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ROBERT ANDREW BEAUMONT — Appellant

and

VALERIE BEAUMONT — Respondent

LL Case No 326/1985

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

ROBERT ANDREW BEAUMONT Appellant

and

VALERIE BEAUMONT Respondent

CORAM: TRENGOVE, VILJOEN, BOTHA, JACOBS JJA et BOSHOFF AJA

HEARD: 6 NOVEMBER 1986

DELIVERED: 15 DECEMBER 1986

JUDGMENT

/BOTHA JA ...

BOTHA JA:-

The parties to this appeal were formerly husband and wife. They were married on 30 May 1964. The mar= riage was dissolved on 27 May 1985 by a decree of divorce issued in an action instituted in the Witwatersrand Local Division by the appellant (the husband), as plaintiff, against the respondent (the wife), as defendant. The appellant had sued for divorce and ancillary relief and the respondent had counterclaimed for a decree of divorce and ancillary relief. The action was tried by KRIEGLER J. The decree of divorce granted by him is not in issue in this appeal. The issues that do arise for considera- tion and decision relate to certain aspects of the orders for ancillary relief which the trial Judge granted in favour of the respondent against the appellant in respect of the former's counterclaim against the latter. In that regard leave to appeal to this Court was granted to the appellant by the trial Judge.

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The judgment of KRIEGLER J has been reported: see Beaumont v Beaumont 1985 (4) S A 171 (W). The orders made by the learned Judge are set forth in the reported judgment at 184 J - 185 D. For ease of reference they are reproduced here:

"1. I grant a decree of divorce.
2. The plaintiff is to pay to the defen= dant the sum of R150 000 on or before 1 December 1985.
3. The obligation in para 2 above is to be secured by a first mortgage bond, to be registered in defendant's favour, over holding 429, North Riding Agricul= tural Holdings, by not later than 1 July 1985.
4. Pending payment in terms of para 2 above, the plaintiff shall pay mainte= nance to the defendant at the rate of R1 400 per month, the first payment to be made not later than 7 June 1985, and the monthly payments thereafter to be made not later than the seventh day of each month.
5. Once the payment in terms of para 2 above has been made, the plaintiff shall pay maintenance for the defendant at the rate of R700 per month, payments to be effected on the seventh of each month.
6. Custody of the minor children Michelle, Nicolette and Mark, is awarded to the

defendant, with reasonable rights of access to the plaintiff.

7. The plaintiff is to maintain Michelle and is to pay to the defendant maintenance for Nicolette and Mark, in the sum of R250 per month each, payments to be made contemporaneously with the payment of maintenance for the defendant.

8. The plaintiff is to pay the costs of suit."

As I have indicated, the order contained in para 1 above is not in issue. Nor are the ancillary orders contained in paras 6, 7 and 8, which relate to the custody and maintenance of the three younger of the four children born of the marriage and the costs of the action. The main matters in dispute are the orders contained in paras 2 and 5. The remaining orders, contained in paras 3 and 4, are relevant only to the extent to which they are related to those in paras 2 and 5. The order in para 2, i e for payment by the appellant to the respondent of a capital sum of R150 000, was made pursuant to the provisions of subsection (3) of section 7, read with subsections (4),

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(5) and (6), of the Divorce Act 70 of 1979, all of which were introduced into that Act by section 36 (b) of the Matrimonial Property Act 88 of 1984. The order in para 5, i e for payment by the appellant to the respon= dent of maintenance for the latter in an amount of R700 per month as from the date of the payment of the afore= said capital sum, was based on the provisions of section 7 (2) of Act 70 of 1979, as amended by section 36 (a) of Act 88 of 1984. The statutory provisions I have men= tioned will be quoted later. It will be convenient first to refer to the facts.

The facts constituting the foundation upon which the two orders in question (paras 2 and 5 above) were based, have been fully canvassed and incisively analysed in the reported judgment of KRIEGLER J. Save in some minor respects, the learned Judge's findings of fact have not been attacked in this appeal. Consequently there is no need to set out the facts in detail. In

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what follows it will be assumed that the reader of this judgment will have read the judgment of the trial Judge. For ease of reference I propose merely to tabulate the principal findings of fact which may have a bearing on the outcome of this appeal. In doing so, I shall, for the sake of convenience, refer in the present tense to the position in which the parties found themselves at the time when the trial was heard; although the facts must have changed in the meantime in some respects - e g as to the ages of the parties - and may have changed in other respects - e g as to the income of the parties - it is clear on general principles, in my view, that the appeal must be dealt with on the footing of the facts as they existed at the trial. In summary, then, they were found to be as follows:

1. The antenuptial contract concluded between the parties at the time of their marriage in 1964 excluded community of property and of profit

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and loss and was inconsistent with any accrual sharing. It provided that household effects to the value of R1 000 and wedding gifts were to go to the respondent.

2. At the time of their marriage neither of the parties had any assets. They started married life with nothing.

3. During the subsistence of the marriage the appellant, who is a capable and extremely hard=working man, built up a flourishing business of his own and amassed substantial assets. His business, conducted as an integrated whole, consists of landscape gardening, a nursery, and the cultivation of trees. His assets comprise a $6^{1}/_{4}$ acre agricultural holding in Randburg, three adjoining pieces of farmland near Brits, and a half-share in a cottage at Mossel Bay - all of which are unencumbered - and movable

/assets ...

assets such as motor cars, lorries, tractors and the like. The Randburg holding has a house with swimming pool on it (this was the matrimonial home) and the nursery business is conducted there. The farm properties near Brits are utilised for the growing of trees.

4. The gross value of the appellant's assets is R500 000. This figure was agreed upon between the parties after the conclusion of the evidence in the case. (The agreement did not allocate specific values to particular assets and the evidence is inconclusive in that regard.) The appellant has contingent liabilities for income tax amounting to some R40 000 to R50 000. That leaves a net asset value of his estate of ap= proximately R450 000.

5. In respect of the income received by the appel= lant out of his business, he experienced two

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record years in succession. For the year ended February 1983 he returned a taxable income of R57 000 and a turnover of approximately R250 000. (These findings of the trial Judge and the evidence on which they were based require elucidation; I shall revert to this aspect of the facts later in this judgment.)

6. During the earlier period of the marriage the respondent went out to work from time to time ("between pregnancies"), and her earnings were absorbed in the family budget. On one occasion R900 of her earnings was used to sink and equip a borehole on the Randburg property. Later, as the family grew, the respondent attended, virtually exclusively as far as the appellant was concerned, to the running of the household and the raising of the children. She did so mostly with no, and occasionally

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with very limited, assistance of a domestic servant. The appellant gave her a weekly allowance for buying household necessaries, which had reached a peak of R100 per week at the time of the disintegration of the marriage. Throughout the appellant "kept her on a shoe-string".

