92/88

CASE NO: 52/87

SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the appeal of:

JUNE MARGARET KRITZINGER — Appellant

and

KONRAD MARTHINUS KRITZINGER — Respondent

CORAM: CORBETT, MILNE JJA et NICHOLAS AJA

DATE OF HEARING: 15 August 1988

DATE OF JUDGMENT: 16 September 1988

J U D G M E N T

MILNE JA/ ..

MILNE JA:

In this matter leave to appeal to this Court was granted by the trial Court.

The appellant and the respondent were married to each other out of community of property on 22 December 1967. In November 1985 the appellant sued the respondent for a divorce, and for a sum of money in terms of section 7(3) of the Divorce Act, 70 of 1979 as amended (the Act). This sum was alleged to be the total amount of her contribution towards the acquisition, improvement, and maintenance of the common home, and her contribution towards payment of the mortgage bond instalments on that home. The amount claimed was initially R149 000 but was increased to R267 488.51. In addition the appellant claimed interest. In regard to the marriage, the appellant claimed that it had irretrievably broken down and alleged that since 1 November 1985 the parties had ceased to live together as man and wife.

The respondent admitted that the parties had not lived together since 1 November 1985, and admitted the irretrievable breakdown of the marriage, but alleged that it was caused solely by the appellant's conduct:

> "in particular her adultery with one Patrick Green, and her express determination to put an end to the marriage to enable her to continue and further her relationship with the said Green."

With regard to the appellant's money claim, the respondent admitted that the appellant had made certain payments in respect of improvements to the common home and instalments on mortgage bonds over the common home. He alleged, however, that, to the extent that such payments consisted of interest on the bonds, they constituted necessaries for the joint household within the meaning of section 23(2) of the Matrimonial Property Act 88 of 1984. He also alleged that payments on the bonds after the end of October 1985 were made by virtue of an agreement between the

parties during November 1985. In addition the respondent alleged that "during the subsistence of the marriage, he contributed indirectly to the maintenance and increase of plaintiff's estate by keeping the common home in or near Cape Town, to the substantial prejudice of his own career and estate, so that plaintiff could pursue her own career to her substantial benefit and that of her estate." He accordingly denied that it would be equitable or just for an order to be made in terms of section 7 of the Act transferring assets of his to the appellant.

The respondent also counterclaimed for a divorce and, in turn, made a money claim against the appellant. This was based upon the allegation that he had contributed indirectly to the maintenance and increase of the plaintiff's estate "by keeping the common home of the parties in or near Cape Town". He alleged that as a result, the appellant's estate was increased to the extent of at

least R600 000, and that it would be equitable and just that the appellant be directed to pay to him the sum of R200 000.

In her plea to the counterclaim the appellant admitted having committed adultery with Green at a number of the places, and on a number of the dates alleged by the defendant, and averred that the marriage had irretrievably broken down (for the reasons alleged in her particulars of claim), prior to her committing any act of adultery.

In response to a request for particulars for trial, the respondent set out the basis for his counter-claim for R200 000 in the following terms:

"2.1 Plaintiff and Defendant each have, and have at all material times had, separate business careers, Plaintiff as an employee of the Clicks Stores group and Defendant as an employee of the Mobil Oil Group.

2.2 The Mobil Oil Group is a multi-national organisation, with operations in most countries in the world. The headquarters of the group is in New York in the United States of America. In

considering any senior employee for promotion, the group places very great emphasis on international experience, especially but not only at its New York headquarters. Meaningful career progress for any employee within the Mobil Oil Group beyond a certain level therefore requires a degree of geographic flexibility on the part of that employee, as will more fully appear below.

2.3 The main avenues for career advancement within the Mobil Oil Group as a whole, for someone at the level at which Defendant now is and has at all material times been, lie in that employee's relocating to the group headquarters in New York on a permanent basis, or in becoming what is termed an 'international foreign resident', that is, an employee who accepts assignments in foreign countries as required by the Group from time to time.

2.4 For significant career progress within the Mobil Oil companies in South Africa, for someone at the level at which Defendant now is and has at all material times been, it is necessary for that employee to have undertaken some foreign assignments, including at least one at the New York headquarters of the group. The duration of such assignments would depend on circumstances, but would generally be not less than two years, and probably three years.

2.5 Meaningful career progress for Defendant would therefore have required the common home to have been moved from Cape Town and South Africa, either permanently or for substantial periods of time, probably not less than three years.

2.6 Moving the common home from Cape Town and South Africa would have been irreconcilable with Plaintiff's business career. Plaintiff holds, and has at all material times held, a very senior position in the Clicks Stores group, and is currently Managing Director of that group. For purposes of her business career it is, and has at all material times been, necessary for Plaintiff to reside in or near Cape Town, where the head offices of the Clicks Stores group is situate.

2.7 Defendant has at all material times been regarded by his employers as having outstanding potential for advancement, save only for the impediment to his geographic flexibility arising from the circumstances described in 2.6 above. But for such impediment, Defendant would have been offered, and would have undertaken, appropriate foreign assignments for his career advancement.

2.8 Had Defendant moved the common home away from Cape Town, in order to undertake such foreign assignments, Defendant would have made very substantial career progress. It is impossible for Defendant to state categorically what specific position he would now have held in the Mobil Oil group, or what his remuneration benefits would have been, but Defendant can and does state:

2.8.1 that his past earnings and other benefits of employment over the past not less than eight years would have been very much greater than they were;

2.8.2 that his current salary rate and other benefits of employment would have been very much greater than they are; and

2.8.3 that his prospective future earnings and other benefits of employment would have been very much greater than his present prospects.

2.9 By keeping the common home in or near Cape Town:

2.9.1 Defendant's career has been prejudiced by foregoing the career opportunities referred to above; and

2.9.2 Defendant's estate has been prejudiced by foregoing the past, present and future benefits referred to in 2.8.1, 2.8.2 and 2.8.3 above.

2.10 Although, since the irretrievable breakdown of the marriage, the circumstances described in 2.6 above are no longer an impediment to Defendant's career advancement at his present age from his present position, the prospects of his now being placed on a career path -

2.10.1 which would at any future time place him in a position comparable with that which he would have held at that time, had he undertaken foreign assignments at a considerably earlier stage of his career, are negligible;

2.10.2 which would be of as advantageous a quality as that of a path on which he would have been placed at a younger age, are remote.

