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CASE NO. 325/92
J VD M

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

JACOB HARMEN WIJKER	APPELLANT
and	
JOSEPHINE ELIZABETH WIJKER	RESPONDENT

CORAM: JOUBERT, EKSTEEN, JJA *et* VAN COLLER, AJA

DATE HEARD: 19 MAY 1993

DATE DELIVERED: 26 AUGUST 1993

J U D G M E N T

VAN COLLER, AJA:

In an action instituted in the Transvaal

Provincial Division the appellant claimed an order of divorce and division of his and the respondent's joint estate. In her counterclaim the respondent, apart from also claiming an order of divorce, claimed a forfeiture order with regard to certain assets. The parties were ad idem that the marriage had irretrievably broken down and the main issue at the trial was whether or not a forfeiture order should be granted against the appellant. After a protracted trial, Heyns J, on 5 February 1992, granted an order of divorce and a forfeiture order. In terms of this order the shares in a company, Jose Wijker (Pty) Ltd ("the company"), as well as certain assets purchased by the respondent with income derived from the company, were declared forfeited in favour of the respondent. He ordered that each party should pay his or her own costs. This Court granted leave to the appellant to appeal against the forfeiture and the costs orders.

The parties were married in community of property in Holland on 15 September 1956. Three months later they emigrated to South Africa and settled in Pretoria. The appellant, who was trained as a mechanical engineer in Holland, also obtained an advanced diploma in business administration at the University of Cape Town in 1968. He was employed in the motor industry practically all his life. He worked for various companies at managerial level and he had a good income. A son was born to the parties in 1958 and two daughters were born in 1960 and 1965 respectively. In 1968 the parties bought a house in Lynnwood Glen, Pretoria, which was sold in 1971 and they then bought a house at 422 Milner Street where they lived together until October 1991. After their arrival in South Africa, the respondent worked for a publishing company and she was also employed by the French department of the State Information Service. From 1958 to 1972, a

period when the children were still young, the respondent was a housewife. In 1972 she commenced working as an estate agent. In July 1976 she launched her own estate agency and for this purpose the company, in which she and the appellant each held 50 shares, was incorporated. In the beginning and while the business was small the appellant acted as its bookkeeper. He also provided the respondent with a motor vehicle and assisted her in putting up signs at properties she had for sale. The appellant also attended the annual directors' meetings held at the offices of the company's auditors. During 1979 the company appointed a bookkeeper and the appellant was no longer burdened with this task. Initially the respondent conducted the business of the company from a rondavel situated on the premises of the matrimonial home at 422 Milner Street. About three years later the company moved to rented premises at a shopping centre in Waterkloof. In 1982

the company purchased a property at 386 Milner Street for R100 000 where it has since conducted its business. It is clear from the evidence that the estate agency became a very successful business. This was due mainly to the respondent's business acumen and hard work. The respondent earned commission and a director's remuneration. She also made various investments. In 1985 two flats, Nordey Heights nos. 901 and 209, were registered in her name. The respondent valued no. 901 at R50 000 and no. 209 at R65 000. The properties were subject to mortgage bonds of R15 000 and R20 000 respectively. The company bought a flat at Sea Point in Cape Town for R23 000. It was a sectional title unit and was used during vacations and for business purposes. During 1980 the respondent bought a flat in Pretoria for approximately R28 000 and she sold it in 1990 at a profit of R40 000. She also made two other investments of approximately R45 000 each. The evidence about

these investments is rather vague and apart from the fact that the respondent no longer had these investments at the time of the trial, it is not clear what became of them. Under cross-examination the respondent admitted that she lost R150 000 which she had invested with a Pretoria businessman. The respondent also purchased three timeshare units at Plettenberg Bay for R3 500 and she bought two units in a timeshare block at Umhlanga Rocks. The purchase price of R1 560 and R2 040 respectively was very reasonable, being the same price paid by the seller 10 years previously.