7. Throughout the years the respondent assisted the appellant "in multifarious ways" in the conduct of his business. (Details are given in the reported judgment at 176 G). I quote from the judgment of KRIEGLER J at 177 C - F and 178 I/J:

> "There can be no doubt that the defen= dant, for close on 20 years, made innumer= able contributions to the growth of the plaintiff's estate. She gave him her wages; she rendered services in his busi= ness and in his home; she made do with far less than she was entitled to by way of domestic help, creature comforts, enter= tainment, social intercourse and all the

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elements necessary to live with reasonable human dignity. In his pursuit of money, he totally ignored her right to pursue happiness. She contributed directly, indirectly, continuously and capably, to the maintenance and increase of his estate. That contribution was very substantial in= deed. The plaintiff had a secretary and general assistant in his business, a mistress, a housemaid, a cook, a seamstress, a scullery maid, a laundress, a nanny, a governess, a general domestic manager and a messenger. She worked for well over ten hours per day, seven days per week, 52 weeks a year. He paid her nothing. Her emoluments were clothing, board and lodging.

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The extent, duration and nature of the con= tribution were extensive. That contribu= tion played a significant role in enabling the plaintiff to advance over 20 years from penury to substantial wealth."

8. The appellant often used foul and abusive lang= uage towards the respondent. He assaulted her. He formed an association with another woman. At the end of 1982 he told the respondent in gross= ly insulting terms that she had to fend for herself. Thereafter, for eight months, he

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gave her no money at all for keeping the house=hold going. His matrimonial misconduct was "certainly gross and prolonged".

9. The appellant left the matrimonial home in June 1983 and the respondent moved out of it in December 1983. She went to Oudtshoorn, where she obtained a flat at a rental of R290 per month. The two younger children are staying with her and the other two (who are in Cape Town) visit regularly over week-ends. She is unemployed. She tried to obtain morning employment; the youngest child requires her assistance in the afternoons with reading and writing problems that he has. I quote again from the judgment of KRIEGLER J, at 178 B/C - D/E:

> "Her attempts at obtaining employment were unsuccessful. It is not surprising. Although the defendant is an attractive woman with a relatively forceful personality

and is fairly articulate, she has no qualifications fitting her for ordinary commercial employment. She matriculated some 25 years ago and has been a household drudge for virtually the whole of her adult life.

The plaintiff testified that the defendant had little useful knowledge of the nursery business and is temperamentally unsuited to serving customers. Moreover the defendant has been receiving medication for several years for a stomach ulcer and for depression. A woman with her back= ground, of her age, with her personality and with minor children to care for, is singularly disadvantaged in the labour market."

10. When the respondent left the matrimonial home she took with her the household furniture and a motor car. These assets are worth about R10 000. She owes relatives of her R7 000, which she was obliged to borrow from them be= cause the amount of R1 000 per month which the appellant had been paying her as maintenance pendente lite was insufficient to provide in her needs. So the net value of her assets is

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no more than R3 000.

11. The reasonable requirements of the respondent by way of maintenance for herself amount to roughly R1 400 per month, inclusive of the rental of the flat. The details of the cal= culation of this amount are set out in the reported judgment at 183 B - I.

12. The appellant is 45 years old and the respondent 43.

I revert now to the statutory provisions men= tioned earlier. For convenience I quote the whole of section 7 of the Divorce Act, 1979, as amended and added to by section 36 of the Matrimonial Property Act, 1984:

> "7. (1) A court granting a decree of divorce may in accordance with a written agreement between the parties make an order with regard to the division of the assets of the parties or the payment of maintenance by the one party to the other.
>
> (2) In the absence of an order made in terms of subsection (1) with regard to the

payment of maintenance by the one party to the other, the court may, having regard to the existing or prospective means of each of the parties, their respective earning capacities, financial needs and obligations, the age of each of the parties, the duration of the mar= riage, the standard of living of the parties prior to the divorce, their conduct in so far as it may be relevant to the break-down of the marriage, an order in terms of subsection (3) and any other factor which in the opinion of the court should be taken into account, make an order which the court finds just in respect of the payment of maintenance by the one party to the other for any period until the death or remarriage of the party in whose favour the order is given, whichever event may first occur.

(3) A court granting a decree of divorce in respect of a marriage out of community of property entered into before the commencement of the Matrimonial Property Act, 1984, in terms of an antenuptial contract by which community of property, community of profit and loss and accrual sharing in any form are excluded, may, subject to the provisions of subsection (4), (5) and (6), on application by one of the par= ties to that marriage, in the absence of any agreement between them regarding the division of their assets, order that such assets, or such part of the assets, of the other party as the court may deem just be transferred to the first-mentioned party.

(4) An order under subsection (3) shall not be granted unless the court is satisfied that it is equitable and just by reason of the

fact that the party in whose favour the order is granted, contributed directly or indirectly to the maintenance or increase of the estate of the other party during the subsistence of the marriage, either by the rendering of ser= vices, or the saving of expenses which would have otherwise have been incurred, or in any other manner.

(5) In the determination of the assets or part of the assets to be transferred as contemplated in subsection (3) the court shall, apart from any direct or indirect contribution made by the party concerned to the maintenance or increase of the estate of the other party as contemplated in subsection (4), also take into account—

(a) the existing means and obligations of the parties;
(b) any donation made by one party to the other during the subsistence of the marriage, or which is owing and en= forceable in terms of the antenuptial contract concerned;
(c) any order which the court grants under section 9 of this Act or under any other law which affects the patrimonial position of the parties; and
(d) any other factor which should in the opinion of the court be taken into account.

(6) A court granting an order under sub= section (3) may, on application by the party against whom the order is granted, order that satisfaction of the order be deferred on such

> conditions, including conditions relating to the furnishing of security, the payment of interest, the payment of instalments, and the delivery or transfer of specified assets, as the court may deem just."

Subsection (1) does not apply in the present case, since the parties did not enter into any agreement as contemplated therein. The absence of an order made in terms of subsection (1) enables subsection (2) to come into operation, having regard to the opening words of the latter, while the absence of any agreement makes it possible to apply subsection (3), having regard to the words therein, "in the absence of any agreement between them regarding the division of their assets", subject, of course, to the other prerequisites for its application being satisfied.

Subsection (2) was amended in 1984 by the addition to the matters enumerated as considerations to which a court must have regard in applying it, of a further factor to be taken into account, viz "an order

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in terms of subsection (3)". The amendment established an interrelationship between subsections (2) and (3). The nature, extent and effect of that interrelationship will be examined later in this judgment. The factors which the court is required to consider in terms of subsection (2) are tabulated in the judgment of KRIEGLER J at 174 D (but there is a typographical error in his paragraph (1): the word "needs" should read "means"). These factors will be referred to again later in this judgment, when I come to deal with their application to the facts of this case. At this stage I would merely point to the very wide discretion which the subsection confers upon a court in deciding upon "an order which the court finds just ....", which is underscored by the words "and any other factor which in the opinion of the court should be taken into account". An illustration of what can be taken into consideration under this head= ing is afforded by the observation of VAN DEN HEEVER J

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in Nilsson v Nilsson 1984 (2) S A 294 (C) at 297 F, with which I agree:

> "One of the factors that must be considered in quantifying a woman's claim to maintenance is what she herself put into the marriage, whether in cash or in kind (tolerance, patience, frugality, etc. etc)."

