IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

SYDNEY JACOB SCHWARTZ ..... appellant

and

GLADYS SCHWARTZ ..... respondent

Coram: CORBETT, KOTZÉ et JOUBERT, JJA

DATE OF APPEAL: 21 May 1984

DATE OF JUDGMENT: 17 August 1984

J U D G M E N T

CORBETT JA:

In some respects the facts of this case bring to mind the words of the poet –

/ "How.....

"How happy could I be with either,
Were t'other dear charmer away!"

The appellant and his wife, the respondent, were married in community of property on 18 December 1960. At the time appellant was a medical student at Pretoria University and respondent was a pharmacy student at the Johannesburg Technical College. After the marriage respondent gave up her studies in order to find employment so that she could support herself and her husband, while he continued with his medical studies. Out of her earnings she in fact partly paid for his studies. The appellant passed his final examinations in June 1967. In about 1969 he commenced private practice as a medical practitioner, on his own, in Krugersdorp, Transvaal. He and the respondent established a home there.

From the start respondent worked for appellant. She handled the financial side and general administration

/ of.....

of the practice. This included keeping the books and preparing annual financial statements. The practice was in a sense a joint venture. They watched it grow together and gained much satisfaction from the fact that it prospered. The extent to which it prospered may be roughly gauged from the fact that during the divorce trial, which later ensued, respondent stated that appellant was earning about R10 000 per month from his practice. This statement was not challenged or denied.

Until about 1977 the parties appear to have been a reasonably happily married couple. They had two children, both daughters. The elder was born in February 1967, just before the completion of appellant's medical studies. The younger was born about 2 years later. Appellant and respondent were both very devoted to their children.

Apart from the fact that they worked together

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in the practice, appellant and respondent had certain interests in common. They were both fond of music and interested in art. Over the years they together had purchased a number of paintings by South African artists, which at the time of the divorce trial were estimated by appellant to be worth about R80 000. The overall impression is one of a placidly happy and contended relationship. It subsequently transpired that marital fidelity was not appellant's strong point. He had had several affairs with nurses and nursing sisters. These were each of short duration. At the trial appellant alleged that his wife had known about these affairs. She denied this, but said that in any event —

> ".... those little things would not have worried me because I loved my husband very much and was prepared to forgive and forget."

In the beginning of 1977 (or it might have been at

/ the.....

the end of 1976) an event occurred which was later to shake the marriage to its very foundations: the appellant met a Miss M Lintvelt. Miss Lintvelt was at the time a teacher at the school attended by appellant's daughters. She was about 20 years younger than the appellant. The circumstances of the meeting are not important. Appellant continued to meet her, send her flowers and so forth. He fell in love with her and she apparently (she did not give evidence at the trial) with him. There then commenced a liaison of a more lasting character.

Respondent became aware of the relationship between appellant and Miss Lintvelt as a result of an anonymous telephone call. She confronted the appellant with the information which she had received. He initially denied that there was such a relationship, but later she found them together at a rugby match. There was another confrontation at a hair-

/ dressing.....

dressing salon. Not unexpectedly this liaison led to accusations, arguments and unhappiness as far as the parties were concerned.

In due course respondent instituted an action against Miss Lintvelt for damages for alienation of her husband's affections. The case came to court early in 1980, but the evidence does not reveal what the outcome of the action was. In the meanwhile and in 1978 appellant had commenced a divorce action against respondent. It does not appear upon what his cause of action was based, but it is clear that the action was brought in terms of the law relating to divorce as it was prior to the commencement (on 1 July 1979) of the Divorce Act 70 of 1979 ("the Act"). Despite the institution of this action and despite his relationship with Miss Lintvelt, the appellant continued to live in the common home until September 1979. He then left and

/ went.....

went to live with Miss Lintvelt in a flat in Krugersdorp.

The divorce action instituted by appellant in 1978 does not seem to have been prosecuted with any vigour or enthusiasm. Appellant was advised that "the chances were not so good in getting a divorce". In October 1981 Miss Lintvelt left on a holiday visit to the Far East. She did so without informing appellant of the trip. He was very upset and surprised when he discovered that she was missing. His immediate reaction was to return home to seek the comfort of his family. He slept there for two nights. He was then able to make contact with Miss Lintvelt and spoke to her (presumably by telephone) every day. He returned to his flat. Miss Lintvelt was away for about 25 days. On her return she and the appellant resumed cohabitation in the flat. Shortly after her return appellant withdrew the divorce action instituted in 1978 and commenced a fresh action, this time in terms of the Act.

