IN THE HIGH COURT OF SOUTH AFRICA
CAPE OF GOOD HOPE PROVINCIAL DIVISION

REPORTABLE

Case no A 434/04

In the matter between

DENYS JOHN KIRKLAND Appellant

and

JILL PATRICIA KIRKLAND Respondent

JUDGMENT DELIVERED ON 10 JUNE 2005

BLIGNAULT J:

Introduction

[1] Appellant and respondent were formerly married to each other. Respondent (as plaintiff) instituted an action against appellant (as defendant) under case no 1669/00 for a decree of divorce and ancillary relief. The action was defended by appellant. He also brought a counterclaim. On 10 October 2002, after a hearing that was spread over a number of days during 2002, the court below (Motala J) granted a decree of divorce and made the following orders:

> "*Plaintiff is ordered to pay Defendant the sum of R2 930 329,00 (two million nine hundred and thirty thousand three hundred and twenty nine rand) as follows:*

i) R1 380 000,00 (one million three hundred and eighty thousand rand) is to be paid on or before 30 November 2002;

(ii) R1 550 329,00 (one million five hundred and fifty thousand three hundred and twenty nine rand) is to be paid on or before 31 January 2003.

The costs of this matter shall stand over for later determination."

[2] On 29 November 2002, after hearing separate argument, the learned trial judge gave a judgment on the question of costs. The orders made by him are set out later herein.

[3] Appellant brought an application for leave to appeal against the judgment on the merits and the judgment on costs. Respondent opposed the application and raised a special defence that appellant had perempted the appeal. Appellant's application for leave to appeal was heard by the trial judge on 22 September 2003. In a judgment delivered on the same date he found that there had been a peremption of the appeal by appellant and that appellant in any event did not have a reasonable prospect of success on appeal. The application for leave to appeal was accordingly refused with costs.

[4] Appellant thereupon submitted a petition to the Supreme Court of Appeal for leave to appeal. On 17 February 2004 the Supreme Court of Appeal granted leave to appellant to appeal to the Full Court of this Division against the finding that the appeal had become perempted and against the judgments on the merits and on costs.

[5] The parties then agreed that the question of the peremption of the appeal would be argued first and separately from the appeal

against the merits of the judgments on the merits and on costs. The question whether appellant had perempted the appeal was accordingly argued as a separate issue before the Full Court on 13 August 2004. In a judgment delivered on 1 September 2004 appellant's appeal against the decision of the court below that he had perempted the appeal, was upheld. That decision of the court below was set aside and appellant was allowed to pursue his appeal against the judgments on the merits and on costs. Respondent was ordered to pay appellant's costs of the appeal against the decision that he had perempted the appeal, but excluding the costs that relate to the application for leave to appeal and the petition to the Supreme Court of Appeal, which were ordered to stand over for later determination.

[6] Appellant's appeal against the judgments of the court below on the merits and on costs was heard by us on 8 April 2005 and 13 May 2005.

The claim and counterclaim

[7] The parties were married to each other, out of community of property, on 3 December 1955. There are four children born out of the marriage but by the time of the parties' separation they were all majors. Respondent alleged in her particulars of claim that the marriage had broken down irretrievably. Apart from a decree of divorce she claimed registration of transfer in her name of a Mercedes Benz motor vehicle but the latter claim was not pursued by her.

[8] Appellant admitted that the marriage had broken down irretrievably. He claimed (i) an order that he is the owner of an equal and undivided half share in the immovable properties described as Bitou Vlei near Plettenberg Bay and Queens House, Sulgrave, Northamptonshire, England; (ii) an order that respondent account for and pay the sum of £75 000,00 to him; and (iii) a redistribution of assets in terms of the provisions of section 7(3) of the Divorce Act 70 of 1979 ("the Act") in such a manner that appellant's estate would be increased so that it would represent two-thirds of the combined net worth of the parties' estates.

[9] Appellant did not pursue his first and second claims, only the third. In final argument in the court below appellant's counsel did not claim the two-thirds of the parties' combined assets adverted to in the counterclaim. He argued that appellant's contribution to the combined assets by way of inheritances in the amount R1 738 000,00, should be paid to him and that the residue of the combined estates should be divided equally between the parties.

The urgent application

[10] On 30 October 2000 appellant launched an urgent application to prevent respondent from dissipating certain assets pending the finalisation of the divorce and to compel her to account to appellant in respect of various sums of money that had been in her possession. Respondent opposed the application and filed an answering affidavit in which she explained that the funds in question were used by her to assist the children, to maintain herself and to maintain and improve the immovable properties registered in her name.

[11] The urgent application was determined by way of a settlement agreement that was made an order of court on 17 November 2000. I propose to quote the terms of this agreement in full:

"*1. By agreement between the parties, this Draft Order is to be incorporated as an Order of the above Honourable Court.*

2. Each party waives his or her right to claim maintenance **pendente lite** *or on divorce from the other.*

3. Respondent is hereby authorised to sign the "offer to Purchase" attached to the papers marked "JK9-1".

4. All monies paid by the purchaser in respect of the property described in Annexure "JK9-1", shall be paid direct to Respondent's attorney of record, Abe Swersky & Associates, to be kept by them in an interest bearing trust account pending the finalisation of the divorce action between the parties under Case No 1669/2000.

5. The remaining portion of the farm known as "Bitouvlei" shall not be sold, encumbered and/or alienated in any way whatsoever, save with the consent of Applicant, which consent will not be unreasonably withheld. In the event of such consent being sought and granted, the proceeds of the sale shall also be dealt with in accordance with paragraph 4 above.

6. Respondent is interdicted from selling, encumbering or alienating the property known as "Queens House" pending the finalisation of the divorce action, save that Respondent shall be at liberty to let same at her discretion.

7. For purposes of Applicant's claim in terms of the provisions of Section 7(3) of the Divorce Act No 70 of 1979, as amended, the parties agree that the following assets shall have the following

values:

(a) Queens House: R3 762 500,00
(b) Respondent's monies invested in HSBC Bank, England: R862 150,00
c) the proceeds of the sale of the Simonstown property: R760 000,00
(d) the farm known as "Bitouvlei": R2 850 000,00
(e) Applicant's share portfolio: R123 000,00
(f) Applicant's loan account in Barlow Financing R1 250 000,00
g) Applicant's share portfolio in England: R537 500,00
h) Respondent's two Mercedes Benzes: South Africa R100 000,00
England R150 000,00
TOTAL R10 395 150,00

8. Insofar as either of the parties may be in possession of assets not included in the list aforesaid, each party shall have the right to prove the existence of such asset and the value thereof, and the parties' rights in this regard are reserved.

9. Neither party shall sell, encumber and/or alienate any furniture presently in his/her possession pending the finalisation of the divorce action.

10. Respondent shall, on a date to be arranged with Applicant, permit Applicant access to the property in England as "Queens House" in order to compile an

inventory. For purposes of such access, Respondent shall be entitled to be present, alternatively such access to be supervised by a person of Respondent's choice.

11. The limitation placed on Respondent's ability to deal with the nett proceeds of the sale of the Simonstown property as recorded in the separation agreement of 17 May 1999 is hereby uplifted.

12. The costs of the application are reserved for determination by the trial court.

13. It is recorded that this Order is incorporated as an Order of the above Honourable Court without either of the parties making any concessions with regard to the merits of the application."

[12] The hearing commenced on 25 March 2002. Apart from appellant himself Mr Stephanus Smith, a forensic accountant, gave evidence on his behalf. Respondent testified and called Messrs Andrew Duncan, Reg Munro (an actuary) and Trevor Foster (a financial investigation consultant) to give evidence. Appellant was then allowed to re-open his case to call Messrs Ronald Franklin and Johan de Wet. The matter was argued on 20 June 2002 and judgment on the merits of appellant's claim was given on 10 October 2002.

The judgment of the court below

[13] In his judgment the trial judge summarised the growth of the parties' estates over the years. At the time of their marriage they had virtually no assets but over the years they acquired various immovable properties:

(i) A house in Daventry Road, Bryanston for £5050,00;

(ii) a vacant erf in Mandable Road for £1 000,00;

iii) 'Windelstone Farm' for R15 500,00;

iv) a vacant plot in Sedgefield for between R6 000,00 and R8 000,00;

v) 'Gideonshoop', a farm in the Karoo for R80 000,00;

vi) 'Bitouvlei', a farm in Plettenberg Bay;

vii) 'The Old Farmhouse' in Plettenberg Bay;

viii) a house in Beverley Estate, Johannesburg;

ix) a flat in London for £80 000,00;

x) a holiday home in Simonstown;

xi) a house in England called 'Dover House' for £400 000,00;

xii) a house in England called 'Queens House' for £340 000,00.