Although this was said prior to the introduction of sub=sections (3) to (6) into the Act, the observation retains its relevance, I consider, when under the new dispensation it is found that an order in terms of subsection (2) is called for, and the quantification of it is being con=sidered.

Subsection (3) introduced an entirely novel concept into this branch of our law: the power of a court under certain circumstances to order the transfer of assets of the one spouse to the other. An order in terms of subsection (3) may conveniently be referred to as a redistribution order. The creation of a power enabling a court to make a redistribution order was

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obviously a reforming and remedial measure (c f KRIEGLER J at 179 G/H). What the measure was designed to remedy is trenchantly demonstrated by the facts of the present case: the inequity which could flow from the failure of the law to recognise a right of a spouse upon divorce to claim an adjustment of a disparity between the respec= tive assets of the spouses which is incommensurate with their respective contributions during the subsistence of the marriage to the maintenance or increase of the estate of the one or the other.

Subsection (3) contains in itself a number of prerequisites that must be satisfied before an order can be made in terms of it, apart from those which are in= corporated in it by reference to subsection (4). The marriage must have been entered into before the coming into operation of the 1984 Act. That requirement is satisfied in the present case. (I need not concern my= self in this judgment with the debate in academic circles

as to the desirability or otherwise of this requirement.) The marriage must have been entered into in terms of an antenuptial contract excluding community of property and of profit and loss and any form of accrual sharing. In the present case the parties' antenuptial contract was in a standard form, expressly excluding community of property and of profit and loss. As mentioned earlier, KRIEGLER J found that it was inconsistent with any accrual sharing. It was rightly not contended that this finding was not justified or that this requirement of the subsection was not satisfied. As KRIEGLER J pointed out (at 175 B), the possibility of making a redistribution order was created concomitantly with the introduction of a system of accrual sharing in Chapter I of the 1984 Act. The Legislature could not have intended an express exclusion of the type of accrual sharing envisaged in the 1984 Act to be a prerequisite for the application of subsection (3), introduced by the same Act. Consequently the express

exclusion of community of property and of profit and loss in a pre-1984 standard form of antenuptial contract must be taken to embrace an implied exclusion of "accrual sharing in any form", sufficient for the purposes of sub=section (3). Next, the subsection requires an "appli=cation" to be made for a redistribution order. Since only a "court granting a decree of divorce" is empowered to make such an order, the contemplated "application" will, in practice, take the form of a claim put forward in the pleadings in the action. This was done in the present case: the respondent in her counterclaim made the necessary allegations to show that the prerequisites for making a redistribution order were satisfied and claimed an order for the transfer to her of such part of the appellant's assets as the court might deem just. (No point was made of the fact that the exact nature and ex=tent of the order sought were not particularised.) The presence in this case of the requirement that there must

be no agreement between the parties as to the division of their assets has already been noted. On satisfaction of the requirements laid down in subsection (3) itself and those incorporated by reference to subsection (4), the court may order the transfer of such assets or such part of the assets of the one spouse to the other "as the court may deem just". In this respect the wording of subsection (3) is substantially the same as that of subsection (2). The Legislature clearly intended to confer a very wide discretion upon a court exercising its jurisdiction under subsection (3). This is high= lighted by the provisions of subsection (5), to which reference will be made presently.

Subsection (4), in the words of KRIEGLER J (at 175 B/C), "contains two conjoined jurisdictional precon= ditions to the exercise of the discretion". The one is a contribution by the one spouse to the estate of the other, of a kind described in the subsection; the wording

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of the subsection in this regard and its meaning and effect will be examined later in this judgment. The other is that the court must be satisfied that, by reason of such a contribution, it would be "equitable and just" to make a redistribution order. The first requirement involves a purely factual finding. The second involves the exercise of a purely discretionary judgment in equity. It is certainly a very prominent and important feature of subsection (4) that ultimately, when once the factual re= quirements of subsections (3) and (4) are satisfied, the determination of whether or not a redistribution order is to be made at all is entrusted by the Legislature to the wholly unfettered discretionary judgment of the court as to whether it would be equitable and just to do so.

Subsection (5) prescribes the considerations which the court must take into account in the determina= tion of the assets or part of the assets to be transferred in terms of a redistribution order. First and foremost

is the contribution by the one spouse to the estate of the other, by which is obviously meant the nature and extent of the contribution. Next to be considered, in terms of para (a), are the existing means and obligations of the parties. The application of these considerations to the facts of the present case will be dealt with later. Para (b) refers to any donation made by one party to the other during the subsistence of the marriage or which is owing and enforceable in terms of their antenuptial con= tract. These facts are of no real consequence in the present case. As to the donation in the antenuptial con= tract, I agree with KRIEGLER J that "It is a trifle in the present context" (at 179 A). The same applies to the donations made by the appellant to the respondent during the subsistence of the marriage (see KRIEGLER J's remarks at 177 A/B). Para (c) refers to any forfeiture order made under section 9 of the Act or under any other law. This plays no role in the present case. Lastly,

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para (d) mentions "any other factor which should in the opinion of the court be taken into account." It is this feature of subsection (5), coupled with the paucity of the considerations mentioned in the preceding paras (a) - (c), to which I referred earlier as highlighting the very wide discretion which a court is given in the exercise of its power to make a redistribution order.

Subsection (6) mentions a number of forms in which a redistribution order can be cast, on the appli= cation of the party against whom it is made. The pos= sibility of "the payment of instalments", in the con= text of the facts of the present case, will be referred to later. At this stage it may be noted that subsec= tions (3) and (6) do not in express terms authorise an order for the payment of a lump sum in cash which is not available as an existing "asset" at the time the order is made, but which the party against whom the order is made is required to raise by means of passing

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a mortgage bond over his property, as in the present case. However, in argument no point was made of this, quite rightly in my view. The Legislature clearly in= tended the court to have the widest powers in relation to the form of a redistribution order, and I agree with the conclusion of KRIEGLER J (at 175 F) that "there are no express or implied limits to the mechanics of the redistribution." Consequently, in my opinion, the order for the payment of R150 000 in the present case falls within the ambit of the statutory provisions, as being a mode of the transfer of part of the assets of the appellant to the respondent.

In my review of the provisions of section 7 above I have singled out certain aspects to stand over for separate examination later. Before I turn to those matters, it is necessary to say something in general about the nature of the argument which was addressed to us on behalf of the appellant. His counsel presented

us with the fruits of a thorough research into the com= parable legislation in England and Scotland, and we were referred to a large number of decided cases, re= ports of law commissions, textbooks, and articles in law journals, relating to recent developments of the law in those jurisdictions. I have found a study of all this material extremely helpful as providing an in= formative general background against which to consider the broadly similar new dispensation which the Legisla= ture introduced into our law by the 1984 Act. (I might add that I have also come across a useful comparative study covering a wider field, including a survey of the comparable legislation in countries such as Australia and New Zealand, in an article by Nicholas D C Dillon published in XIX (1986) CILSA 271 under the title: "The financial consequences of divorce: s 7 (3) of the Divorce Act 1979 - a comparative study".) Having said that, however, I must make it clear that I do not intend to

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embark upon a general discussion of the similarities and dissimilarities emerging from a comparison between our legislation and that of other countries. I am con= cerned in this judgment with the resolution of specific issues between the parties to this litigation, arising out of the particular facts of this case. Accordingly I shall limit my references to the overseas legislation and literature to which we have been referred to in= stances in which I consider such to be directly pertinent to the particular questions that fall to be answered in this case.

