IN THE SUPREME COURT OF SEYCHELLES

Civil Side: MA 322/2016 and MA 43/2016 (consolidated)

(arising in CS78/2015)

[2017] SCSC 545

Anthony Herbert Dave Pillay Petitioner

versus

Gracy Sybil Pillay Respondent

And

Gracy Sybil Pillay Cross Petitioner

versus

Anthony Herbert Dave Pillay Cross Respondent

Heard: 17 October 2016, 13 March 2017, 20 March 2017, Submissions 10 May 2017

Counsel: Mrs. Alexia Amesbury for petitioner and cross respondent

Mr. Serge Rouillon for respondent and cross petitioner

Delivered: 27 June 2017

JUDGMENT

M. TWOMEY, CJ

Background

[1] This is an acrimonious matrimonial property dispute between parties who were married on 5 December 1999 and divorced on 31 July 2015.

[2] They both applied for ancillary relief pursuant to Rule 4 (1) (f) of the Matrimonial Causes Rules (made under section 27 of the Matrimonial Causes Act) hereinafter the Rules, for the division of their matrimonial property. For the purposes of this decision Anthony Herbert Dave Pillay will hereinafter be referred to as the Petitioner and Gracy Sybil Pillay as the Respondent.

[3] It is the Petitioner's application that before the marriage, namely 11 November 1999, he solely acquired Parcel J1606 at Bel Ombre from Herbert Hoareau.

[4] It is also his averment that during the marriage he solely bought Parcel S6399 on 27 April 2010 at Reef Estate, Anse Aux Pins from Jeffrey Esther and Parcel V10596 on 4 April 2013 from Robenson Louis Hoareau.

[5] He avers that subsequently that parcel J1606 was transferred to a company Impact Logistics ((Pty)) in which he holds 90 shares and the Respondent 10 shares.

[6] He also avers that he has full beneficial ownership of three companies, namely Impact Logistics (((Pty)) Ltd, World of Curls (Sey)(which is not the subject of this application) and Sterling Investments ((Pty)) Ltd.

[7] The Respondent has averred she is entitled to the entire interest in Parcel J1606 and a half share in Parcels S6399 and V10596.

[8] She also avers that she should be awarded SR6, 000,000 as her share in the businesses jointly owned by herself and the Petitioner.

[9] She has also filed a plea in limine litis in which she avers that the Petitioner's application for ancillary relief should be dismissed as it does not disclose the Rules under which it is brought and that particulars about the property are not accurately detailed.

[10] This is now dismissed as it was resolved at the beginning of the hearing. The Petitioner asked for leave and was granted the same to amend his application for ancillary relief in respect of the matrimonial property by deleting "apply to the court for an order to declare his 100% share of the property" and inserting instead "apply to the court for an order to declare his share of the property". I also need to point that that Form 2 of the Rules contains no specific provision about how ancillary relief should be applied for. Form 2 is a generic form and is very loosely worded and allows for inclusion of whichever remedy is sought. I fail to see how the Petitioner's application does not meet the requirements of the form. On that basis the plea has no validity and is dismissed.

The Petitioner's Evidence

[11] The Petitioner testified that before he married the Respondent on 5 December 1999 he was a sole trader was living in a house at Beau Bel on Parcel J1606 which he had bought for SR400, 000. He later sold this property to his brother-in-law, George Gill, on 17 July 2001 for SR670, 000. He explained that the transfer was done as he owed the Commissioner of Taxes the sum of SR 1.2 million and because he was leaving for the United States to do pilot training. After the debt was repaid the same property was retransferred on 8 April 2010 into both his name and that of his wife (Exhibit P4).

[12] The Petitioner explained that although the property had always been his, his wife had threatened him with divorce unless he transferred a half share of the property into her name. He produced an Agreement (P6) signed by himself and the Respondent in which it was agreed that the said property would be transferred into their joint names.

[13] Subsequently, the same property was transferred to Impact Logistics (((Pty))) Limited (Exhibit P 5) on 4 April 2013 in which the Petitioner holds 90 shares and the Respondent 10 shares. It is noted that the Transferor signing the deed of transfer is only the Petitioner and not the Respondent. Exhibit P7 signed on 25 March 2013 records a board resolution

authorising the Petitioner as company director to sign the transfer deed in respect of J1606. This resolution was signed by both the Petitioner and the Respondent.