The deposit on the purchase price of the house in Bryanston was paid by respondent out of an inheritance that she had received. Appellant paid the instalments on the mortgage bond that was raised to finance the balance of the purchase price. The purchases of all the other properties were financed by appellant. Most of the properties were extensively renovated. Appellant paid the costs thereof. He also financed the construction of a new house at Sedgefield. Appellant contributed his skill and experience as engineer and his physical labour. Respondent's financial contribution, so the trial judge held, was minimal. She had not been in full time employment since the marriage and her earnings from giving music lessons, acting in two films and making certain records did not make a significant contribution to the parties' accumulation of assets. She did however make a substantial contribution by way of her labour and talents to the improvement of the various properties. Appellant conceded in his evidence, the trial judge said, that her contribution in this regard was equal to his. Over the years the parties also acquired a portfolio of shares that were selected and paid for by appellant.

[14] The trial judge then considered whether the parties had concluded an agreement regarding the transfer of Queen's House

to respondent which precluded the court from making an order in terms of section 7(3) of the Act. He held that appellant bore the onus of proving that no such agreement had been concluded. He considered the evidence and held that appellant had discharged this onus and that the court accordingly had jurisdiction to consider appellant's claim under section 7(3) of the Act.

[15] The trial judge next dealt with the parties' estates. There is no doubt, he said, that appellant made a major contribution to the value of respondent's estate. He referred to the application which appellant brought during November 2000 for an interdict restraining respondent from dissipating her assets pending the finalisation of the divorce proceedings. In terms of paragraph 7 of the order that was granted by agreement between the parties, they agreed upon the value of the following assets then held in the name of respondent:

	(i)	Queens House	R3 762 500,00
(ii)	HSBC Investment	862 150,00	
	iii)	Proceeds of the sale of the Simonstown property	760 000,00
	(iv)	Bitouvlei	2 850 000,00
(v)	Motor cars	250 000,00	
			R8 484 650,00

To that amount, the trial judge held, must be added R1 million, being half of the agreed value of the furniture in her possession. The other half was offered by her to appellant and accepted by him. The value of her estate was therefore R 9 484 650,00.

[16] The trial judge then dealt with appellant's estate. He mentioned that three of his assets were dealt with in the settlement

agreement that was made an order of court, namely:

(i) Share portfolio R123 000,00
(ii) Loan account in Barlow Financing 1 250 000,00
(iii) Share portfolio in England 537 500,00

In regard to appellant's loan to Barlows he said that much evidence was given as to whether the full amount of R1 250 000,00 should be regarded as part of his assets. The evidence, he said, indicated that about R1 million of that sum may be lost. In view of the fact that the full amount of that loan was included in the court order in the urgent application he held that appellant was precluded from contending otherwise. The possibility that the income appellant received from that source might be reduced was, however, a factor to be taken into account. The trial judge said that there were three other assets of appellant that were not in dispute, namely:

(iv) Surrender value Liberty life Policy 16 000,00
(v) Surrender value Clerical Medical policy 369 726,00
(vi) Barclays Saving Account 44 666,00

The trial judge held that the capitalised value of appellant's

interests in the Turner Trust and his retirement annuity policy should also be regarded as assets in his estate. He accepted Munro's valuation of these assets at R198 200,00 and R84 900,00 respectively. The value of appellant's share of the furniture had been agreed upon as being R1 million. He rejected respondent's contention that appellant's share of the Hermanus house purchased jointly with Ms Ruth du Toit should be included as part of his estate. The payments made by appellant in this regard came from the proceeds of his sale of his shares. It would amount to double counting, he said, to include his interest in this house.

[17] The trial judge accordingly held that the value of appellant's estate was R3 623 992,00, made up as follows:

(i)	Share portfolio	R123 000,00
(ii)	Loan account in Barlow Financing	1 250 000,00
(iii)	Share portfolio in England	537 500,00
(iv)	Surrender value Liberty life Policy	16 000,00
(v)	Surrender value Clerical Medical policy	369 726,00
(vi)	Barclays Saving Account	44 666,00
(vii)	Capitalised value Turner Trust	198 200,00
(viii)	Capitalised value retirement annuity	84 900,00
(ix)	Furniture	1 000 000,00
		R3 623 992,00

[18] The trial judge considered a number of other factors. In

referring to respondent's needs he expressed the view that it would be unreasonable for her to expect to be able to keep a house in England and one in South Africa. He also said that although he was bound to accept the agreed values of the parties' assets he could not ignore the deterioration in the value of the Rand since the date of the court order. Respondent's assets in England, he said, *"are probably worth far more today"*.

[19] The trial judge concluded that it would be just and equitable to make an order that the parties share equally in the value of their combined estates as determined above which amounted to R13 108 642,00. In the result, he ordered respondent to pay the sum of R2 930 329,00 to appellant.

The judgment on costs

[20] The trial judge delivered his judgment on costs on 29 November 2002. He considered first the effect of a without prejudice offer made by respondent on 20 March 2002, the first day of the trial. In terms thereof respondent offered to pay appellant R2 million and £60 000. According to the evidence of Munroe the quantum of that offer exceeded the award made to appellant by the court. The usual rule in such a situation, said the trial judge, is that the offeror would be entitled to the costs incurred

after the date of the offer. He then considered certain submissions advanced by counsel for appellant as to why the usual rule should not apply in the present case. One submission was that respondent could not rely upon the offer as she disavowed any liability for costs. The trial judge rejected this submission on the ground that appellant could have set the matter down in terms of rule 34(5)(d) for a hearing on the question of costs. It would probably have taken two days to determine the issue of costs and appellant would probably have obtained an order that respondent pay his costs up to the date of the offer and the costs of determining that issue. Both parties thus achieved a measure of success on the issue of costs and it would be fair, he held, if each party bore his/her own costs of the hearing on that issue. In regard to the costs of the urgent application under case no 7911/2000 he was of the view that each party should bear his/her own costs.

[22] The trial judge accordingly made the following cost orders:

"A. In matter no 1669/2000 [the divorce action]:

a) Plaintiff is ordered to pay Defendant's costs up to and

including the third day of the hearing;

b) *Defendant is ordered to pay Plaintiff's costs incurred after the third day of the hearing, save for the costs dealt with in paragraph (d) below, which costs shall include the costs of two counsel and the qualifying expenses of Mr Trevor Foster;*

c) *The costs of the transcript of the evidence shall be costs in the cause;*

d) *Each party shall pay his or her own costs of the hearing on 22 November 2002.*

B. In matter no 7911/2000 [the urgent application]:

Each party is to pay his or her own costs."

Evidence on behalf of Appellant

[22] Appellant testified that he and respondent were married on 3 December 1955. He left the common home on 24 March 1999 but over the following 80 days he still spent almost half of his time with her. He and respondent met in 1954 while they were both students at the University of Cape Town. He qualified as a civil

engineer at the end of 1954. She was a first year student in music. At the time of their marriage his only asset was a right to a testamentary trust created by his grandfather. The trust owned property in Port Elizabeth and there were about five beneficiaries that received monthly payments from the trust. Respondent had no assets at that time. On 11 October 1956 their first child Peter John was born. At that stage they were living at the Wemmershoek Dam where he worked for the City Council. In July 1956 they went to England where he was employed by the London County Council. On 9 November 1958 their second son Michael was born. By Easter 1959 he had to return to South Africa after his father had suffered a stroke. For a while they stayed on his parents' farm in the Eastern Cape and then they moved to Johannesburg where he obtained employment with a firm of consulting engineers.

[23] On 13 August 1959 they bought a property in Daventry Road, Bryanston for a purchase price of £5 050. Respondent paid the deposit of £1 263 from monies which she had inherited. The property was registered in her name. They passed a bond to raise

the balance of the purchase price. They effected some improvements to the property. Both of them were involved with this. On 25 August 1960 their first daughter Robyn was born. On 11 February 1963 they bought an eleven acre smallholding which they called Windlestone Farm for R15 500,00. They passed a bond for R11 625,00. The Daventry Road property was sold for R11 000,00. At this time respondent was mainly a housewife but she started giving piano lessons. She did not derive a significant income from this source. On 25 January 1964 their youngest son Timothy was born. They effected a major renovation of the homestead which he financed from an inheritance of R27 000,00 which he received from his mother. They worked as a team in improving their properties but respondent did not make any financial contribution to the improvement of the properties. Respondent became more and more involved in amateur theatre and she was then offered roles in two professional South African films, *Katrina* and *Jannie Totsiens.* For *Katrina* she was away from home for two periods of six weeks and for the second film two periods of two weeks. He employed a housekeeper during the periods of her absence. By looking at his income assessments for

the period 1966 to 1973 he calculated that respondent received an income of R4 266,00 over that period. In 1961 respondent formed a relationship with one of the actors that she had met through her amateur acting. This carried on for about 8 years. When he decided to approach lawyers she attempted to commit suicide by taking an overdose of pills. They subsequently became reconciled.