In 1979 the appellant started a business known as Puma Marketing CC in which he and the respondent each had a 49% interest. He has always been very interested in motor cars and the manufacture of sports cars was the main object of this business. The appellant considered this as a hobby and he spent time during weekends working at the factory where 23 cars had

been manufactured since 1985. The property on which the factory was established belongs to another close corporation, namely J H Wijker Properties CC. The appellant and the respondent have an equal interest in this corporation and they are its only members. The purchase price of R78 680 was financed by means of a loan of R30 000 from the company and by a bond of R35 000 on the property at 422 Milner Street. The appellant paid the balance. The bond was subsequently increased to R45 000 and the respondent testified that she repaid this amount out of her own income. In order to establish the factory the property was encumbered with a bond of R90 000 in favour of a building society. The respondent did not participate actively in Puma Marketing CC but according to her evidence the office staff of the company rendered certain administrative services to this firm. Although the evidence on this aspect is not satisfactory it would appear that the

respondent valued the entire members' interest in J H Wijker properties CC at R323 000 (less the bond of R90 000). The value of the entire members' interest in Puma Marketing CC was put at R142 000. The joint estate is also the owner of a yacht which the respondent valued at R50 000. The value of the contents of the matrimonial home at 422 Milner Street was put at R15 670 and the property itself at R345 000. With regard to the assets belonging to the company, the respondent gave the following valuations: 386 Milner Street R250 000 less the amount of R60 000 owing on the bond; No. 1 Hyde Park (flat at Sea Point) R160 000 less the amount of R12 000 owing on the bond; loose assets R57 790; time share unit at Plettenberg Bay R4 600. She placed no value on the goodwill of the company whereas the appellant valued it at R685 440. It also appears from the record that the respondent had 5000 Westwits shares and Unit Trusts in Old Mutual. There

was, however, no evidence with regard to the value of these assets.

The evidence reveals that prior to 1976 the appellant was the major, if not only, breadwinner of the family. When their son reached standard eight he was sent to St Andrews College in Grahamstown and the appellant also supported him while at university, which he attended for a period of two years. The two daughters also went to university and the appellant assisted them financially in this and in other respects. Between 1958 and 1972 the family went on holiday regularly and in 1974 the appellant took the whole family on an overseas vacation. At some stage, and it appears to be round about 1980, the respondent started paying all expenses pertaining to the joint household except the accounts relating to water, electricity and rates and taxes, which were paid by the appellant.

The marriage was reasonably happy until the

respondent's estate agency started to flourish from 1980 onwards. Disagreement of a serious nature first erupted in 1983 when the respondent was reluctant to bind the company as surety to the Ford Motor Company on behalf of Puma Marketing CC. According to the respondent's evidence, the appellant threatened her with divorce should she not sign the deed of suretyship, which she eventually agreed to do under pressure. This was denied and according to the appellant they decided not to sign the document. On 14 October 1985 the appellant's attorney wrote to the respondent about a divorce. It was suggested that a meeting be arranged in order to agree amicably on the terms of the dissolution of the marriage. The appellant explained that he wanted a divorce at that time because the respondent was not prepared to let him take an equal part in the running of the company. According to the respondent the differences were caused by the

appellant's insistence on increasing the bond on the matrimonial home in order to finance the factory, to which she did eventually agree. The parties became reconciled when the respondent acceded to the appellant's request to terminate the services of the auditor of the company.

A former employee of the company testified that from 1983 there was a marked deterioration in the erstwhile happy relationship. The appellant made unflattering remarks about the respondent, referred to her as "die ou vrou" and tried his best to humiliate her. According to the evidence of a mutual friend, who was called as a witness by the respondent, the appellant had great difficulty in coping with his wife's success. From about 1988 he noticed that the appellant's conduct towards the respondent had become vindictive and ungentlemanly. This witness said that the appellant made it patently obvious that any compliment to the

respondent and any attempt to discuss her success in business did not meet with his approval.

