THE SUPREME COURT OF APPEAL

OF SOUTH AFRICA

CASE NO: 382/04

Reportable

In the matter between

CLIVE THOMAS BUTTNER Appellant

and

CHERYL ANN BUTTNER Respondent

Coram**:** Scott, Lewis, Van Heerden JJA, Nkabinde et Cachalia AJA

Heard: 23 August 2005

Delivered: 23 September 2005

Summary: *Divorce – redistribution of assets in terms of s 7(3) of Divorce Act 70 of 1979 – powers of court on appeal to interfere with exercise of discretion by trial court – s 7(2) of Divorce Act - award of token maintenance made by trial court in terms thereof – correctness of such order.*

JUDGMENT

VAN HEERDEN JA:

Introduction

[1] This appeal concerns, in the main, the issue of redistribution of assets between the parties upon their divorce and the correctness or otherwise of an order for the payment of so-called 'token' maintenance made by the trial court in favour of the wife.

[2] The parties were married to each other on 2 July 1977. The proprietary regime of their marriage was governed by an antenuptial contract in the then standard form, excluding community of property, community of profit and loss and thus, by implication, accrual sharing in any form, between them.

[3] In April 2003, the appellant husband instituted divorce proceedings against the respondent wife in the Cape High Court. He claimed, inter alia, a redistribution order in terms of s 7(3) of the Divorce Act 70 of 1979 ('the Act') in respect of the respondent's member's interest in a property-owning close corporation known as Wanderer Night 20 CC. In her counterclaim, the respondent claimed that she was entitled to half of the net proceeds of the sale of the parties' former matrimonial home in Brisbane (Australia). She alleged that she and the appellant had been the co-owners in equal undivided shares of this property which was registered in their joint names. In the alternative, and in the event of the court finding that she was not

entitled to such proceeds, the respondent sought a s 7(3) redistribution order on the basis that the appellant transfer to her half of the value of the assets amassed by him during the existence of the marriage. She also claimed maintenance for herself until her death or remarriage. In response to this counterclaim, the appellant amended his particulars of claim to the effect that, in the event of the respondent's claim for half of the net proceeds of the Brisbane house succeeding, she should be ordered, in terms of s 7(3) of the Act, to transfer to him one half of the value of the assets in her estate.

[4] Prior to the commencement of the trial, the parties agreed that custody of their 18 year old daughter (Kate) should be awarded to the appellant, with the respondent having reasonable access to her. At that time the appellant was financially supporting both Kate and the parties' 21 year old daughter (Amy) and no maintenance order in respect of either daughter was sought by either party. In granting the divorce order, the court *a quo* (Thring J) dismissed the appellant's proprietary claims. In respect of the claim in reconvention, the appellant was ordered to pay to the respondent the amount of R360 000.00 in respect of her main claim and to contribute to her maintenance at the token rate of R10.00 per month until her death or remarriage. In addition, Thring J ordered the appellant to pay

the costs of the action. This appeal - against the proprietary, maintenance and cost orders made by the court *a quo* – is with the leave of that court.

The factual background

[5] When the parties were married in 1977, the appellant was employed by Murray & Stewart in Umtata (Transkei) as a trainee quantity surveyor, alternately working for six months of the year and then studying for six months, his study fees being paid by his employer. The respondent (who has no tertiary education qualifications) was working for Barclays Bank in East London as a teller, but managed to get a transfer to Umtata. In 1978 or 1979, the appellant joined the Durban City Council, also as a trainee quantity surveyor, and the parties moved to Durban. Once again, the respondent succeeded in getting a transfer to a branch of the bank in Durban.

[6] After the appellant had qualified as a quantity surveyor, he worked for a Durban-based company for about four years, but was transferred to Port Elizabeth. The respondent was again transferred by the bank to Port Elizabeth and the parties moved there together. During the period 1981 to 1984, the appellant worked for two other building companies in Port Elizabeth. The parties built a house in Port Elizabeth, financed by means

of their joint savings and a mortgage bond, with the appellant himself managing and supervising the building work.

[7] Amy was born in 1983 and, by joint decision, the respondent stopped working in order to care for the child. In about 1984, the appellant obtained employment with a building concern in Knysna and the family moved there. In late 1985, together with two partners (Messrs Thompson and Tanner), the appellant started a new business in Knysna building timber houses. The parties sold their house in Port Elizabeth and a plot in Knysna (which they had earlier acquired using joint funds) to generate finance for the business (Thompson & Buttner Construction CC, trading as T & B Log Homes) and to support themselves while the business established itself. From the latter half of the eighties, T & B Log Homes ('T & B') became very successful and grew rapidly, expanding into the export market.