[24] During 1971 appellant started his own company to carry on his business as an engineer. The business flourished and he formed other companies. In April 1979 he retired from this business but still retained shares in two companies, Dig Group (Pty) Limited ("Dig Group") and Dig Construction (Pty) Limited ("Dig Construction").

[25] In February 1979 they moved to a farm near De Rust called Gideonshoop. He had taken two younger partners in his company and that allowed him to semi-retire on the farm. He had purchased the shares in the company that owned the farm in 1977 for R80 000,00 but he transferred 40% of the shares to respondent. Prior to that they had purchased a vacant plot at Sedgefield for R6 000,00 or R8 000,00 with the intention of building a beach house there. It was registered in respondent's name. He employed a local builder to build the house. It cost about

R25 000,00 or R27 000,00. He financed it. She assisted with decorations but she made no financial contribution. They lived on the Gideonshoop farm for about 18 months. They moved in about July 1980 when they acquired the farm Bitouvlei near Plettenberg Bay. They did not make any profit on the sale of Gideonshoop. Bitouvlei consisted of two portions namely portion 8 of the farm Stofpad and the portion named Sarel. The purchase price was R85 000,00 for both properties and they were transferred into the name of respondent on 21 July 1980. They effected major alterations to the garage and the homestead. He used two teams of builders for that purpose. He drafted the plans for the alterations and he paid for them. Respondent also contributed to the work but his own contribution was the major one.

[26] In October 1980 the parties returned to Johannesburg and re-established themselves on Windlestone Farm. It once again served as the family home – from 1980 to 1987. He was again occupied on a full time basis in his company. They effected major improvements to the property such as a swimming pool and stairways. He formed the DJK Family Trust of which his four

children were the beneficiaries. He sub-divided the farm and sold four stands, one to each of his children. The other stands (there were eleven altogether) were also sold. His four children each received a fully built home paid for by him at a cost of R350 000,00. His youngest son Timothy emigrated to London in 1994. He received R250 000,00 to R280 000,00 in cash and an additional £50 000 to enable him to buy a home. Respondent was not involved in the scheme that resulted in the children receiving these houses. On 1 March 1985 the trust bought a property called The Old Farmhouse at Plettenberg Bay for R185 000,00. A bond was registered for R135 000,00 and the balance was paid by the trust. They effected renovations to this property for some R105 000,00. It was sold by the trust for R550 000,00 in March 1991. The Sedgefield property was sold at a profit of about R160 000,00 and these funds were used to cancel the bond over The Old Farmhouse. Although this was reflected as a loan account in favour of respondent he had generated that money. They purchased a property called Beverley Estates in Sandton for about R600 000,00 plus. He paid for it from the proceeds of the sale of The Old Farmhouse. Improvements of the order of

R100 000,00 were effected. Bonds were registered for R800 000,00 to support the company Dig Group. This property was sold in 1995 for R1, 8 million. The profit of R800 000,00 plus R450 000,00 was pledged to Barlows for the debts of Dig Group. At the end of March 1997 he retired and they moved to Bitouvlei. In 1990 they had carried out another renovation at a cost of about R250 000,00. On 4 April 1995 a property known as erf 1028, Simonstown was purchased for R470 000,00. He financed this purchase from monies that he inherited from his grandfather. It was registered in both their names. This property was sold for about R760 000,00 in February 2000. The profit was paid into a bank account to generate interest for the maintenance of respondent. The remainder of the farm Bitouvlei was sold for R2,1 million. A portion of about 5 hectares had previously been cut off and sold to their one daughter who was then living on it with her husband. After these sales the portion of that farm called Sarel was still registered in respondent's name.

[27] The parties also built up an estate in England. Over the years they had often travelled abroad and they managed to

accumulate funds that were held in London. Appellant used £30 000 of these funds to purchase a property in Bollingbrook Road for £80 000. A bond was registered in favour of the Halifax Building Society for the balance. In December 1993 he purchased Dower House for £400 000. He registered a bond for £100 000 and paid the balance from his investments. From 1997 to 1998 he and respondent both worked quite hard in effecting improvements to that house. He sold it in September 1998 for a net sum of about £650 000. An amount of £34 645 was paid as a deposit on Queen's House. The total purchase price was about £340 000. The contracts for the purchase of Queen's house were completed in May/June of 1999. Meanwhile he had received over the period from 1975 a total amount of R1 736 686,00 by way of an inheritance from his grandfather. These funds were used for living expenses and investments.

[28] Appellant, with reference to his income tax assessments, provided the following particulars of his taxable income for the tax years 1998 to 2002:

- Income tax year 1998 R70 935,00
- Income tax year 1999 107 189.00
- Income tax year 2000 114 454,00
- Income tax year 2002 78 640,00

Appellant explained that his monthly expenses amounted on average to approximately R18 000,000. He said that he had bought a house in Hermanus which is registered in his name and that of Ms Ruth du Toit. He still owed R673 852,00 to her for his half share in the property.

[29] Mr Stefanus Smith was called as an expert witness on behalf of appellant. He is a chartered accountant that specialises in forensic accounting. He was requested by appellant to investigate the assets and liabilities of his estate. It appears that Mr Trevor Foster, a financial investigator employed by respondent, had previously prepared a report dated 26 July 2000 of his investigation into these matters. Smith and Foster attended a meeting on 10 April 2005 at which they discussed various issues. Smith then prepared a report on his findings, dated 26 April 2002, and a statement of appellant's assets and liabilities. His evidence can be summarised as follows:

(i) He agreed with Foster that appellant's shareholding in Dig Group and Dig Construction had no value.

ii) Smith dealt with appellant's deposit of R1,25 million with Barlows. (The company in question was formerly known as Barlows Central Finance Corporation (Pty) Limited. By April 2002 its name had been changed to Barloworld Capital (Pty) Limited. I shall simply refer to it as Barlows). The deposit served as security for amounts owing by Dig Group to Barlows in respect of certain leases. Smith testified that Dig Group in fact owed Barlows R1 003 081,87. Dig Group was bankrupt and in dire financial straits. The possibility of it meeting its obligations to Barlows was very slim. Although the deposit constituted an asset of appellant it was largely offset by his contingent liability to Barlows.

iii) Smith also dealt with the Hermanus property purchased jointly by appellant and Ms Ruth du Toit. He pointed out that appellant's indebtedness to Ms du

Toit in respect of this house exceeded the value of his interest therein. He explained that appellant's deposit of funds with Ms du Toit in the amount of R300 000,00 came out of appellant's share portfolio in England that was reflected in the settlement agreement as an asset of his with a value of R537 500,00.

iv) Appellant had a savings account with Barclays Bank in England. As at 28 February 2002 the balance in this account was £3 190,00. Converted at an exchange rate of R16 to the Pound it amounted to R51 000,00.

v) Smith and Foster agreed that the surrender value of appellant's insurance policy in England was £26 000 odd which, converted at an exchange rate of R16 to the Pound, amounted to R400 000,00.

vi) The surrender value of appellant's Liberty Life policy was reflected as R15 992,00 in the settlement agreement.

vii) Smith expressed the view that appellant's income from the Turner Trust should not be regarded as an asset of his estate.

Evidence on behalf of Respondent

[30] Respondent's version of the parties' marital life and the accumulation of their assets did not in the main differ much from that of appellant. She met appellant early in her first year as a B Mus student at the University of Cape Town. They got married on 3 December 1955. As appellant was working as an engineer at the Wemmershoek Dam at the time she changed her course and did a teacher's diploma in her second year. She said that until appellant left her she would have described their marriage as a good and happy one. After the birth of their son Peter John she and appellant went to live in England for a short while. When she became pregnant with their second child they decided that she would return to South Africa. Her son Michael was born on 9 November 1958. Appellant stayed on in England at first but when

his father had a stroke, he returned to South Africa. At that time they had very little in the way of assets. She testified that she made very little contribution towards living expenses and the acquisition of assets in the first years of marriage. She had children and in England she had to perform all the household duties. When they moved to Johannesburg they bought their first house. She paid the deposit from the inheritance that she received from her mother's estate. In 1959 she started giving piano lessons from home. Her earnings were used for household expenses. She also purchased furniture from these monies. Her daughter was born in 1962. At a later stage she made nine long playing records, mostly folk songs and ballads. She also produced 52 programs for children of 15 minutes per week for the SABC and some cabaret work. She acted in two South African films, *Katrina* and *Jannie Totsiens*. She collected a substantial amount of antiques over the years.