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In paragraph 6 of his particulars of claim the appellant alleged the following (he and respondent being referred to as "plaintiff" and "defendant" respectively):

> "The marriage relationship between the parties has irretrievably broken down since it has reached such a state of disintegration that there is no reasonable prospect of the restoration of a normal marriage relationship between them, in that:
>
> (a) Defendant acted as follows:
>
> (i) She was quarrelsome, moody and domineering towards Plaintiff;
>
> (ii) She criticised Plaintiff.
>
> (iii) On several occasions she threatened to leave Plaintiff.
>
> (iv) On several occasions she threatened to commit suicide knowing that such a threat would distress Plaintiff.
>
> (v) She drove Plaintiff from the common household of the parties and on the 15th November 1977 Plaintiff left the common household of the parties.
>
> (vi) She conducted a war of nerves with Plaintiff and destroyed him psychologically.

/ (vii) There.....

(vii) There was no communication or sexual intercourse between the parties for a considerable period.

(viii) She assaulted Plaintiff.

(ix) She was untidy in her appearance and neglected to improve her appearance resulting in Plaintiff losing interest in her.

(x) She poisoned the children's minds against Plaintiff.

(xi) Since September 1979 to date hereof, the Plaintiff has been living in adultery with a certain Miss M. Lintvelt.

(b) The parties have lost their affection and respect for one another."

In pleading to this paragraph respondent admitted that the marriage relationship between the parties had broken down, but denied that such breakdown was irretrievable and that there was no reasonable prospect of the restoration of a normal marriage relationship between the parties. Respondent also pleaded specifically to the allegations contained in sub-paragraphs (a) and (b), but it is not necessary to quote

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this portion of the plea. At the trial appellant did not attempt to substantiate the allegations contained in these sub-paragraphs, save that he testified (and this was indeed common cause) that in September 1979 he left the common home and commenced living in adultery with Miss Lintvelt and that there had been no sexual intercourse between himself and respondent as from that date.

The matter came to trial before THERON J in the Transvaal Provincial Division in August 1982. At the trial the only witnesses were appellant and respondent. In a reserved judgment (delivered in November 1982) the trial Judge summed up his views and findings as follows:

> "Briefly the history of this marriage is that throughout defendant has sacrificed: at first she gave up her studies and accepted employment in order to pay for plaintiff's studies, she put him through University.
>
> / Thereafter.....

Thereafter she helped him build up his substantial practice and joint estate.

Defendant is genuinely in love with the plaintiff. Previous adultery admitted by him she has condoned. She is now prepared to forgive his present adultery with Miss Lintvelt, a young woman of 20 years younger than the plaintiff.

From the evidence there can be no doubt that before the intrusion of Miss Lintvelt the parties lived a normal happy married life. Even after his infatuation with Lintvelt he did not break off total connection with the defendant.

He has some of his clothes in her house, expensive articles of art such as paintings purchased subsequent to September 1979 he has placed in her house. She has been nursing his sick parents at her house and he paid frequent visits there. She has throughout been working in his consulting rooms and they are still in daily contact. When in need of support and advice he turns to the defendant.

They have in common their religion, love for art especially paintings and music. They have their two young daughters who are to a degree a bond

/ between.....

between them. He expects her from time to time to meet him at clinics and when on the odd occasion she is delayed and arrives late, he becomes upset.

He now stated that he loves Miss Lintvelt and wishes to marry her. When he reached the stage of stating that he no longer loved the defendant he was most unconvincing, almost apologetic in saying so. Quite clearly he is passing through a period of uncertainty, in stating his case on paper he made substantial allegations which he was unable to prove.

The defendant impressed me as a dutiful, sincere person, deeply in love with a man who perhaps does not deserve it. His behaviour in Court both in the witness box and while sitting in Court was an indication of abject misery with no true desire of breaking total relation with the defendant.

The onus being upon plaintiff to establish that the marriage has been irretrievably broken down, he has failed to establish his case."