[8] Kate was born in 1987 and, shortly after her birth, the respondent obtained part-time employment at the Perm Bank, her earnings being absorbed by the family's living expenses. The respondent subsequently qualified as an estate agent and worked as such on a part time basis in Knysna for a few years. The commissions which she earned were also used for the family's living expenses, as well as an overseas holiday for the

parties in 1996. She managed the household and devoted herself to the care and upbringing of their daughters, structuring her working hours around their needs and activities. The parties owned a house in a 'good area' of Knysna which they sold in 1994, thereafter living in rented accommodation. The proceeds of their house were apparently transferred to New Zealand in a variety of ways.

[9] The family emigrated to New Zealand in January 1998. In preparation for this move, the appellant sold his member's interest in T & B to one of his 'partners' (Mr John Tanner) for a price of R1, 2 million in December 1997. The price was 'paid' to the appellant in various forms, including the entire member's interest in each of two property-owning close corporations, Wanderer Night Twenty CC and Wanderer Night Twenty-One CC. The member's interest in the former ('WN 20 CC') was transferred to the respondent, while the member's interest in the latter ('WN 21 CC') was transferred to the appellant. The respondent was somewhat reluctant to leave Knysna, but she agreed to support the appellant in his desire to emigrate and the decision to do so was ultimately a joint one.

[10] Both parties testified that, as a family, they arrived in New Zealand 'cold'. However, within less than two months, the appellant secured

employment in the building industry. The parties purchased a house in New Zealand from their savings, plus the proceeds of a mortgage bond. Neither party was sure whether the house was registered in their joint names, but it is clear that they both regarded it as a joint asset. For the whole of 1999, the appellant was employed by a developer to oversee the building of a hotel using a log wall system supplied by T & B and imported by the developer. As the hotel was being built in an area some two hours' drive from the parties' home, this job entailed extensive travel for the appellant and he was only able to spend the weekends at home with his family. In the meantime, the respondent commenced study by correspondence for an international travel agent's diploma, at the same time gaining practical experience by working part time for a travel agency in New Zealand. The commissions she earned were 'off-set against' air travel undertaken by members of the family. She remained very involved in the lives of the two girls, seeing to all their needs and running the household without any domestic help. Both parties agreed that their time in New Zealand was stressful, largely due to work pressures on the appellant and the resulting deterioration in his health, as well as the strain of trying to settle in a new country.

[11] In January 2000, the family moved to Australia, where the appellant had secured employment as the general manager of an engineering business

in Brisbane. Both girls were enrolled in private schools. The respondent completed her travel agent's diploma and, after about a year of trying to find employment in this field, started working on a casual basis for a small travel agency. Here too, all her earnings were used to pay for the family's travel expenses (including trips back to South Africa), and she continued to care for the family and run the household without any assistance.

[12] During the course of 2001, the parties purchased a plot in Brisbane and built a house on it. The property was registered in their joint names and the cost of acquiring the land and building the house was funded partly by means of a mortgage bond and partly by the proceeds of the house which they had sold in New Zealand. In early 2002, the appellant's member's interest in WN 21 CC was sold and the proceeds used to reduce the bond over the Brisbane property.

[13] Both parties testified that, from the start of their married life, they 'pooled everything' and considered their income and assets to be joint. The respondent was effectively in charge of their bank accounts and she used the money in these accounts to pay their household bills. According to the appellant, '…we viewed all property whether in her name or in my name…everything was basically a pooled resource, we didn't see our assets as being individual despite where [they] came from.' The respondent

testified to much the same effect: '…we really considered our assets to be joint assets…we did everything pretty much as a partnership and as a team.'

[14] Beginning in late 2000, Kate exhibited serious problems. She started to abuse marijuana and stayed away from school; her academic results declined dramatically and she lost interest in all her extra-mural activities. She dropped out of two different schools and was diagnosed as suffering from depression. She eventually provoked the respondent to such an extent that the latter struck her for the first time in her life, whereupon she left home for a while. These problems obviously placed a considerable strain on the parties' relationship and, according to the respondent, made her realise that their marriage was 'in trouble'. In July 2002, whilst on a five week visit to South Africa – the appellant remaining in Australia with the girls – the respondent committed adultery with a Mr Shaw, an old friend of the parties. After her return to Australia, she continued to communicate by electronic mail (in intimate terms) with Mr Shaw, even after the appellant had surprised her doing so and she had admitted her adultery. Although the parties attended marriage counselling, both together and then separately, this did not succeed in saving their marriage. The appellant was subsequently retrenched from his position as general manager.

