Judgment No. S.C. 207/98
Civil Appeal No. 603/96

SANDRA MAY SIM v CLAYTON EDWARD SIM

SUPREME COURT OF ZIMBABWE
GUBBAY CJ, EBRAHIM JA & SANDURA JA
HARARE, SEPTEMBER 21, 1998 & JANUARY 11, 1999

A P de Bourbon SC, for the appellant

J C Andersen SC, for the respondent

SANDURA JA: This is an appeal against a judgment of the High Court in terms of which the parties were granted a decree of divorce and a division of the matrimonial assets. The appeal only concerns the division of the matrimonial assets and the order relating to the costs of suit.

The facts are as follows: The parties married each other in Scotland in September 1970. After living in Switzerland and Canada they came to this country in 1972. Thereafter, both of them worked and acquired a lot of property. At the time of the break-up of the marriage in April 1991 the matrimonial estate included the matrimonial residence at Highlands, shares in various companies, two plots at Mazvikadei, motor vehicles, boats, household furniture and effects, and monies in local and foreign bank accounts.

During the course of the trial, counsel for the respondent informed the trial judge that the respondent conceded that the appellant was entitled to fifty percent

of the matrimonial estate as it existed at the time of the break-up of the marriage, which was 24 April 1991. Thereafter, an order by consent was granted by the learned trial judge and the matter was postponed *sine die*. The order provided, *inter alia*, that Ian Ferreira ("Ferreira"), appointed as an independent valuer, was to assess and fix the market value of the assets which were listed on an attached document. The valuations were to be on the basis of what the assets were worth on 24 April 1991.

Subsequently, the valuations were carried out, a valuation report was compiled and the trial resumed. At the end of the trial the learned trial judge distributed the matrimonial assets as follows:

For Mrs Sim (the appellant):

1.	The matrimonial residence at No. 8 Cecil Rhodes Drive (Mr Sim was to pay the balance of $85 000.00 on the mortgage), valued at:	$950 000.00
2.	The Mercedes Benz 300E motor vehicle, valued at:	$500 000.00
3.	The contents of the house at No. 8 Cecil Rhodes Drive, valued at:	$205 000.00
	TOTAL VALUE:	$1 655 910.00

For Mr Sim (the respondent):

1.	Stand No. 16, Mazvikadei, valued at:	$30 000.00
2.	Stand No. 17, Mazvikadei (half-share), valued at:	$15 000.00
3.	The Mercedes Benz 280 SLC motor vehicle, valued at:	$150 000.00

4.	The Triumph Spitfire motor vehicle, valued at:	$30 000.00
5.	Miscellaneous items, valued at:	$31 116.00
6.	A boat valued at:	$60 000.00
7.	A house boat (half-share), valued at:	$350 000.00
8.	Furniture, valued at:	$10 000.00
9.	Shares in various companies, valued at:	$349 332.00
10.	Money in local bank accounts:	$58 258.00
11.	Money in foreign bank accounts, valued at:	$265 029.00
	TOTAL VALUE:	$1 348 735.00

As far as costs of suit were concerned, the learned trial judge ordered that each party should bear its own costs.

The main bone of contention between the parties as far as the division of the matrimonial estate was concerned was how the shares in the Edisan Products Group of Companies were to be valued. On that issue Mr Colin Hay ("Hay") gave evidence. At the relevant time he was a partner in the firm of chartered accountants called Ernst & Young and had, until September 1990, been the partner responsible for compiling the financial statements of the Edisan Products Group of Companies.

His evidence was as follows: After a request made by Ferreira, who was authorised to do so by the court order already referred to, Hay prepared valuations of all the shares owned by the respondent in various companies. In all but one the respondent was a minority shareholder. In those companies where he was a

minority shareholder, his shares were valued on the basis of the earnings of the company. He determined what an investor purchasing the shares would receive by way of dividends and calculated the value of the respondent's shares on the basis of a 50 percent dividend distribution of the after tax earnings.