It is common cause that appellant's shareholding in the company was the main bone of contention between the parties. During October 1988 and at a meeting with their auditor, the appellant agreed to transfer his shares in the company to the respondent. This was done to procure an income tax benefit for the respondent as a married woman. According to the appellant it was agreed that a written option would be given to him to enable him to have the shares back if and when he wanted them. It was put to the appellant, and this was also the respondent's evidence, that an option was in fact given to the appellant at the meeting but that he told her that she could tear it up, which she did. This was denied by the appellant, whose version was that the option never materialised, notwithstanding frequent requests to the

respondent. There was even correspondence between the parties on this issue and the respondent admitted that the appellant nagged her about the option. The respondent conceded that it was her refusal to return the appellant's shares which caused him to institute the divorce action. She was not prepared to return the shares because she did not have a high regard for the appellant's financial ability and she was afraid that he would use the shares to further his own interest. In November 1990 she wrote to the appellant about his demands and she gave him three weeks to think about it and to make up his mind. She testified that she saw the letter as "a last resort for my husband to realise that he had to make a choice between me and the signing of the shares". The appellant said in his evidence that when the respondent finally refused to let him have the shares back he considered it a breach of trust with the result that they could no longer live together. It is

common cause that the respondent left the communal bedroom on 27 January 1991. She alleged that she did so because the appellant assaulted her by striking her and by twisting her right arm. In her evidence she also referred to an incident during 1985 when appellant slapped her face, causing a cut in her lip. On another occassion he twisted her arm. The appellant denied these incidents. It can serve no purpose to give the appellant's version of these incidents in more detail, because although the learned trial judge referred to them, he made no findings with regard thereto. The respondent also mentioned a few other incidents of abusive behaviour on the part of the appellant. Apart from the fact that the appellant's version differed from that of the respondent, these incidents are of minor importance and need not be dealt with. The respondent left the matrimonial home in October 1991.

The respondent's claim for a forfeiture

order was based on the provisions of section 9(1) of the Divorce Act 70 of 1979 ("the section") which reads as follows:

> "When a decree of divorce is granted on the ground of the irretrievable break-down of a marriage the court may make an order that the patrimonial benefits of the marriage be forfeited by one party in favour of the other, either wholly or in part, if the court, having regard to the duration of the marriage, the circumstances which gave rise to the break-down thereof and any substantial misconduct on the part of either of the parties, is satisfied that, if the order for forfeiture is not made, the one party will in relation to the other be unduly benefited."

The learned trial judge referred to the long duration of the marriage. As regards the circumstances which gave rise to the break-down of the marriage, he concluded that the main cause of the break-down of the marriage was the fact that the appellant could not get the shares back from the respondent. The learned trial judge

expressed surprise at the appellant's explanation that he considered the respondent's refusal as a breach of trust. He was not impressed by the moral tone adopted by the appellant, which he considered to be insincere. Other significant findings made by the learned trial judge with regard to the appellant's conduct are that nobody forced him to transfer the 50 shares to the respondent; that he did so from considerations which he did not explain to the court and that he was bound by his own decision. Heyns J emphasized the fact that it was the appellant who initiated the divorce proceedings after he had already threatened to do so in 1985. He stated in the judgment that the divorce action was a calculated step by the appellant to obtain half of the shareholding of the company which the respondent was not prepared to give to him. That part of the judgment dealing with the cause of the break-down of the marriage concludes as follows:

> "On what principle of fairness can he be heard to say that he wants half a share of the shareholding of the company, which would result in him being able to have a half share in all the profits that the company makes? It seems to me that his attitude is that because I am married to Mrs Wijker, she must give me a half share in this company, although she is the person who works hard and conducts the affairs of the company."