[15] In late 2002, the parties decided to move back to Knysna, largely for Kate's sake so that she could be settled in a familiar environment and placed in a suitable school. The house in Brisbane was thus sold in November 2002 for about A$590 000. Apart from redemption of the mortgage bond, various other amounts were paid from the proceeds of the sale: estate agent's commission; the family's relocation expenses to South Africa; and the balance outstanding on a Toyota Prado motor vehicle (some A$39 600) which had been purchased in 2000 through the appellant's employer, but registered in his name. The net proceeds of A$ 225 000 were paid into the parties' joint bank account (on which each of them could operate independently of the other) on 16 January 2003. On the same day, at the instigation of the respondent, the parties opened a new joint account (at the same bank) which required the consent of both parties to any withdrawal, the agreement being that the net proceeds of the Brisbane house would, when cleared, be transferred into that account. However, five days later, on 21 January, the appellant transferred the amount of A$215 000 from the 'old' joint account into an account at another bank, over which he had sole operating power. He did this surreptitiously, without the respondent's knowledge or consent, leaving only A$10 000 from the sale of the house in the joint account, which amount the respondent then withdrew and appropriated for her own use.

[16] Of the A$215 000 which the appellant transferred to his own account, he transferred approximately A$32 800 (some R170 000) to South Africa and spent about A$24 300 on air tickets to South Africa, Amy's university fees in Australia, and the family's living expenses prior to their departure for South Africa. This left a balance in his Australian bank account of A$157 900. He and Kate left Australia on 28 January 2003, while the respondent (who was scheduled to depart a few days later) stayed on for about two weeks to undergo certain medical tests. During this time, she brought *ex parte* proceedings in the Australian Family Court for an order prohibiting the appellant from dealing further with what remained, in his account, of the net proceeds of the Brisbane house sale. In about March 2003, some time after her arrival in Knysna, she informed the appellant that she had 'taken action in the family court in Australia to freeze all those funds'. The appellant's immediate reaction to this information was to transfer the remaining funds (in the amount of A$157 900) to another Australian account in the name of a business associate, Mr Gareth Tanner, who holds a member's interest in T & B. The documentary evidence placed before the court *a quo* indicates that he had not at that stage been given 'formal' notice of the Australian court order, although the respondent had told him that she had taken steps to freeze the funds. The appellant testified that Mr Tanner was holding the funds (equivalent to

approximately R720 000) ‘in trust’ for him and that, from early 2003, he had borrowed money from T & B against the security of such funds. At the time of the trial, his total borrowings from T & B amounted to just over R425 000. He had used the bulk of the borrowed monies (some R289 000) on living expenses for himself and Kate and Kate’s school fees, while the balance had been absorbed by expenses incurred by him in trying to set up a new business (about R19 000), legal costs (approximately R70 000) and the purchase of a motor cycle (R47 000).

[17] In April 2003, on the day that the divorce summons was served on her, the respondent moved out of the rented house where she had been living with the appellant (although not as husband and wife) and Kate. Thereafter, Kate continued to live with the appellant, while the respondent obtained rented accommodation of her own. In September 2003, the respondent sold her member’s interest in WN 20 CC, receiving net proceeds of about R284 000. She spent approximately R123 000 of this money on the purchase of a motor vehicle and on living expenses, and lent R25 000 to the appellant to enable him to purchase a motor vehicle for Amy’s use (while she was studying in Cape Town in 2004). The balance of R136 000 was invested in the respondent’s name.

[18] Although the respondent's counterclaim was for one-half of the total net proceeds of the Brisbane house sale, including the sum used to pay off the balance outstanding on the appellant's Prado motor vehicle, her counsel indicated during the course of the trial that she would be content with one-half of the amount of A$157 900 (some R720 000) remaining in the Tanner account in Australia (ie R360 000). This was the amount that Thring J ultimately ordered the appellant to pay to her.

The judgment of the court a quo

[19] The relevant portions of s 7 of the Act read as follows:

'(3) A court granting a decree of divorce in respect of a marriage out of community of property -

(a) entered into before the commencement of the Matrimonial Property Act, 1984 [on 1 November 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; or

(b) . . .

may, subject to the provisions of subsections (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 subsection (3), shall not be granted unless the court is satisfied that it is equitable and just by reason of the fact that the party in whose favour the order is granted, contributed directly or indirectly to the maintenance or increase of the estate of

the other party during the subsistence of the marriage, either by the rendering of 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 subsection (3) the court shall, apart from any direct or indirect contribution made by the party concerned to the maintenance or increase of the estate of the other party as contemplated in subsection (4), also take into account –

(a) the existing means and obligations of the parties…;

(b) any donation made by one party to the other during the subsistence of the marriage, or which is owing and 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.'