Defendant therefore says that the very substantial prejudice to his career development and future prospects as described above is irreparable."

Also in response to a request for particulars for trial, the respondent alleged that the sum of R600 000, by which the appellant's estate had allegedly been increased, represented the market value of 40 000 shares in Clicks Stores Ltd and 80 000 shares in Clickden Ltd held by the appellant, less an amount owed by the appellant in respect of the purchase of such shares. The respondent also denied that "had the common home been moved from Cape Town, plaintiff's own estate would have increased beyond its present extent before taking into account the amount of R600 000 ..."

In response to a request for particulars as to how the counterclaim for R200 000 was made up, the respondent furnished the following further particulars:

> "4.1 Defendant states that the value of the combined net assets of the parties is approximately R1 000 000,00, and that, save as set out in 6.2 below, such assets have been accumulated out of the earnings and other benefits of employment of

the parties.

4.2 Defendant further states that, by reason of the circumstances set out in 4.4 below, it would be equitable and just for this Honourable Court to direct a redistribution of assets so as to ensure that Defendant obtains one half in value of the said combined net assets, that is, net assets to the value of R500 000,00.

4.3 The difference between the said value of R500 000,00 and the value of Defendant's net assets is not less than R200 000,00. The amount referred to in paragraph 7.3 of Defendant's Counterclaim represents the said difference.

4.4 The circumstances referred to in 4.2 above are:

4.4.1 the fact that, by keeping the common home in Cape Town, Defendant's estate and career and future financial prospects have been prejudiced as hereinbefore set out, and have been sacrificed for the benefit of Plaintiff's estate and career and future financial prospects, which have thereby been very greatly enhanced, and

4.4.2 the fact that the irretrievable breakdown of the marriage was caused solely by Plaintiff's conduct as set out in paragraphs 4, 5 and 6 of Defendant's Counterclaim.

4.5 Alternatively to the foregoing sub-paragraphs of this paragraph 4, Defendant states that -

4.5.1 by reason of the circumstances set out in 4.4 above, it would be equitable and just for this Honourable Court to

direct Plaintiff to pay to Defendant one third of the amount by which her estate has increased in consequence of the facts set out in 4.4.1 above;

4.5.2 the amount by which her estate has increased in consequence of the facts set out in 4.4.1 above is not less than R600 000,00;

4.5.3 the amount of R200 000,00 referred to in paragraph 7.3 of Defendant's Counterclaim represents one third of the said amount of R600 000,00."

Why the value of the respondent's so-called contribution should be one third (as opposed to any other fraction) of the amount by which the appellant's estate was allegedly increased in the manner claimed, is not stated.

What was referred to in the pleadings as "the common home", was certain immovable property consisting of Erf 4775 and Remainder of Erf 556 Constantia, Cape, together with the dwelling house and other buildings thereon, which was known as "La Mistral". I shall simply refer to it as "the home."

At a reconvened Rule 37 conference held before the commencement of the trial, the respondent admitted that the appellant had contributed the following sums for the following purposes:

"1.1	Improvements to the common home	R91 932.22
1.2	Mortgage bond instalments i.r.o. the common home	49 950.00
1.3	Rates and water i.r.o. the common home	9 835.64
1.4	Insurance of the common home	1 225.72
1.5	Maintenance of the common home	2 427.61
		R155 371.19"

During the course of the trial, the respondent conceded that the appellant had contributed R131 903 towards improving the property. This replaced the figure of R91 932.22 referred to above. The respondent also conceded during the trial that the figure of R49 950 referred to above should be increased to R56 711 bringing the total amount contributed by her in respect of the home to R201 102. It was common cause that the respondent's

contribution to the acquisition and the improvement of the home was R25 000, being R20 000 in cash in respect of the purchase price of the land in 1974 and R5 000 in respect of a swimming pool, a year or so later. It was also common cause that respondent had contributed the amount of approximately R66 240 by way of instalments on the bonds on the home. It is appropriate to mention, at this stage, that there is a striking disparity between the amount of R131 000 which the respondent conceded the appellant had contributed directly to improvements of the home, and the amount of R25 000 which it was common cause the respondent had contributed. It seems to have been common cause in the Court a quo that the amounts expended by each of the parties in respect of instalments on the bond, rates and maintenance should be excluded from the amounts that each of them contributed. This was, apparently, because it was agreed that save in respect of capital repayments on the bond,

these constituted necessaries in the sense already mentioned, and the total capital repaid on the bond was relatively small (approximately R3 000). Counsel adopted a similar approach in argument before us. Assuming that one is to put aside the amounts expended by each of the parties on bond instalments, rates, water, insurance and maintenance, the appellant's contribution was some five times that of the respondent. It was sought to suggest, however, that "in real terms" the contribution of the respondent amounted to approximately R150 000. This submission was based, so I understood it, upon either:

(a) the proposition that the value of money had decreased between 1974 (when the land for the home was purchased), and the date of the trial; or

(b) respondent's suggestion that the property was worth R150 000 for the land, alone, at the time when the appellant commenced making her

contributions.

The first proposition is undoubtedly correct, but if, in view of the depreciation in the value of money, the R25 000 contributed by the respondent is to be scaled up, then the appellant's contribution must be scaled up similarly. This would be difficult to calculate accurately since it was common cause that the appellant contributed the amounts totalling R131 900 over the seven years between 1979 and 1986. Although the learned trial Judge made an allowance for the depreciation in the value of money with regard to the respondent's contribution, he made no such allowance in respect of the appellant.

