

IN THE SUPREME COURT OF SEYCHELLES
Civil Side: MA 322/2016 and MA 43/2016 (consolidated)
(arising in CS 78/2015)

[2018] SCSC

ANTHONY HERBERT DAVE PILLAY

Petitioner

versus

GRACY SYBIL PILLAY

Respondent

GRACY SYBIL PILLAY

Cross Petitioner

versus

ANTHONY HERBERT PILLAY

Cross Respondent

Heard: Auditors' Report 8 November 2017, Submissions 22 November 2017

Counsel: Mr. Serge Rouillon for petitioner
Mrs. Alexia Amesbury for respondent

Delivered: 5 February 2018

ORDER

M. TWOMEY, CJ

[1] In June 2017 after protracted litigation between the parties, this Court delivered its judgment in relation to the division of the matrimonial properties of the parties. It made the following orders:

“[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 property 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.”

[2] In August 2017, the Auditor wrote to the Court and stated that despite engaging with the parties the fee for his work had not been paid. Settlement for the same was thereafter effected. Subsequently, the Auditors Report was duly received as were further written submissions from the parties.

[3] The Auditor, who effectively is the single joint expert witness in this case, made a share valuation of Sterling and Impact Logistics by using two approaches: a net asset approach and an income approach. He explains these approaches as follows:

In determining fair market value of equity of the Companies, we consider the (i) Net Asset Approach and (ii) Income Approach. Whilst both of these approaches are initially considered in the valuation, the nature, characteristics and circumstances of the business will indicate which approach, or approaches, is most applicable.

Net Asset Approach: In the valuation of equity of a business, the adjusted net asset method represents one methodology employed in the cost approach to value. In this method, a valuation analysis is performed for a company's identified fixed, financial and other assets. A derived aggregate value of these assets is then "netted" against the estimated value of all existing and potential liabilities, resulting in an indication of the equity value of a company

Income Approach: For the purpose of benchmarking a valuation range arrived at using the Net Asset Approach Methodology, we will also value Sterling using the Income Approach. We estimate the fair value of Sterling using the Approach (DCF Methodology), as Sterling is an operating entity. In the valuation of the equity of a business, the Income Approach uses a Discounted Cash Flow Method (DCF), which focuses on the expected cash flow of the subject company, and is a primary method to estimate value. In applying this approach, the cash flow available for distribution is calculated for a finite period of years. Cash flow available for distribution is defined, for purposes of this analysis, as the amount of cash that could be distributed as a payment to the equity holders without impairing the future probability or operations of the subject company. The cash flow available for distribution and the terminal value (the value of the subject company at the end of the estimation period) are then discounted to present value to calculate an indication of value of the equity."

[4] Using the net asset approach, he valued a share in Sterling Investment (Pty) Ltd at SR757, 400. When he used the income approach the share's value was SR878, 551. Insofar as the valuation of the shares in Impact Logistics (Pty) Limited was concerned he was unable to arrive at a value using the income approach as it was his finding that the

company's "negative financial performance and the lack of support for a stronger outlook" precluded him from making such an assessment. He valued a share in the company using the net asset approach at negative (-) SR24, 260 due to the high value of the company's liabilities.

- [5] Generally, asset based valuations are perceived as being more comprehensive and reliable and courts generally prefer them for valuations of small business. An income approach assesses value based on the business's ability to generate future economic benefits, and is therefore suited for established, profitable businesses which is certainly not the case for Impact Logistics. In either approach it is reasonable to expect that the party who owns more shares in the company will argue that the business is worth less than the party who has a minor interest in the same company.
- [6] I have taken these considerations into account when considering the valuations as presented by the single joint expert. I conclude that there is no set formula for the valuation of shares especially when it relates to matrimonial property. I am also aware that despite the valuation carried out by the expert the court should be mindful of other factors brought into evidence at the hearing. I have struggled to find jurisprudence in Seychellois law on this issue. I have therefore considered UK case law whose matrimonial proceedings law Seychellois law mirrors.
- [7] In the UK case of *Marano v Marano* [2010] EWCA Civ 119), the Court of Appeal found that in share calculations the trial judge was at liberty to exercise a broad and general discretion to achieve fairness. In *FZ v SZ (Rev 1)* [2010] EWHC 1630 (Fam), Mostyn J stated that the form of the valuation should be present market value and "fair/hope/economic values should only be used in the exceptional case" (at paragraph 118).
- [8] There are also as I have already stated many factors extrinsic to the share valuation by the expert that may also be taken into account. This is acknowledged by the court in *Livock v Livock* (unreported 21st December 2009) when Coleridge J stated:

“Both accountants concede that what goes into the accounts cannot be decisive by itself. Of course, viewed narrowly and strictly, there can be no doubt that the value on a sale today must be the value calculated by reference to the most up-to-date property valuations. But, is that the end of the matter? Does that really inform the court about the company's true value in the context of this family litigation? I am quite sure it does not. I need to look at the whole background and picture.” (Emphasis added).