[20] In *Beaumont v Beaumont*,[1] this court (per Botha JA) held that, as the grant or refusal of a redistribution order in terms of s 7(3) involves the exercise of a 'very wide' judicial discretion, the room for an appeal court to interfere is limited. It can, however, do so if the trial court has failed, through misdirection in regard to the law or to a material finding of fact or otherwise, to exercise its discretion properly.[2] In the recent judgment of this court in *Bezuidenhout v Bezuidenhout*,[3] however, reference was made

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[1] 1987 (1) SA 967 (A).
[2] *Beaumont* at 988H-989E and 1002A-E. See further *Ex parte Neethling & others* 1951 (4) SA 331 (A) at 335E-F.
[3] 2005 (2) SA 187 (SCA).

to the distinction drawn in *Knox D'Arcy Ltd & others v Jamieson & others*[4] and earlier cases between 'a discretion in the broad sense', which means no more than a mandate to have regard to a number of disparate and incommensurable features in arriving at a conclusion, and 'a discretion in the narrow sense', the essence of which involves a choice between two or more different, but equally permissible, alternatives.[5] It is when a court exercises a discretion in the narrow sense that an appeal court's powers of interference are said to be limited. When a court exercises a discretion in the broad sense, an appeal court may substitute its own discretion for that of the trial court if it differs from such court on the merits and may make the order which it deems just. It was argued in *Bezuidenhout* that the appropriate categorisation of the discretion conferred on a trial court by s 7(3) of the Act was that of a discretion in the broad or wide sense. While Brand JA found this argument 'attractive in its logical progression', he left the question open and assumed, without deciding, that a misdirection by the trial court is a prerequisite for the appeal court to interfere with its decision under s 7(3).[6] As I am satisfied that the trial court did misdirect itself in the

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[4] 1996 (4) SA 348 (A) at 361G-I.
[5] See also *Media Workers Association of South Africa & others v Press Corporation of South Africa Ltd* 1992 (4) SA 791 (A) at 796H-I and 800C-G; and cf *Wijker v Wijker* 1993 (4) SA 720 (A) at 727C-728C.
[6] See too in this regard the judgment of Blignault J in *Kirkland v Kirkland* [2005] 3 All SA 353 (C) paras 46-51.

exercise of its discretion, it is also not necessary for me to decide this question one way or the other.

[21] In considering the appellant's claim for a redistribution order in respect of the proceeds of the sale of the respondent's member's interest in WN 20 CC, Thring J stated the following:

'…the question which, in my view, must be asked is whether, in terms of section 7(3) of the Act, adequate grounds have been shown to exist to justify the Court in disturbing the current position and granting an order to the effect that the proceeds of the Wanderer Night transaction, or any part thereof, must be transferred by the defendant to the plaintiff.'

He went on to say that –

'…the only possible grounds for an order such as that sought, contingently, by the plaintiff [appellant] are, first, that the defendant [respondent] did not contribute directly to the acquisition by her of this asset and, secondly, her adultery with Shaw.'

[22] As was held by Botha JA in the *Beaumont* case,[7] the first 'jurisdictional precondition' to the exercise of the court's discretion in terms of s 7(3) is a contribution made by the spouse claiming a redistribution order to the estate of the other spouse of the kind described in

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[7] 1987 (1) SA 967 (A) at 988H-J.

s 7(4). By considering the appellant's claim from the *opposite* perspective (the *absence* of a direct contribution by the respondent to her acquisition of the member's interest in WN 20 CC), Thring J in my view clearly misdirected himself; indeed, this was conceded by counsel for both parties in argument before this Court.

[23] Thring J committed the same misdirection when considering the respondent's claim for half of the net proceeds of the Brisbane house sale:

'The plaintiff had no right, in my opinion, to act as he did with this money: only half of the net proceeds of the sale belonged to him; the balance was his wife's…it is only by means of a redistribution order under section 7(3) of the Act, I think, that he can justify his retention of the portion of these funds which legally belongs to the defendant.

The potential grounds for such an order are limited, in my view, to the same as those which potentially apply to the Wanderer Night transaction: the smallness of the defendant's direct or material contribution, and her adultery.' (Emphasis added.)

Exercise of discretion by this court

[24] In view of the material misdirections by the trial court, this court is at large to substitute its own exercise of the discretion afforded by s 7(3) for that of the trial court. In this regard, I am mindful of the fact that, in

Kritzinger v Kritzinger,[8] Milne JA (with whom Corbett JA and Nicholas AJA concurred) regarded as a misdirection the 'overall or globular approach' adopted by the trial court to the claim and counterclaim in that case:

'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.'[9]

This view seems to me to be rather too inflexible and may have to be reconsidered in the future in light of (inter alia) the fact that, as pointed out by Botha JA in the *Beaumont* case:[10]

'It is certainly a very prominent and important feature of [subsec 7 (4)] that ultimately, when once the factual requirements of ss (3) and (4) are satisfied, the determination of whether or not a redistribution order is to be made at all is entrusted by the Legislature to the wholly unfettered discretionary judgment of the Court as to whether it would be equitable and just to do so.'[11]

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[8] 1989 (1) SA 67 (A) at 77I-J.
[9] At 79B-D.
[10] 1987 (1) SA 967 (A) at 988J-989A
[11] Cf the approach adopted by the trial court and the appeal court in *Kirkland v Kirkland* [2005] 3 All SA 353 (C) paras 19 and 87-90.