S 3 of the Act provides that —

"A marriage may be dissolved by a court by a decree of divorce and the only grounds on which such a decree may be granted are —

/ (a) the.....

(a) the irretrievable break-down of the marriage as contemplated in section 4;

(b) the mental illness or the continuous unconsciousness, as contemplated in section 5, of a party to the marriage."

The ground upon which a decree of divorce was claimed by appellant in this case is that stated in s 3(a) above.

This is amplified in s 4 of the Act in the following terms:-

"(1) A court may grant a decree of divorce on the ground of the irretrievable break-down of a marriage if it is satisfied that the marriage relationship between the parties to the marriage has reached such a state of disintegration that there is no reasonable prospect of the restoration of a normal marriage relationship between them.

(2) Subject to the provisions of subsection (1), and without excluding any facts or circumstances which may be indicative of the irretrievable break-down of a marriage, the court may accept evidence —

(a) that the parties have not lived together as husband and wife for a continuous period of at least one year immediately prior to the date of the institution of the divorce action;

/ (b) that.....

(b) that the defendant has committed adultery and that the plaintiff finds it irreconcilable with a continued marriage relationship; or

(c) that the defendant has in terms of a sentence of a court been declared an habitual criminal and is undergoing imprisonment as a result of such sentence,

as proof of the irretrievable break-down of a marriage.

(3) If it appears to the court that there is a reasonable possibility that the parties may become reconciled through marriage counsel, treatment or reflection, the court may postpone the proceedings in order that the parties may attempt a reconciliation.

(4) Where a divorce action which is not defended is postponed in terms of sub-section (3), the court may direct that the action be tried de novo, on the date of resumption thereof, by any other judge of the court concerned."

As is apparent from a reading of the above-quoted sections, the Act has fundamentally changed our divorce law in regard to the grounds upon which a marriage may be

dissolved by a decree of divorce. Prior to the commencement of the Act, the only grounds at common law upon which a court could pronounce a decree of divorce at the instance of one of the parties to the marriage (the plaintiff) were that the other party (the defendant) had either committed adultery or maliciously deserted the plaintiff. (Possibly also on the ground that the defendant had been convicted of a crime and sentenced to life imprisonment, but there was some uncertainty about this: see Hahlo, The South African Law of Husband and Wife, 4th ed., pp 398-9.) Adultery and malicious desertion constituted a breach by the defendant of his marital obligations. Thus, apart from the possible exception of life imprisonment, entitlement to divorce was based on fault: the fault of the defendant. In 1935 the Legislature added two further grounds of divorce, viz. the incurable insanity of the defendant and the imprisonment of the defendant for five years after having

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been declared an habitual criminal (see Act 32 of 1935, s 1(1)). S 3(a) of the Act, read with s 4, introduces a "no-fault" criterion for the grant of a decree of divorce, viz. irretrievable break-down of the marriage. The court may grant a decree of divorce on this ground if it is satisfied, as an objective fact, that the marriage relationship between the parties to the marriage has reached such a state of disintegration that there is no reasonable prospect of the restoration of a normal marriage relationship between them. S 4(2) specifies certain facts or circumstances which the court may accept as proof of the irretrievable break-down of a marriage, but the subsection makes it clear that this list does not exclude any other facts or circumstances which may be indicative of the irretrievable break-down of the marriage.

The Act also places emphasis on the possibility of reconciliation. S 4(3) provides that if it appears to the court that there is a reasonable possibility that

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the parties may become reconciled through marriage counsel, treatment or reflection, it may postpone the proceedings in order that the parties may attempt a reconciliation. And s 4(4) contains certain procedural provisions where an undefended divorce action is postponed for this purpose.

It was submitted by respondent's counsel that s 4(1) confers a discretion on the court; and that inasmuch as the Court a quo exercised a discretion in reaching the decision it did, this Court should not readily interfere with the exercise of that discretion. Reference was made in this connection to the decision of the Full Bench of the Orange Free State Provincial Division in the case of Smit v Smit, 1982 (4) SA 34 (O).