The second proposition also requires some examination. The figure of R150 000 is nothing more than the respondent's own estimate of the value of the bare land in 1981 on the ground that "at that stage there were one acre plots in far less favourable positions in the

neighbourhood changing hands at R120 000". There is also some evidence that this was still the position in 1984. The suggestion is, therefore, that in 1984 the unimproved value of the land was R150 000 and that therefore the appellant's contribution should be taken at that figure. This, however, loses sight of two factors. Firstly, the respondent did not pay the full amount of R36 000 from his own funds, but only the sum of R20 000, (the balance having been raised on bond). Secondly, it was common cause that by the time the trial commenced in October 1986, the value of the home had decreased from a figure between R550 000 and R500 000 to R350 000 because of the depressed state of the property market. If the property had dropped in value by not less than R150 000 at the time the trial commenced, then it is not unreasonable to diminish the value of the land itself from R150 000 to R105 000 and, as the respondent had contributed only R20 000 of the purchase price, his R20 000

would, at the time of the trial, on that basis have been worth $^{20}/_{36}$ of R105 000, namely approximately R58 500. To this would have to be added the R5 000 for the swimming pool giving a total of R63 500. This sum is still less than half the amount contributed by the appellant. If one makes some allowance for scaling up the value of the appellant's contributions because of the depreciation in the value of money, it becomes apparent that, even looking at the matter in a manner reasonably favourable to the respondent, it is probable that at least two thirds of the present value of the home is directly attributable to the appellant's contributions.

At the Rule 37 conference referred to, it was agreed that the then current market value of the home was R350 000, and that the balances due under the bonds registered over the property as at 21 June 1986 totalled R131 267.13. The nett asset value of the home was,

therefore, approximately R218 000 at the commencement of the trial. Under cross-examination the appellant agreed that her claim in terms of section 7 of the Act would, in the light of the evidence, be suitably met by directing the respondent to pay her an amount equal to one half of the nett proceeds of the sale of the common home. This, as pointed out by the appellant's counsel, would amount to R109 000; which is R22 000 less than the amount which, on respondent's own figures, the appellant had contributed to his estate by way of improvements to the home.

It was common cause throughout the trial that the appellant had, during the marriage, acquired 40 000 Clicks shares and 80 000 Clickden shares, and that the value of her rights in respect of these shares was R636 000 at the time of the trial. Clicks was described by the trial Judge as "a very large and enterprising chain of retail stores". The appellant joined Clicks as a toiletry buyer about six or

seven months after her marriage to the respondent, and, such was her ability in the business world, that by the time of the trial she was managing director of that company (and had been chosen as Businesswoman of the Year). When Clicks became a public company and she was allocated the right to purchase these shares, this was, in the words of the respondent's counsel in the Court below, "... not a gift or inheritance. You got these shares because you work very hard in that firm and because you did a good job for them ..." It was also common cause that she exercised her right to purchase these shares, and acquired them entirely out of her own earnings. She later purchased a further 30 000 Clicks shares which she paid for out of the proceeds of a restraint of trade agreement which she entered into with Clicks. These shares were sold between April 1980 and June 1982 for a total consideration of R94 000 and this money is included in the R131 000 which the respondent admitted was

used to improve the common home.

Each of the parties operated separate banking accounts into which they deposited their respective earnings. It is clear that the parties' finances were separately administered and no control was exercised by one over the other's banking account or expenditure generally. The appellant paid for all her jewellery and clothing out of her own funds, derived from her own earnings: a total of some R88 000 over a period of nine years was expended by her on these items. Both parties contributed to living expenses.

At the pre-trial conference the respective assets of the parties and the value of these assets at the date of the conference were agreed upon, and the learned trial Judge found that the plaintiff's nett assets were worth approximately R690 000 (including the value of the shares), and the defendant's were worth R275 000 (including the home).

Most of the income of the parties which had not been spent in living expenses of various kinds, had gone into the home and the shares. The appellant contributed not less than double the amount of the respondent's contribution to the home, and acquired the shares wholly out of her own earnings.

The trial Court dismissed the appellant's money claim and granted judgment in full against the appellant on the respondent's claim in reconvention, namely for the sum of R200 000. The decision is reported in 1987(4) SA 85(C). I should add that, in the course of the trial, a decree of divorce was granted, and it was declared in the judgment of the trial court "that the decree of divorce granted on 19 September 1986 was issued at defendant's instance".

The trial court seems to have reached this, prima facie, rather remarkable conclusion in the following manner. In the first place it did not deal separately with the

claim and counterclaim, but adopted an overall or globular approach. It then found that:

(a) it was the appellant's fault that the marriage came to an end;

(b) in subordinating his prospects of advancement with Mobil Oil to the appellant's prospects of advancement with Clicks, the respondent made a contribution as contemplated in subsection 7(4) of the Act, to the increase of the appellant's estate;

(c) since "no figure can be put on defendant's sacrifice" it was impossible to say that one spouse had contributed more than the other;

(d) it was impossible "to put a price on her blameworthiness in bringing the marriage to an end";

(e) having regard to the existing means and

obligations of the parties, the duration of their marriage, their way of life and the objectives they pursued over the years "it seems ... that it can fairly be said that the parties are entitled to share equally."

This appears to me, with all due respect, to be an imprecise and faulty method of dealing with the claims (even assuming, for the moment, the correctness of the factual findings of the trial Court). The judgment appears to be based upon a finding that the parties "effectively pooled their resources. Although they were married de jure out of community of property by antenuptial contract as between themselves they were de facto married in community of property for the house was always 'ours' and not 'his' and the shares were never regarded as her exclusive property." The trial Judge also found "that where spouses intend that all they acquired during their marriage should be regarded

as their common property, a unique form of partnership does effectively come into existence."

It is, no doubt, correct that during the marriage each of the parties contributed to their joint living expenses, and that for this purpose the appellant paid various sums to the respondent, and paid sums to the Receiver of Revenue in respect of their joint income tax and bills relating to their joint living expenses. It will also be apparent, from what I have said, that both parties put a substantial sum of money into the acquisition, maintenance and improvement of the home. It is true, furthermore, that every marriage is a partnership in one sense of the word. The spouses live together and contribute (one hopes) to each other's physical and mental well-being. They may, furthermore, agree that they will pool their resources. Such an arrangement, unless it has the requisites of a legal partnership (as was the case in Fink v Fink & Another 1945

WLD 226), is not irrevocable, and may be resiled from at any time. Only if the requisites of a partnership are present and it is intended by the parties that there will be a universal partnership, could it be said that, in a sense, although parties were married de jure out of community of property they were de facto married in community - although even in these circumstances this would be an imprecise description.