As was pointed out by June D Sinclair, commenting on this aspect of Milne JA's judgment in *Kritzinger*, '[t]he danger of this formalist separatist approach is that the court will lose sight of what it is enjoined to do – to effect justice as between the parties.'[12]

For the purposes of this judgment, it is, however, not necessary to take the point any further as this *is*, in my view, the kind of case where, for the reasons which I set out below, the facts relevant to the claim and counterclaim are indeed so closely interrelated that a 'globular' approach is the appropriate one.[13]

[25] As indicated above, the evidence of both parties clearly indicated that, throughout their marriage lasting some 27 years, the parties always pooled their income and regarded the assets acquired through their joint efforts as being joint assets. While the appellant was the family's principal breadwinner and made by far the greater financial contribution to the assets acquired by the parties, there is nothing to indicate that either party regarded the contributions made by the respondent, primarily as housewife and mother, as being any less valuable than those made by the appellant, nor that the respondent's contributions were any less instrumental than

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[12] 'Divorce and the Judicial Discretion – In Search of the Middle Ground' (1989) 106 *SALJ* 249 at 256-257.
[13] See further June D Sinclair op cit 257.

those of appellant in the acquisition of assets by the parties.[14] Their evidence that they considered themselves to be 'partners' brings this into sharp focus. It is evident that the division of labour between the parties was a conscious choice made by both of them. In my view, in these circumstances, fairness demands that effect be given, on divorce, to the principle of equal sharing which the parties consciously applied throughout their married life.[15]

[26] When the appellant sold his member's interest in T & B, part of the consideration received was the entire member's interest in each of two property-owning close corporations. In line with the parties' approach of equal sharing, the member's interest of one of these close corporations (WN 21 CC) was transferred to the appellant, while the member's interest in the other close corporation (WN 20 CC) was transferred to the respondent. The appellant's member' interest in WN 21 CC was sold during the existence of the marriage and the full proceeds used to reduce the mortgage bond over the parties' Brisbane house. In all probability, had the respondent's member's interest in WN 20 CC also been disposed of before the marriage broke down, the proceeds would have been utilised in

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[14] This obviously distinguishes the facts of this case from those of *Bezuidenhout v Bezuidenhout* 2005 (2) SA 187 (SCA), especially at para 30 and paras 33-36.
[15] See also *Kirkland v Kirkland* [2005] 3 All SA 353 (C) para 89.

the same way for the benefit of both parties. If this had been done, then the net proceeds of the Brisbane house sale (after deduction of the amount of approximately A$57 100 spent by the appellant on, primarily, living expenses for the family, travel costs and school and university fees) remaining in the Tanner account in Australia at the time of the divorce would have been approximately R1 004 000 (R720 000 plus R284 000). If this were to have been shared equally between the parties -- in accordance with the *modus operandi* followed by them throughout their marriage -- each would have received a share of R502 000. Instead of this, the respondent effectively received a share of R284 000, while the balance of some R720 000 went to the appellant. To redress this imbalance, the appellant would have to pay R218 000 (R502 000 minus R284 000) to the respondent.

[27] The respondent is also the owner of a house in a retirement complex at St Francis Bay, valued at the time of the trial at R642 000, as well as an investment of R200 000. Both of these assets are subject to a usufruct for life in favour of her mother, who was 76 years old at the time of the trial. Her mother lives in the house and receives the interest on the investment. Both assets were purchased from the proceeds of the sale of another house in Cape St Francis, where the respondent's parents lived after their retirement. The respondent had inherited this house from her father, who

died in May 1997, subject to a life usufruct in favour of her mother. The parties had, in about 1979, paid approximately R1 500 as half of the purchase price of the plot on which this house was built, at cost, by T & B in about 1986 for the respondent's parents. According to the appellant, he had from time to time made (relatively small) contributions in money and labour to the maintenance and improvement of this house, where the parties and their children had spent a few holidays.

[28] In both this court and the trial court, counsel for the appellant submitted that, in the exercise of its discretion to make or refuse to make a distribution order in terms of s 7(3), the court should take into account the assets inherited by the respondent from her father (albeit subject to a usufruct in favour of her mother) as part of 'the existing means …of the parties' under s 7(5)*(a)*. While this is undoubtedly correct,[16] taking such assets into account in terms of s 7(5)*(a)* does not alter my view of what redistribution order would be equitable and just in the present case.