The submission is, in my opinion, not well-founded. In the first place, I am not convinced that s 4(1) does confer upon the court the kind of discretion contemplated by counsel's submission. It is true that s 4(1) is couched

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in permissive terms. It provides that a court "may grant a decree of divorce" (Afrikaans text: "kan 'n egskeidingsbevel ..... verleen"). It does not necessarily follow, however, that the Legislature intended to confer a discretion on the court. S 4(1) is clearly an empowering section; it confers legislatively a power which the court did not previously enjoy. A statutory enactment conferring a power in permissive language may nevertheless have to be construed as making it the duty of the person or authority in whom the power is reposed to exercise that power when the conditions prescribed as justifying its exercise have been satisfied. Whether an enactment should be so construed depends on, inter alia, the language in which it is couched, the context in which it appears, the general scope and object of the legislation, the nature of the thing empowered to be done and the person or persons for whose benefit the power is to be exercised. (See generally Noble and

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Barbour v South African Railways and Harbours, 1922 AD 527, at pp 539-40, citing Julius v The Bishop of Oxford, (1880) 5 AC 214; South African Railways v New Silverton Estate, Ltd, 1946 AD 830, at p 842; CIR v King, 1947 (2) SA 196 (A), at pp 209-10; South African Railways and Harbours v Transvaal Consolidated Land and Exploration Co Ltd, 1961 (2) SA 467 (A), at pp 478-80, 502-4.) As was pointed out in the Noble and Barbour case (supra), this does not involve reading the word "may" as meaning "must". As long as the English language retains its meaning "may" can never be equivalent to "must". It is a question whether the grant of the permissive power also imports an obligation in certain circumstances to use the power.

S 4(1) empowers the court to grant a decree of divorce on the ground of the irretrievable break-down of the marriage "if it is satisfied that....."; and then follows

/ a specified.....

a specified state of affairs which is in effect the statutory definition of irretrievable break-down. Clearly satisfaction that this state of affairs exists is a necessary prerequisite to the exercise by the court of its power to grant a decree of divorce on this ground. But once the court is so satisfied, can it, in its discretion, withhold or grant a decree of divorce? It is difficult to visualize on what grounds a court, so satisfied, could withhold a decree of divorce. Moreover, had it been intended by the Legislature that the court, in such circumstances, would have a residual power to withhold a decree of divorce, one would have expected to find in the enactment some more specific indication of this intent and of the grounds upon which this court might exercise its powers adversely to the plaintiff. In Smit's case (supra) it seems to be suggested that, notwithstanding the fact that a marriage has broken down irretrievably, the court may refuse a decree of divorce

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in order to exercise the power granted to it in terms of s 4(3) of the Act, ie to postpone the proceedings in order that the parties may attempt a reconciliation (see p 41 H to 42 A). The pre-requisite to the exercise of the power contained in s 4(3) is that it must appear to the court that there is a reasonable possibility that the parties may become reconciled through marriage counsel, treatment or reflection. If there is this reasonable possibility, can it be said that the marriage has broken down irretrievably? And conversely if the marriage is found to have broken down irretrievably, can such a reasonable possibility exist? It seems to me that there is much to be said for the view that these concepts, ie irretrievable break-down and the reasonable possibility of reconciliation, are mutually contradictory and that the existence of the power conferred by s 4(3) does not necessarily indicate a residual discretion vested in the court by s 4(1).

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In Smit's case (supra, at p 42A) s 6(1) is also referred to, apparently in support of the thesis that the court enjoys a discretion under s 4(1). S 6(1) provides that a decree of divorce "shall not be granted" until the court is satisfied that the provisions made or contemplated with regard to the welfare of any minor or dependent child of the marriage are satisfactory or are the best that can be effected in the circumstances. And in order to satisfy itself in this regard the court is empowered by s 6(2) to cause any investigation which it may deem necessary to be carried out. S 6(1) thus requires, in imperative terms, that the court should be satisfied in regard to these matters concerning minor or dependent children before it grants a decree of divorce. The power of the court to grant a decree of divorce on the ground of irretrievable break-down of the marriage (and on the other grounds stated in s 3) is thus qualified, or made subject to, the court being satisfied as to the

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matters referred to in s 6(1); but I do not read s 6(1) as conferring, or substantiating the existence of, a discretion under s 4(1).