Allied to the remarks I have just made, is my response to the invitation extended to us by counsel for the appellant to lay down "guidelines" as to how subsec= tion (3) should be applied in practice. To the extent that the invitation would have us consider hypothetical situations not arising for decision on the facts of this case, it is politely but firmly declined. I have taken

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note of the pleas by some overseas authors for the courts to formulate guidelines concerning the making of redistri= bution orders, so that practitioners may be the better enabled to advise their clients what to expect and to facilitate settlements without having recourse to pro= tracted and expensive litigation (see e g Ruth Deech, "Financial Relief: the retreat from precedent and prin= ciple", in 98 (1982) L Q R 621; J Gareth Miller, "The reform of the law relating to financial provision and matrimonial property", in 15 (1984) Cambrian L R 73; J M Thomson, "Financial Provision on Divorce: In quest of some principles", in 1985 Scots L T 29; and c f generally, Cretney, Principles of Family Law, 4th ed, at 849 - 851). I am not impressed by these pleas, nor by the criticism of the courts for failing to heed them. I do not believe that any attempt to formulate guide= lines outside the wide criteria mentioned by the Legisla= ture itself would be a useful, or even a feasible,

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exercise. The truth of the matter is that there is such an infinite variety of circumstances under which subsection (3) falls to be applied that any attempt to lay down guidelines as to the manner in which the court's discretion is to be exercised is likely to increase un= certainty rather than to reduce it. On the other hand, guidelines laid down by the courts may result in a rigidity of approach displacing the flexibility envisaged by the Legislature itself. The English courts have, for the most part, declined to lay down guidelines. For instance, ORMROD L J said, in one particular context:

> ".... it is unwise to make statements of general application in these cases. The danger of creating rigid rules of practice is too great."

(O'D v O'D (1976) Fam 83 (C A) at 92 A/B; and, in another:

> "It is inevitable that there will be a high degree of uncertainty. We have said before that, however much that is to be regretted, there is no way of avoiding it of which I

> am aware, and I have never heard anyone sug= gest a way in which this uncertainty can be reduced."

(Potter v Potter (1982) 1 W L R 1255 (C A) at 1260 E.)

A notable exception is the judgment of LORD DENNING M R in Wachtel v Wachtel (1973) 1 All E R 829 (C A). KRIEG= LER J in his judgment (at 180 D - 181 F) quoted that part of LORD DENNING's judgment in which he advocated the al= location of one-third of the family assets to the wife as a guideline in the form of no more than "a starting point". I shall deal later with the merits of this approach. For present purposes I refer to LORD DENNING's approach in order to show what its fate was in the sub= sequent development of the law. Although LORD DEN= NING's one-third starting point was applied in many cases, there were also a number of cases in which the English courts, for a variety of reasons, refused to make use of such a starting point: see e g Potter v Potter supra per DUNN L J at 1257 F and per ORMROD L J at 1260 E;

S v S (1980) 10 Fam Law 240 (C A); Page v Page (1981) 11 Fam Law 149 (C A); and the quotations from other cases (not available to me) cited in Dillon's article in XIX (1986) CILSA at 284 note 71. Cretney op cit, in the course of a survey of the application of the one-third principle in the English courts, says the follow=ing (at 830):

> "It would thus seem to be premature to say that the one-third principle is dead although its applicability (as we shall see, already restricted to a comparatively narrow range of cases) will be even further eroded in scope."

It seems to me fair to say that LORD DENNING's attempt to establish a guideline in the form of a one-third starting point has created more problems than it resolved, and although an obituary may be inappropriate as yet, it is likely that this guideline will eventually come to nought. In our legislation the feature of overriding importance in the exercise of the court's discretion as to what proportion of assets is to be transferred in

terms of subsection (3) is the court's assessment of what would be "just", having regard to the factors mentioned specifically and to "any other factor which should in the opinion of the court be taken into account." This power has to be exercised in widely divergent circumstan= ces, as is illustrated by comparing the facts of the present case with those in the other cases decided under the new legislation and reported up to date - see Van Gysen v Van Gysen 1986 (1) S A 56 (C), MacGregor v Mac= Gregor 1986 (3) S A 644 (C), and Kroon v Kroon 1986 (4) S A 616 (C). The Legislature has seen fit to confer a wide discretion upon the courts, and the flexibility in the application of subsection (3) thus created ought not, in my judgment, to be curtailed by placing judicial glos= ses on the subsection in the form of guidelines as to the determination of what would be a just redistribution order.

In the present case, however, the arguments ad= dressed to us have raised a number of questions of principle

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relating to the interpretation and manner of application of subsections (2), (3) and (4), which require to be answered. They relate to those aspects of the provi= sions which I indicated earlier would stand over for examination. It is to these that I now turn.

The first matter I propose to discuss is the interrelationship between subsections (2) and (3). I said earlier that such an interrelationship was established by the introduction into subsection (2), in 1984, of a reference to an order under subsection (3), as one of the matters to which regard must be had in deciding upon an order in terms of subsection (2). I agree in this respect with what was said by KRIEGLER J at 180 B of his judgment. Counsel for the appellant, however, sought to place a restricted, one-sided operation on the interrelationship between the two subsections, which was based on the ab= sence in subsections (3) and (5) of any corresponding reference to an order made under subsection (2) as being

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relevant to an order in terms of subsection (3). From this it followed, so it was argued, that the court was required first to consider an appropriate order in terms of subsection (3), on its own, and only thereafter to ap= ply its mind to the possibility of making a further order in terms of subsection (2). From the judgment of KRIEGLER J it is clear that when he decided upon the sum of R150 000 to be paid in terms of subsection (3) he had already made up his mind that he would also make an order in terms of subsection (2); otherwise he might well have awarded a higher sum under subsection (3) (see at 181 G and 184 D - E). This, counsel argued, was putting the cart before the horse. Hence it was contended that the trial Judge had misdirected himself. I am unable to agree with this argument. In my opinion it ascribes to the absence of a reference in subsections (3) and (5) to subsection (2) a significance which is unwarranted. I cannot imagine that the Legislature could have intended,

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in such oblique a manner, to require the court to shut its eyes to the possibility of making an order in terms of subsection (2) when considering what order to make in terms of subsection (3). If the court should find, for whatever reason (and that there may be many valid ones cannot be doubted), that an order in terms of sub= section (2) is necessary in order to do justice between the parties, it is clear, in my view, that such an order would qualify to be taken into account under the wide terms of para (d) of subsection (5) in determining the nature or extent of a redistribution order which is to be made in terms of subsection (3). Counsel's argument would prevent the court from taking an overall view, from the outset, of how justice could best be achieved between the parties in the light of possible orders under either subsection (2) or subsection (3) or both subsections, in relation to the means and obligations, and the needs of the parties, and all the other relevant factors. In my

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opinion such a limitation on the court's exercise of its discretion in terms of the section as a whole was not intended by the Legislature and must be rejected.

