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Case No 437/87

SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the appeal of:

BARRY ELI KATZ — Appellant

and

HAZEL PAMELA KATZ — Respondent

CORAM: CORBETT CJ, HOEXTER, NESTADT, MILNE JJA et NICHOLAS AJA

DATE OF HEARING: 6 March 1989

DATE OF JUDGMENT: 31/3/89

J U D G M E N T

MILNE JA/.....

(a) the existing means and obligations of herself and defendant;

(b) the contributions direct and indirect made by her to the maintenance or increase of the estate of defendant during the subsistence of the marriage, both by the rendering of services and the saving of expenses which would otherwise have been incurred, it is just and equitable that defendant be directed to transfer to plaintiff one half of the total assets amassed by him from the inception of the marriage between the parties to date."

The claim for a divorce was based upon the incompatibility of the parties, the fact that they had, during September 1986, agreed to live apart and the fact that the marital relationship between them had broken down irretrievably.

The relief which the respondent claimed included:

(1) An order directing the defendant to furnish a statement of account relating to the disposition of the respondent's immovable property, and to pay the amount

due to the respondent in terms of that account,

(2) An order directing the appellant "as prescribed in terms of section 7 of the Divorce Act No 70 of 1979" to transfer to her one half of the appellant's assets up to the date of dissolution of the marriage,

(3) A decree of divorce,

(4) Maintenance for the respondent at the rate of R1 000 per month (with a proviso to the effect that this sum should be increased by R1 000 per month "for each R100 000 by which the sum payable to plaintiff (in terms of section 7) falls short of R1 000 000", and also for payment of maintenance to the respondent to be increased in accordance with rises in the consumer price index, as notified by the Director of Statistics.

(I have omitted certain of the claims made by the respondent because the appellant, in his plea, made detailed

tenders some of which were accepted by the respondent in a document called "acceptance of tender", subsequently incorporated in the order of the court a quo. These related to the custody and maintenance of the children of the marriage and nothing more need be said about these matters.)

The appellant made a conditional counterclaim for a decree of divorce, and an order incorporating the terms of certain paragraphs of the tender. The action was heard by COETZEE J. During the course of the trial a decree of divorce was granted and on 20 August 1987 an order was made incorporating those terms of the tender which had been accepted; this order is not in issue in this appeal.

The appellant was also ordered to pay to the respondent the sum of R278 000, and the sum of R3 500 000 on or before the second day of October 1987. The trial judge granted leave to

appeal against the whole of the judgment, but in fact it was only the order for payment of the sum of R3 500 000 that was in issue in the appeal. The sum of R278 000 represented the net proceeds of what was described as "the former common home of the parties" found by the court to be the respondent's property. It was, furthermore, not part of the appellant's case that no award should have been made in terms of the provisions of s7(3) of the Divorce Act No 70 of 1979 (the Act). The objection was to the quantum. It was submitted that the award of R3,5 million -

> "should be reduced substantially to reflect a transfer by the appellant to the respondent of an amount which this Court deems just and equitable in terms of section 7 of the Act in addition to the payment of the amount of R278 000 as ordered in para. 1 of the Order, and the retention by the respondent of the sum of R26 000."

The amount of R26 000 was the amount standing to the credit of the respondent in a savings account. The original tender in the appellant's plea, which was dated 7 August 1987, included a tender to pay or deliver to the respondent:

(a) the sum of R2 000 per month as maintenance for herself;

(b) the sum of R300 000;

(c) all household furniture and effects in the parties' former matrimonial home excluding certain items;

(d) a motor car in the respondent's possession;

(e) R10 000 as a contribution towards the purchase of another motor vehicle by the respondent; and

(f) the respondent's costs as between party and party up to the date of the tender.

On 17 August 1987, when the trial had been running for several days, the appellant's tender was amended by deleting the offer to pay maintenance of R2 000 per month, and increasing the amount of R300 000 to R750 000. This was described by the appellant's senior counsel as "a clean break tender". What was obviously contemplated by this was that the court should make only a redistribution order in terms of ss(3), and no maintenance

order in terms of ss(2) of s7 of the Act. Cf Beaumont v Beaumont 1987(1) SA 967 (A) at 993B-C. It was the appellant's case, in other words, that the court should, instead of making a maintenance order in terms of ss(2), award a lump sum in terms of ss(3). This, in fact, appears to be what the trial judge had in mind at one stage in his judgment. He quoted the following remarks of BOTHA JA in Beaumont's case at 993A-E:

> "In other words, the English legislation now seeks to foster the imposition of a 'clean break' in appropriate cases (**Cretney (op cit** at 835)). Our legislation contains no corresponding provision, but in this instance I do not consider the concept underlying it to be foreign to our law. On the contrary, there is no doubt in my mind that our Courts will always bear in mind the possibility of using their powers under the new dispensation in such a way as to achieve a complete termination of the financial dependence of the one party on the other, if the circumstances permit. The last-mentioned qualification is, of course, very important; I shall return to it in a moment. The advantages of achieving a 'clean break' between the parties are obvious; I do not think they need be elaborated upon. The manner of achieving such a result is, of course, by making only a redistribution order in terms of ss(3) and no maintenance order in terms of ss(2). What I have said earlier with regard to the

> Court taking an overall view, from the outset, of the possibility of making an order or orders under either ss(2) or ss(3) or both, does not mean that the Court will not consider specifically the desirability in any case of making only a redistribution order and awarding no maintenance, having regard particularly to the feasibility of following such a course. With regard to the latter and to the qualification I stressed a moment ago ('if the circumstances permit'), there will no doubt be many cases in which the constraints imposed by the facts (the financial position of the parties, their respective means, obligations and needs, and other relevant factors) will not allow justice to be done between the parties by effecting a final termination of the financial dependence of the one on the other. In the end everything will depend on the facts and the Court's assessment of what would be just."

The learned trial judge then says:

> "In my order I follow the clean break principle aforementioned."

As one would expect in these circumstances, the trial judge then examined, in detail, the respondent's claim for maintenance, and also her evidence as to her capital requirements for the purchase of a town house, and a new motor car, and the expenses incidental

to such acquisitions. He came to the conclusion that the respondent's capital requirements amounted to R300 000 and that "... R6 000 per month would be ample to cater for the needs of the plaintiff so as to maintain the same life style to which she was accustomed."

The order for the sum of R3,5 million which he made was, however, quite unrelated to these findings. It seems that he awarded this sum upon the following basis:

(a) the net assets of the appellant were R7 539 200;

(b) throughout the marriage there was a universal partnership between the parties in which they held equal shares;

(c) that, accordingly, it would be just and equitable that: "... the parties should share equally."

It would seem that in arriving at the figure of R3,5

million the trial judge first divided R7 539 200 in half, and then deducted approximately the net proceeds of the sale of the respondent's house in Melrose namely R278 000. I say "approximately" because the figures do not work out exactly, but the learned judge stated earlier in his judgment that the amount of R278 000, and the respondent's savings of R26 000 constituted "... factors I must have regard to when considering my order in terms of s.7(3), namely as being part of the means of the plaintiff." (Presumably in terms of s7(5)(a).)

The finding that the net assets of the appellant at the date of conclusion of the trial were R7 539 200 was not challenged, and appears to be correct. The appellant's counsel initially contended that, on a proper reading of s7, it was necessary to determine the parties' assets at the date when they separated, namely in September 1986, but he abandoned this contention in argument. In my view it is quite clear that the

court, in making an order in terms of s7(3) is required to have regard, so far as that is practicable, to the assets and liabilities of the parties as at the date of the order. Ss(2), which deals with the payment of maintenance, requires the court to have regard to "... the existing or prospective means of each of the parties, their respective earning capacities, financial needs and obligations ...". Ss(3) which deals with a redistribution order, requires the court to consider the provisions of ss(4),(5) and (6) before making an order in terms of ss(3). Ss(5) expressly refers in sub-para (a) to "the existing means and obligations of the parties". There is nothing to indicate that the legislature had in mind any date other than the date of the court's order and, indeed, if the original contention of the appellant were to succeed, it could give rise to highly anomalous consequences.

Despite the submissions of the respondent's counsel to

the contrary, it is quite clear that the trial court arrived at the conclusion that it was just and equitable to award the respondent R3,5 million on the basis that a universal partnership in equal shares existed between the parties throughout the marriage, and on no other basis. Certainly no other basis is suggested in the judgment, and the words used in the judgment leave no doubt in my mind that this is what the trial court found. The learned judge dealt at length in his judgment with a letter which the appellant wrote to the respondent on 11 November 1978 (to which I shall refer later). In this letter the appellant said "... I have always considered our marriage a universal partnership ...". The trial court found that certain statements in that letter were the truth, "... and that a universal partnership existed between the parties at the time of the marriage and during the marriage." He then went on to say, "I find that this was an equal affair." At a later stage in his judgment after dealing with the factors to be taken into account

in making an order under s7(3) of the Act, the learned judge says:

> "I am of the view that the parties should share equally. I find as a fact that the parties at all times intended that their assets during the marriage belonged to both equally. The letter of 11 November 1978 corroborates the plaintiff's version as to 'what is mine is yours and what is yours is mine'. The defendant's denial of this attitude is rejected. The redistribution order I make will reflect this position."