It does not follow that where some of the income (not all) goes into a common home, the parties intend there to be a partnership in the legal sense, even in respect of that home; counsel for the respondent expressly disavowed any suggestion that there was a partnership in the legal sense between the parties. There is no question here of the home being regarded as a joint business run for a profit. Cf Fink v Fink & Another, supra. Still less could the appellant's shares be regarded as jointly held; they were

the product solely of her talent and work. There is no evidential basis for the finding of the trial Judge that "the shares were never regarded as her exclusive property" - in fact he found that "... the shares were never intended to be registered in their names jointly ..." Even if it was correct to say that there was a partnership in some vague general sense, there is no warrant whatsoever for saying that it is fair or appropriate to divide the joint nett assets of the parties equally, regardless of their respective known and unequal contributions. Even in the case of the dissolution of a legal partnership, the dissolution takes into account the respective contributions of each of the partners, unless it is impossible to say that one has contributed more than the other. See Fink v Fink & Another supra at 241 and Van Gysen v Van Gysen 1986(1) SA 56(C) at 61G-H.

It was argued by the respondent's counsel that the

trial Court's approach was not really based upon the finding that the parties were "de facto married in community of property". It is possible that the passages from the judgment cited above were intended merely to support the proposition that a contribution need not be "... measured in terms exclusively or even primarily confined to money provided, or property delivered or services rendered ..." in order to qualify as a contribution within the meaning of section 7(3) of the Act. I am not confident that this is so, but, assuming that this submission is correct, I am nevertheless satisfied that the trial Court misdirected itself in yet another respect, in that it adopted the globular approach already referred to. There is nothing in the section which authorises such an approach.

For the sake of convenience I set out the relevant subsections, namely 2-6 inclusive:

"(2) In the absence of an order made in terms of sub-

section (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 marriage, 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 sub-section (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 sub-sections (4), (5) and (6), on application by one of the parties 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 sub-section (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 services, or the saving of expenses which would 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 sub-section (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 sub-section (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 enforceable 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 (3) requires an "application" 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. Beaumont v Beaumont 1987(1) SA 967(A) at 988E. It seems probable that in most cases it will be the wife who makes such an "application". Where, as here, a claim in convention invoking the provisions of subsection 3 is answered by a claim in reconvention also relying on such provisions the claims are, in law, separate claims. Claims in reconvention while almost always adjudicated upon together are, in fact, separate actions. Not only is this historically so - see, for example, the remarks of **CLOETE J**

in Brunette & Others v Stanford (1859) 3 **SEARLE** 221 at 225 and 226, and **LANSDOWN** J in Fielding v Sociedade Industrial de Oleos Limitada 1935 NPD 540 at 548 - but it is plain from the provisions of Rule 22(4) of the Uniform Rules, that the Court may, in certain circumstances, direct that the claim in convention be proceeded with before the claim in reconvention. Even if the actions proceed at the same time, the fact that one party has counterclaimed, cannot deprive the other of the right to have his or her claim separately considered. There may, possibly, be cases where the facts relevant to both claims are so inextricably interrelated that a globular approach is the only possible one, but, save in such circumstances, the claims must, at least initially, be considered separately. It may well occur that where, as here, there are conflicting claims under section 7(3), the Court would consider the practical effect of giving judgment on the claim in convention upon the financial position of

the defendant, and the practical effect of giving judgment on the claim in reconvention upon the financial position of the defendant in reconvention, before finally formulating its order or orders. This appears to have been done in Van Gysen supra at p66. It might well occur, furthermore, that judgment upon the claim in convention would be wholly or partly extinguished, by way of set-off, by the judgment on the counterclaim or vice versa; but that does not mean that the Court is not obliged to consider such claims separately on their merits. The trial Court, in fact, never applied its mind to the appellant's claim in this manner, and this Court is accordingly at large to make its own findings on the merits or demerits of the parties' respective claims.

I deal, firstly, with the appellant's claim in convention. As I have already indicated, she eventually limited her claim to half the nett value of the home. It is common cause that this is the sum of R109 000. The

grounds upon which as I understood it, the respondent's counsel submitted that the appellant's claim in convention should fail, and fail entirely, were the following:

(a) The trial Court was correct in finding that it was the appellant's fault that the marriage came to an end.

(b) The respondent's contribution to the home was "in real terms" R150 000, although, in actual fact, the amount he actually contributed was only R25 000.

(c) The appellant was able to make such a substantial contribution because she had such a substantial salary and this, in turn, "...she owed to a large extent to the respondent's contribution by staying in Cape Town".

I have already dealt with (b) to some extent. As mentioned above, I do not think that the value of the

respondent's contribution (at best for the respondent), exceeded R63 500. If the appellant were to be granted judgment in convention for the sum of R109 000, the respondent would, in effect, be retaining exactly the same sum viz R109 000, which substantially exceeds the scaled-up value of his contribution, and makes no allowance for scaling-up the appellant's contribution. There is no substance in this point.

I deal now with the question of fault. The learned trial Judge regarded the nature of "this particular marital relationship" as being "of prime significance in resolving the proprietary claims".

In Beaumont v Beaumont (supra) at 994D **BOTHA JA** expressed the view that, by virtue of the wide import of the wording of paragraph (d) of subsection (5) of section 7 of the Act, "...the Court is entitled...to take a party's misconduct into account even when only a redistribution

order is being considered under ss(3), and where no maintenance order under ss(2) is made." Although this opinion was avowedly obiter, no attack on it was made in this Court and I respectfully agree with it. **BOTHA JA**, however, went on to say firstly, "I am convinced that our Courts will adopt a conservative approach in assessing a party's misconduct as a relevant factor whether under ss(2) or ss(3)" and, secondly, that the directive in section 25(1)(g) of the English Act dealing with this subject, was in accordance with the pattern of our legislation. This direction is to the effect that the Courts are to consider "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". The judgment then goes on at p994(I):

> "In many, probably most, cases both parties will be to blame, in the sense of having contributed to the breakdown of the marriage (see per Lord Denning in Wachtel's case supra at 835g). In such cases, where there is no conspicuous disparity 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."

The facts in Beaumont's case were that misconduct existed on the part of the appellant only, and that such misconduct was "certainly gross and prolonged". Despite this, the Court took such misconduct into account only in allowing the scales of justice to be tipped in favour of the respondent where the facts were not altogether clear or certain, and where the areas of uncertainty were not due to any remissness on the part of the respondent in placing available information before the Court.