[14] The Petitioner explained that he had taken all the loans from the bank in respect of the company and the properties and that he ran the company's day to day affairs. His wife gave him authority to do so as she was flying and away a lot in her job as cabin crew.

[15] Parcel J1606 with the four bedroomed was valued in 2014 at SR4 million.

[16] The Petitioner testified that he solely bought further properties, namely: Parcel S6399 at Cacao Estate (Reef Estate), Anse Aux Pins and Parcel V1596 at Le Niole and a long lease on a warehouse at Providence on Parcel V10450. Parcel S6399 was transferred into his sole name on 27 April 2010 for SR1 million. It comprises of 1031 square metres and a five bedroomed house now valued at SR2.1 million. Parcel V10596 was transferred to Impact Logistics (Proprietary) Ltd for SR2, 500,000 on 4 April 2013. It comprises an area of 1397 square metres and a three bedroomed house and is now valued at SR3.2 million.

[17] In August 2014 the Petitioner and the Respondent purchased all the shares in Sterling Investments Proprietary Limited with 9 shares being transferred to the Petitioner and 1 share to the Respondent for SR 6,500,000. The company is the owner of a long lease on Parcel V10450 at Providence which has numerous tenants. This Agreement contains a clause at paragraph 14 which provides as follows:

> *Gracy Pillay hereby acknowledges that in respect of the one share transferred to her, she is holding the shares (sic) for and on behalf of Dave Pillay and on that basis she has effected a blank share document which in (sic) the possession of Dave Pillay, which the latter may act upon to cause the share to be transferred from Gracy Pillay. Furthermore, Gracy Pillay acknowledges that Dave Pillay shall have the final decision, in his capacity as a Director of the Company, in respect of the management of the company, including but not limited to the disposal of the assets of the Company.*

[18] The Respondent’s share was transferred to Mrs. Flory Gill on 11 January 2016 (Exhibits P 21 and 22.).

[19] It is the Petitioner’s evidence that he was authorised to run both Impact Logistics and Sterling Investment alone and to maintain and administer bank accounts related to the companies as the sole signatory. This is borne out by company resolutions. (Exhibits P 17, 18 and 19).

[20] He also testified that his wife had worked at Air Seychelles from 1999 to 2010 and earned about SR10, 000 a month. She never purchased the 10% shares in the company Logistics Impact which had been allocated to her. When she worked for the company as a sales person, she received a salary similar to the one he was drawing, that is, SR 6154. She left the job in October 2014. He explained that the company was largely surviving on overdraft at the moment and this could not be extended by the Bank as he had no collateral to offer to secure further overdrafts since the Respondent had put restrictions on all the immovable property they co-owned.

[21] The amount currently outstanding to the bank as far as Impact Logistics Ltd is concerned is SR312, 500.14. Impact Logistics owns both Parcel J1601 and Parcel V19596.

[22] The amount outstanding in terms of Parcel V 10450, Providence is about SR5 million.

[23] As far as Parcel S6399 at Reef Estate is concerned he is indebted in that regard to George Gill for SR1.2 million.

[24] He also owes Flory Gill SR 785,000 for a vehicle.

[25] In cross examination he admitted having paid off his loan in the sum of SR1.2 million to George Gill. He also admitted that when the parties had first attempted a reconciliation after a decision to divorce in 2010, the documents were drawn up by an attorney (Mr. Basil Hoareau) transferring Parcel J1606 and the house thereon in equal shares to himself and his wife. He also admitted that subsequently that property was transferred to Impact Logistics.

[26] Mr. George Gill also testified. He stated that he financially backed the Petitioner's investments on many occasions. The first time was in respect of Parcel J1606 in 2001 but which had then be retransferred into the parties joint names in 2010 as a condition of their reconciliation. He stated that the Petitioner still owes him SR1.5 million. He also stated that he helped the Respondent financially especially between October 2014 and July 2015 when she indicated that she was working on reconciling with the Petitioner.