In adopting this approach it is plain that the trial court misdirected itself. In the first place the respondent's case was not based upon a claim for distribution of the assets of an equal partnership. It was based upon the provisions of s7(3) of the Act. That is clear from the pleadings and the evidence, and, indeed, it was common cause between counsel at the hearing of the appeal. Secondly, it is quite clear from the respondent's evidence that there never was a legal partnership between them, and the respondent's counsel conceded as much in argument. Even

if spouses agree to pool their resources such an agreement, unless it has the requisites of a legal partnership, is not irrevocable and may be resiled from at any time. Kritzinger v Kritzinger 1989(1) SA 67 (A) at 77C-E. Reliance was sought to be placed on certain remarks in the judgment of the Full Court of the Cape Provincial Division in Sloane v Sloane, delivered on 26 February 1988 (as yet unreported), and in particular the following remarks of TEBBUTT J:

> "It is not necessary in the case of what, for want of a better phrase, I shall call a matrimonial partnership that the four requisites usually required for a partnership referred to by **POTHIER** on Partnership and cited with approval in many South African cases (see e.g. Joubert v Tarry & Co 1915 TPD 277 at 279; Rhodesia Railways v Commissioner of Taxes 1925 AD 438 at 465; V's case supra p615A-B; Muhlmann v Muhlmann 1981(4) SA 632 (W) at 634C-D) should be present."

Reliance is then placed upon certain remarks by BERMAN J in the Kritzinger case in the court below. To the extent that this passage is in conflict with what was held by this court in the appeal in Kritzinger's case supra Sloane's case must be taken to

have been overruled. I should, perhaps, add that on the facts of Sloane's case the wife had undoubtedly made a contribution which would have justified an order in terms of s7(3) of the Act. Furthermore, in the instant case the only properties that were "acquired by the joint endeavours and out of the joint resources of the spouses during marriage" were the three matrimonial homes, namely the properties at Glenhazel, Waverley and Melrose, and it is the Melrose property which the respondent claimed as her sole property, and the entire proceeds of which were separately awarded to her in the trial court's order.

On the facts of this case it certainly cannot be said that a legal partnership existed; still less a universal partnership, and even less a partnership in equal shares. The respondent was obliged to concede in cross-examination that there had never been any express agreement of partnership (despite her evidence in chief that there had been) and that the sole basis

for her contention that she and the appellant were equal partners was the letter of 11 November 1978. As already mentioned, the trial court found the contents of this letter to be true, and based the finding that there was a universal partnership in equal shares upon it. I accordingly reproduce it in its entirety.

> "Dear Hazel,
>
> I feel that it is necessary, having regard to my recent disclosure to you of my having had an affair with another woman, to set your mind at rest in regard to what your position would be if we were to become divorced from each other.
>
> Firstly, I would like to make it perfectly clear that I acknowledge that I would not be in the financial position which I am in, were it not for your assistance; and by that I mean your financial assistance quite apart from your moral support and the manner in which you have discharged your duties as my wife and the mother of my children (in which respects your behaviour has been impeccable).
>
> I therefore feel that it is no more than right that you should not have to change your lifestyle if we became divorced from each other. Our marriage has been a partnership in all respects and I would certainly not seek to deprive you of your just deserts.
>
> I undertake in the aforegoing event to ensure that-

1. The house in which we reside and the entire contents thereof (save for my clothing and personal effects) will become your sole and exclusive property.
2. The remainder of our assets (save for my share in my practice and our respective cars) will be divided equally between us.
3. We shall each retain our respective cars and I shall remain liable to make all payments in respect of the lease of your car.
4. To the extent that your income from your share in half of our assets is insufficient to afford you and the children a sufficient amount to maintain yourselves adequately, I shall pay to you as maintenance for yourself and the children a monthly amount equivalent to such shortfall.

   You may rest assured that I shall not go back on my undertaking even if you ultimately feel that you are unable to forgive me for what I have done, or are unable to continue with our marriage as a result thereof, and we become divorced by virtue thereof; whether or not such divorce is against my will.
5. In point of fact I would be most disappointed in myself if I were to go back on my word and I sincerely believe that any judge who may read this letter would justifiably be hard-pressed to grant a divorce on any terms more favourable to me.
6. I reiterate that I have always considered our marriage a universal partnership and I should imagine that that is how you have seen it.
7. I am indeed sorry that this situation has arisen and I obviously assume full responsibility for it.

> In fact there is nothing to assume - I am fully responsible for it."