[29] Counsel for the appellant also contended that the trial court erred by not paying due regard to what he described as 'the gross and prolonged

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[16] See, in this regard, *Van Zummeren v Van Zummeren & another* [1997] 1 All SA 91 (E) at 96e-98f (and, on appeal to the Full Court, *Van Zummeren v Van Zummeren* (Eastern Cape High Court Case No 307, unreported judgment dated 25 November 1997); *Jordaan v Jordaan* 2001 (3) SA 288 (C) paras 20-23; but cf *Beira v Beira* 1990 (3) SA 802 (W), especially at 805H-808E.

misconduct of the respondent' (her adultery with Mr Shaw in July 2002 and her continued, clandestine and deceitful communication with him thereafter) which, he argued, led to the breakdown of the marriage.

[30] It is well established that, in the exercise of its discretion in terms of s 7(3) of the Act, a court is entitled to take a party's misconduct into account when considering a redistribution order.[17] However, in the words of Botha JA in the *Beaumont* case,[18] the court should adopt 'a conservative approach in assessing a party's misconduct as a relevant factor'.

In our legislation, as I have pointed out, the feature of overriding importance is that the Court will grant such order, in respect of both ss (2) and (3) [of s 7 of the Act], as it considers to be just. In many, probably most, cases, both parties will be to blame, in the sense of having contributed to the break-down of the marriage…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.'[19]

In the same case, Botha JA also held that the directive in s 25(2)*(g)* of the English statute dealing with this subject,[20] to the effect that the courts are to

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[17] See eg *Beaumont v Beaumont* 1987 (1) SA 967 (A) at 994B-E; *Kritzinger v Kritzinger* 1989 (1) SA 67 (A) at 80B-H.
[18] At 994E.
[19] At 994H-995A; and see also *Kritzinger v Kritzinger* 1989 (1) SA 67 (A) at 82I-J, where Milne JA agreed with this approach.
[20] Section 25(2)*(g)* of the Matrimonial Causes Act 1973, as substituted by s 3 of the Matrimonial and Family Proceedings Act 1984.

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', was in accordance with the pattern of our legislation.[21]

[31] In the English Court of Appeal case of *Kyte v Kyte*,[22] Purchas LJ stated the following in relation to s 25(2)*(g)* of the English statute:

'The court is entitled, in my judgment, to look at the whole of the picture, including the conduct [of the parties]…which may or may not have contributed to the breakdown of the marriage or which in some other way makes it inequitable to ignore the conduct of each of the parties. A clear example of such a case is where the parties may each not have been blameless (almost inevitably in a normal marriage) but where the imbalance of conduct one way or the other would make it inequitable to ignore the comparative conduct of the parties.'

I agree with this approach. In a case such as the present, I do not think that it is appropriate for the court to attempt to perform some kind of detailed comparative analysis of the parties' conduct in order to determine their respective degrees of blameworthiness. In essence, the misconduct of one or both of the parties must only be allowed to influence the outcome of the case where to disregard it would be unjust.

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[21] *Beaumont v Beaumont* 1987 (1) SA 967 (A) at 994E-I.
[22] [1987] 3 All ER 1041 (CA) at 1048h-j.

[32] The respondent testified that, by the time she committed adultery, the parties' marriage had already been in trouble for some time. On several occasions between March and May 2002, she had told the appellant that she did not love him any more, that he was no longer in love with her, and that she no longer felt committed to their marriage. According to the appellant, he could not remember these communications, but he could not deny that they were made. On the evidence as a whole, I agree with the conclusion of the trial judge that, while the respondent's adultery might have been 'the straw which broke the proverbial camel's back', the breakdown of the marriage was not caused solely, or even predominantly, by 'any matrimonial misconduct which weighs more heavily against either the one or the other of the parties'. In my view, the failure of the parties' marriage must be seen in the context of a couple struggling to cope with the strains placed on them and their children by emigration, first to New Zealand and then to Australia; work stresses experienced by the appellant in these new countries and the effect of these stresses on the family; and the parties' reaction to the behavioural problems exhibited by Kate and their concern about her health and well-being. I thus do not agree with counsel for the appellant that the conduct of the respondent was of such a nature that it would be inequitable to disregard it in the consideration of a possible redistribution order or orders in terms of s 7(3).

The award of 'token' maintenance in favour of the respondent

[33] In terms of s 7(2) of the Act –

'(2) In the absence of an order made in terms of subsection (1) with regard to the payment of maintenance by one party to the other [ie an order made in accordance with a written agreement between the divorcing parties], 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 breakdown of the marriage, an order in terms of subsection (3) and any other factor which in the opinion of the court should be taken into account, make an order which the court finds just in respect of the payment of maintenance by the one party to the other for any period until the death or remarriage of the party in whose favour the order is given, whichever event may first occur.'