The learned trial Judge obviously did not have the benefit of this Court's judgment in the Beaumont case when he delivered judgment in this case, and, had he done so, I doubt whether he would have given the appellant's "fault" the weight that he clearly did.

In any event the evidence does not justify his finding that, in effect, the appellant was solely to blame for the marriage coming to an end. Even if it is correct that it was her "fault" in the sense that her adultery, or, more correctly, her intention to marry Mr Green, was the immediate cause of the marriage coming to an end, it is quite clear, on the facts, that the respondent was by no means free from blame, nor could it conceivably be said that any relevant misconduct on the part of the appellant was either gross or prolonged. There is not the slightest suggestion that she was promiscuous or brazen. She married Green during the course of the trial immediately after the divorce order was granted. In actual fact, it can probably more accurately be said that both the parties were the victims of prevailing social attitudes. It is still, today, unusual for the wife to be the major breadwinner. Furthermore, the appellant succeeded in business to such an

extent that it could rightly be called spectacular. She received considerable publicity and respect for her achievement. In these circumstances it would be understandable if the respondent felt rather inferior to the appellant, and possibly his conduct towards his wife was influenced by the spectacular difference in their respective achievements. It is possible that her success in her career compared with his own felt lack of distinction, played a part in the unsatisfactory sexual relationship which undoubtedly developed between the parties. The appellant refers to Green as a man who took notice of what she said. Her evidence does seem to indicate that she did not feel valued as a wife, and the lack of a satisfying sexual relationship no doubt contributed to this and produced a state of discontent on her part or, at least, rendered her vulnerable to the affectionate attentions of another man. In these circumstances, I very much doubt whether it would

be fair to regard the appellant as being substantially more at fault than the respondent. There is no question here of the parties being of advanced years. At the date of the trial the appellant was only 37 and the respondent in his early forties. Nor is there any question of either of them being in ill-health or suffering from any physical affliction that would affect their normal sexual behaviour. Sexual relations are, of course, not everything in a marriage, but the important role that they play has long been recognised. See Brown v Brown 1905 TS 415 at 417 where **BRISTOWE J** described the sexual relationship of the parties as "...the one thing which differentiates the marriage relationship from every other relationship..." and Ainsbury v Ainsbury 1929 AD 109 at 117-118 where **STRATFORD JA** said "it is true that the right of sexual approach is one of the most important, if not the cardinal privilege of marriage ...". The psychological effect upon the respondent of the

appellant's glittering success in business was not really examined in the Court below, but it may be significant that the sexual difficulties in the parties' married life really only began at about the time when the appellant's meteoric success in business commenced. The parties' description of this problem differed. The appellant said that intercourse was confined to three or four times a year over the last seven or eight years of marriage, whereas the respondent said that it was probably of the order of once a month. Whichever version one accepts, it is clear that the relative infrequency of sexual intercourse, between the parties was a matter which was a source of dissatisfaction to the appellant and that she expressed this dissatisfaction. The respondent said that she was not the kind of woman who initiated sexual intercourse and it seems, therefore, that she was the kind of woman who likes a man to play the dominant part and to initiate love-making. It is quite

apparent that, in these circumstances, it would require some provocation for her to complain of the lack of sexual intercourse; yet it is common cause that, on a number of occasions, she did so. The respondent's answer when asked what his reaction was to her complaints is, in my view, revealing. He said that he replied by saying he would "try and satisfy her more frequently". This indicates a curious attitude towards sexual intercourse, which is more normally the natural consequence of love and affection, or at least ordinary desire between a married couple. His answer suggests that it was not a form of activity from which he derived any satisfaction at all; that it was merely a question of "satisfying her". It was not the kind of response calculated to enhance a spouse's self-esteem in this area. When it was put to him in cross-examination that he should have appreciated that these complaints about the lack of sexual activity between them indicated that

something was seriously wrong with the marriage, his reaction was, in effect, that she should, as it were, have put him "in mora". The evidence reads as follows:

> "But what more must the woman do? She raises it with you she says...? - she says 'look the marriage may be coming close to being in jeopardy because of this', if that is how she felt about it I would have been quite sure that is what she would have said."

The learned trial Judge deals with this aspect of the matter by saying "... the assessment earlier undertaken of the parties as individuals makes it abundantly clear that plaintiff with her dominant personality would have had children if she had insisted thereon and defendant would not have denied her her marital privileges had she expressed any real or urgent desire therefor". With respect, I do not think this is a realistic attitude. Sexual intercourse is nothing if it is not shared. For many women it would be an unsatisfactory sexual relationship if they had always to

make the first advances and, a fortiori, if the husband's response was the rather lame attitude that he would not deny her. The learned trial Judge seems to have attached undue importance to the fact that the plaintiff had a forceful personality. In fact, after setting out the respective contentions of the parties his first step was to say "something...of the personalities of the parties..." and he took the view that this was necessary "for a proper appreciation of the nature of this particular marital relationship." Rightly or wrongly, he seems to have found her a somewhat uncongenial person, and a very forceful personality. He dismissed the submission that the defendant's lack of sexual interest or activity rendered the appellant susceptible to an extra marital relationship on the grounds that "this...is to sadly underestimate plaintiff's strength of character, determination and forcefulness of personality." It is not logical to infer

that because the appellant has a strong personality she would not be susceptible to a really attentive man who actively sought to make love to her. This is simply a non sequitur. Nor is it safe to assume that because a woman has a forceful personality she is necessarily content with a less than ardent sexual partner. Several times the trial Judge, in speaking of the respondent's alleged soft-pedalling of his prospects of advancement with Mobil, spoke of it as being a sacrifice on the altar of the appellant's career; borrowing the phrase one may perhaps ask whether the appellant's sexual and emotional life was to be sacrificed on the altar of the respondent's inertia. It seems more than probable that his lack of ardour contributed directly to her adultery. Without intending to lay down any rule on the subject (and indeed I am plainly not qualified to do so), I respectfully agree with **BOTHA JA** that human experience suggests that, generally speaking, where

there is a breakdown in a marriage the conduct of both parties has contributed to it. It seems probable that it was, inter alia, the recognition of this basic truth that led the legislature to abolish (save to the extent where it is expressly indicated otherwise), the notion of "fault" in divorce.