It is not necessary, however, to decide the question as to whether the court enjoys a discretion under s 4(1) since the point does not really arise in this case. Although the trial Judge did not refer specifically to the provisions of ss 3 and 4 of the Act, as I read his judgment, he found that there had not been an irretrievable break-down in the marriage, or at any rate that irretrievable break-down had not been proved. The necessary pre-requisite to the exercise of the court's power to grant a decree of divorce was, therefore, absent. There was no question of the court having found irretrievable break-down, exercising a discretion. For this reason alone counsel's submission is ill-founded.

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The main issue on appeal was whether the trial Judge's finding in regard to irretrievable break-down was justified by the evidence. In determining whether a marriage has reached such a state of disintegration that there is no reasonable prospect of the restoration of a normal marriage relationship between the parties it is important to have regard to what has happened in the past, ie the history of the relationship up to the date of trial, and also to the present attitude of the parties to the marriage relationship as revealed by the evidence at the trial.

As I have already indicated, in the present case the parties lived in reasonable amity until the appellant met and fell in love with Miss Lintvelt. The liaison with Miss Lintvelt had been in existence for about 5½ years by the time that the case came to trial. For the latter approximately three years appellant and respondent had not lived together as husband and wife. In fact during this time appellant and Miss Lintvelt had been living together as man and wife in a home established by them, initially in a flat

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and later in a house. At the time of the institution of the divorce action appellant and respondent had been living apart for over two years.

Prima facie, and having regard to the provisions of s 4(2)(a) of the Act (quoted above), these facts would seem to indicate an irretrievable break-down of the marriage. The evidence of the parties in regard to their attitude to the marriage relationship may be summed up as follows. The appellant stated that he wanted to have his marriage with respondent dissolved so that he and Miss Lintvelt could marry. His marriage with respondent had been an "average" one and in this connection he referred to his extramarital affairs. He still admired and respected the respondent - he regarded her as "a good woman" and a "true and supporting wife" - but he did not have for her the love which he had for Miss Lintvelt. Since meeting

/Miss....

Miss Lintvelt he had had no other affairs. As he put it -

> "When Miss Lintvelt appeared, and she has - I found love in this woman which I would not find anywhere else".

He was not in love with respondent any more. Appellant mentioned a number of factors which militated against the relationship with Miss Lintvelt and against divorce - the religious difference between Miss Lintvelt and himself (he being Jewish and she not), his dislike of hurting his wife and upsetting the children, the attitude of friends, associates and ministers of religion, who advised him to give up the relationship with Miss Lintvelt, the fact that after the divorce he would no longer have the efficient services of respondent in the practice and the opposition of members of his family, his brothers, his sister, his children, to his divorce - but stated that he was nevertheless resolved to go ahead. He said —

/ "It always.....

> "It always boils down to the same thing. I do not want to lose this other female's love."

He would be very despondent and upset and emotionally disturbed were his relationship with Miss Lintvelt to be terminated. At a certain stage during his relationship with Miss Lintvelt appellant consulted a certain clinical psychologist and put his problems to him. Subsequently he and his wife had interviews with a marriage guidance counsellor. At certain of these interviews their children were also present. He regarded the interviews more as an opportunity to explain to respondent and the children what his attitude was and what the consequences of a divorce would be rather than an attempt at reconciliation. It was put to appellant in cross-examination that he was "a man torn between two loyalties", to which he replied —

> "Well, I would not be human if I would not be torn between two duties. But then I have to go for the one that I want most...." .

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It was suggested, in cross-examination of the appellant and in the evidence of respondent, that in pursuing his action for divorce appellant was acting under pressure from Miss Lintvelt: that he was not acting as a free agent in the matter. Appellant admitted that, like he, Miss Lintvelt was keen to get married, but he denied that she had any additional "hold" over him. There were references, from respondent's side, to an operation which appellant was alleged to have performed on Miss Lintvelt early in 1977 (the insinuation being that there was something improper about it), but nothing in this regard was substantiated.

It was also put to appellant in cross-examination that he had not been acting like a man who really wanted a divorce. In this connection several points were canvassed. Firstly, it appeared that shortly prior to the trial there had been far more communication between the parties than had previously been the case. Appellant had

/ visited.....

visited respondent and the children at their home and there had been more conversation and discussion than usual between himself and respondent at the consulting rooms. He conceded that in the week prior to the trial he had visited the family home on five nights. Appellant explained that at work he and respondent did have discussions about the divorce and that, because respondent would no longer be working for him in the event of a divorce, it was necessary to discuss matters concerning the practice. He visited the home to see the children and discuss matters with them. He wished to be on more friendly terms with his wife.