The learned trial judge has not made any findings with regard to the third factor mentioned in the section, namely substantial misconduct. He did not refer to any such conduct and he made the following concluding remarks with regard to the three factors referred to in the section:

> "Bearing these considerations in mind, I find that on a balance of probabilities, I am satisfied that if an order of forfeiture is not made as asked by Mrs Wijker, Mr Wijker will in relation to Mrs Wijker be unduly benefited. He will share in the

company and its assets whilst he made hardly any contribution towards its management and administration and so did not help it to earn its profits. As I have already said, he has during the subsistence of the marriage enjoyed the financial advantages from the income which Mrs Wijker earned from the company, but apparently he is not satisfied with that. He wants to hold half of the shares of the company in his own name."

Before dealing with the merits of the appeal, it is necessary to consider the approach that should be adopted on appeal in this matter. Counsel for the respondent contended that the decision that the appellant would be unduly benefited had been reached in the exercise of a judicial discretion. The power of this Court to interfere with this decision, according to this argument, is limited and it can only do so if the discretion of the court a quo is shown to have been unjudicial in one or more of the respects mentioned in

Ex Parte Neethling and Others 1951(4) SA 331 (A) at 335 D-E. I cannot agree with this contention.

It is obvious from the wording of the section that the first step is to determine whether or not the party against whom the order is sought will in fact be benefited. That will be purely a factual issue. Once that has been established the trial court must determine, having regard to the factors mentioned in the section, whether or not that party will in relation to the other be unduly benefited if a forfeiture order is not made. Although the second determination is a value judgment, it is made by the trial court after having considered the facts falling within the compass of the three factors mentioned in the section. In dealing with the manner in which an appeal in an unfair labour practice dispute should be approached, E M Grosskopf JA made the following remarks in Media Workers Association of South Africa and Others v Press Corporation of South

Africa Ltd ('Perskor') 1992(4) SA 791 (A) at 800 C-G:

> "However, as I stated above, the word discretion is used here in a wide sense. Henning 'Diskresie-uitoefening' in 1968 THRHR 155 at 158 quotes the following observation concerning discretionary powers:
>
> > ''(A) truly discretionary power is characterised by the fact that a number of courses are available to the repository of the power' (Rubinstein Jurisdiction and Illegality (1956) at 16).'
>
> The essence of a discretion in this narrower sense is that, if the repository of the power follows any one of the available courses, he would be acting within his powers, and his exercise of power could not be set aside merely because a Court would have preferred him to have followed a different course among those available to him. I do not think the power to determine that certain facts constitute an unfair labour practice is discretionary in that sense. Such a determination is a judgment made by a Court in the light of all relevant considerations. It does not involve a choice between permissible

> alternatives. In respect of such a judgment a Court of appeal may, in principle, well come to a different conclusion from that reached by the Court a quo on the merits of the matter."

These remarks are in my view of equal application in this matter. To determine whether a party would be unduly benefited a trial court would certainly not be exercising a discretion in the narrower sense. Here too no choice between permissible alternatives are involved. In considering the appeal this Court is therefore not limited by the principles set out in Ex Parte Neethling (supra) and it may differ from the court a quo on the merits. It is only after the court has concluded that a party would be unduly benefited that it is empowered to order a forfeiture of benefits, and in making this decision it exercises a discretion in the narrower sense. It is difficult to visualize circumstances where a court would then decide not to

grant a forfeiture order. This discretionary power may be more apparent than real but it is not an issue in this appeal and no more need to be said about it.

I now turn to consider the merits of the appeal. Mr van der Merwe, who appeared on behalf of the appellant, advanced three arguments in support of his contention that the appeal should be upheld. He firstly submitted that because no finding of substantial misconduct on the part of the appellant had been made, forfeiture could not have been decreed. His second contention related to the extracts from the judgment quoted above and to the blameworthy conduct of the appellant referred to by the learned trial judge. Mr van der Merwe submitted that the court a quo misdirected itself in blaming the appellant for the break-down of the marriage and in taking into account that it was unfair that the appellant should share in a company which the respondent made successful. Mr van der

Merwe's third argument was that it was not possible on the evidence to find that the respondent had in fact contributed more to the common estate than the appellant, or, if so, to what extent. The evidence with regard to the value of the parties' respective contributions is certainly not satisfactory and the third argument is not without merit. In view of the conclusion to which I have come with regard to the second argument it is not necessary to deal any further with this contention. It will be assumed in favour of the respondent that the respondent had in fact contributed more to the common estate than the appellant. It is strictly speaking also not necessary to deal with the first argument but in view of conflicting decisions on that issue I propose to do so.