Putting the respondent's case at its highest I do not think that it can be said that there is a "conspicuous disparity of fault between the conduct of the one party and that of the other". In these circumstances I think the learned trial Judge erred in regarding fault as a significant factor, and all the more so in regarding it as being "...of prime significance in resolving the proprietary claims..." With regard to contention (c), this argument proceeds on the basis that the respondent's conduct constituted a "contribution" within the meaning of section 7(3). For reasons which are set out later in this judgment I have come to the conclusion that

it did not, and this contention accordingly falls away.

The way is now clear to consider the appellant's claim upon a proper basis. It was not disputed that the prerequisites of subsection 3 discussed in Beaumont supra at p987J-988H had been established. Furthermore it is quite clear that one of the "... jurisdictional pre-conditions to the exercise of the discretion" conferred on the Court in subsection (4) had been established; there had been a contribution by the appellant to the estate of the respondent of a kind described in the subsection. The other jurisdictional prerequisite is, of course, that the Court must be satisfied that by reason of such a contribution it would be "equitable and just" to make a redistribution order. This is in the words of **BOTHA JA** a "...wholly unfettered discretionary judgment of the Court...". Many of the aspects already discussed in this judgment bear upon this question, but before dealing with it finally, it is

necessary to consider the provisions of subsection (5). This subsection prescribes the factors which the Court must take into account in the determination of the assets, or part of the assets, to be transferred in terms of a redistribution order. As pointed out in Beaumont's case supra at p989B, "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." I do not think it is necessary to add anything to what I have already said in this regard. The remaining relevant factor is the existing means and obligations of the parties. As appellant's counsel pointed out, the respondent's nett assets would still amount to approximately R166 000 if the appellant were to be awarded one half of the nett proceeds of the sale of the home, namely R109 000. The respondent's monthly salary and benefits, at the time of the trial were approximately R5 000 per month, and there is nothing to

suggest that the respondent will be financially embarrassed if he is ordered to pay the appellant the sum of R109 000.

As the trial Court failed to exercise its judicial discretion properly in considering the appellant's claim, this Court is at large to exercise its own discretion. No factors other than those already discussed occur to me as being relevant to the exercise of such discretion; certainly none were referred to in argument. Bearing in mind that the figure of R109 000 is some R22 000 less than the appellant's admitted contribution to the respondent's estate, and the fact that these figures make no allowance for the depreciation in the value of money over the relevant period, I have no doubt that it is just and equitable to grant judgment for the appellant on the claim in convention in the amount of R109 000. I have already indicated that in my view there is "...no conspicuous disparity between the conduct of the one party and that of the other...", but even

if I had come to the conclusion that there was and that the appellant was predominantly to blame for the breakdown of the marriage, I would have held that to reduce the claim by R22 000 (particularly in the light of the absence of any allowance for depreciation in the value of money in respect of the appellant's contribution), would more than allow for such fault on the appellant's part.

I deal now with the respondent's claim in reconvention. Before dealing with the legal question of whether the respondent's conduct could constitute a contribution within the meaning of subsection (4) I think it is necessary to consider precisely what that conduct was. The trial Judge found that the respondent "... did indeed sacrifice his future career and prospects upon the altar of her advancement with Clicks, and I am satisfied that it was indeed a sacrifice which defendant made." There are other passages to the same effect, for example the following:

"Any resentment or frustration he might have felt in a self-imposed inability to break out into wider legally orientated fields - which the evidence made clear he could certainly have done - because to do so would have impeded his wife's advancement in her field (if not ended it) was never discernible in his testimony".

That is not the basis upon which the respondent himself put the claim. What the respondent said was that the decision "not to go the Mobil Route" was "...a decision that was taken after discussion as to what was in our joint best interests." The evidence then continues:

> "Now I want to investigate that decision a little bit. What you are saying is that if you had decided to go the Mobil Route...?
> Yes.
> That would have been in your joint best interests less favourable?
> That was the view I took and it was a view she shared with me at the time.
> Because you would have earned less than - along that route than, had a lower standard of living than you were able to have with the two of you working in Cape

Town?
Correct.
That was the motivation as you understood it?
Correct. I would say it was both a question of current standard of living and future prospects down the road, ja.
Whose future prospects?
The joint future prospects, taking them in the one alternative as against the other alternative.
I do not understand that remark. In her case I can understand that your complaint at the moment as I understand it is that your future prospects were made less rosy by this decision. Why at that stage was it a wise decision?
Because her rate of progression from the early mid-1970's was greater than I thought mine would have been with Mobil.
Along the international route?
Along the international route. I would ...
Now, Mr Kritzinger, if you had gone the Mobil Route, you very fairly said that your position today could well have been one like, or similar to that of your Australian colleague who heads the European operation?
Correct.
The legal side. That is in the pecking order of things little below where Racine is?
Correct.
As head of Mobil South Africa?
Correct.
Now, let us examine that scenario. Had you decided on that route your wife had given up her work in Cape Town, clearly what you foresaw was that this source of income would now come to an end, you would have to live

off your income only?
Correct. What we would be looking at would be living off whatever my advanced status in Mobil would be as against my, shall we say my reduced status in Mobil plus her earnings out of Clicks here."

What he is saying is that he decided that it was in their joint financial interest not to take the overseas posting. He must, therefore, have calculated what he could probably earn overseas, what she could probably earn overseas and the increased cost of living overseas, compared these figures with what he expected their combined South African earnings would be, and come to the conclusion that it would be financially better to stay. His case is, therefore, that they jointly took what they believed to be a sound business decision, not that he thought he was sacrificing anything in the sense of putting his wife's interests before his own. (In deciding what was just and equitable a consideration which the learned Judge a quo seems entirely to have ignored is that, as a result of this

decision, the respondent enjoyed an extremely high standard of living during the period 1976-1985, largely as a result of her earnings. These flowed from the fact that she occupied a very senior and responsible position and bore, no doubt, the usual stresses a demanding occupation imposes.)