Secondly, appellant was taxed with having shortly before the trial put out feelers for a postponement of the case for some months. His evidence - and that of respondent - on this issue is not very clear, but what it seems to amount to is that a postponement was thought desirable in the interests of the children, who were writing school examinations.

/ Nevertheless.....

Nevertheless, appellant appears to have suggested a post-ponement on condition that respondent "gave" him a divorce at the end of the year. This was not acceptable to her.

Thirdly, appellant conceded that on the morning of the first day of the trial he said to her that if the action succeeded and an order of divorce was granted, she could appeal. He explained that respondent had been begging him to postpone the case, in the interests of the children, and he then said:

> "Well, that is one thing, I suppose, that you have got on your side. You can appeal."

Respondent, in her evidence gave a different version:

> "This morning he made me promise that if the decision of the judge was to grant a divorce, I would appeal and he said, if the appeal was not accepted and they granted a divorce, I must give him two weeks. If he told me he would not get married in these two weeks and he came back we could start from scratch again."

/ Under.....

Under cross-examination, however, this version changed somewhat. Respondent later alleged that appellant said —

> "Gladys, don't be upset. I have got to say it. I am coming home. I want to come home, appeal".

I detect a measure of wishful thinking in this and certain other portions of respondent's evidence.

Fourthly, appellant conceded that if Miss Lintvelt were to be killed ("disappear in tragic circumstances") he would come home, but would live a life which could not be described as a normal marriage. It would be a relationship where he would go his own way:

> "I would not have to explain my whereabouts and wouldn't have all that family tie and the common bedroom".

Fifthly, appellant was taxed with the fact that certain of his clothes were still in the common home. He

/ explained.....

explained that whenever he tried to remove them there was a "violent eruption".

Respondent's attitude, as revealed by her evidence, was a simple one: she wished, despite everything, to preserve her marriage with appellant. She still loved the appellant "very, very much"; she was totally dependent on the appellant and he on her. She did not believe appellant when he said that he loved Miss Lintvelt and no longer loved her. He was "just saying so because he has to say it". Prior to the advent of Miss Lintvelt the marriage had been "very good and happy". They lived in harmony, were reliant on each other and did everything together. As I have indicated, respondent brushed aside appellant's extra-marital affairs. She accepted that as long as Miss Lintvelt was "alive and well" the chances of appellant returning to her were remote, "until she leaves him". She felt that if appellant were not granted a divorce, Miss Lintvelt would be "out of the picture". She (Miss Lintvelt) was looking for security

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and wanted to get married. She would disappear if she failed to achieve such security.

There is no doubt that respondent's steadfast devotion to her errant husband and her firm determination to preserve the marriage, in so far as it is in her power to do so, are wholly admirable. And, as the trial Judge remarked, possibly the appellant does not deserve her love. His conduct does not evoke admiration. Even before meeting Miss Lintvelt he was something of a philanderer and he does not seem to have shown much remorse over his extra-marital affairs. Nor does he appear to have looked at the problem of his relationship with Miss Lintvelt from anything other than his own selfish point of view. Nevertheless, as I apprehend the position, moral rights and wrongs are not the issue. The question is whether the marriage between appellant and respondent has reached such a state of disintegration that

there is no reasonable prospect of the restoration of a normal marriage relationship between them. Looking at the facts objectively I am of the opinion that the question must be answered in the affirmative. At the time of the trial the parties had been living apart for three years and the relationship between appellant and Miss Lintvelt had been in existence for five-and-a-half years. Appellant evinced at the trial a determination to obtain a divorce, if possible, and to marry Miss Lintvelt. The suggestion that he was being coerced into this attitude and was not a free agent - an issue upon which the Court a quo made no definite finding - seems far-fetched and contrary to the probabilities. There is no doubt that irretrievable break-down can come about as a result of the conduct and attitude of one of the parties to a marriage, and despite the wish of the other to perpetuate a marriage relationship (see eg. Kruger v Kruger,

/ 1980.....