Arising from and related to the interrelation= ship between subsections (2) and (3) there are two further matters which were raised in argument before us and which may conveniently be discussed at this stage. The first is the so-called "clean break" principle and the second the role of the "misconduct" of either of the parties. I shall deal with each of these matters in turn.

With regard to the "clean break" principle, a brief reference to the position in the English law might be a useful introduction to the discussion. Under the English legislation the courts were at first enjoined, broadly speaking, to exercise their powers in such a way as to place the parties as far as possible in the finan= cial position in which they would have been if the marriage had not broken down (see Cretney op cit at 760). This

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so-called "statutory objective" is a concept wholly foreign to our legislation and we must ignore it. It was abolished in England by the amending legislation of 1984, which at the same time introduced a new section (25 A) into the English Act. In terms of section 25 A it is now the duty of the English courts to consider whether it would be appropriate so to exercise their powers that the financial obligations of each party to the other will be terminated as soon after the grant of the decree of divorce as the court considers just and reasonable (see Cretney op cit at 820-1). In other words, the English legislation now seeks to foster the imposition of a "clean break" in appropriate cases (Cretney op cit at 835). Our legislation contains no corresponding provision, but in this instance I do not consider the concept underlying it to be foreign to our law. On the contrary, there is no doubt in my mind that our courts will always bear in mind the possibility

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of using their powers under the new dispensation in such a way as to achieve a complete termination of the finan= cial dependence of the one party on the other, if the circumstances permit. The last-mentioned qualification is, of course, very important; I shall return to it in a moment. The advantages of achieving a "clean break" between the parties are obvious; I do not think they need be elaborated upon. The manner of achieving such a result is, of course, by making only a redistribution order in terms of subsection (3) and no maintenance order in terms of subsection (2). What I have said earlier with regard to the court taking an overall view, from the outset, of the possibility of making an order or orders under either subsection (2) or subsection (3) or both, does not mean that the court will not consider specifi= cally the desirability in any case of making only a re= distribution order and awarding no maintenance, having regard particularly to the feasibility of following such

a course. With regard to the latter and to the quali= fication I stressed a moment ago ("if the circumstances permit"), there will no doubt be many cases in which the constraints imposed by the facts (the financial position of the parties, their respective means, obligations and needs, and other relevant factors) will not allow justice to be done between the parties by effecting a final ter= mination of the financial dependence of the one on the other. In the end everything will depend on the facts and the court's assessment of what would be just. I do not propose to take the matter further than that. In the present case, KRIEGLER J was undoubtedly alive to the possibility of making only a redistribution order: he expressly acknowledged (at 175 E) "an intention on the part of the Legislature to permit a 'settling of accounts' upon divorce - and a final one." From his judgment as a whole it is apparent, in my view, that he considered the possibility and decided against it because

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justice could not be achieved by following that course: if the appellant were ordered only to pay a capital sum to the respondent and no maintenance were to be awarded to the latter, undue hardship would have been caused, either to the appellant (because the amount of the capital to be paid would have required too onerous an encumbrance to be placed on the appellant's income-producing assets) or to the respondent (because the amount of the capital to be paid would have been too small to provide in her needs in respect of a home for herself and the children and a reasonable income for herself). In my judgment, the approach adopted by the learned trial Judge with re= gard to this aspect of the case cannot be faulted.

With regard to the role of the "misconduct" of the parties, counsel for the appellant pointed to the fact that the parties' "conduct in so far as it may be relevant to the break-down of the marriage" was mentioned in subsection (2) as one of the factors to be taken into

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account in deciding upon a maintenance order, but that there was no corresponding provision in subsections (3) and (5) in relation to a redistribution order. Counsel argued that after the introduction into our law of the "no fault" principle in regard to divorce, by the Divorce Act of 1979, the Legislature must have intended that "fault" or "misconduct" should play no role at all in connection with the making of redistribution orders in terms of subsection (3). KRIEGLER J, however, so the argument continued, in effect gave simultaneous consider= ation to both an order under subsection (2) and an order under subsection (3), and since he took the appellant's misconduct in relation to the break-down of the marriage into account in connection with subsection (2) (see at 184 F), he must perforce have done so too, albeit in= directly, in connection with subsection (3). This was not permitted by the Legislature, so it was contended, and therefore the trial Judge had misdirected himself.

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I do not agree with this argument. To the extent that KRIEGLER J may, as counsel suggested, in effect and in= directly have taken the appellant's misconduct into account in deciding upon a redistribution order, I have no doubt that he was entitled to do so by virtue of the wide import of the wording of para (d) of subsection (5), by which he was empowered to have regard to "any other factor which should in the opinion of the court be taken into account." In any event, I would go even further, and this I must say, although it is not necessary for the purposes of this case to do so, lest there be any misunderstanding about my viewpoint: in my opinion the court is entitled, in terms of the wide words of para (d) of subsection (5) that I have quoted, to take a party's misconduct into account even when only a redistribution order is being considered under subsection (3), and where no maintenance order under subsection (2) is made. But I should add at once that I am convinced that our courts

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will adopt a conservative approach in assessing a party's misconduct as a relevant factor, whether under subsection (2) or subsection (3). In this regard a brief reference to the position in the English law will be useful. At first the English legislation contained a general refer= ence to the parties' conduct as a relevant factor in the context of the "statutory objective" which I mentioned earlier (see Cretney op cit at 760). Under that dispen= sation LORD DENNING in Wachtel's case supra (at 835 j) held, to put it briefly, that only conduct which could be described as "both obvious and gross" would be taken into account. In other cases other epithets were used to describe the degree of seriousness of the misconduct which was required before it would be taken into account (see Cretney op cit at 797-8 and 802). When the "statutory objective" was abolished in 1984, the English Legislature added a further factor to the list which the courts were directed to consider in exercising their

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powers (para (g) of section 25 (1) of the English Act), reading as follows:

> "the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it."