In support of his first argument Mr van der Merwe relied on Matyila v Matyila 1987(3) SA 230 (W) where it was held that if a party failed to prove

substantial misconduct, forfeiture could not be decreed. Van Zyl J, with whom O'Donovan AJ concurred, held that all three factors to which a court must have regard should be alleged and proved and said the following at 234 G:

> "On a proper interpretation of this section, it would appear that all three factors should in fact be both alleged and proved. There is no indication that the court may have reference to only the one or the other. Had the section read differently insofar as there was a reference to 'any other factor which may be relevant' or had the word 'or' or some similar word indicating alternative possibilities been used, then Mr Wepener's argument may hold water."

This judgment was apparently not brought to the attention of Kriegler J when he decided the matter of Klerck v Klerck 1991(1) SA 265 (W). In that case counsel on behalf of the plaintiff argued that not only was substantial misconduct a precondition to the

granting of a forfeiture order, but that all three factors mentioned in the section were preconditions. In rejecting this argument, Kriegler J dealt fully with the wording and context of the section and said the following at 269 D-G:

> "Bowendien, en laastens, meen ek dat die interpretasie waarvoor mnr Kruger betoog, geweld doen aan die woorde van die subartikel soos hulle daar staan. Dit is wel so dat die drietal faktore gekoppel word deur die koppelwoord 'en'. 'n Mens kan jou egter nie blindstaar op daardie koppelwoord nie. Wat die Wetgewer duidelik met sy woordkeuse aandui, is dat die Hof die drie genoemde faktore in ag moet neem. Ek weet van geen taalkundige manier om drie faktore te noem wat saam in een verband genoem word, anders as om hulle met 'n 'en' te koppel nie. Die Wetgewer wou juis nie die koppelwoord 'of' gebruik nie omdat hy aan die Hof die opdrag wou gee om breed en wyd te kyk na die drie kategorieë faktore. Non constat egter, dat as een van hulle ontbreek, die diskresie te niet gaan. As dit die bedoeling van die Wetgewer was, dan kon daardie bedoeling baie

maklik deur ander woordkeuse so uitgespel gewees het.

Myns insiens is die duidelike betekenis van die woorde wat die Wetgewer gebruik het dat ek myself moet afvra of daar in casu onbehoorlik bevoordeling van die eiseres sal wees indien daar nie 'n verbeuringsbevel gemaak word nie. Ten einde daardie vraag te beantwoord, moet ek kyk na die duur van die huwelik, die verbrokkelings-omstandighede en, indien teenwoordig, wesenlike wangedrag aan die kant van òf eiseres, òf verweerder, òf albei."

I am in full agreement with these passages and in my judgment Leveson J in Binda v Binda 1993(2) SA 123 (W) correctly held that the decision in Matyila v Matyila (supra) was clearly wrong. The context and the subject matter makes it abundantly clear that the legislature could never have intended that the factors mentioned in the section should be considered cumulatively. As was pointed out by Leveson J in Binda v Binda (supra) at 126 A-B the following statement by Innes CJ in Barlin v

Licensing Court for the Cape 1924 AD 472 at 478 is apposite also with regard to the interpretation of the section here in issue:

> "Now the words 'and' and 'or' are sometimes inaccurately used; and there are many cases in which one of them has been held to be the equivalent of the other. Much depends on the context and the subject matter. I cannot think that in this instance the Legislature intended to make these provisions cumulative."