[31] Respondent testified that her alleged suicide was not a genuine suicide. It happened in 1965. She had been asked by a friend to take part in a fund-raising effort. Appellant was upset and

told her he was going to leave her. She then took a handful of Disprins. She went to a doctor and he performed a stomach pump. She explained that she was emotionally wrought up at that time and she wanted to scare appellant. She also testified that she only had a brief affair with Blundell. Her adultery with him did not last longer than about five months. Appellant, she said, was very understanding about it. When appellant started his business in 1972 he worked very hard and he was often away from home for a few days at a time. She took over the running of the home and all the lifting of the children. She gave guitar lessons for children and she cut appellant's hair for 30 years. She arranged and attended to the children's extra-mural activities.

[32] She said that she was terribly proud of their children. Peter John was 43 years old when the marriage broke up. He is a civil engineer but now involved in a jewellery business. He is married and living in Cape Town. They have three children. Her second child Michael lives in Wynberg. He has two children who are still at school. Her daughter Robyn is married to a plastic surgeon. They used to stay in Johannesburg but they recently moved to part

of the Bitouvlei property near Plettenberg Bay that was sub-divided for her. They have four children. Her youngest son Timothy and his wife and their children were then living in Queen's House and they were paying the running costs. Timothy was involved in information technology but he had recently been made redundant. Respondent described Queen's House as a very old picturesque stone house in a small village Salgrave in Northamptonshire. There was enough room for her and his family when she stayed there.

[33] She described appellant's departure from the common home on 24 March 1999. She was at home at Plettenberg Bay and towards evening she expected appellant to return home after golf. Just after seven he called her on the phone and told her that he was not coming back. He sounded upset and confused. When she went upstairs she found that he had taken all his clothes and his computer. The next day she drove to Cape Town but she did not know where he was. A few days later she received a call from him. He told her that he was in Johannesburg with Ruth. He then came to Cape Town over the Easter weekend and he spent part of

the weekend with her in Simonstown. Ruth was a friend of theirs for many years and when she got divorced appellant helped her with her money problems. After the weekend appellant phoned her twice a day. She expected him to return to her.

[34] She also explained how the Simonstown agreement came about. Her children and friends told her that she needed some kind of security. The only lawyer that she knew was Mr Duncan who practised in Simonstown. She consulted him and he prepared the first draft of a separation agreement. She had to go to England to complete the Queen's House agreement. He was about to go with her. She met him at the airport and they drove to Simonstown. There was some unpleasantness when he told her that he intended to spend some time with Ruth in London. She threatened that she would not go with him in that event. He then phoned Ruth to tell her that he was not joining her in England. At Simonstown she produced the agreement. That afternoon they went to see Duncan. He told appellant that he should look at the agreement over the weekend which he did.

[35] On the following Monday morning they went to Duncan's office and signed the agreement. The gist of the agreement was that she would get an amount of R10 000,00 and that the Simonstown house would be sold. She was very upset at the time and she could not recall how the amendments were made. She remembered that appellant said that the Bitouvlei property could be struck out because it was in her name in any event. She and appellant spent the weekend at Simonstown and they went to Arniston and on to Plettenberg Bay. Her daughter would not let them stay on the farm because she was too upset about the break up of their marriage. Then they flew to Johannesburg and from there to London. The intention had been to put Queen's House in their names jointly but when appellant told her that Ruth knew everything about their financial affairs she became quite upset and she refused to go through with the transaction in that form. She told him that the property would have to go into her name or she would not proceed with the purchase. They went to see the solicitor and appellant told him to register it in her name. She moved into the home on 2 or 3 June and appellant stayed on for a week. The day before he returned to South Africa he wrote out a

cheque for £100 000 of the joint money to be put in a share portfolio for her. He also put £50 000 into his own portfolio in England. She wanted him to stay on in England for another week because their daughter-in-law was about to have her pregnancy terminated. His attitude was that he had promised Ruth to be back on a certain date and that he had to go. He left her on 15 June 1999 and flew back to South Africa. On 16 June 1999 he sent a letter to her about their "sad and poignant parting". It gave her hope that he would end his relationship with Ruth and return to her. On 8 July 1999 he faxed her a letter from Plettenberg Bay. She understood from it that he was telling her to get on with her life and that he was putting everything in place so that she could manage her affairs in future. He never interfered with her management of Queen's house. She wrote a note to appellant about the amount of R10 000,00 that he undertook to pay in terms of the Simonstown agreement and about putting the car in her name.

[36] On 23 July 1999 she executed a deed of gift in terms of which she donated one quarter of Queen's House to her son

Timothy. She moved into the house in June 1999 and she stayed there for a while in August 1999 and then for six weeks in April/May 2000 and for a month in January 2000. Her intentions had been to live in England but it did not work out as she had to attend to the sale of the Simonstown property and she became responsible for the maintenance of the Bitouvlei farm. Her plans for the future, she said (this was on 2 May 2002), were to live part of the year in Queen's House but visit her children in South Africa for a few months every year. She also wanted to purchase a house in Cape Town where she could live whilst in South Africa. During her marriage with appellant she had become used to a comfortable lifestyle. They went on overseas trips, she collected antiques and her major interest was in music.

[37] Respondent testified about her relationship with Mr Michael Wells. He was a neighbour of them at Plettenberg Bay. His wife died of cancer in January 1999. They got to know one another better and in February 2000 she went on a holiday with him and his sister and her husband. That was for her a turning point in her life. He was 73 years old and in good health. He had three

children but they were struggling financially. After selling Bitouvlei she went to stay with him on his farm. She is financially independent and she does not rely on him for maintenance. At this stage they were not planning to get married. Her plan at that stage was to live in Cape Town. She would buy a small property and her monthly expense would amount to about R15 000,00. She produced a schedule which showed how this was computed. She also produced a schedule of her monthly expenses in England. These came to about R2 500,00. Respondent also produced a list of her assets. They included the four major assets mentioned in the court order, jewellery of unknown value and furniture. The combined value of the HSBC investment, the Simonstown proceeds and Bitouvlei amounted to R4 472 150,00. She tendered to pay appellant the sum of R1 380 000,00 and to give half of the furniture to him on a basis as had been agreed upon. She also produced a schedule showing the utilisation of these assets after divorce. Her maintenance in the sum of R15 000,00 per month in South Africa and R17 000,00 per month in England was capitalised in the sum of R2 207 500,00, her legal costs were estimated to amount to R500 000,00 and the home to

be acquired by her in Cape Town was costed at R1 000 000,00. She did not deal with the division of the furniture as the parties were about to settle it by agreement. The loan of £50 000 to Peter John, she explained, would have to be written off as he did not have the means of repaying it.

[38] Respondent dealt separately with the various houses that the parties purchased during their marriage. The Bryanston house was bought partly with money that she had inherited. She agreed with appellant's evidence that she made a meaningful contribution towards the selection, decoration and making a profit on Windlestone Farm. No profit was made on the farm Gideonshoop. The Sedgefield plot was purchased in about 1967 for R7 000,00. The total cost was about R35 000,00. It was sold for about R160 000,00. Bitouvlei was purchased in her name. Appellant never suggested to her that it was not really her property. Everyone referred to it as Jill's farm as appellant had a property of his own in Johannesburg, called Sleep. It was a beautiful old home and she spent a lot of time and effort in decorating and improving it. She expected appellant to visit her on her birthday in

October 1999 and she made various arrangements for his visit but in the end he did not come. The old farmhouse in Plettenberg Bay was purchased in a trust for the children and when it was sold one half of the proceeds went into Bitouvlei and the other half went into the trust. The Simonstown property was registered in both their names. Respondent also produced a letter from her attorney setting out what her legal costs would be in the event of judgment given for or against her. She confirmed that she and appellant spent a lot of effort in 1997 and 1998 in improving and decorating it. They made an enormous profit on the sale of Dower House.

[39] Respondent confirmed the evidence given by her on affidavit that the separation agreement and the registration of Queen's House in her name were motivated by a desire on the part of appellant to provide her with financial security. She prepared a schedule which showed her living costs and expenditure over the period from March 1999 to November 2000. They amounted to R470 000,00 in total.