1980 (3) SA 283 (O)); and it seems to me that this is such a case.

The trial Judge found that the appellant was "passing through a period of uncertainty" and that his behaviour in Court was "an indication of abject misery with no true desire of breaking total relation with the defendant (respondent)". It is not clear what the basis for these findings was. The learned Judge stated that even after appellant's infatuation with Miss Lintvelt he did not break off total connection with the respondent and that when appellant reached the stage of stating that he no longer loved the respondent he was "most unconvincing almost apologetic in saying so"; and he also referred to the substantial allegations made in the appellant's particulars of claim which "he was unable to prove".

/ It.....

It is true that after meeting Miss Lintvelt appellant did not "break off total connection" with respondent, but persons in that kind of situation very often do not. He found it convenient to have respondent continue working at his consulting rooms and this of necessity brought them into daily contact. When Miss Lintvelt went unexpectedly overseas appellant did turn homewards for comfort and support, but he stayed for only two days and did not resume cohabitation with respondent. On the other hand, there is the fact that appellant did leave the respondent in September 1979 and that they have not lived together again to this day.

The fact that appellant was "almost apologetic" in saying that he no longer loved the respondent and that he did not attempt to support most of the allegations in his statement of claim do not, in my view, establish uncertainty on his part. Appellant emerges from the record as a selfish and, to some extent, irresponsible person, but not as someone

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totally lacking in sensitivity. On the contrary, he clearly still admired and respected respondent and did not wish unduly to hurt her. In the circumstances, and knowing that she professed still to love him, it would not be surprising if he were diffident about denying love for her; and for the same reasons it is understandable that he did not seek to substantiate many of the hurtful allegations contained in his particulars of claim, even if he were in a position to do so. It must be accepted that appellant did present a picture of "abject misery" in the witness box and while sitting ir court, but it does not necessarily follow that he had no true desire to become divorced. Obviously he was "torn between two duties", as he put it, and from the practical and common sense points of view there were many good reasons why he should give up Miss Lintvelt and return to the respondent. But human emotions do not always respond to the dictates of practicality and common sense. And

/ appellant.....

appellant chose Miss Lintvelt and the path of divorce. His chosen path was nevertheless calculated to cause him much heartache, as obviously it did.

It was argued on behalf of the respondent that the denial of a divorce order would result in the termination of the relationship between appellant and Miss Lintvelt and in the resumption of married life between appellant and respondent; and that, therefore, the break-down was not irretrievable. I do not think that it is legitimate or indeed logical to determine whether or not a marriage has broken down irretrievably by reference to what would or might occur if and after a decree of divorce has been refused on the ground that irretrievable break-down has not been established. But, in any event, I think that this argument must fail on factual grounds. There is no solid basis for concluding that appellant and Miss Lintvelt would terminate their relationship if a decree of divorce were refused. Respondent

/ opined.....

opined that they would, but she was hardly in a position to know; and, as I have remarked, respondent's wishes tended on occasion to father her thoughts. Nor is there, in my view, good ground for holding that, if they did terminate their relationship, appellant would resume a normal marriage relationship with respondent. On the contrary, as indicated above, appellant himself stated that, although he would come home, he would "go his own way" and that it would not be a normal marriage.

For these reasons I feel constrained to differ from the conclusion of the trial Judge. In my view, although there are admittedly some unusual features to this case, the appellant did establish that his marriage to respondent had broken down irretrievably and that he was entitled to a decree of divorce.

In his particulars of claim appellant made the following ancillary claims:

/ "2. An order that....

"2. An Order that the custody and control over the two minor children born out of the marriage between Plaintiff and Defendant be awarded to Defendant subject to Plaintiff's rights of access to the minor children at all reasonable times and which rights of access to include the right of Plaintiff to remove the minor children for one weekend per month and on alternate school holidays.

3. An Order that Defendant be prohibited from permanently removing the two minor children out of the Republic of South Africa without the prior written consent of the Plaintiff first being had and obtained and which consent the Plaintiff undertakes not to withhold unreasonably.

4. An Order that Plaintiff pays maintenance for each minor child at the rate of R200,00 per month per child.

5. An Order that the Plaintiff retain the minor children on his Medical Fund at his own cost and that Plaintiff pay any shortfall of such medical expenses on demand.