The background to the writing of this letter was as follows. In about 1975 the appellant had commenced an affair with another woman. On the morning of Sunday 5 November 1978 the respondent asked the appellant whether he was involved with another woman, and he admitted that he was, and on that day he left the matrimonial home. The next day however, after discussing the matter with respondent's mother, the appellant moved back. The letter of 11 November was thus written a few days after the appellant had returned. At that time the respondent's stepfather, a Mr Emdin, was terminally ill and he died of cancer in January the following year. The appellant was on extremely good terms with Emdin, and wanted to set his mind at rest about what would happen to the respondent if the reconciliation did not work out, and the parties were divorced.

The appellant's evidence was that many of the statements in this letter were quite untrue, and that Emdin would have known that they were untrue. Thus the appellant said that Emdin would have known that there was no partnership between the appellant and the respondent. The trial judge found that this evidence could not be true since the letter would be cold comfort to Emdin if he knew that the statements in it were untrue. This is a misconception of the position. There was no need for Emdin to accept that there was a partnership. On the appellant's evidence and, indeed, on all the facts, there was no partnership. The point is that Emdin knew that the letter could be used by an attorney as a tactical weapon against the appellant. The appellant indicated as much in evidence:

> "Mr Katz, what you are saying is this letter had a self-destructive device in it because it contained a statement which Sonny Emden must have known to be absolutely false? --- He knew it to be false, I have no doubt but he knew that it could be used in case I misbehaved."

The appellant also said that he knew Emdin would be taking the letter to an attorney. Indeed, as matters turned out, the letter proved to be a potent weapon in the hands of the respondent in the trial. There are, however, a number of reasons why this letter does not assist the respondent. In the first place the very terms of the letter are themselves inconsistent with the notion of a universal partnership although the appellant is an attorney who, one would think, would normally use such terms accurately. The respondent's own case, both on the pleadings and in her evidence, was that she never, at any time, regarded any of dwelling houses successively occupied by the parties as being anything but her own exclusive property. On her own evidence therefore, there was no inclusion of any of the dwelling houses in the so-called "universal partnership". Secondly, the letter itself excludes the appellant's interest in his legal practice, and also excludes the parties' motor cars. Also on the facts,

with which I shall deal more fully in a moment, there was no partnership between the parties, universal or otherwise, and a fortiori no equal partnership.

Quite apart from these considerations however, the letter of 11 November, whether it be regarded as an undertaking or a declaration of intent, was obviously related to the particular situation which subsisted at the time when it was written. At that time the appellant was the guilty party, and he was acutely stricken with remorse. The respondent, at that stage, was completely innocent. Within a few months the situation had changed, because the respondent herself had committed adultery and had admitted as much to the appellant. The letter in its opening paragraph refers to the disclosure of the appellant's affair with another woman, and to his intention to set the respondent's mind at rest in regard to what her financial position would be "if we were to become divorced from

each other". Read in context, this clearly means "if we were to become divorced from each other as a result of my adultery". True, the parties had been back together for a few days but the wound was still raw and it is clear that the appellant contemplated that his adultery might prove too much for the respondent to stomach. He says -

> "You may rest assured that I shall not go back on my undertaking even if you ultimately feel that you are unable to forgive me for what I have done, or are unable to continue with our marriage as a result thereof, and we become divorced by virtue thereof; whether or not such a divorce is against my will." (My underlining)

Secondly, it must be borne in mind that at that stage the appellant's estate was relatively modest. It was common cause that its value was then of the order of R350 000. If at that stage the respondent had got half the appellant's estate she would not have been particularly well off and, indeed, the letter contemplates this because it provides that -

> "To the extent that your income from your share in half

> of our assets is insufficient to afford you and the children a sufficient amount to maintain yourselves adequately, I shall pay to you as maintenance for yourself and the children a monthly amount equivalent to such shortfall."

The letter also refers to "our respective cars" being retained by each, and the appellant says "I shall remain liable to make all payments in respect of the lease of your car", which indicates an intention to deal with the situation then pertaining. This letter appears to me to have little relevance to the situation in August 1987, when the trial took place. By that time, as already mentioned, the net value of the plaintiff's assets was R7 539 200.

The letter, therefore, afforded no good ground for the finding that there was an equal partnership. Since this finding coloured the whole approach of the learned trial judge this court is now free to consider the matter afresh.

I think it must be borne in mind that the respondent not only claimed a redistribution order in terms of s7(3) of the Act, but also a maintenance order in terms of ss(2). These two subsections refer to a variety of matters which are to be taken into account when orders under them are sought. Some of these factors are to be found in both subsections, e.g. ss(2) refers to the means and obligations of the parties as does ss(5)(a) which, together with ss(4), lays down matters which must be taken into account by a court making an order under ss(3) in addition to those set out in ss(3) itself. There are, of course, clear differences between these two subsections. It is a prerequisite to the grant of an order under ss(3) that the spouse seeking such an order has made a contribution of the nature described in ss(4). No such contribution is required under ss(2). The two subsections are, however, interrelated, because one of the matters required to be taken into account when considering the grant of a maintenance order is "an order in terms of ss(3)".