The Respondent's Evidence

[27] The Respondent also gave oral evidence. She admitted that Mr. George Gill had financed the payment of SR 2 million to the Commissioner of Taxes for an outstanding tax bill in consideration of Parcel J 1606 being transferred to him on 17 July 2001. This was only retransferred to them in joint names in 2010.

[28] In 2001 the parties went to the States which the Respondent averred was partly financed by the sale of a white Nissan tipper to Mr. Gill for SR120, 000 and the Petitioner's sports car. The money was partly used to fund the Petitioner's studies to obtain a commercial pilot licence. On their return to Seychelles, the Petitioner was employed as a trainee pilot with IDC and was told that part of the training involved training with the military academy. He left the job and she was the sole provider for the family at that time. Although the Petitioner was operating as a sole trader, the business was not performing well and as she worked as a flight attendant and she was able with her salary to purchase goods and resell it at a profit to maintain the family. Between 2002 and 2005 because of her access to rebated airfares, the Petitioner was able to travel cheaply and this helped with the recurring expenses. She also borrowed SR20, 000 from the Youth Enterprise Scheme to invest in the business. In 2005 in recognition of her contribution to the business she was offered 10% shares in the company Impact Logistics and also became a director of the same.

[29] On her return from the States with the savings she had made, she bought a second hand Subaru. This was later sold and she purchased a Sirion car and with the profits from the business the Rav 4 jeep was purchased. Any excess money in the buying and selling of

the cars was injected into the company. In further evidence in chief she stated that all she had benefited from her efforts in Impact Logistics was the Rav 4 jeep.

[30] A loan in their joint names was also obtained from the Development Bank of Seychelles for SR6, 398,000 to purchase the shares in Sterling Investment Company on 17 July 2014. She obtained one share in the company and the Petitioner the remaining 9 shares. She also signed a blank share transfer in respect of that share and has since learned that she is no longer a shareholder.

[31] All the other properties were financed by bank loans and transferred to Impact Logistics which repaid the loans. She has one share in that company but estimates that she injected about SR1.3 to SR1.4 million into it from the salary she was obtaining from Air Seychelles between the years 1998 to 2010 when she worked there. She stated that she was earning an allowance of about £1000 monthly as well as her salary but in cross examination stated that she only received £1000 monthly and at that time the exchange rate was about SR10 for a pound, giving her a monthly salary of SR10, 000 although she had started off with a salary of SR2, 500 and an off base allowance of £500 to £600 monthly.

[32] She was now therefore amending her cross petition and only praying the court for full ownership of Parcel V10596 at Le Niole and half share in J1606 and SR 4 million in respect of her share in the two companies Impact Logistics and Sterling Investments.

[33] In cross examination she stated that she helped make Impact Logistics grow and that the company had made a profit until she left in 2015. She also admitted she used her Air Seychelles allowance for her personal needs, for the household and for the family. She also admitted that she was using the money to purchase hair products but stated that she resold these for a profit which she then used to assist the business and the family.

[34] She also admitted that the Rav 4 jeep was partly paid for from SR 389, 500 from the insurers for a car which belonged to her that had been written off and the balance made up from money from Impact Logistics.

[35] Ms. Fantina Bamboche from Barclays Bank testified that Impact Logistics holds two accounts with the bank- a loan account and a current account. Currently the only outstanding loan to the company is SR52, 083.49.

[36] Mr. Joeliffe Yocette from the Ministry of Home Affairs, Immigration and Civil Status Department produced documents showing the travel history of the Petitioner. Between 2005 and 2009 he travelled in and out of Seychelles an average of 28 times a year. Between 2010 and 2016 he had travelled an average of 14 times a year.

[37] Mr. Danny Pierre, the head of recovery and collection at Barclays Bank also testified. A loan of SR1.6 million was granted in April 2010 to the company Impact Logistics for the purpose of purchasing property at Anse Aux Pins and had been repaid. An overdraft facility for SR 400,000 was also granted in 2013. A further loan for SR 2.5 million was also granted in March 2013 for the purchase of property at Le Niolee. He stated that the company Impact Logistics does not owe the bank any money.

[38] Cindy Blakemore, the Acting Commissioner for Customs testified that the company Impact Logistics imported about seventy five containers of goods from 2008 to 2016.