[34] At the time of the trial, the respondent was 48 years old and in full-time employment as a personal assistant at a property development company in Knysna, earning a net monthly salary of R3 400. Although she is qualified as an estate agent and as a travel agent, the trial judge found, correctly in my view, that her age, coupled with the fact that she had not worked regularly and in a full-time capacity for over 20 years, made it improbable that she would be able to further her career and improve her employment prospects to any great extent. It was common cause that such income as she was earning was inadequate to meet her living expenses.

The evidence established that this situation was unlikely to change, although of course, when her mother dies, she will then have additional assets which can be used to generate income for her support. The order which I propose in respect of her claim in reconvention, while it will provide her with an additional capital sum, will certainly not improve her financial situation to the point where she will *not* reasonably require maintenance. Her relatively modest earning capacity is largely the result of the fact that, for some 27 years, she devoted her life to running the parties' home and raising their children, with the full agreement of the appellant. As regards her alleged 'gross and prolonged misconduct' with Mr Shaw, exactly the same principles as those set out in paragraphs [30] to [32] above apply.[23] I agree with Thring J's conclusion that such misconduct, seen in the context of all the other evidence relating to the reasons for the breakdown of the parties' marriage, is not 'such as to merit depriving her of the right to a contribution to her maintenance' from the appellant.

[35] On the other hand, it was clear from the evidence that, at the time of the divorce, the appellant's financial position was such that he was not immediately able to contribute to the maintenance of the respondent. He was unemployed and appeared to be living off his capital. I do not,

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[23] See eg *Beaumont v Beaumont* 1987 (1) SA 967 (A) at 993I-995B.

however, agree with the contention made by the appellant's counsel that his unemployment was 'notwithstanding his best endeavours' to find work or that his prospects with regard to obtaining suitable employment in the future were 'severely compromised'. According to the appellant's own evidence, T & B had, during the course of 2003, approached him to oversee a building project of considerable magnitude (the reconstruction of a hotel in Port Elizabeth that had been burnt down). Although the appellant initially testified that he had been unable to accept this offer of work because of the travelling involved, which would have interfered with his responsibilities in respect of his 18 year old daughter (Kate), it subsequently became clear that the main reason for his unwillingness to undertake this project was that, because of the stress of the break up of his marriage and the ongoing divorce proceedings, his 'mind wasn't just focused as it needed to be to do this job successfully'. He also conceded that the reason why he had not been able to make any significant progress with a new business venture which he had planned to start in Knysna on his return from Australia, was not only the fact that his capital funds were 'frozen', but also partly because the divorce proceedings were distracting him and he had lost his energy and drive as a result of the emotional and other strains upon him at that time. He confirmed that his attempts to find a suitable position had been confined to Knysna, although he fully realised

that, 'at my age, I'm probably not the best employment prospect for a small company in Knysna…I am a fairly expensive overhead for a small company, there aren't many big companies in Knysna'. Although this geographical choice had definitely limited his employment options, his first priority was to Kate who did not want to live with her mother. He admitted that, had he not been confined to Knysna, he 'could very easily have left and found employment somewhere'. In this regard, it should be noted that Kate was in her Matric year in Knysna at the time of the trial, she had largely overcome her dependency problem and she was becoming increasingly independent. In light of the above, the submission made by counsel for the appellant to the effect that 'there was no evidence of any substance that the [employment] circumstances of the appellant were likely to change in the near future' is, in my view, not justified.

[36] It is true that 'one of the fundamental principles for an award of maintenance is an ability to pay on the part of the spouse from whom maintenance is claimed'.[24] Section 7(2) of the Act did not alter this principle in any way. Counsel for the appellant relied on *Qoza v Qoza*[25] in support of his contention that 'a spouse is not entitled to an award of token maintenance on the basis that such spouse will as it were be entitled to a

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[24] See for example, *Reynecke v Reynecke* 1990 (3) SA 927 (E) at 932J-933F.
[25] 1989 (4) SA 838 (Ck).

free policy against the normal risks of life with the [other spouse] as the insurer'. In that case, however, the spouse claiming an order of token maintenance was self-sufficient and there was no evidence of any likelihood that she might find herself unemployed in the future. Inasmuch as the approach of the courts in previous cases[26] may have been to make an order of token maintenance unless circumstances were proved which showed that it would probably not be needed or which rendered it unjust, such approach is in conflict with that envisaged by s 7(2) of the Act: this section requires the court to consider the factors listed in s 7(2) in order to decide, first, whether a need for maintenance exists and, if so, by whom and to whom maintenance is to be paid; secondly, the amount to be paid, and thirdly, the period for which it is to be paid.[27] This does *not*, however, mean that, in the exercise of its discretion in terms of s 7(2), a court is not competent to make an award of token maintenance, provided of course that the circumstances of the case render it just in the light of the factors set out in s 7(2). In my view, this case falls into that category.