What is more, it is clear that in the Beaumont case, supra, at 992E-F read with the passage cited above, this court decided that the legislature intended the court to be able to take -

> "... an overall view, from the outset, of how justice could best be achieved between the parties in the light of possible orders under either ss(2) or ss(3) or both subsections, in relation to the means and obligations, and the needs of the parties, and all the other relevant factors."

When a court makes an order for maintenance in terms of s7(2) it may have regard to the factors there set out, including "an order in terms of subsection (3) and any other factor which in the opinion of the court should be taken into account". There is nothing in ss(5) which specifically provides that in the determination of the assets to be transferred as contemplated in ss(3), regard may be had to the fact that no order is being made in terms of ss(2). Nevertheless, such regard is not excluded. (See ss5(d)). In terms of the decision in Beaumont's case supra

the 'clean break' concept is not foreign to our law. It is obvious that a "complete termination of the financial dependence of one party on the other" cannot be achieved so long as there is to be an order for the periodical payment of maintenance. It follows that it will frequently (one may almost say generally) be necessary, if a clean break is to be achieved, that the amount of the determination should be at least such that the spouse concerned will be in a financial position to maintain herself or himself. In such circumstances a court will ordinarily take into account the spouse's maintenance needs.

I have already referred to the trial court's findings as to the capital sum required to provide the respondent with a new town house and a new motor car, and as to what sum she would reasonably require to maintain herself. On the basis of these findings and on the basis of a calculation contained in a document which formed part of the agreed bundle of documents, the

amount needed to maintain the respondent would be in the vicinity of R500 000. This is on the assumption that the R300 000 needed for the house and car and incidental expenses would be provided for by the amount of the net proceeds of the Melrose home together with the respondent's R26 000 invested in a savings account. The calculation referred to indicated that R500 000 would purchase an annuity which would provide a monthly income of approximately R6 000 per month.

The respondent's claim was, however, not confined to one for maintenance. The trial court found that the respondent had, indeed, contributed to the increase or maintenance of the appellant's estate, and that she had done so in various ways. For the sake of convenience these may be divided into three broad categories. The first consisted of contributions made by the respondent's parents. The second consisted of contributions to the matrimonial home made directly by the respondent. The third

consisted of her indirect contributions in the shape of her "services" as a wife.

I exclude from the first category any contribution by the respondent's parents to the acquisition of the matrimonial homes of the parties. The trial court found that the respondent "... brought into the marriage a top class trousseau, so much so that almost never since was there a major replacement other than the odd item, such as, e.g., duvets. The trousseau consisted of linen, cutlery, bedding, cloths, towels, crockery etc. She also brought into the marriage a large number of pieces of valuable antique furniture." Reference was also made to "... curtains provided by the plaintiff through her mother." It was also found that, early in the marriage, the respondent's father had provided the appellant with R8 000 which was "advanced" to the appellant to enable him to pay for his share in a legal partnership. There was some uncertainty about this amount; an uncertainty which, I

may say, was shared by the respondent. (In her further particulars she alleged that the sum was "R5 000 to R8 000.") It was also found that because of the generosity of the respondent's mother the children of the marriage had better quality clothing etc. when they were babies than the parties could have afforded at the time, and that the parties were able to have holidays in Cape Town which they would not have been able to afford then but for the fact that the respondent's mother allowed them to use her flat in Cape Town.

I am not certain that these contributions constitute contributions by the respondent within the meaning of ss(3). They were certainly contributions made for the benefit of the family, but were probably made mainly on account of the love and affection which the respondent's parents had for the respondent. Possibly they were also made out of affection for the appellant. Assuming, without deciding, that they do constitute contributions

within the meaning of the subsection, I do not think that they should play a material part in arriving at the value of the respondent's contributions. I say this because the contribution which the appellant made to the respondent's estate was at least equal in value to the contributions made to his estate by the respondent's parents. I refer here to the increase in the respondent's estate caused by the appellant's conduct in enhancing the value of the matrimonial homes of the parties which were the respondent's property.