[40] Respondent called Mr Andrew Duncan to give evidence. He

was the attorney that attended on the parties on Friday 14 May 1999. He prepared an agreement in accordance with their instructions. At the request of the parties certain amendments were made to the first draft of the agreement. Appellant wanted to sign the amended version of the agreement there and then but he advised him to take it home andlook at it. The parties returned to his office on Monday 17 May 1999 and both signed the agreement.

[41] Mr Trevor Foster testified as an expert witness on behalf of respondent. He is a qualified chartered accountant practising as a financial investigation consultant. His mandate from respondent was to examine appellant's financial position. He prepared a first report styled 'preliminary report' dated 23 July 2001. At that stage he was not yet in possession of all relevant documentation. In that report he referred to various receipts from and payments made by appellant to Ms Ruth du Toit. These were tabulated in his report. He also prepared schedules of the value of the known joint assets of the parties as at March 1999 and in July 2001. He had prepared a supplementary report dated 16 April 2002 on the

position up to that date. He commenced giving evidence on 30 April 2002. In regard to appellant's deposit with Barlows he said that a letter from Mr Denicola, the managing director of Dig Group, referred to additional securities to the value of R8 million which had been accepted by Barlows in extending the overdraft facility to R7 million. Those securities, he said, would be more than sufficient to cover the arrears owing by Dig Group. He had noted that the payments made by Dig Group to Barlows formed a regular pattern until February 2000 but thereafter only one payment of R13 000,00 was made. Previous payments had been of the order of R140 000,00 per month. He had discussed the matter with Mr Knight of Barlows and asked him for details of how the payments by Dig Group had been allocated by Barlows. Apart from stating that Barlows could allocate payments in their discretion he was unable to get information from Mr Knight. He also discovered that the equipment that had been let in terms of the agreements that were covered by appellant's suretyship, had been moved to other entities when it came to the end of the lease and then refinanced back to Dig Group. Dig Group regularly paid the interest on the R1,25 million loan to appellant. In regards to the Hermanus

property he said that appellant's notes indicated that R190 000,00 had been paid as part payment for that house whilst Ms du Toit informed him that the loan had been repaid as appellant was indebted to her in a substantial amount for living costs. He calculated that the present value of appellant's income from the Turner Trust was R225 000,00. He valued appellant's interests in the Liberty life retirement annuity policy at a figure of R95 000,00. Foster next dealt with his third report dated 28 April 2002 which consisted of comments on Smith's report. He mentioned, *inter alia,* that Barlows displayed a long–standing *de facto* tolerance in regard to Dig Group's default. He also pointed out that the repayments made to Barlows by Dig Group were not allocated against the debt that was secured by appellant's suretyship. Foster suggested further that appellant appeared to be evading tax by channelling certain transactions through his companies. He also dealt with the Hermanus property which appellant had purchased jointly with Ms du Toit and he said that he agreed with Mr Smith that the funds paid by appellant in this regard came from his overseas share portfolio.

[42] Mr Reg Munro is a consulting actuary. He calculated, *inter alia,* that the present value of the benefit to appellant of receiving the amount of R35 000,00 *per annum* for the rest of his life, was (on the assumption of no future increases in the Rand amount) equal to R198 200,00. The value of a retirement annuity of R15 000,00 *per annum* payable for the rest of appellant's lifetime, was R84 900,00.

Additional evidence on appellant's deposit with Barlows

[43] After respondent's case had been closed appellant obtained leave to call two further witnesses on the issue of his deposit with Barlows. The first was Mr Ronald Franklin. He has been the general manager of Barlows since 1993. He confirmed that Barlows had financed the purchase of many items of equipment by Dig Group. On 11 December 1996 appellant had signed a suretyship in favour of Barlows for payment of all the debts owing by Dig Group to Barlows. On 12 December 1999 Barlow issued a letter of comfort to appellant. Appellant had informed them that he was about to leave the company and they agreed to issue the letter of comfort stating that the suretyship would apply in respect

of existing business. He stated that, despite the letter of comfort, Barlows was contractually entitled to allocate monies received from Dig Group to any of the debts owing by it. The debts owing by Dig Group were supposed to have been paid in full by December 1999. The reason why legal action had not been taken earlier is that they were trying to nurse the company through its financial difficulties. On 13 June 2002 Barlows' attorneys wrote a letter to Dig Group advising it that by reason of its continued non-payment of its indebtedness, Barlows required the return of all the equipment in its possession by Friday 21 June 2000. On 11 June 2002 Barlows concluded an agreement of settlement with appellant in terms of which it accepted the sum of R1 030 000,00 in full settlement of its claim against appellant in terms of the suretyship. Pursuant to this agreement Barlows retained the amount R1 million from the amount loaned to it by appellant and the balance of R250 000,00 was to be refunded to appellant.

[44] Mr Johan de Wet also testified on behalf of appellant. He was at that time an attorney employed as a professional assistant in the firm that acted as appellant's attorneys of record in this

matter. On 3 May 2002 Mr De Nicola of Dig Group faxed a copy to him of a letter of demand dated 17 April 2002 which had been addressed to appellant by Mr Lanham-Love of attorneys Singer Horwitz in which they claimed on behalf of Barlows payment of the amount of R1 002 566,80 from appellant on the strength of the deed of suretyship signed by him in respect of the debts owing by Dig Group to Barlows. At the request of appellant he contacted Mr Lanham-Love and they agreed to meet in order to discuss Barlows' claim. On 30 May 2002 a round table conference was held. He and Adv Smith represented appellant. They raised issues such as the allocation of payments by Barlows and Barlows' letter of comfort. Mr Lanham-Love debated these matters with them. He (de Wet) contacted appellant and obtained instructions from him to settle the matter. He then put forward an offer of settlement by appellant which entailed that Barlows would allocate the sum of R1 million to the outstanding debt of the Dig Group and pay the balance of R250 000,00 to appellant. This offer was subsequently accepted by Barlows and a written agreement of settlement was concluded on 11 June 2002.

The court's discretion under section 7(3) of the Act

[45] Shortly before the appeal on the merits was to be heard, appellant brought an application to have new evidence admitted on appeal. Before dealing with that application I propose to review the legal principles relating to the exercise of the court's discretion under section 7(3) of the Act. Section 7(3) must be read with sub-sections 7(4) and 7(5) of the Act. They provide 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, 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*
>
> *… … …*
>
> *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 have 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, including any obligation that a husband to a marriage as contemplated in subsection (3) (b) of this section may have in terms of section 22 (7) of the Black Administration Act, 1927 (Act 38 of 1927);

(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."

[46] Mr Weinkove appeared, with Ms Gassner, on behalf of respondet. He referred to certain passages in **BEAUMONT v BEAUMONT** 1987 (1) SA 967 (A) in support of the argument that the trial court has a very wide discretion when applying section 7(3) of the Act. The first passage is at page 988 H – 989E:

"*The Legislature clearly intended to confer a very wide discretion upon a Court exercising its jurisdiction under ss (3). This is highlighted by the provisions of ss (5), to which reference will be made presently.*

Subsection (4), in the words of Kriegler J (at 175B - C), 'contains two conjoined jurisdictional preconditions to the exercise of the discretion'. The one is a contribution by the one spouse to the estate of the other, of a kind described in the subsection; the wording of the subsection in this regard and its meaning and effect will be examined later in this judgment. The other is that the Court must be satisfied that, by reason of such a contribution, it

would be 'equitable and just' to make a redistribution order. The first requirement involves a purely factual finding. The second involves the exercise of a purely discretionary judgment in equity. It is certainly a very prominent and important feature of ss (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.

Subsection (5) prescribes the considerations which the Court must take into account in the determination of the assets or part of the assets to be transferred in terms of a redistribution order. First and foremost is the contribution by the one spouse to the estate of the other, by which is obviously meant the nature and extent of the contribution. Next to be considered, in terms of para (a), are the existing means and obligations of the parties. The application of these considerations to the facts of the present case will be dealt with later. Para (b) refers to any donation made by one party to the other during the subsistence of the marriage or which is owing and enforceable in terms of their antenuptial contract. These facts are of no real consequence in the present case. As to the donation in the antenuptial contract, I agree with Kriegler J that 'It is a trifle in the present context' (at 179A). The same applies to the donations made by the appellant to the respondent during the subsistence of the marriage (see Kriegler J's remarks at 177A - B). Paragraph (c) refers to any forfeiture order made under s 9 of the Act or under any other law. This

plays no role in the present case. Lastly, para (d) mentions 'any other factor which should in the opinion of the Court be taken into account'. It is this feature of ss (5), coupled with the paucity of the considerations mentioned in the preceding paras (a) - (c), to which I referred earlier as highlighting the very wide discretion which a Court is given in the exercise of its power to make a redistribution order."