[37] For these reasons, I agree with Thring J that an order for the payment of token maintenance to the respondent was appropriate in this

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[26] See, for example, *Ford v Ford & another* 1965 (1) SA 264 (D); *Portinho v Porthino* 1989 (4) SA 595 (D); *Brink v Brink* 1983 (3) SA 217 (D).
[27] See *Qoza v Qoza* 1989 (4) SA 838 (Ck) at 840C-843F, especially at 842A-E (per Liebenberg AJ). See too *Lincesso v Lincesso* 1966 (1) SA 747 (W).

case; the order can be rescinded, suspended or varied at some time in the future by a competent court, on the application of either party, should this be justified by a change in the circumstances of one or both of them.

The respondent's application for security for costs

[38] The appeal was set down for hearing on 23 August 2005. On 4 August 2005, the respondent, purporting to act in terms of SCA Rule 11(1)*(b)*, filed an application with the Registrar of this court seeking an order, on various grounds, that the appellant furnish security for the respondent's costs in the appeal in the amount of R50 000 or an amount to be determined by the court. She stated that an application (in terms of Uniform Rule 49) in the Cape High Court requiring the appellant to furnish security for her costs of appeal had been served on the appellant's attorneys on 4 July 2005. She was, however, subsequently advised that, in terms of s 20(5)*(b)* of the Supreme Court Act 59 of 1959, the Cape High Court did not have jurisdiction to make such an order and that she had to approach the President of this Court for a direction in terms of SCA Rule 11 in respect of the furnishing of security. In the light of this advice, the application before the Cape High Court was 'withdrawn', with a tender of costs to the appellant, and an application was brought on an urgent basis before this court. (It appears from the appellant's opposing affidavit that the Cape High Court application was not in fact withdrawn, but simply

removed from the court roll for the day on which it had been set down for hearing.)

[39] The respondent's application was opposed by the appellant. Apart from disputing the grounds for the application relied on by the respondent, he correctly pointed out that, at the time the application was launched in this court, the vast majority of the costs in the appeal had already been incurred.

[40] Counsel for the respondent relied on the unreported judgment of Louw J (dated 5 August 2005) in the Cape High Court in *The MV 'Navigator' & the Owner of the MV 'Navigator' v Wellness International Network Ltd* (Case No 383/2004) for her contention that, in a case such as the present – where the court of first instance has granted leave to appeal against its judgment and where the appeal is pending before this court – the court of first instance does not have jurisdiction to order the appellant to furnish security for the costs of the appeal. In my view, it is not necessary for present purposes to consider the reasoning of Louw J or the correctness of his conclusions in the *Navigator*. Suffice it to say that the application for security for costs, at this very late stage of the proceedings when the bulk of the costs of appeal have already been incurred, was misconceived and futile. The application should accordingly be dismissed with costs.

Costs

[41] Section 10 of the Act provides as follows:

'In a divorce action the court shall not be bound to make an order for costs in favour of the successful party, but the court may, having regard to the means of the parties and their conduct in so far as it may be relevant, make such order as it considers just, and the court may order that the costs of the proceedings be apportioned between the parties.'

[42] In view of the order that I propose to substitute for the disputed parts of the order made by the trial court, the nature of the issues raised, and the relevant circumstances of the parties, I am of the opinion that this is an appropriate case in which to make no order as to costs in respect of the appeal. As regards the costs of the proceedings in the trial court, however, I see no reason to interfere with the order made by Thring J. Even though the amount awarded to the respondent on her claim in reconvention is to be reduced, she will still have been substantially successful in the trial proceedings and is entitled to the costs of such proceedings.

Order

[43] For these reasons, I make the following order:

(a) The respondent's application for security for costs is dismissed with costs.

(b) The appeal is upheld and the following order is substituted for **paragraph 2** of the order of the court *a quo*:

'2. <u>On the defendant's claim in reconvention</u>

(1) The plaintiff is ordered to pay to the defendant the amount of R218 000.00, with interest thereon at the rate of 15.5 per cent per annum from the date of this order to the date of payment.

(2) The plaintiff is ordered to contribute to the maintenance of the defendant at the rate of R10.00 per month until her death or remarriage, whichever event may first occur.'

B J VAN HEERDEN
JUDGE OF APPEAL

Concur: Scott JA, Lewis JA, Nkabinde AJA, Cachalia AJA