As I have already mentioned the parties had three homes during the course of their marriage. The first was the Glenhazel property which was bought for R24 500, of which the appellant's father donated the sum of R4 750, and the respondent's father the same sum. A bond was taken for R15 000. This property was sold for R45 000, the net proceeds being R30 000. The second home of the parties, which I shall call the

Waverley property, was bought for R85 000, R25 000 having been raised on bond, R30 000 being the monies received by the respondent from a trust of which she was the beneficiary, and R30 000 representing the net proceeds from the Glenhazel property. The Waverley property was, in turn, sold for R105 000 net, and the balance after paying off the bond, was R78 000. The last home of the parties, which I shall call the Melrose property, was bought for R55 000, of which R40 000 was raised on bond and R15 000 was used from the proceeds of the sale of the Waverley property. The Melrose property was finally sold in or about March/April 1986, some six months before the parties finally agreed to part company. The proceeds of the sale of the Melrose property was R278 000 net. There can be no doubt that on the evidence it was as a result of the appellant's expertise that each of the three successive matrimonial homes was bought relatively cheaply, and sold for a high price. It was also not in dispute that the appellant had spent approximately R3 000 in

improving the Glenhazel and Waverley properties and approximately R57 000 in improving the Melrose property. It is unnecessary to go into the precise arithmetical proportions in which each contributed to the homes since, in terms of the judgment of the court a quo, the respondent received as her property the whole of the net proceeds of the sale of the Melrose property. On that basis she was more than fully repaid the R30 000 that she put into the Waverley property from the trust even if this sum is scaled up to allow for the depreciation in the value of money between 1970 and the date of the trial. In addition she received the value of the improvements already mentioned, which had been effected to the homes at the appellant's expense.

Before dealing with the value of the respondent's "services" as a wife, I should refer to the argument of the respondent's counsel that the respondent had also contributed to the increase in the appellant's estate with regard to his

property dealing. There can be no doubt that the appellant's large estate at the time of the trial came into being because the appellant made money out of property dealings, and then, at the right time, sold his total property portfolio for approximately R3 000 000 and put all his money into the stock market which then rose spectacularly. At the time of trial the stock market was just about at its peak before the crash of October 1987. It is correct that, as submitted by respondent's counsel, the appellant received the benefit of interest from time to time on certain of the proceeds of the sale of the matrimonial homes, but his evidence that it was his money and not hers that went into his property portfolio and property developments was not really challenged. In fact, the trial court found that the appellant used his own cash funds in the building of his property portfolio.

There is no doubt that it was, to an overwhelming

degree, the appellant's own energy, ability, knowledge and courage that enabled him to make extremely profitable investments in property, and even more profitable investments in the stock market. The evidence is that he was constantly on the look-out for what he regarded as potentially valuable industrial or commercial properties; that he bought such properties at very reasonable or even bargain prices largely with borrowed money; that he sold such properties extremely profitably; and that he got out of the property market and into the stock market at precisely the right time, and stayed in the stock market while it rose to the level it had reached by the date of judgment. Respondent's counsel sought to attribute to good fortune the phenomenal rise in the value of the appellant's assets from the time of the writing of the letter in November 1978 to the date of the trial. No doubt good fortune played a part, but anyone who has experience of investments in property and the stock market must be aware of the fact that "the higher the stakes the greater

the risk" and, as the trial judge put it, the appellant displayed a "finely honed business acumen." Such acumen may be in part a natural gift, but a constant attention to what is going on in the market appears to be an indispensable ingredient for success and acumen is at least in part the product of painfully gained knowledge and experience. True, the respondent has some recollection of the properties being purchased, as she was kept generally informed in regard to what was happening, and perhaps it is fair to say that the appellant used her on some occasions as a "sounding board" in respect of his proposed investments. It is clear however that, as contended by appellant's counsel, the respondent played no role in the decisions to acquire any assets which constituted the appellant's property portfolio, and later his share portfolio. She took no part in the business of running the properties or realising them.

The respondent must therefore rely upon the performance

by her of "services" as a wife, in order to establish that she contributed to the maintenance or increase of the appellant's estate. Her role in the marriage was confined to the traditional one of being wife, mother and manageress of the household. This role is rather more fully described in the respondent's pleadings as follows:

> "Throughout their marriage, Plaintiff afforded Defendant moral support in respect of all his undertakings and ventures, and was a dutiful and loyal wife to Defendant and mother to the children. At Defendant's insistence Plaintiff was totally and actively involved in the running of the home and the caring for the children and Defendant. At his insistence she was always home when the children returned from school and personally supervised their extra-mural activities, both educational, sporting and social. In order to free Defendant on weekends to enable him to attend to his weekend activities, Plaintiff was obliged to bear the entire burden of attending to the children's weekend social and sporting activities. Plaintiff attended to all Defendant's personal needs, even to the extent of purchasing his toiletries and always being at home when he returned from work. Whenever required to, she accompanied him to social functions and entertained business associates by holding numerous dinner parties and Christmas parties for Defendant's staff, clients and business

> associates. Plaintiff assumed total responsibility for the running of the home and attended to the needs of the children so as to leave Defendant completely free to further his career, investment and other interests."