In my view the sense of this provision reflects the man= ner in which our courts are likely to deal with the mis= conduct of the parties in assessing its relevance as a factor to be taken into consideration. In our legis= lation, as I have pointed out, the feature of overriding importance is that the court will grant such order, in respect of both subsection (2) and subsection (3), as it considers to be just. The directive of the English legislation that I have quoted is thus in accordance with the pattern of our legislation. In many, probably most, cases, both parties will be to blame, in the sense of having contributed to the break-down of the marriage (see per LORD DENNING in Wachtel's case supra at 835 g). In such cases, where there is no conspicuous disparity

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between the conduct of the one party and that of the other, our courts will not indulge in an exercise to apportion the fault of the parties, and thus nullify the advantages of the "no fault" system of divorce. But in the present case the misconduct was found to have existed on the part of the appellant only, and it was found to have been "certainly gross and prolonged". Upon that footing KRIEGLER J was fully justified in taking it into account as a relevant factor, as he did. Counsel for the appellant submitted that the orders granted were "punitive". However, KRIEGLER J expressly disavowed any intention on his part to "impose a purely penal sanction for the plaintiff's misconduct under the guise of maintenance" (at 184 E/F). It is true that the learned Judge did not indicate in precisely what manner he was giving effect to the appellant's misconduct as a relevant factor in deciding upon a figure in respect of maintenance, but in my view he was not required to do so

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and he cannot be faulted for not having done so. I cannot imagine that a court must go through a process of first fixing a particular amount that might have been appropriate in the absence of any misconduct and there= after readjusting it by means of a percentage or a spe= cific proportion because of the misconduct. There is no need to quantify, in whatever way, the weight to be accorded to each relevant factor; a mathematical approach would be out of place. In consonance with my aversion to guidelines I shall not enter into a discussion generally as to how a court could or should give effect to a finding of relevant misconduct. As it happens, however, the facts of the present case afford an excellent example of one way in which it can be done, and which, I consider, was in all probability present to the mind of the learned trial Judge. In some areas the available facts in this case do not allow of a precise assessment of the financial position in which the parties are likely to find themselves in the

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immediate or the more distant future, either because of the paucity of the information which was placed before the Court a quo, or simply because of the uncertainty as to what the future holds. Examples are: the respondent's prospects of finding employment for herself; what it would cost the respondent to acquire a reasonably comfor= table home for herself and the children (those who are staying with her and those who will come to visit); and the appellant's net available income. (These matters will be referred to again later). Both parties will inevitably suffer hardship because of the parting of their ways. In relation to the areas of uncertainty it is impossible to assess accurately the relative degrees of hardship which each of the parties will suffer, depending upon what assumptions are to be made. Where choices are to be made and decisions to be taken in the dark, as it were, and where the areas of uncertainty are not due to any remissness on the part of the respondent to place available information before the court, it would be fair, because of the appellant's misconduct, to allow the scales of justice to be tipped

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in favour of the respondent and against the appellant, rather than the reverse. So, for instance, with regard to the respondent's prospects of finding employment, one should find some balance in favour of the assumption that she will not obtain work (although not necessarily giving full effect to such assumption), for justice requires that it should be the appellant who must suffer the hard= ship of paying an additional amount of maintenance, beyond what may turn out to be strictly necessary, rather than to allow the respondent to suffer the hardship of an in= adequate income if in fact she does not find employment. I think this is probably the way in which the trial Judge approached the matter. In any event, this will be my approach when I come to look at the facts more closely later on.

I turn now to the next aspect of the legisla= tive provisions that requires examination. It is the manner in which the Legislature, in subsection (4), has

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circumscribed the nature of the contribution which the one party is required to have made to the estate of the other, as a prerequisite for the issuing of a redistri= bution order. In the argument of counsel for the appel= lant this aspect of the legislation assumed great importance. In spite of that, in the view I take of the matter, the argument on this point can be disposed of easily. It rested on the premise that under our common law the spouses owe a reciprocal duty of support to each other. Typically, it was said, it is the husband who, out of his income, provides his wife and family with sup= port, and in return, the wife's primary duty is to per= form her traditional role as wife and mother by managing the household and looking after the children of the mar= riage. So far so good. The crux of the argument then was that the Legislature could not have intended a con= tribution by either spouse, made purely in the discharge of the common law duty of support as described above, to

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qualify as a contribution which entitled the spouse making it to claim "compensation" for it in the form of a re= distribution order. Something more was required: a contribution which exceeded the bounds of the duty of support which existed ex lege, which went beyond the call of duty, as it were. Counsel conceded, on the facts of the present case, that the respondent had contributed more than had been required of her by law, but argued that the court was obliged, in considering a redistribu= tion order, to differentiate between what was legally due and what went beyond that. Putting it graphically, counsel said that the respondent was entitled to a claim in respect of the services she had rendered as a secre= tary in the appellant's business, but not in respect of the services she had rendered as a nanny looking after the children. In my opinion this argument is quite un= tenable. The simple, and also the complete, answer to it is to be found in the language of the Legislature.

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In terms of subsection (4), what is required is that the claimant for a redistribution order must have

> "contributed directly or indirectly to the maintenance or increase of the estate of the other party during the subsistence of the marriage, either by the rendering of services, or the saving of expenses which would otherwise have been incurred, or in any other manner."

In these words one searches in vain for any suggestion of a qualification of the nature of the contribution re= quired, in the sense contended for by counsel. To read the words used by the Legislature subject to the restric= tion contended for, would compel one to import into the subsection a notion which is simply not to be found there, and for the implication of which I can find no warrant whatever. Counsel relied strongly on an article by Prof J C Sonnekus, "Egskeiding en Kwantifi= sering van die Bydrae tot die Ander Gade se Boedel - Artikel 7 (3) - (5) van die Wet op Egskeidings 70 van 1979", in 103 (1986) S A L J 367. In that article Prof

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Sonnekus propounds the theory that only a contribution which exceeds that which a spouse is required to make by virtue of the common law duty of support (i e what is referred to as a "meer-bydrae") is relevant for the pur= poses of subsection (4) - see especially at 373 para 10 and 378 para 15. With respect to the learned author, I have carefully studied the arguments advanced by him in support of his theory, and having done so, I have no hesitation in firmly rejecting it. Upon analysis, the theory rests mainly on a comparison of the wording of our legislation with that of the corresponding provision in the English legislation (see the concluding portion of para 1 at the top of 368) and on some aspects of the history of our legislation (see para 12 (a) at 375-6 and paras 13 and 14 at 377-8). With regard to the English legislation, the courts are required (para (f) of sec= tion 25 (1) of the English Act) to take into account

> "the contributions which each of the parties

/has ...

> has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution by looking after the home or caring for the family."

Prof Sonnekus sees an important point of distinction in the fact that the English legislation refers specifically to contributions "to the welfare of the family, including any contribution by looking after the home or caring for the family" (in other jurisdictions, such as Australia and New Zealand, there are apparently also provisions referring specifically to homecare services as something to be looked at by the courts - see the article by Dillon in XIX (1986) CILSA at 281-2), whereas our legislature refers specifically to a contribution "to the maintenance or increase of the estate of the other party". In my opinion, however, there is no significance in the dif= ferences in wording, at all events in relation to the issue now under discussion, viz whether a contribution in the form of a discharge of the common law duty of

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support qualifies as a contribution for the purposes of subsection (4). (What effect the differences in wording may have in other directions is not a matter arising for consideration in this case - e g where despite the wife's homecare services the husband has not built up any estate and an inheritance comes his way shortly before the divorce.) Our legislation does refer specifically to contributions made "directly or indirectly .... by the rendering of services, or the saving of expenses .... or in any other manner". In my view there can be no doubt that the plain meaning of these words is so wide that they embrace the performance by the wife of her ordinary duties of "looking after the home" and "caring for the family"; by doing that, she is assuredly rendering ser= vices and saving expenses which must necessarily contri= bute indirectly to the maintenance or increase of the husband's estate. With regard to the history of our legislation, as referred to by Prof Sonnekus, I do not

/find ...

find it necessary to deal with that. It is not permis=
sible to use the reports of select committees and
kindred matters to manufacture a doubt as to the Legis=
lature's intention where none arises from the language
ultimately used by it.