/ 6. Division.....

6. Division of the joint estate.

7. Costs of Suit but only in the event of the Defendant defending the action."

Apart from stating in evidence that she regarded the proffered maintenance of R200 a month for the children as "insulting", respondent did not indicate her attitude to these claims.

As regards the custody of the two daughters it seems obvious that it would be in their best interests that such custody be awarded to respondent and that appellant should have reasonable access to them. The elder daughter is now 17 years of age and the younger is 15. Ever since their parents first separated they have lived with respondent and, in any event, the mother would ordinarily be the parent to whom the custody of teenage daughters should be awarded. With reference to the provisions in prayer 2 above to the effect that appellant's right of access is to include having the children with him for one weekend per month and for

/ alternate.....

alternate school holidays, I do not think that in the circumstances of this particular case - and especially since the matter was not canvassed at the trial - it is either practical or prudent to define the right in this way. I would prefer to leave it to the good sense of the parties to make mutually acceptable arrangements as to how and when appellant's right of reasonable access to his children is to be exercised.

I see no reason for this Court to make the order sought in par. 3 of appellant's claims. There is no indication whatever of a possibility that respondent might remove the children permanently from South Africa. Should this situation ever arise, then the parties must deal with it in the light of the circumstances then existing.

In regard to maintenance, appellant's counsel intimated - in response to enquiries from this Court - that his client was prepared to increase the maintenance tc R400 per month for each child. There is unfortunately no information on record to indicate what the children

require by way of maintenance. It does not seem to be necessary, however, for this aspect of the matter to be further investigated. The members of the Court have some knowledge and experience of what is normally required in this regard. Moreover, in assessing the adequacy of the amount of maintenance offered, there are three factors to be borne in mind. Firstly, respondent will be receiving a half share of the joint estate, the total amount of which at the time of the trial appeared to exceed R250 000. Secondly, respondent, obviously a very capable person, would probably be in a position to obtain lucrative employment and assist in maintaining the children. And, thirdly, there is the appellant's willingness, indicated by par. 5 of his claims, to undertake responsibility for the medical expenses of his children. In all the circumstances I am satisfied that the payment of R400 per child per month by way of maintenance would satisfactorily cater for their needs. Appellant's counsel further informed this Court that appellant was willing to submit to an order in terms whereof he was obliged

to pay all tuition and other fees reasonably required by either of his children for any course of study undertaken after leaving school.

As to par. 5 of appellant's claims, there is no information to indicate that it is possible for appellant to keep the children as dependent beneficiaries in terms of his medical aid fund. Appellant's liability in this regard should, therefore, be defined on a broader basis in this Court's order.

The order for division of the assets of the joint estate, claimed in par. 6, seems to be in order and does not call for any comment.

As regards costs, s 10 of the Act gives the court a wide discretion. Bearing in mind that the parties were married in community of property and that, although he is the successful party, appellant was responsible for the break-down in the marriage, I am of the view that there

/ should.....

should be no order as to costs, either in this Court or in the Court a quo.

It is ordered:

(1) That the appeal is allowed and no order is made as to the costs of appeal.

(2) The order of the Court a quo is set aside and there is substituted the following:

"(a) A decree of divorce is granted.

(b) Custody of the two minor children of the marriage is awarded to defendant, subject to the plaintiff having the right of access to the children at all reasonable times.

(c) Plaintiff is to pay maintenance in respect of the minor children at the rate of R400 per month for each child until such child attains the age of 21 years or becomes

/ self-supporting.....

self-supporting. Plaintiff shall, in addition, pay all tuition and other fees reasonably required by either of his children for any course of study undertaken after leaving school.

(d) In addition to his obligations as set forth in par (c) above, plaintiff shall be responsible for the payment of all medical and dental expenses reasonably incurred in respect of his two minor children. This responsibility may be discharged by plaintiff ensuring that his two children are retained as dependent beneficiaries in terms of the medical aid scheme to which he belongs and by plaintiff making good, on demand, any shortfall that there may be in the payment of medical and dental expenses by the scheme.

(e) There will be a division of the assets of the joint estate.

(f) There will be no order as to costs."

M M CORBETT

KOTZE JA)
JOUBERT JA) CONCUR.