The second passage is at page 1002A – E:

"*Counsel for the appellant went to much trouble to put before us alternative orders that could be made, which, it was contended, would not be as hard on the appellant as the present orders, while still being fair to the respondent. I do not find it necessary to deal with counsel's proposals, which involved, inter alia, the payment of a capital sum in instalments, instead of in a lump sum. The discretion to be exercised was vested in the trial Judge. When once it is found, as I have done, that he had not misdirected himself, and that he had not exercised his discretion improperly, the room for this Court to interfere with the result arrived at by him, is very limited indeed. That is always the case when the exercise of a discretion is involved. In the particular context with which we are concerned here, I would quote the following passage from the judgment of Ormrod LJ in Preston v Preston 1982 Fam 17 (CA) at 29, where he approved of what had been said in an earlier case:*

'We are here concerned with a judicial discretion, and it is

> ***of the essence of such a discretion that on the same evidence two different minds might reach widely different decisions without either being appealable. It is only where the decision exceeds the generous ambit within which reasonable disagreement is possible, and is, in fact, plainly wrong, that an appellate body is entitled to interfere.'***
>
> *In my judgment, there are no grounds in the present case upon which this Court could interfere with the orders made by the Court a quo."*

This meant, Mr Weinkove argued, that this court can only interfere with the exercise of the trial court's discretion if it is satisfied that the discretion was not exercised judicially.

[47] Mr Hodes appeared, with Ms van Zyl, for appellant. He relied on the recent judgment of the Supreme Court of Appeal in **BEZUIDENHOUT v BEZUIDENHOUT** 2005 (2) SA 187 (SCA). **Brand JA,** at 194G – 195G, said the following with regard to the court's discretion under section 7(3) of the Act:

> "*[16] On behalf of the respondent it was contended that since the redistribution order granted by the court a quo involved the exercise of the discretionary power conferred by s 7(3),*

the room for this court to interfere is limited. It cannot, so the respondent contended, substitute its own discretion for that of the trial court's simply because it would have preferred a different result. It can do so only if the trial court had failed, through misdirection or otherwise, to exercise its discretion properly. It is clear that these contentions are directly supported in the judgment of Botha JA in Beaumont v Beaumont 1987 (1) SA 967 (A) 988H-989A; 1002A-E.

[17] The appellant's counter-argument was that Beaumont had been overtaken by later judgments of this court, such as, Media Workers Association of South Africa and others v Press Corporation of South Africa Ltd ('Perskor') 1992 (4) SA 791 (A) 796H-I and 800E-G and Knox D'Arcy Ltd and others v Jamieson and others 1996 (4) SA 348 (A) 361G-I. In these judgments, both of EM Grosskopf JA, a distinction is drawn between two categories of discretionary powers. These two categories can conveniently be described as 'a discretion in the broad sense', on the one hand, and a 'discretion in the narrow or strict sense' on the other. The essence of a discretion in the latter sense, so Grosskopf JA explained, involves a choice between two or more different, but equally permissible, alternatives, while the former means no more than a mandate to have regard to a number of disparate and incommensurable features in arriving at a conclusion. It is only when the exercise of a discretion is in the strict or narrow sense, Grosskopf JA

said, that an appeal court's powers of interference are limited, because it is the essence of such a discretion that, on the same facts, different minds may legitimately arrive at different conclusions. With regard to the exercise of a discretion in the broad sense, he said, there is no reason why the powers of an appeal court should be so restricted. Since these matters can be determined equally appropriately by an appeal court, the latter may substitute its own discretion for that of the trial court. The mere fact that a discretion is described as 'wide', Grosskopf JA added, does not mean that it is necessarily a discretion in the strict sense. It only means that the trial court is entitled to have regard to a wide range of disparate and incommensurable factors in arriving at its decision.

[18] In view of these later decisions, the appellant argued, the appropriate category for the discretion conferred upon the trial court in terms of s 7(3) of the Act, is that of discretions in the broad sense. Consequently, the argument went, s 7(3) confers an equally unfettered discretion on this court to make the redistribution order that it may deem just and to substitute the result of that exercise for the order made by the court a quo. I find this argument attractive in its logical progression and I have no doubt that it will be raised again. However, for present purposes it is unnecessary to decide its validity. In the light of the view that I hold regarding the outcome of this matter, I am prepared to assume, without deciding, that a misdirection by the trial

court is a prerequisite for this court's interference with the decision of that court."

[48] It appears from the *dicta* quoted above that there may be a possibility of confusion in regard to the terminology used to describe the nature of the court's discretion. In **BEAUMONT v BEAUMONT**, *supra,* the term *"wide discretion"* was used to describe the type of discretion where the powers of a court of appeal to interfere with the decision of the trial judge would be limited. In the **BEZUIDENHOUT** case, however, reference was made to the distinction drawn in **KNOX D'ARCY LTD AND OTHERS v JAMIESON AND OTHERS** 1996 (4) SA 348 (A) and earlier cases between a discretion in the narrow sense which involves a choice between two or more different, but equally permissible, alternatives, and a discretion in the wide sense which means no more than a mandate to have regard to a number of disparate and incommensurable features in arriving at a conclusion. It is normally only when the exercise of a discretion is in the narrow sense that an appeal court's powers of interference are said to be limited. I shall refer to it hereunder as a narrow discretion in the *Knox D'Arcy* sense.

[49] On the face of it the discretion of a court in terms of section 7(3) of the Act appears to me to fit more comfortably into the category of a wide rather than a narrow discretion in the *Knox D'Arcy* sense. Support for such a conclusion may be found in the judgment of the Supreme Court of Appeal in **WIJKER v WIJKER** 1993 (4) SA 720 (A). In that case the court dealt with a claim for an order for the forfeiture of the patrimonial benefits of a marriage in terms of s 9(1) of the Divorce Act 70 of 1979. On behalf of the respondent in that matter it was contended that the trial court had exercised a discretion and that the power of the court of appeal to interfere with this decision was therefore limited. In the course of his judgment **van Coller AJA** said the following, at 727 D - :

> "*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".

The learned judge then referred to the remarks of **E M Grosskopf JA** in Media Workers Association of **SOUTH AFRICA AND OTHERS V PRESS CORPORATION OF SOUTH AFRICA LTD** 1992 (4) SA 791 (A) at 800C-G (referred to by **Brand JA** in the **BEZUIDENHOUT** case, *supra*) and continued, at 727HI, as follows:

"*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 is 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."*

[50] In view thereof that **Brand JA,** in the **BEZUIDENHOUT** case, still left the question of the proper categorisation of the court's

discretion under section 7(3) of the Act open, I am prepared to assume in respondent's favour that it is a narrow discretion in the *Knox D'Arcy* sense. In **BOOKWORKS (PTY) LTD v GREATER JOHANNESBURG TRANSITIONAL METROPOLITAN COUNCIL AND ANOTHER** 1999 (4) SA 799 (W), **Cloete J** (with **Heher J** and **Preller AJ** concurring) dealt with the question of the nature of the discretion conferred on a court of first instance to require that a plaintiff company provide security in terms of the provisions of section 13 of the Companies Act 61 of 1973. He applied the *Knox D'Arcy* distinction between a wide and a narrow discretion and held that the discretion vested in a court of first instance by section 13 of the Companies Act, is a narrow discretion. Of relevance for present purposes are various examples in our case law where, according to **Cloete J**, at 805G – 807G, the discretion conferred upon the court was a narrow one. I refer in particular to the following categories:

i) The estimation of compensation for general damages for pain and suffering, loss of amenities of life and disability. See **NGUBANE v SOUTH AFRICAN**

TRANSPORT SERVICES 1991 (1) SA 756 (A) at 786H.

ii) Sentencing in a criminal trial. See **R v MAPUMULO AND OTHERS** 1920 AD 56.

iii) The apportionment of damages in terms of the Apportionment of Damages Act 50 of 1956. See **SOUTH BRITISH INSURANCE CO LTD v SMIT** 1962 (3) SA 826 (A) at 837F - *in fine.*

[51] It is significant that in regard to each of these categories, although the discretion has been described as narrow in the above sense, courts of appeal have held that they are entitled to interfere if there is a *"striking disparity"* (sometimes described as a "*substantial variation")* between the assessment of the trial judge and that of the court of appeal. I mention one example in each of the three categories:

(i) In regard to compensation for general damages: **AA**

MUTUAL INSURANCE ASSOCIATION LTD v MAQULA 1978 (1) SA 805 (A) at 810G – 811A.

ii) In regard to sentencing: **S v PACKEREYSAMMY** 2004 (2) SACR 169 (SCA) at 171F-G.