Submissions

[39] In closing submissions, Mrs. Amesbury for the Respondent has stated that Parcel J1606 was co-owned by the parties in 2010 and transferred by one of the co-owners (the Petitioner) not acting through a fiduciary to Impact Logistics (((Pty))) Ltd in 2013. This she submitted was unlawful and renders the sale null and void.

[40] She admits that Parcel S6399 is solely owned by the Petitioner while Parcel V10596 which she currently occupies is owned by the Impact Logistics (((Pty))) Ltd.

[41] She relies on the case of *Lesperance v Lesperance* SCA 3/2001 to submit that the court in that case awarded a 50% share in matrimonial property to the wife who had made no direct financial contribution but had made a contribution in kind.

[42] In his closing submissions, Mr. Rouillon for the Petitioner has submitted that the Respondent was unable to produce any documentation of any financial contribution she

made towards the business activities of Impact Logistics. He admits that she provided evidence of having taken a small loan of SR 30,000 for the purchase of a tipper truck but he submits that this was probably for the purchase of her own car. He submits that the scale of the business enterprises resulted in the Petitioner clawing back money which was not matched by the input from the Respondent's salary. In any case he submits, both parties had been cabin crew when they met and her salary was not more than SR5000 plus an allowance Euro 350 which was equivalent to SR 4,200 at the time. If, as she claims, she earned £1000 (which he estimates was equivalent to SR20, 000 at the time) it made no financial sense for her to leave the lucrative salary to come and work for the company and only earn SR 6154.

The Law

[43] An application for the division of matrimonial property is made pursuant to section 20 (1) (g) of the Matrimonial Causes Act 1992 which states in relevant part:

> *…on the granting of a conditional order of divorce or nullity or an order of separation, or at any time thereafter, the court may, after making such inquiries as the court thinks fit and having regard to all the circumstances of the case, including the ability and financial means of the parties to the marriage-*
>
> …
>
> *g) make such order, as the court thinks fit, in respect of any property of a party to a marriage or any interest or right of a party in any property for the benefit of the other party or a relevant child.*

[44] The provisions give the court the widest of powers to inquire into all matters which may assist it in coming to an equitable decision when settling matrimonial property. *Finesse v Banane* (1981) SLR 103 is authority that in such exercise, the Supreme Court is vested with the same power, authority and jurisdiction as the High Court of England by virtue of section 4 of the Courts Act. This therefore enables the Court to take it account all considerations such as contributions made by each party both for the welfare of the family and for the home itself. What the Court seeks to do is to find a level of equity so

that each party is not deprived of their fair share of contributions to the matrimonial asset despite such assets being registered solely in the name of one party (*Esparon v Esparon* (2012) SLR 39. The Court of Appeal in *Chetty and Emile*(2008-2009) SCAR 65 went further establishing that the court may make an order for the benefit of one party even in the absence of any financial contribution by that party and that the acquisition of property during marriage is not solely through the consideration of monetary contribution but also through love and affection that permits such acquisition.

[45] In any case the starting point in such deliberations by the court is that where a home is held jointly the presumption is that each party has an equal share (See *Charles v Charles* (2004-2005) 231).

[46] It is my view that based on the above legal considerations the Court also has to take into account the following principles: the length of the marriage; economic advantage or disadvantage gained or lost by the parties during the marriage; the consideration of the burden of looking after children of the marriage and whether a party might suffer financial hardship as a result of the divorce.

[47] In regard particularly to the present case, I also find the following view of Lord Nicholls' comments in *White v White* [2001] 1 AC 596 very helpful when distinguishing between previously held property and matrimonial property:

> *"42. This distinction is a recognition of the view, widely but not universally held, that property owned by one spouse before the marriage, and inherited property whenever acquired, stand on a different footing from what may be loosely called matrimonial property. According to this view, on a breakdown of the marriage these two classes of property should not necessarily be treated in the same way. Property acquired before marriage and inherited property acquired during marriage come from a source wholly external to the marriage. In fairness, where this property still exists, the spouse to whom it was given should be allowed to keep it. Conversely, the other spouse has a weaker claim to such property than he or she may have regarding matrimonial property.*

43. Plainly, when present, this factor is one of the circumstances of the case. It represents a contribution made to the welfare of the family by one of the parties to the marriage. The judge should take it into account. He should decide how important it is in the particular case. The nature and value of the property, and the time when and circumstances in which the property was acquired, are among the relevant matters to be considered. However, in the ordinary course, this factor can be expected to carry little weight, if any, in a case where the claimant's financial needs cannot be met without recourse to this property."