I doubt whether it can accurately be said that it was "at Defendant's insistence" that the respondent undertook what was primarily a domestic role, and furthermore the pleading omits to state that the parties had three servants and "all of the accoutrements of a comfortable home". The respondent had regular holidays and overseas trips, she acquired jewellery and furs and her own estate was substantially improved by the appellant's efforts. I refer here to the efforts he made, which were successful, to increase the value of the matrimonial home which was hers. It is also the case that the appellant encouraged the respondent to pursue her own occupations, and she did at various times work for an auditor, for ten months as a real estate agent during which time she earned some R16 000 (which she retained to spend as she wished), as was the case with her earnings as a

public relations officer for an aerobics establishment. She was encouraged to attend university, and other courses, and these courses were paid for by the appellant. Furthermore it was clear that when Christmas parties were held for the appellant's staff, caterers were called in to assist. Nevertheless, in my view, the trial court was right in holding that -

> "Throughout the years the plaintiff ... assisted defendant by rendering him services in his home. In pursuit of his practice and his property speculation, he relied on her implicitly to keep the home fires burning and he lived in great comfort."

There is no evidence which enables one to put a money value on these services. Nor is there evidence that if the respondent had not performed them the appellant would have employed someone to perform them, nor as to what it would have cost to employ such a person. In Kretschmer v Kretschmer 1989(1) SA 566 (W) **FLEMMING J** appears to have thought that such evidence was a prerequisite to a finding that the plaintiff in that case had made a contribution within the meaning of ss(3) and (4) of s7. (p580H-581C.) What

is more, he appears to have thought that the spouse seeking to prove a contribution would have to prove that the contribution exceeded "... the amount of the duty to contribute to own support". (p579C-582E.)

It seems to me, with respect, that this reasoning involves a confusion between the jurisdictional facts which have to be proved before the court can make an order in terms of s7(3), and the manner in which the court is to exercise that power once it is established. Before the court can make an order in terms of ss(3) it must be established (a) that the party seeking such an order has made a contribution; (b) that such a contribution has increased or maintained the other party's estate; and (c) that it would be just and equitable to make such an order because of (a) and (b). It does not follow that the manner in which the court is to arrive at what is just and equitable is limited to what has been contributed. In the first

place this is not what the section says. In the second place this court in Beaumont's case supra has held quite clearly that this is not what the section means. It is quite clear from the judgment of **BOTHA JA** that factors other than purely monetary ones may properly be taken into account. See e.g. the reference to the remarks of **VAN DEN HEEVER J** quoted in Beaumont's case at p987E-G. Furthermore at p996B-997H the argument was considered that the legislature could not have intended a contribution by either spouse made purely in the discharge of the common law duty of support, to qualify as a contribution which entitled the spouse making it to claim compensation in the form of a distribution order. This argument was specifically rejected and at p997F it was held that the plain meaning of the words in ss(4) was so wide that:

> "... they embrace the performance by the wife of her ordinary duties of 'looking after the home' and 'caring for the family'; by doing that, she is assuredly rendering services and saving expenses which must necessarily contribute indirectly to the maintenance or

increase of the husband's estate."

I think furthermore it is relevant to bear in mind that **KRIEGLER J** in the court a quo in the Beaumont case had plainly taken into account not only the services which the wife had rendered to the plaintiff in his business, but also the services in his home. There does not appear to have been any evidence led of the nature contemplated by **FLEMMING J** in Kretschmer's case. **KRIEGLER J**, nevertheless, held that inter alia on the basis of such contributions there should be a substantial redistribution order. This court at p998C found that **KRIEGLER J**'s findings in this regard could not be faulted. Indeed, when appellant's counsel referred to Kretschmer's case, and it was put to him that the reasoning in that case was inconsistent with the judgment of this court in the Beaumont case, he did not even attempt to argue the contrary.

I return therefore to the question as to the evaluation

of the wife's "services". This is a difficult task. I have already dealt in detail with the nature and extent of the respondent's contribution to the appellant's estate. The following are also factors which I regard as relevant:

(a) The net value of the appellant's assets at the time when the court a quo made its order was R7 539 200 (excluding the value of his share in the legal practice).

(b) The net value of the respondent's assets at that time (excluding household furniture and fittings, clothing, jewellery and furs) was R26 000 and in terms of the court's order she was to receive a further R278 000 being the net proceeds of the Melrose property and it was common cause that this part of the order would stand.