(iii) In regard to the apportionment of damages: **SHIELD INSURANCE CO LTD v THERON, NO** 1973 (3) SA 515 (A) at 518C.

In the light of the above decisions it seems to me that, even if the trial court's discretion in the present case is categorised as narrow, this court would be entitled to substitute its own order for that of the trial court if there is a "*striking disparity*" between the redistribution regarded by this court as correct and the order made by the trial court. I propose to approach the matter on that basis.

The application to receive new evidence

[52] On 9 March 2005 appellant brought the application for an

order admitting on appeal certain evidence relating to respondent's sale of certain immovable property, namely Queen's House, Sulgrave, England and the portion, known as *Sarel,* of the farm Bitouvlei, Knysna.

[53] Appellant pointed out that in terms of the court order made by agreement between the parties on 17 November 2000 in terms of which respondent was, pending the finalisation of the divorce action, interdicted, *inter alia* from selling the remaining portion of the farm Bitouvlei and selling Queen's House. Appellant alleged that respondent had sold Queen's House to one Felicity Monica Ford for a purchase price of £490 000,00. Transfer of the property was entered into the land register on 19 September 2002 and the purchase price was paid on 20 August 2002. The exchange rate on that date was R16,4267 to the pound. Respondent thus received the equivalent of R8 049 083,00 on that date as the purchase price for Queens House. Appellant alleged further that respondent sold the portion, known as Sarel*,* of the farm Bitouvlei, Knysna, to a company named Blaze Green (Proprietary) Ltd for the sum of R1,3 million. The sale took place on 11 July 2002, some three months before the judgment in the matter had been handed down. The portion known as Sarel was agreed to have a value of R750 000,00.

[54] Appellant alleged that both sales were effected by respondent in breach of the court order dated 20 November 2000. The information regarding these two sales, he said, was not disclosed to appellant or to the court *a quo.* The trial itself, including argument, ended on 20 June 2002. Judgment was handed down on 10 October 2002.

[55] Respondent filed an affidavit in opposition to the application to admit further evidence. She denied that she had been in wilful default of the court order and explained that her own evidence at the trial was concluded on 9 May 2002 and that her final witnesses were called on 10 May 2002. Thereafter appellant called witnesses in connection with the Barlows loan and argument took

place on 22 June 2002. She stated that she assumed that the trial was over and all that remained was argument and witnesses about the Barlow loan. She liquidated her assets in order to place herself in a position to pay her costs and to effect payment to appellant of at least the sum which she had tendered to pay him in her "without prejudice" offer of settlement. She pointed out further that appellant was aware from early December 2004 that she had sold Queen's House but prior to receiving his application to admit the new evidence, there was no indication that he intended placing these facts before the court. She pointed out that the schedule of agreed values that was incorporated in the "freezing order" came about as a result of negotiation and compromise in order to curtail the issues during the hearing. The value of Queen's House, for instance, was fixed as if she had not donated 25% of that property to her son Timothy. Appellant's loan to Barlow rand was fixed in the sum of R1,25 million although he complained that he would not be able to recover the full amount of the loan.

[56] Respondent explained that she always hoped to be able to hold on to Queen's House as she wished to live there for part of the year. After her cross-examination had been concluded and having regard to the tender that she had made and the escalating legal costs it became clear to her that holding on to Queen's House might no longer be possible. In December 2001 her son Timothy and his family moved into Queen's House. He paid most of the costs of running the house. Before that she had tried to find a tenant for the house but she was unable to do so. Timothy stayed there from December 2001 until about August 2002. In about April or May 2002 he and his family felt that they wanted to move out of the house. She contacted an estate agent with a view to letting the house and through the agent's intervention a purchaser was introduced in July 2002 who made an offer of £490 000. The process of selling the property took from July 2002 to August 2002. At the same time she was approached by a person who wanted to purchase the portion of Bitouvlei named "Sarel". Her agreement with him was that the sub-division of the portion which she had given to her daughter would go ahead but he reneged on that agreement and she was unable to enforce it. She referred to the detailed cash flow account of the proceeds of the Queen's House sale that was attached to the affidavit of Mr Eric de

Kroon. Only certain amounts were brought back to South Africa in order to pay her legal costs, to purchase a house as a property investment and to implement her offer of settlement to appellant. The rest of the monies were expended in England and for the purchase of a stone semi-detached village cottage in Languedoc, France. She also drew attention to the fluctuations in the rand/pound exchange rate which are set out in the schedules attached to de Kroon's affidavit.

[57] Appellant filed a replying affidavit. He denied that he had been dilatory in bringing the application for the admission of the new evidence. He explained that he could only bring the application after the relevant information had been obtained and considered by him. Respondent, he said, did not assist him in providing any of the relevant information.

[58] In support of the application to admit the new evidence Mr Hodes pointed out that the two properties were sold for amounts that were much higher than the values relied upon by the court *a quo* in deciding upon the redistribution of assets. Had this information been conveyed to the trial judge, he submitted, he would probably have made an award in excess of the amount actually awarded by him to appellant. Mr Hodes submitted that the application to receive this evidence complied with the requirements laid down for such a procedure, namely that the evidence was not known to appellant at the time of the trial, that it was *prima facie* true, and that it was materially relevant. See for example **RÖSEMANN v GENERAL COUNCIL OF THE BAR OF SOUTH AFRICA** 2004 (1) SA 568 (SCA) at 572I – 573A:

> "*[9] In order to succeed in his application the appellant had to satisfy the tests laid down in Colman v Dunbar 1933 AD 141 at 162 - 3: the circumstances justifying leave to adduce further evidence must be exceptional; that the evidence was not brought forward before must not be owing to any remissness on his part; the evidence must be weighty, material and believable and such that if adduced would be*

practically conclusive; conditions should not have changed so that the fresh evidence will prejudice the opposite party."

In **Colman v Dunbar** 1933 AD 141 **Wessels CJ** said, *inter alia,* in an oft-quoted passage, at 161:

"*It is essential that there should be finality to a trial and therefore if a suitor elects to stand by the evidence which he adduces, he should not be allowed to adduce further evidence except in exceptional circumstances. To allow fresh evidence on a point which calls in question evidence already led would necessitate a rehearing of the witnesses whose evidence is questioned, so as to give them an opportunity of answering the fresh evidence. This means that the case will be largely re-opened which militates against finality."*

Mr Hodes suggested that if the court decided to receive the evidence then this court should itself consider the evidence and take it into account in adjudicating the appeal, rather than referring it back to the court below.

[59] Mr Weinkove argued that the application should be refused as the evidence proposed to be admitted would not be material. He relied in this regard upon the terms of the court order that was made by agreement between the parties. He pointed out that the

terms of the order agreed upon, he submitted, went far beyond the relief claimed by appellant. Thus each party waived his or her right to claim maintenance from the other, both parties were interdicted from alienating any of the furniture in his or her possession and for purposes of appellant's claim in terms of section 7(3) of the Act the parties agreed that certain defined assets had a particular value in rand terms.

[60] We refused the application to receive the new evidence on 8 April 2005 and intimated that our reasons would be given in due course. The reasons follow now. I propose to consider respondent's principal defence to the application first, namely that the parties had conclusively agreed upon the values of the assets in question or, as it was put in argument, that these values were *"cast in stone"*. This defence, I may point out, was also raised by respondent against some of appellant's attacks on the judgment of the trial judge.

[61] It seems to me, however, that although the parties had agreed upon the values of certain assets, it was implicit in their agreement (and thus in the order) that each party retained the right to prove that there had been an unforeseen material deviation of the value of any particular asset. In terms of section 7(5)(d) of the Act the court has the general power to consider "*any other factor which should in the opinion of the court be taken into account."* In my view the parties could not, when they entered into the settlement agreement, have intended to waive their rights to rely upon such *"other factor(s)".* A material unforeseen deviation from the agreed value of any such asset would in my view fall within the ambit of such an "*other factor"* and would therefore be relevant. It seems to me that the trial judge actually construed and applied the agreement in this manner for he took into consideration changes in the values of some of the assets that formed part of the subject

matter of the agreement. The first factor taken into account was the effect of the exchange rate variation between the date of the agreement and the time of the trial. The second was the actual value of appellant's deposit with Barlows. Whether these factors were correctly taken into account by the trial judge or not, are two of the issues on appeal to be dealt with hereunder. At this stage I merely point out that he did not regard all the values as being *"cast in stone".*

[62] I turn then to the new evidence relating to the sale of Queen's House. It is in my view important to note that the difference of R4 286 583,00 between the alleged proceeds of the sale of Queen's House, expressed in rands as at the time of its sale (R8 049 083,00), and the figure used by the parties in the settlement agreement as the agreed value of Queen's House (R3 762 500,00), is the result of two separate contributory factors. The first factor is the real increase in the value of Queen's House, measured by the sale price relative to the agreed value of £350 000 for purposes of the settlement agreement. The second factor is the variation in the exchange rate of the rand to the English pound between these two dates. The separate effect of each of these two factors can be calculated with precision. It appears from the affidavits in the interdict application that an exchange rate of R10,75 to the pound was used for purposes of determining the figure in rands used in the settlement agreement as the agreed value of Queen's House. According to appellant the exchange rate at the time of the sale of Queen's House was R16,4267 to the pound. Upon my calculation an amount of R1 986 845,00 of the difference of R4 286 583,00 then resulted from the exchange rate variation alone and R2 299 738,00 was due to the real increase in the value of Queen's House, expressed in rands as at the date of the sale.