He seems further to have overlooked an inherent contradiction in the respondent's case. The following passage occurs in the judgment of the trial Court:

> "Just as it is beyond dispute that plaintiff's very substantial estate has been built up over the years because she remained in Cape Town, it is beyond dispute that defendant had very real prospects of promotion in the services of Mobil Oil. The managing director of Mobil Oil testified to this effect - indeed defendant was in line for promotion at least 8 years' ago (and he could not be promoted in South Africa having attained the highest position in his employer's legal department in this country). Had he not stood back to allow his wife to take advantage of the opportunities open to her, and had he availed himself of the opportunities open to him on transfer, he would today have probably been earning five times his present salary."

This conclusion is, in my view, at least open to question. It is, however, repeated in the respondent's Heads in which it is suggested that the respondent would have been head of the Mobil Europe Legal Department in 1986, that he would then have had an income of approximately $9 000, or about R25 000, per month, whereas his salary at the time of the trial was R5 000 per month. The facts, however, demonstrate that these figures could not have been the basis upon which the respondent made his calculations. It was accepted that the appellant's salary was approximately double that of the respondent's salary at the time of the trial. Thus her salary was R10 000 per month and his R5 000 per month making a total of R15 000 per month i.e. some R10 000 per month less than the R25 000 which, so it is suggested, he would have been making on his own. On these figures his decision to remain in this country was patently wrong from a business point of view. There is, however,

a revealing passage in the respondent's evidence which, in my view, indicates the true source of the respondent's error of judgment and it is one which cannot in any way be laid at the appellant's door. At the time he made the decision not to take employment overseas, he very much over-estimated his prospects of promotion or of obtaining a better salary from his employers in South Africa. In 1977 he went into marketing and was in marketing for approximately four years. It is plain that his talents did not lie in that field. In 1976, however, he did not realise this, and no doubt in making his calculations, he calculated what his earnings would be on the basis that he would be earning substantially more in the marketing field, or some other field with a less limited salary prospect than the legal field. More than a hint of this glimmers through the following passage in his evidence:

"Now Mr Kritzinger the decision which you took not to

take the Mobil Route you have said today that that was taken on the basis that it would be in your joint best interests?
Correct.
It was a decision which you took freely, nobody compelled you to take it?
Correct.
That way you saw the two of you earning more, having a better life than taking the Mobil Route?
That is so. <u>But if I may say My Lord, if I had known then that the Mobil Route was going to end now the decision may well have been different</u>."
(My underlining)

(I might say, in parenthesis, that his description of the decision-making process is quite inconsistent with the notion that the appellant was an overbearing, domineering woman, and that he was a shy, retiring mouse, who was completely overwhelmed by her wishes and desires when it came to making any important decision. He proposes that he was quite capable of making a contrary decision, bearing in mind his own best interests.)

The respondent is, so it seems to me, caught on the horns of a dilemma. If, in fact, his prospects were

really as rosy as those painted by him and his counsel, then he simply made a bad error of judgment in deciding to stay where he was, and cannot expect to be compensated for his error by the appellant. If, however, his prospects were not nearly as rosy as those suggested on his behalf, then he has not, in fact, made the sacrifice which it is suggested he made. On the contrary he has profited from the decision to remain in South Africa by enjoying the very high standard of living which his wife's earnings made possible during the past eight to nine years. It becomes apparent that what the respondent was really seeking to do was to claim damages for loss of his wife's contribution to their combined earning power, due to the breaking up of their marriage, which he alleges was her fault. There is, of course, no warrant for such a claim. No doubt his decision to remain in South Africa might have been different had he contemplated that the marriage might come to an end, but, human nature being

what it is, such a possibility was always on the cards, and there is no basis in law upon which he can be compensated for the fact that his expectations turned out not to be justified.

On the facts, therefore, I am not satisfied that the respondent "gave up" anything, still less that he "sacrificed" his career.

In any event, I consider that for the reasons that follow, the conduct pleaded by the respondent did not constitute a contribution within the meaning of subsection (4).

Counsel for the respondent relied heavily upon the remarks in Beaumont's case supra at 996H where **BOTHA JA** said with reference to the provisions of subsection (4) "in these words one searches in vain for any suggestion of a qualification of the nature of the contribution required in the sense contended for by counsel." There, of course, the Court was considering the submission of counsel that the legislature could not have intended a contribution by either spouse made solely in the discharge of a common law duty of support, to qualify as a contribution which entitled the

spouse making it to claim "compensation" in the form of a redistribution order. The Court found there was nothing in the words used to indicate that the legislature intended that qualification. That is quite a different question from the problem that arises in this case. In fact, in the passage cited earlier in this judgment, when describing the jurisdictional preconditions to the exercise of the discretion, **BOTHA JA** referred to the precondition that there "...is a contribution by the one spouse to the estate of the other of a kind described in the subsection." In the case before us, so the appellant's counsel argued, the respondent did nothing - he could not be said to have contributed to the maintenance of or an increase in the estate of the other party "by merely not earning". In other words, the submission was that all the respondent did was to fail to prevent the appellant from increasing her estate. The validity of this point depends upon what the

legislature meant in subsection (4) when it used the words "...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". The words used are certainly of wide meaning but that does not make them of unlimited meaning. One must look at the ordinary grammatical meaning of the words used, and what is more, the particular context within which they are used. The first (non-obsolete) definition of the word "contribute" in the **OXFORD ENGLISH DICTIONARY** is "to give or pay jointly with others; to furnish to a common fund" (**VOLUME II** p924 of the **1961 ed**). The dictionary includes, as a figurative meaning, "to give or furnish along with others towards bringing about a result; to lend (effective agency or assistance) to a common result or purpose." (I stress the

word effective in that definition). **BLACK's LAW DICTIONARY** defines "contribute" as follows: "to lend assistance or aid or give something to a common purpose; to have a share in any act or effect; to discharge a joint obligation". It goes on to say that when applied to negligence it "signifies causal connection between injury and negligence which transcends and is distinguished from negligent acts or omissions which play so minor a part in producing injury that **LAW** does not recognise them as legal causes". P297(5th ed). The Afrikaans version of the Act, (which is the signed version, both in the case of the original Act, and in the case of the amending Act which introduced the relevant subsections,) uses the following words: "Direk of indirek bygedra het tot die instandhouding of groei in die boedel van die ander party", and respondent's counsel relied upon the second meaning given by **HAT** p124/5 namely: "saamhelp, help", (the first meaning