Mr van der Merwe's first argument can therefore not be upheld.

The second and main argument on behalf of the appellant relates to the two overriding considerations which persuaded Heyns J that the appellant would be unduly benefited should a forfeiture order not be granted. Although he found that the main cause for the break-down of the marriage was the fact that the appellant could not get his shares back, he

also found that it was brought about solely by the appellant and burdened him with all the blame. Secondly, the extracts from his judgment referred to above, clearly indicate that the learned trial judge was strongly influenced by what he found as a fact, namely that should a forfeiture order not be made, the appellant would share in the company and its assets while having made hardly any contribution towards its management and administration, which he considered to be unfair. I have little doubt that notwithstanding the introduction into our law of the "no fault" principle to divorce, a party's misconduct may be taken into account in considering the circumstances which gave rise to the break-down of the marriage. The words "the circumstances which gave rise to the break-down" of the marriage are words of wide import and as Kriegler J also pointed out in Klerck v Klerck (supra) this factor has been stated in broad terms. The fact that substantial

misconduct has been included as a third factor does not in my opinion exclude a consideration of misconduct as a circumstance which gave rise to the breakdown of the marriage. Substantial misconduct may include conduct which has nothing to do with the break-down of a marriage and may for that and other reasons have been included as a separate factor. Too much importance should, however, not be attached to misconduct which is not of a serious nature. In regard to a court's assessment of a party's misconduct as a relevant factor under subsection 2 and 3 of section 7 of the Divorce Act 70 of 1979, Botha JA made the following remarks in Beaumont v Beaumont 1987(1) SA 967 at 994 D-E:

> "... in my opinion the Court is entitled, in terms of the wide words of para (d) of ss (5) that I have quoted, to take a party's misconduct into account even when only a redistribution order is being considered under ss (3), and where no maintenance order under ss (2) is made. But I

should add at once that I am convinced that our Courts will adopt a conservative approach in assessing a party's misconduct as a relevant factor, whether under ss (2) or ss (3)."

And at 994 I-J and 995 A he said the following:

"In many, probably most, cases, both parties will be to blame, in the sense of having contributed to the break-down of the marriage (see per Lord Denning in Wachtel's case supra at 835g). In such cases, where there is no conspicuous disparity between the conduct of the one party and that of the other, our Courts will not indulge in an exercise to apportion the fault of the parties, and thus nullify the advantages of the 'no fault' system of divorce."

These remarks apply with equal validity when a court, in considering the circumstance which gave rise to the break-down of the marriage, also assesses a party's misconduct as a relevant factor.

Heyns J, however, in taking the appellant's conduct into account as one of the factors which

contributed to the break-down of the marriage, misdirected himself. The finding that the appellant transferred the shares out of considerations which he did not explain, is factually incorrect. It is common cause that the appellant transferred the shares at the auditor's suggestion to enable the respondent to obtain certain income tax benefits. The learned trial judge then went on to say that the appellant had by his own decision transferred the shares and was bound thereby. This is not quite correct and does not put the facts in a true and correct perspective. It was clearly not the intention that the respondent should keep the shares on a permanent basis. There was an undertaking that the appellant could have an option to buy the shares back. Even if the respondent was initially prepared to grant an option, she later refused to do so. The conclusion that the appellant was insincere in regarding the respondent's refusal as a breach of trust was clearly

founded on a wrong premise. It seems to me that in putting all the blame on the appellant, the trial court has also been guilty of a one-sided approach. No criticism has been levelled at the respondent who, in November 1990, wrote to the appellant and gave him three weeks to think about his demands and to make a choice between her and the shares. This letter reveals an uncompromising attitude and is something like an ultimatum. The respondent was not really justified in refusing to return the shares and her reasons for doing so were not convincing. She was not prepared to give the shares back even if it resulted in a divorce. On the other hand, the appellant was not prepared to abandon his claim to the shares and sued for divorce in order to get them. The conduct of the appellant and that of the respondent with regard to the shares issue was equally unrelenting, and in considering the circumstances which led to the break-down of the

marriage it was wrong to put all the blame on the appellant.