Having at last completed my survey of the pro=
visions of section 7, I can now turn my attention to the
gravamen of counsel for the appellant's attack on the
judgment of KRIEGLER J. It was that the learned Judge
had not exercised his discretion properly, having regard
particularly to the cumulative effect of the redistri=
bution order and the maintenance order that he made.
On that basis it was argued that this Court was at large
to consider the matter afresh, and in doing so we were
urged to find that an order in terms of the tender made
on behalf of the appellant at the trial would meet the
demands of justice (i e for the payment of R125 000, with
interest, in instalments - sèe the judgment of KRIEGLER J at

173 E). In arguing that the trial Judge had not exer= cised his discretion properly, counsel relied mainly on certain aspects of the evidence pertaining to the respon= dent's needs in respect of maintenance, and also on the evidence relating to the appellant's net income. I shall deal with these matters presently. It will be convenient first to say something about the award of R150 000 made by the trial Judge by way of a redistribu= tion order.

Counsel for the appellant, wisely in my view, did not contend that the order for the payment of R150 000, standing by itself, was assailable. KRIEGLER J found that the respondent's contribution to the maintenance and increase of the appellant's estate had been substantial, and (at 178 I) that:

> "Justice and equity clearly dictate that such contribution should be acknowledged in a substantial redistribution order."

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These findings cannot be faulted. Nor was it suggested that the amount awarded did not properly take into account "the existing means and obligations of the parties", in terms of para (a) of subsection (5), or that any other relevant factor had been overlooked. Although the use by the trial Judge of LORD DENNING's one-third "starting point" was criticised, counsel did not argue that its use had, on the facts of the present case, by itself led to an unacceptable result. In this respect, too, I consider that counsel's attitude was correct. I referred earlier to the fate of the one-third approach in the English law. At this stage I would say a brief word about the merits of that approach, which commended it= self to KRIEGLER J, inter alia by virtue of the "logic" and the "sound common sense" displayed by LORD DENNING in his exposition of it in the passage from Wachtel's case quoted at 180 E - 181 F. With respect, I do not share KRIEGLER J's enthusiasm for the one-third starting

point. LORD DENNING thought that the courts could not "operate in a void", and that "a start has to be made somewhere". I do not see any real difficulty in starting with a clean slate, then filling in the void by looking at all the relevant facts and working through all the relevant considerations, and finally exercising a discretion as to what would be just, completely unfet= tered by any starting point. In any event it is an illusion to think that a one-third starting point will make the task of the courts easier, as the experience of the English courts has shown. In my opinion our courts can do without any starting points.

With regard to the order for maintenance made by the trial Judge (R700 per month), counsel for the appellant argued that the respondent's reasonable needs had been over-estimated. In this connection various points were raised, bearing on some of the considerations mentioned in subsection (2) as relevant factors to be

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taken into account. First, it was submitted that the trial Judge had not afforded sufficient (if any) weight to the respondent's earning capacity. Counsel pointed to a passage in the cross-examination of the respondent, in which she agreed with the proposition put to her, that she should be able, "sometime in the future", to "get a job even in Oudtshoorn", at a salary of about R350 per month. With this answer must be contrasted, how= ever, the evidence she had given in chief concerning her unsuccessful attempts to find employment. She said that she had tried at at least seven places to find work, but that she had found that there was no work available. On the whole of her evidence it seems to me to be quite un= certain whether or not she will be able to find employ= ment. On the basis explained earlier, I would to some extent allow the benefit of the doubt to operate in her favour, rather than the appellant's. Accordingly, I am not prepared to differ from the trial Judge's finding

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(at 184 F) that the respondent's "earning capacity, if anything, is humble". Then it was submitted that the trial Judge had lost sight of the fact that if the respon= dent acquired a home, the rental of the flat (R290 per month) had to be deducted from the figure of R1 400 per month, accepted as representing her reasonable needs. I do not think that the learned Judge overlooked that. In any event, the respondent would require the means to pay the rates and taxes for the house and to provide for its upkeep. Then it was said that if the respondent used a reasonable portion of the sum of R150 000 that she is to receive, for the purpose of acquiring a house, a substantial part of the money would be left over for investment, which would provide the respondent with a fair income. The difficulty I have with this argument is that it is quite impossible, on the basis of the evi= dence led at the trial, to assess what it would cost the respondent to acquire a reasonably comfortable home in

Oudtshoorn for herself and the children, with the result that it is also impossible to assess what return she could expect to receive from an investment of the balance of the money. Accordingly I am not prepared to differ from the conclusion of the trial Judge (at 184 H) that the respondent will be "hard-pressed" to maintain the home "on the income she can earn by working, even if some return is added on the basis that she invests some of the capital." It was argued further that the trial judge had erred in not giving effect to the fact that the standard of living of the parties was "not particu= larly high", because "that was due to the parsimonious regime imposed" by the appellant (at 184 F/G). I do not agree that the learned Judge erred in this regard. The appellant had reaped the benefits of the frugal stan= dard of living to which the respondent was subjected while the marriage lasted; now that he has caused it to break down, he cannot claim to continue reaping the

/benefits ...

benefits by expecting the respondent to adhere to "the parsimonious regime" that he had imposed.

The main argument on behalf of the appellant on this aspect of the case was that the trial Judge had failed to take into account properly the appellant's means and his financial obligations, and in the result, by combining the redistribution order with the maintenance order, had placed an intolerably heavy burden on the ap= pellant. His counsel calculated that the appellant's liability for interest on a mortgage bond in respect of the sum of R150 000, at the rate prevailing at the time of the trial, would be some R2 678 per month. He has to pay maintenance for the two younger children in a total sum of R500 per month. In addition he must main= tain the elder daughter, Michelle; counsel estimated his liability in that regard to be R400 per month. His total commitments in respect of interest and maintenance for the children thus approach about R3 600 per month.