is: "iets skenk"), and the second meaning given in **DIE AFRIKAANSE WOORDEBOEK** p564 namely: "Iets wat meehelp tot bevordering van 'n bepaalde of gemeenskaplike saak" (the first meaning is: "Wat as skenking gegee word, dikw. i/d vorm van geld"). There does not appear to be any significant difference between the English and the Afrikaans versions. This legislation is dealing with the financial position of the parties and, prima facie, therefore, with contributions of a financial nature. In Beaumont's case supra at p987 **BOTHA JA** having said that the creation of a power enabling a Court to make a redistribution order was a reforming and remedial measure, went on to say, "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 respective 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." I am inclined to agree with the opening submissions of counsel for the respondent in the Beaumont case (as reported at 978E-G) as to the reasons for the introduction of this power, but, clearly, if a husband's claim falls within the provisions of the Act, he is just as much entitled to an order as the wife. But as the legislation is dealing with the financial position of the parties, what was clearly envisaged was some positive act by means of which one spouse puts something into the maintenance or increase of the estate of the other spouse - whether by way of money or property, labour or skill. It does not envisage a mere refraining from a particular activity or course of conduct. It was submitted that the inclusion of "the saving of expenses which would

have otherwise been incurred" indicated that a positive act was not necessary. This is not necessarily so. For example, if a spouse was to spend money or time or labour in cultivating vegetables for the family that would constitute a positive action which would have the effect of saving expenses. It is conceivable, however, that a spouse may refrain from expenditure which in the circumstances of the parties is reasonable (for example, the employment of a domestic servant), and that this could constitute a saving of expenses amounting to a contribution within the meaning of the section. On the other hand to refrain from employing a domestic servant would entail many positive acts. Such a situation could be put positively or negatively. Thus one may say "Refrain from employing a domestic servant" or "do domestic work"; "refrain from buying clothes" or "make clothes oneself to effect a saving". The negative generally entails a positive.

Refraining from extravagance, for example, would not fall within the meaning of the sub-section, being purely negative. The words "expenses which would otherwise have been incurred" implies necessary or at least reasonable expenditure in the particular circumstances. It seems to me that it is a prerequisite to a successful claim under this subsection, that the claimant must show, on a balance of probabilities, that the conduct relied upon as a contribution, in fact caused the alleged maintenance or increase of the other spouse's estate. To borrow from the language of causation used in negligence cases, the conduct must be the causa causans, and not merely the cause sine qua non of the alleged maintenance or increase. If the appellant had not been married, or had married some other man, there is no reason to suppose that she would not have accumulated exactly the same estate. The respondent contributed nothing in the form of money, property, work,

time or skill - or, indeed, any form of activity, whatsoever, to the increase of the appellant's estate.

I must say, furthermore, that I am inclined to think that it was never contemplated by the legislature that the sacrifice by one of the spouses of a more lucrative career which was not accompanied by the rendering of services or the saving of expenses which would otherwise have been incurred, or some other factor for which a value in money can reasonably be ascertained, would be capable of constituting such a contribution. Divorce is a distressingly common feature of contemporary life in South Africa and, if a claim could be made for giving up a career to the parties' common benefit, there would be few marriages between parties of any real economic substance, where such a claim would not be made. I find it difficult to consider upon what conceptual basis such a claim would be formulated in terms of money unless the conduct under

consideration was capable of being so evaluated. For example, in Beaumont's case the wife contributed her services in various ways which are apparent from the judgment of the trial court, and a value could be put upon those services. Suppose, however, that a young woman who is half way through her medical degree, marries a politician, and decides not to pursue that degree in order to assist her husband socially in his public life, is she to be compensated if the marriage comes adrift for giving up her degree and her medical career? If so, upon what monetary basis? Or let us suppose that both parties have qualified as medical practitioners, and the wife is offered an overseas course lasting six months to a year the result of which, it is shown on a balance of probabilities, would have been to place her on the specialist register in a particularly lucrative field, and she declines to take up the scholarship because they make a joint decision that

she will remain with her husband in South Africa where his career is; if the marriage breaks down and a divorce ensues, is she to be compensated for the career she would have had, had she taken up the scholarship? The kind of difficulty which would be involved in acceding to claims of this nature is well illustrated by the fact that the respondent's counsel found it quite impossible to indicate any basis at all upon which it would be proper to evaluate the respondent's claim. The trial court found that "... no figure can be put on defendant's sacrifice ..." and this must generally be the case where, during the course of the marriage one of the spouses has given up a more lucrative career, or given up a career.

The respondent accordingly failed to establish that he contributed to the maintenance or increase of the appellant's estate. This renders it unnecessary to consider whether, in calculating whether it would be just

or equitable to make a redistribution order in favour of the respondent, it would be necessary to take into account that the appellant, in order to provide funds to improve the home, sold shares at a much lower price than she would have received had she sold them at the date of the trial.

The appeal is accordingly upheld with costs, including the costs consequent upon the employment of two counsel, and the judgment of the court below is altered to the following:

(a) On the claim in convention there will be judgment for the plaintiff in the sum of R109 000 together with interest thereon at the rate of 15% p.a. from 1 April 1987 to date of payment with costs, such costs to include the costs consequent upon the employment of two counsel;

(b) Upon the claim in reconvention, the claim in reconvention is dismissed with costs, such costs

to include the costs consequent upon the employment of two counsel.

The orders for costs in favour of the plaintiff are not to include the wasted costs incurred on 5 September 1986, which are to be paid by the plaintiff, including the costs consequent upon the employment of two counsel.

I have fixed the date from which interest is to run as 1 April 1987 for the same reasons, mutatis mutandis, as those which induced the trial court to fix on it as the date upon which interest was to run on the respondent's claim.

No application for deferment in terms of subsection (6) (in the event of the appeal resulting in an order for payment being made against the respondent), was made in this Court. It seems reasonable, however, that some deferment should be granted, and prima facie I would be inclined to think that a period of six months may be

appropriate. If the parties are unable to agree upon a deferment, the respondent is given leave to apply to the Court a quo for an order in terms of section 7(6).

A J MILNE
Judge of Appeal

CORBETT JA)
)CONCUR
NICHOLAS AJA)