maintenance was scrapped off. What falls for determination here is whether or not the proprietary clause in respect of what was awarded to the respondent should be varied.

The consent paper incorporated into the divorce order HC 2800/99 has a variation clause para 4 which reads:

> "The provisions of this consent paper shall be variable on application by the plaintiff or defendant to the High Court of Zimbabwe or other court of competent jurisdiction on good cause shown".

"Good cause" has been defined in a number of cases in applications for variation of maintenance orders. Circumstances and guidelines for consideration in maintenance variation applications have been given as change of financial circumstances ability of the responsible person and liabilities and obligations on the responsible person. See *Crone* v *Crone* 2000 (1) ZRL 367 and also *Chizengeni* v *Chizengeni* 1988 (1) ZLR 286. On applications for variation of maintenance the principle of good cause is pivotal. Section 9 of the Matrimonial Cause Act [*Chapter 5:13*] on variation is instructive, it states:

> "Without prejudice to the Maintenance Act [*Chapter 5:09*] an appropriate court may on good cause shown vary suspend or rescind an order made in terms of section seven…..".

The good cause principle as applied in variation of maintenance in my view is equally applicable in proprietary rights applications for variation. What is central in consideration of good cause is for the court to consider what is just and equitable in the circumstances. The parties in the present case included a variation clause in their consent paper. The consent paper was incorporated as party of this court's order. Even if such a variation clause was not in the consent paper the parties would still be at large to approach the court for variation provided they have 'good cause' which would justify variation of the initial order. In assessing whether or not it is just and equitable in the circumstances of the case the court has a wide discretion which it ought to judiciously exercise. A wholistic approach for consideration of good cause would include all circumstances and of necessity not live out

considerations of whether or not the application is abuse of court process calculated to bring about injustice. Variation is therefore anchored on whether or not there is good cause in the circumstances of each case.

The onus to establish 'good cause' rests on the applicant. The property awarded to the respondent was the matrimonial home of the parties prior to the divorce. The applicant was awarded other property which constituted matrimonial assets. At the time of dissolution of marriage both parties were alive to the circumstances of acquisition of the property. For the applicant to turn around years after divorce and seek to vary the consent proprietary order on the basis that the property was acquired through inheritance monies and thus has sentimental value is not good cause contemplated by the legislature and the variation clause. This afterthought by the applicant does not constitute good cause as it would cause injustice to the other party. The court in assessing whether or not there is good cause shown to warrant variation ought to consider whether the request is just an equitable. The applicant got a share of the matrimonial assets. For him to turn around and seek to share what was awarded to the respondent on basis of the property having a sentimental value as if the fact is coming to his knowledge for the first time is not only mischievous but calculated to frustrate the ends of justice. The good cause concept in so far as continuing or on going obligations such as custody and maintenance cannot be equated to proprietary rights. The question is, whether or not there are change of circumstances amounting to good cause warranting a just inference with the court order. In *casu* the parties agreed among other things on sharing property. The respondent was declared the owner of the matrimonial home a portion of which the applicant now seeks to get on basis of sentimental value. The applicant was in the same consent paper which forms part of an order of this court awarded and declared owner of the other property matrimonial assets. It would not be just and equitable to seek to vary the order so as to take a portion of the property awarded to the respondent per the contractual agreement the consent paper, and per the court order. There is no evidence that the consent paper was reached through fraud or error. The court order was informed by the consent paper entered into by the parties. In the absence of good cause for variation moreso given there is no allegation or element of fraud or error it would be unjust to seek to vary the consent order. See *Cloete* v *Cloete* 1953 (2) SA 176 E and also *Willis* v *Willis* 1947 (14) SA 740. In the absence of good

cause one has to underscore the importance of litigation being brought to finality. I am alive to provisions of s 7 of the Matrimonial Causes Act [*Chapter 5 : 13*] that an order for division apportionment or distribution of assets of spouse may be made upon divorce or at any time thereafter. This however should not be misconstrued to mean unreasonable delays in unsatisfactory circumstances can be condoned. In this case the apportionment, division and distribution was effected per the consent order upon divorce. What the applicant seeks is variation of the proprietary clause which forms part of the extant order. The applicant has the onus to show that there is good cause warranting such variation. From the foregoing it is clear, it is not just and equitable to vary the proprietary consent order as there is no good cause shown. The application has no merit and must fail.

In the result it is ordered that the application be and is hereby dismissed with costs.

Honey & Balnckenberg, Applicant's legal practitioners
Coghlan, Welsh & Guest Incorporating Stumbles & Rowe, Respondent's legal practitioners