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As against that, counsel argued, the trial Judge accepted that the appellant's taxable annual income was R57 000, or R36 000 after tax, giving him a net income of R3 000 per month. Hence it was submitted that the appellant would be unable to comply with the orders made by the trial Judge. At first sight there appears to be force in this argument, but upon analysis I do not consider that it can be sustained. The major flaw in it is the assumption that the appellant's net available income is R3 000 per month. Although the trial Judge referred without comment to the fact that the appellant had re= turned a taxable income of R57 000 for the year ended February 1983 (at 178 F/G) and said that his after-tax income would be "not less" than about R36 000 per year or R3 000 per month (at 184 I), I am not at all sure that the learned Judge really accepted these figures to be correct. He certainly made no positive finding in that regard. The record shows that there was no evidence

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to substantiate the correctness of these figures. It appears that the figure of R57 000 as the appellant's taxable income for the year ended February 1983 emanated from the documents discovered by the appellant, and that it was used by the respondent's counsel in cross-examining the appellant. The relevant passage in the cross-exami= nation reads as follows:

> "In fact in 1983, if I am correct, your taxable income was R57 000, R57 924. --- 83.
>
> For the tax year ended 1983, yes. --- What is the figure you have got here. There is some dispute about that, we have not actually finalised our (Mr Lapidos intervenes).
>
> R57 924. --- We have actually not fina= lised that. I want to still go and check it all out.
>
> Can you tell us what the correct figure is then? --- I do not know, I have not had the opportunity to do it. To study the whole thing.
>
> You must have an idea of what you earned. --- No, it is very difficult. I work and that is it, I do not worry about how much I earn.
>
> You have no idea how much you earn. --- No, it is not of consequence.
>
> So when you were giving her R100 a week,

it might have been 1% of your income or it might have been 80% of your income. --- Precisely.

You have no idea. --- No."

It is evident that the appellant was most evasive about his income, and in fact declined to confirm the correct= ness of the figure of R57 000. A further passage in his cross-examination reads as follows:

"Now, according to your 1983 return.

COURT: February 1983?

MR LAPIDOS: February 1983, M'Lord. --- Yes.

Your total sales were R251 970. --- That is correct. I have been very fortunate, we had a fantastic year.

COURT: The figure is?

MR LAPIDOS: R251 970 M'Lord. That was a record of year? --- That is the best, yes, the best we have had. Everything seemed to go right.

For February 1982 your sales were R167 439. 1981 R37 798. --- Something like that, yes.

So there has been, you would agree, a marked improvement in your business since 1981. --- Very much so, yes.

Now we do not have your 1984 balance sheet because that has not been prepared I understand. How would you estimate 1984

/compared ...

compared with the year ending. --- Very simi=
lar to last year I should think as an average.
Another record year. --- Yes, we had a
very good year."

With such a huge turnover as admitted by the appellant, the taxable income figure of R57 000 cannot be accepted as a true reflection of his real income, in the absence of evi=dence on the point. Moreover, not a word was said by the appellant about his net income for the years ended Feb=ruary 1984 and February 1985. The probabilities are over=whelming that his net available income at the time of the trial was very substantially in excess of the figure of R3 000 per month. It is obvious from the appellant's evi=dence on the record that his modus operandi was to plough back every available cent into his business, expanding it whenever possible by acquiring additional motor vehicles and tractors, fixed properties, planting more trees, and so forth. Not long before the trial he had purchased an additional property at Brits for R80 000, which he paid

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in cash. It is fair to assume that the appellant derived very substantial tax benefits from the way in which he ploughed back his income into his business. Furthermore, the appellant had tendered to pay to the respondent the sum of R125 000 in three annual instalments, with interest at 18% per annum. Counsel for the respondent pointed out (and this was not challenged) that the appellant's offer involved a total outlay by him, in the first year, of R64 000, which is more than R5 000 per month. There is no reason to think that the appellant was daunted by this prospect. On all the evidence, I do not believe that the appellant's net available income is only R3 000 per month. I am satisfied, on the probabilities, that it is very much in excess of that sum.

It is not possible to say with any accuracy what the appellant's net available income is, but the uncertainty in that regard is entirely due to the ap= pellant's own fault. He was not open with the Court

a quo. After he had first given evidence, his counsel at the trial (who was not the counsel representing him in this appeal) closed his case, subject to the reserva= tion of his right to lead evidence in rebuttal in respect of the respondent's counterclaim, after the respondent had closed her case. When the respondent had given her evidence and closed her case, the appellant's counsel informed the trial Judge that he was not going to lead any evidence in rebuttal. But at that stage it was perfectly clear to the appellant what the respondent was claiming. She had testified about her requirements by way of maintenance from the appellant, and she had made it clear that she claimed a sum of R175 000 by way of a redistribution order. She had placed before the Court a quo such information as she was able to, with regard to the appellant's financial position. Yet he preferred not to go into the witness stand to answer the respondent's case. There was no evidence from him

/that ...

that he would not be able to comply with the respondent's demands, nor even any suggestion that he would find it difficult to meet them. The suggestion that that might be the case was no more than a submission, unsupported by any evidence, made by his counsel in this appeal. For the reasons given, the submission is rejected. I should add that if the appellant should have problems in com= plying with the orders of the Court a quo by using only his available income, there is no reason why he should not dispose of some of his assets in order to meet his obligations, for he can do so without harming his income-producing business. It appears from the evidence that the appellant is not using all of the land he has at Brits for the purposes of his business; he can sell off whatever he does not need. He can also realise his share in the property at Mossel Bay. This will not result in undue hardship to him. It must be borne in mind that the orders of the Court a quo allow the appellant to retain

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the erstwhile matrimonial home, with the valuable business on the property, from which the appellant will continue to derive an excellent income. The respondent, on the other hand, can reasonably claim to be put in a position enabling her to acquire a home for herself and the children, and to have an income from which to support herself.

In the result, it has not been shown that the trial Judge had misdirected himself in any way, or that he has failed to exercise his discretion properly, in the manner contended for on behalf of the appellant, or in any other manner.

Counsel for the appellant went to much trouble to put before us alternative orders that could be made, which, it was contended, would not be as hard on the appellant as the present orders, while still being fair to the respondent. I do not find it necessary to deal with counsel's proposals, which involved, inter alia, the payment of a capital sum in instalments, instead of in

a lump sum. The discretion to be exercised was vested in the trial Judge. When once it is found, as I have done, that he had not misdirected himself, and that he had not exercised his discretion improperly, the room for this Court to interfere with the result arrived at by him, is very limited indeed. That is always the case when the exercise of a discretion is involved. In the particular context with which we are concerned here, I would quote the following passage from the judgment of ORMROD L J in Preston v Preston 1982 Fam 17 (C A) at 29, where he approved of what had been said in an earlier case:

> "We are here concerned with a judicial discretion, and it is of the essence of such a discretion that on the same evidence two different minds might reach widely different decisions without either being appealable. It is only where the decision exceeds the generous ambit within which reasonable dis= agreement is possible, and is, in fact, plainly wrong, that an appellate body is entitled to interfere."

/In ...

In my judgment, there are no grounds in the present case upon which this Court could interfere with the orders made by the Court a quo.

Due to temporary indisposition, my colleague JACOBS is unable to participate in the delivery of this judgment. The views he expressed during our deliberations after the hearing of the appeal accorded with the result arrived at in this judgment, and also with its general tenor. In terms of section 12 (3) of the Supreme Court Act, 1959, this judgment is the judgment of the Court.

The appeal is dismissed, with costs.

A.S. BOTHA JA

TRENGOVE JA

VILJOEN JA CONCUR

BOSHOFF AJA