(c) While it is reasonably possible that the respondent may take up some occupation which would provide some income

it is reasonable to proceed on the basis that she probably will not. In the first place on the evidence she is not qualified for any particular profession, occupation or job. Secondly, she is no longer a young woman and apart from brief periods when she worked as an estate agent and later as a public relations officer she did not have a job of any kind during the marriage.

(d) The appellant has a substantial legal practice and is obviously highly successful in the investment field, and is more likely than not to continue to be successful.

(e) The marriage had its ups and downs and, as already mentioned, each of the spouses committed adultery, but they had three children who are now grown-up and the marriage lasted some 23 years.

(f) The appellant has always provided satisfactorily for the maintenance of the children, and will continue to

do so.

(g) On the facts of this case there is not such a conspicuous disparity of fault between the conduct of the appellant and that of the respondent in bringing the marriage relationship to an end as to warrant this being taken into account, even on the very limited basis that it was taken into account in Beaumont's case supra at 995E-J. (In the court a quo both parties, through their counsel, expressly disavowed any reliance on the misconduct of either party as a factor to be taken into account in making a redistribution order and the trial court accordingly approached the matter on that basis.)

I have already referred to the fact that the sum of R500 000 would purchase the respondent an annuity which would provide her with approximately R6 000 per month for the rest of

her life. This is, however, an unrealistic calculation since it fails to take into account the effect of inflation. For some years, the annual rate of inflation in the Republic has been substantial and there does not appear to be any ground for believing that it is likely to decrease appreciably in the foreseeable future. What is more, the Republic is subject to artificial pressures in the form of sanctions which have an effect on the economy. Interest rates have fluctuated very considerably over the past few years. In these circumstances it is difficult for the average person to invest safely and at the same time receive a reasonable return while avoiding the ravages of inflation. Furthermore, the calculation referred to does not take into account the tax which the respondent would have to pay on the R6 000 per month.

In the light of all the circumstances I consider that, on the facts of this particular case (and I stress that I am

laying down no principle nor even a general guide) it would be just and equitable to make a redistribution order which would, so far as is reasonably practicable, enable the respondent to maintain the same standard of living as the parties enjoyed when the marriage broke up. This order is intended, again so far as is practicable, to give the respondent financial security for the rest of her life. What is more, it is intended to be sufficient to cater for the respondent paying for expert advice on her investments on a continuing basis, and even to cater for occasional losses on investments. It is only possible to proceed on this relatively generous basis because the appellant has a very large estate. This may seem anomalous because, in the case of the person of average means and even more so in the case of a poor person, the spouse may actually have worked a great deal harder and had a much more demanding married life than the respondent; yet because of the limited nature of the other spouse's resources, be entitled to very limited maintenance, and

in the case of poor persons to virtually nothing. This is, in the nature of things, unavoidable and, in any event, it is no more anomalous than taking into account the standard of living of the parties prior to the divorce which ss(2) expressly enjoins the court to do when making a maintenance order. It is not possible to make anything like a precise calculation, partly because of the difficulty in putting a money value on the respondent's services and partly because of the impossibility of forecasting what interest rates are likely to be during future years. In the light of all the factors I have referred to I have come to the conclusion that it would be just and equitable to make a redistribution order in favour of the respondent in the sum of R1,5 million.

As the appellant has achieved substantial success on the appeal he is entitled to the costs of the appeal. There is, however, no good reason to interfere with the order for costs

made in the court below with regard to the costs of the trial.

It was common cause at the hearing of the appeal that the respondent was granted leave to execute upon the judgment of the court a quo, and we have been furnished with a copy of the order of court in this regard. It appears from this that leave to execute was granted on 21 October 1987 and that the respondent was ordered to furnish security to the appellant de restituendo in the sum of R3 028 000 "... including an undertaking to pay interest at the legal rate on such amount up to R3 028 000 as the respondent may become entitled as a result of the judgment of the Appellate Division". The reference here to "the respondent" is to the respondent in the application for leave to execute, namely the appellant.

The order of the court is accordingly as follows:

(a) The appeal succeeds with costs, including the costs

consequent upon the employment of two counsel.

(b) The judgment of the court below is altered by substituting in para. 4 of the order the sum of R1,5 million for the sum of R3,5 million.

(c) The respondent is ordered to refund to the appellant the sum of R2 million, and, in terms of the undertaking referred to above, to pay interest thereon at the legal rate calculated from the date upon which the judgment of the court a quo was carried into execution until the date of payment.

A J MILNE
Judge of Appeal

CORBETT CJ]
HOEXTER JA]
NESTADT JA] CONCUR
NICHOLAS AJA]