The only remaining factor which persuaded the court a quo to grant the forfeiture order is that it was considered unfair that the appellant should share in the company and its assets while he had made hardly any contribution towards its management, administration and profit-making. The finding that the appellant would be unduly benefited if a forfeiture order was not made, was therefore based on a principle of fairness. It seems to me that the learned trial judge, in adopting this approach, lost sight of what a marriage in community of property really entails. H R Hahlo in The South African Law of Husband and Wife, 5th edition, at pages 157 and 158 describes community of property as follows:

"Community of property is a universal economic

> partnership of the spouses. All their assets and liabilities are merged in a joint estate, in which both spouses, irrespective of the value of their financial contributions, hold equal shares."

The fact that the appellant is entitled to share in the successful business established by the respondent is a consequence of their marriage in community of property. In making a value judgment this equitable principle applied by the court a quo is not justified. Not only is it contrary to the basic concept of community of property, but there is no provision in the section for the application of such a principle. Even if it is assumed that the appellant made no contribution to the success of the business and that the benefit which he will receive will be a substantial one, it does not necessarily follow that he will be unduly benefited. Cf Engelbrecht v Engelbrecht 1989(1) SA 597 (C) at 601 F-G. The benefit that will be received cannot be viewed in

isolation but in order to determine whether a party will be unduly benefited, the court must have regard to the factors mentioned in the section. In my judgment the approach adopted by the court a quo in concluding that the appellant would be unduly benefited should a forfeiture order not be granted was clearly wrong.

It is plain on the evidence that a forfeiture order should not have been granted. The marriage lasted for a very long time, approximately 35 years. The appellant was the only breadwinner of the family over a period of almost 20 years and he rendered more than adequate support to the children and to the respondent. It was only after the respondent's business was successfully established that she also started to contribute to the expenses of the joint household. Initially the appellant assisted the respondent in the estate agency business. When it became successful he did not rest on his laurels but

continued with his own employment and he also started a business. If this business was not a very successful one it does not appear to have been due to a lack of interest or application on the part of the appellant and it is in any event not really relevant. The marriage was reasonably happy until 1983 and it can be accepted that the parties became estranged mainly as a result of the fact that the respondent became successful in business. It seems that the appellant found it difficult to cope with this situation and this was probably one of the circumstances which gave rise to the break-down of the marriage. The appellant's conduct can certainly not be ignored but it must be assessed with all the other circumstances. One must also bear in mind that the final break-down came as a result of the shares issue and on this issue the respondent's conduct was certainly not beyond reproach. Having regard to all the circumstances and to the fact that no

substantial misconduct has been proved against the appellant it can not, in my judgment, be concluded that the appellant will be unduly benefited should an order of forfeiture, as claimed by the respondent, not be made. The appeal must therefore succeed.

The petition to the Chief Justice for leave to appeal has been included in the record on appeal. The record was unnecessarily burdened with 53 pages from page 991 to 1044 and the costs with regard to these pages should be paid by the appellant's attorneys, Shapiro and Partners Incorporated, de bonis propriis. We were informed by Mr van der Merwe that there was no objection to such an order being made.

The appeal is allowed with costs, such costs to include the costs consequent on the employment of two counsel. The order of the court a quo, save for the order of divorce, is set aside and the following order is substituted therefor: The main claim is granted

with costs and the counterclaim is dismissed with costs. The appellant's attorneys, Shapiro and Partners Incorporated, are ordered to pay the costs incurred in respect of pages 991 to 1044 of the record _de bonis propriis_.

A P VAN COLLER
ACTING JUDGE OF APPEAL

JOUBERT, JA)
) CONCUR
EKSTEEN, JA)