[48] Another legal consideration to be taken into account in respect of the present suit is the fact that the matrimonial properties are or were previously owned by businesses of the parties in unequal shares. It must be noted that it is problematic for a partywho starts and operates a business during a marriage to argue that it is external to the marriage (see in this respect: *SK v WL* (Ancillary Relief: Post Separation Accrual) [2011] 1 FLR 1471 and *Evans v Evans* [2013] EWHC 506 Fam). Hence, where transfers of property owned by a party to the marriage is to a company, that business wealth is also transferred into the matrimonial property pot for consideration by the judge. Equally, business impoverishment is also transferred into the pot for settlement.

Discussion

[49] The parties in this case have been married for a period of fifteen and a half years although it is undisputed that they lived apart for long periods as their marriage was rocky for several years. They have a sixteen year old daughter who is living with the Respondent although there is an order for her maintenance and private education fees by the Petitioner.

[50] Shares were claimed by the Respondent for various properties held by the Petitioner in her pleadings, but during the hearing of the Petition, she abandoned her claim in respect of Parcel S 6399. I do not therefore wish to make any comment in respect of that property.

[51] The shares of the party have to be settled in respect of Parcel J 1606 at Le Niole and Parcel V10596 at Beau Bel currently held by Impact Logistics (((Pty))) Ltd, and Parcel V10450 at Providence in the name of Sterling Investments (((Pty))) Ltd.

Parcel J1606 at Beau Bel

[52] There is uncontroverted evidence that at the time of the marriage the Petitioner owned Parcel J1606. He had bought it for SR400, 000. Although the Respondent has averred in the affidavit to her pleadings that this was presented to her as a wedding gift she did not pursue this in her evidence in court. She has instead applied for a half share of that property.

[53] The evidence adduced is that Parcel J1606 changed hands many times - in 2001 to George Gill in consideration of money paid by the latter to settle a tax bill with the Commissioner of Taxes; in 2010 when the property was retransferred to both parties in equal shares and finally in 2013 to Impact Logistics (Proprietary) Ltd in which the company the Plaintiff owns 90 shares and the Defendant 10 shares.

[54] The latter transfer has been challenged by the Respondent on a legal point and I find favour with her argument. The transfer was from the parties, co-owners of a property to a company. A company resolution could not authorise the Petitioner to transfer that property **to** the company although it might authorise a transfer **from** the company or a purchase by the company. Only a fiduciary of co-owned property can transfer such property (See in this respect Articles 105 and Article 818 et seq of the Civil Code and the cases of *Jumeau v Anacoura* (1978) SLR 180 and *Azemia v Dubignon* (1992) SLR 33). For all intents and purposes therefore that sale was indeed null and void. As a point of departure in adjusting the shares of the parties I shall therefore treat Parcel J1606 as still in being in the joint names and in equal shares to the parties.

[55] I am not of the view that either party has been totally forthcoming in their evidence as to their shares in that property. However, given the fact that it is the Petitioner who bought the property in the first place, despite its subsequent transfer and retransfer I am prepared to give him a greater share in the property to reflect his financial contribution to it. I do

not see much evidence of the Respondent's financial contribution to that property. Courts do take into account the efforts of parties to a marriage to the care giving and home making in assessing their share in a matrimonial home (see *Finesse v Banane*, *Esparon v Esparon* and *Chetty v Emile,* paragraph 44 supra). However both parties' efforts in this respect cancel each other out as both were away from the home and their child for long periods, the Respondent as an air hostess and the Petitioner on his more than frequent business trips.

[56] Although the starting point for the Court's assessment of the parties share in this property is 50/50 as is evident on the transfer document of 2010, other factors need to be taken into consideration in arriving at a fair adjustment. In the circumstances given all the evidence adduced before the Court, bearing in mind the length of the marriage, the acrimonious and rocky state of the marriage from very early, the periods of time spent living apart, the financial contributions and other efforts towards the parties business' and other undertakings I find it reasonable to assess the share of the Petitioner as 70% and that of the Respondent as 30% of this property.