[9] In this respect I was urged by both Counsel for the parties to consider the following:

Mr. Rouillon for the Petitioner: Impact Logistics was operated on the basis of bank overdraft facilities and the Respondent’s shareholding in Sterling was only on a nominee basis.

Mrs. Amesbury for the Respondent: The reference to the purchase of a Toyota Rav 4 by Sterling (sic) was not recorded in the Fixed Asset Register and cannot be the vehicle purchased by the Respondent before the parties acquired the shares of Sterling. It should be returned to the kitty for settlement. The expert’s witness’s report is not a true and accurate reflection of the value of Impact Logistics. The education of the child of the marriage is borne entirely by the Respondent.

[10] As regards, the nominee shareholding in Sterling, I found in my judgment of June 2017 that the shares in Sterling were acquired in August 2014 with the following acknowledgment by the Respondent:

“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.”

[11] I acknowledge that the Respondent only held the share for about 16 months and it is true that she was a nominee shareholder. However, I have to take into consideration the fact that she is still liable for that debt which has allowed the company to flourish. I also have to take into account the fact that it is Sterling who is now paying off the loan. I believe therefore that the value of the share at the time of its transfer should be used for its valuation.

[12] Sterling is an established and performing business with a projected stable growth rate of 3% by 2021. It was bought for SR 6,500,000. I intend therefore to use the income based approach for its share valuation. The Auditor has estimated the value of each share at SR878, 551 as at 31 July 2017. I have to take into account the valuation of her share as at the 11 January 2016 when it was transferred. However, this is not apparent from any of the accounts provided to the court. Therefore I have calculated it as follows: The Auditors report shows that in 2017 the company had an annual growth of 1.8%. I have applied this percentage to calculate the value of the share as of the 1 January 2016. The figure of SR878, 551 is the value of the share on 1 January 2016 plus 19 months of growth at 1.8%. 19 months of growth at 1.8% per year is an effective growth of 2.85%. Therefore the value of the share at the time of its transfer was $(878,551 - 2.85\%)$ SR 853,600.15. I so find.

[13] As regards the Respondent's share in Impact Logistics, I have taken into consideration all the matters raised including the fact that it is a loss making venture. There is only one valuation for the shares in Impact Logistics based on its net assets. I use that valuation to calculate the share of the Respondent in the company.

[14] I take on board the submissions made by Mrs. Amesbury but see from the report that despite having fixed assets valued at SR2, 666,654 at the end of 2016 the company also had liabilities of SR7, 080,012. The shareholding of the Respondent is therefore valued at minus SR24, 26924. I have no other information to lead to a conclusion different to that of the Auditor and therefore accept his valuation of the shares.

[15] Mrs. Amesbury's submission relating to the Rav 4 is unclear. I am not sure as to what business she is stating should have recorded it as a fixed asset. In any case from the

evidence adduced at trial it is clear that it is her client, the Respondent who has had the benefit of the Rav 4. I do not understand why therefore she seeks to have it brought back to the kitty. It certainly would not be in her interest to have the value of it recalculated and shared out. In any case it is not a claim that was made at the hearing or in the pleadings. I therefore disregard this submission.

[16] Similarly, as concerns the Respondent's submission relating to the education of the child of the parties, this issue although canvassed in the pleadings was not raised at the hearing nor any evidence adduced about it. This Court therefore cannot at this eleventh hour entertain this matter.

[17] I have already ordered that the Petitioner pay the Respondent the sum of SR 1.2 million for her share in the matrimonial home on Parcel J6106. In addition and in view of the circumstances outlined above I make the following additional orders:

1. I Order the Petitioner, Anthony Herbert Dave Pillay to pay SR 853,512.30 to the Respondent, Gracy Sybil Pillay for her one share in the company Sterling Investment (Pty) Ltd with a deduction of SR 24,269 for her shares in Impact Logistics (Pty) Ltd. This amounts to a total of **SR 829, 243.30** to be paid by the Petitioner to the Respondent.
2. I make no order as to costs.

Signed, dated and delivered at Ile du Port on 5 February 2018.

M. TWOMEY
Chief Justice