However, in the company in which the respondent was the majority shareholder, Hay valued the respondent's shares on a net asset value basis. He determined the net asset value of the company by deducting the company's liabilities from the total value of its assets. He then multiplied the result by the percentage of the company's shares held by the respondent, in order to get the value of the respondent's shares in the company on a net asset value basis.

Hay said that the normal way of valuing the shares of a minority shareholder was to look at the earnings of the company and then determine what an investor purchasing the shares would receive in dividends. He added, however, that in the case of a majority shareholder, the normal way of valuing his shares was to do so on a net asset value basis. Commenting on the two methods of valuing shares, he made the point that whereas a majority shareholder could dispose of the entire company or its assets or undertaking, a minority shareholder could not do so without the concurrence of the other shareholders. All that a minority shareholder could dispose of were his shares at the market value. In the circumstances, he was adamant that a valuation of the respondent's shares, in those companies where he was a minority shareholder, on a net asset value basis would have been clearly inappropriate.

Hay's evidence was accepted by the learned trial judge. In my view, that decision was correct.

In any event, the parties had agreed that what was to be determined by the valuer was the market value of the assets, and that included the respondent's shares. The market value of the shares is the price at which the shares would be sold if offered publicly. According to Hay, that price was $349 332.00 at the relevant time. In my view, that valuation cannot be faulted.

The other aspect of the division of the matrimonial estate which the appellant complained about on appeal was that she was not awarded any share of the money in the foreign bank accounts. It was common cause at the trial that the foreign currency in question amounted to US$99 864.00 at the relevant time.

The learned trial judge converted the foreign currency into local currency using the exchange rate applicable in April 1991, the date accepted as the date of the break-up of the marriage. Applying that exchange rate, the local currency equivalent was $265 029.00. The learned judge then awarded all the foreign currency to the respondent on the basis that its value in April 1991 was $265 029.00. That was on 4 September 1996, the date when his judgment was handed down.

In my view, the learned trial judge should have awarded 50% of the foreign currency to the appellant. That is so because the respondent made a categorical offer to that effect when he gave evidence at the trial, as the following question and answer show:-

> "Q. So far as these foreign bank accounts are concerned, you accept that half of this should all be paid to your wife now? A. I have never disputed (that) and I have offered, it was offered in 1991, it was offered in 1993, and it is offered again now."

It is quite clear from his answer that the respondent offered the appellant 50% of the foreign currency, which was US$49 932.00. That is the sum which should have been awarded to the appellant. However, as payment in foreign currency cannot be enforced, the respondent would have been entitled to make payment in local currency, using the rate of exchange applicable in September 1996.

The rate of exchange applicable in April 1991 was irrelevant because at the trial in 1996 the respondent offered the appellant the sum of US$49 932.00. Obviously, had it been possible to enforce payment in foreign currency the appellant would have preferred payment in foreign currency. It is, therefore, only fair that the foreign currency be converted to local currency using the rate of exchange applicable at the time the judgment was handed down.

Bearing in mind the fact that the respondent made a firm offer at the trial to pay to the appellant 50% of the foreign currency, and the fact that he appears to have been a successful businessman, the probabilities are that he would have paid to the appellant the local currency equivalent almost immediately.

Finally, as far as the costs incurred at the trial are concerned, I am of the view that the learned trial judge was correct in ordering each party to pay its own costs. In any event, this is a matter within the discretion of the trial court, and it cannot be said that that discretion was not exercised judicially.

However, with regard to the costs of the appeal, I think that the appellant is entitled to her costs because she has been successful to a large extent.

The appeal is therefore allowed to the extent that the appellant is entitled to 50% of the foreign currency.

In the circumstances, I would order as follows:

1. That paragraph (b) of the order of the court *a quo* is amended by the addition, after subparagraph (iv), of the following subparagraph:

   "(v) The defendant shall pay to the plaintiff the sum of US$49 932.00, or its equivalent in local currency using the rate of exchange applicable on the date of this order."

2. That the costs of this appeal shall be paid by the respondent.

GUBBAY CJ: I agree.

EBRAHIM JA: I agree.

Lofty & Fraser, appellant's legal practitioners

Winterton, Holmes & Hill, respondent's legal practitioners