Parcel V10596 at Le Niole

[57] Parcel V10596 was purchased in 2013 by Impact Logistics (Proprietary) Company). The shares in that company are 90% for the Petitioner and 10% for the Respondent. In many aspects both parties were evasive in some part of their testimony in relation to the company. I do not for example believe that the Petitioner was the only person putting in work for the company. Nor do I believe that the Respondent was earning the money she claims from Air Seychelles and transferring the whole amount to the company. I note that the Petitioner was a sole trader before he married but that the company Impact Logistics (Proprietary Ltd) was only set up in 2005. No evidence has been led to suggest that this company was a successor to any previous business of the Petitioner. I note that both Parties were using money from the company for the purchase of motor vehicles.

[58] I have not received any auditor's report of the value of the shares in the company. However it must be noted that the shares in a company reflect both the positive and negative equity of the company. The general formula for shareholder equity is Total

Assets - Total Liabilities = Shareholder Equity. Section 27(6) of the Companies Act in reference to the rights of pre-emption of shareholders in proprietary companies provides a formula for calculating the fair value of shares by an auditor. It provides in relevant part:

> *In making his estimate the auditor shall take into account the net value of the company's assets (after deducting its liabilities and contingent and prospective liabilities), its earnings in each of its most recent five complete financial years and its current financial year, the expansion or contraction of the company's undertaking during those five years and the prospect that such expansion or contraction will continue in the future, but the auditor shall not take into account the facts that a purchaser of the shares would acquire them subject to the rights of other members of the company under this section, or that the shares do or do not enable the outgoing member to control the voting at general meetings of the company, or that the shares are not readily saleable.*

[59] The Court is not in a position to perform this task and refers this calculation to a company auditor who shall be appointed by the Court after payment of fees by the parties. Based on this calculation the parties' shares in the company will be realised as to that value. On the receipt of that valuation by the Court a further order will be made in terms of the term for purchase of the shares by one or the other party or adjustment as to the property ownership of Parcel V10596.

Parcel V10450 at Providence

[60] This parcel of land formed part of the assets of Sterling Investment (Proprietary Ltd) which was purchased by the Parties on 26 August 2014 with 90% of the shares to the Petitioner and 10% of the shares to the Respondent. The Respondents' shareholding was transferred (by blank transfer) on 29th January 2016 for SR 1000. She has testified and it is not denied that she did not receive this money. I also note that Sterling Investment was purchased by a joint loan of SR6, 398,000 to both parties from Development Bank which loan is still being repaid.

[61] Similarly to the shares in Impact Logistics (Proprietary) Ltd, the auditor appointed by the Court shall make a fair evaluation of the share of the Respondent who shall them by further order of this Court be compensated for the same.

<u>My decision</u>

[62] Parcel J1606 has been valued at SR 4 million by the Petitioner. The Respondent has not challenged this valuation nor offered an alternative valuation. Her share in that party is therefore SR 1.2 million and I so Order.

[63] I shall make further orders in respect of how her share in Parcel J1606 is to be realised on receiving the valuations of her shares in the other two companies, namely Impact Logistics (Pty) Ltd and Sterling investment (Pty) Ltd and by inference in Parcels V10596 and V10450.

[64] In respect of the appointment of an Auditor to audit the companies' accounts and provide the court with a valuation of the shares of the Parties in Impact Logistics (Pty) Ltd and Sterling Investments (Pty)Ltd, after consultation with the parties it is agreed that Jean-Marie Moutia of ACM Associates, English River, is appointed for the work. A copy of this judgment is to be forwarded to the Auditor, whose fees shall be met by the parties' jointly on or before the 15 July 2017. The Auditor is to report to the Court on or before the 14 October 2017. The Parties are ordered to fully cooperate with the Auditor and to surrender all relevant documents to him so that he may carry out his work.

[65] This case is adjourned for the consideration of the report and further Orders of the Court to 18 October 2017.

Signed, dated and delivered at Ile du Port on 27 June 2017

M. TWOMEY
Chief Justice