[63] As far as the effect of the variation in the exchange rate is concerned it seems to me that appellant does not have to invoke any new evidence. That variation and the effect thereof were

taken into account by the trial judge. He made this quite clear in his judgment. Whether sufficient weight was given to it by the trial judge in arriving at the award is a different question but that is to be considered in the appeal itself. It is not necessary to introduce any new evidence for that purpose.

[64] The difference between the proceeds of the sale (in pounds) and the original valuation (in pounds) must be approached on a different footing. Appellant must be able to introduce this as new evidence at this stage in order to be able to rely upon it. Mr Hodes readily conceded that the evidence in question would have been irrelevant if the sale in question occurred after the date of judgment. He relied strongly on the fact that respondent was acting in breach not only of an agreement but also of a court order. This is undoubtedly a relevant fact but it should in my view not be over-emphasised. Respondent explained in her opposing affidavit that she had regarded the trial as virtually concluded. I do not have any reason to doubt her good faith in this regard. Had she been surreptitious, as suggested by Mr Hodes, it would have been quite easy for her to delay the sale for some time, at least until the judgment had been given. I am also not persuaded that appellant was prejudiced by respondent's action in selling the property two months earlier than she should have. His contention is that she should have complied with the court order. Had she done that and sold the property after judgment had been given, such sale would have been irrelevant and there would not have been any room for introducing it as new evidence.

[65] In my view the general consideration referred to in the cases as the need for finality in litigation must also be taken into account. The parties are not young anymore. They have four children and many grandchildren. The litigation between them has been extensive and expensive. In these circumstances it appears to me to be in everyone's interest that there be finality in the litigation.

[66] Appellant also sought to introduce evidence of the sale of the portion named Sarel of the farm Bitouvlei. It seems to me that the considerations mentioned by me in paragraphs [64] and [65] above apply with equal force to the introduction of new evidence in regard to this sale. For these reasons we were of the view that appellant's application to introduce new evidence on appeal should be refused.

[67] I now revert to the issues and arguments advanced by the parties on appeal on the question whether the redistribution order made by the trial judge should be varied. Counsel advanced submissions in regard to the following six main topics:

(1) The parties' contributions;

(2) Appellant's inheritances;

(3) The sum of R1 250 000,00 deposited by appellant with Barlows;

(4) The effect of changes in the Rand/Pound exchange rate;

(5) Appellant's Liberty Life retirement annuity and his interest in the Turner Trust;

6) The loan to Peter John Kirkland.

I propose to discuss these topics in the same order before reverting to the central question of the appropriate measure of division to be applied in this case.

The parties' contributions

[68] The trial judge appears to have accepted that appellant's financial contributions to the accumulation of the parties' assets far outweighed that of respondent. He described her financial contribution as minimal and insignificant. This finding is borne out by the evidence and was not disputed by Mr Weinkove. The trial judge also found that respondent made a substantial contribution by way of her labour and talents on the maintenance and improvement of their properties. He said that appellant conceded that her contribution in this regard was roughly equal to his own. I must agree with Mr Hodes that the particular concession related only to the Dower House property. It nevertheless appears to me to be a fair estimate of the parties' relative contributions by way of labour and talents and hours in regard to their various properties.

[69] Mr Weinkove, on the other hand, argued that respondent also made a substantial contribution as homemaker and primary carer of the four children. He referred to the statement of **Brand JA** in **BEZUIDENHOUT v BEZUIDENHOUT**, *supra,* at 198G that

> "*the traditional role of housewife, mother and homemaker should not be undervalued because it is not measurable in terms of money".*

[70] It thus appears from counsel's submissions that there is no real dispute in regard to the general nature and extent of the relative contributions made by the parties to their living expenses and the accumulation of assets. I revert later to the question of the weight to be attached hereto in arriving at a just and equitable redistribution of assets.

Appellant's inheritances

[71] Appellant was a beneficiary under a testamentary trust created by his grandfather and he inherited two properties from his mother. Appellant did not keep a record of the amounts received by him from these sources during the period from 1953 to 1970. Over the period from 1971 he calculated that he had received R1 738 686,00 from these inheritances. This figure excluded the value of his mother's house which was subsequently sold. These

amounts were utilised entirely for investments and the acquisition and improvement of assets that constituted part of the parties' combined estate. Mr Hodes argued that the trial judge failed to take this contribution properly into account in the final distribution made by him. He submitted that appellant should have, at the very least, received assets equal to the sum of his inheritances and that the balance of the combined estate should thereafter have been distributed in a just and equitable manner.

[72] Mr Weinkove pointed out that respondent also contributed from an inheritance when she paid the deposit of £1 263 for the parties first house. This was later repaid to her but it was ultimately spent on living expenses. He submitted that the argument in regard to separate treatment of the inheritances had been raised on behalf of appellant in the court below and that the trial judge did indicate in his judgment that he had considered all the submissions made by the parties' respective counsel. It is implicit in the judgment, he argued, that the trial judge had given weight to the fact that appellant's means had been supplemented by inherited assets.

[73] It seems then that there are no real factual disputes in regard to the inheritances. I do not however propose to treat it differently from appellant's other financial contributions. It formed part of the major financial contribution which appellant made and it will be taken into account as such in arriving at the measure of division to be applied in the redistribution of the parties' assets.

Appellant's deposit of R1, 25 million with Barlows

[74] Mr Hodes submitted that the facts relating to this issue are quite clear. Appellant testified that he had invested an amount of R1,25 million with Barlows as security for the debt of Dig Group. Dig Group was unable to pay the debt as a result of which only R250 000,00 out of the sum of R1,25 million was released to appellant. The court *a quo* nevertheless included this as an asset of appellant worth R1,25 million for purposes of the final division made by him. Mr Hodes submitted that he erred in this regard.

[75] Mr Weinkove submitted that the question whether the balance of the deposit of a million rand had been lost or not was not common cause between the parties. Foster's investigation into this aspect had raised various questions in particular regarding the allocation of payments by Barlows and the effect of the letter of comfort. Mr Weinkove submitted in the alternative that appellant

was in any event bound by the value he attached to that asset in the settlement agreement that was made an order of court. The trial judge, he pointed out, nevertheless favoured appellant in that he took into account, in arriving at the final award in appellant's favour, that his income from this deposit might be lost to him. In support of his argument that the values of the assets mentioned in the settlement agreement were 'cast in stone', Mr Weinkove submitted that respondent never sought to rely upon her donation of one-quarter of Queen's House to her son Timothy. She accepted that the entire property was to be regarded as one of her assets.

[76] I tend to agree with appellant's contention that the trial judge erred in including the full amount of this deposit as an asset of appellant. Although it was given a value of R1 250 000,00 in the settlement agreement it is clear from the evidence of particularly Franklin and De Wet that an amount of R1 million of this deposit had been irrecoverably lost by appellant. They confirmed that Barlows took up an intransigent attitude and that, despite the existence of possible defences, appellant was advised to settle the

claim which he did. On what I regard as the proper construction of the settlement agreement appellant was not precluded from disputing the value of this asset. The matter was fully canvassed in evidence and the real value of the asset to appellant was in my view properly proven. In these circumstances it seems to me that it would be unrealistic and inequitable to appellant to redistribute the parties' assets on the basis that this asset should be valued at its original value. This issue can also be approached from a different angle. Even if appellant were to be precluded from contending that the asset in question had a value other than R1,25 million he would still be entitled to contend that he had a corresponding liability to Barlows of R1 million. The net value of his assets, on either approach, would be the same.

[77] I must also deal with respondent's contention that the exclusion of the donation by her of a one quarter share in Queen's House to Timothy supports her construction of the settlement agreement. This donation, however, took place before the settlement agreement was concluded. In her answering affidavit in the interdict application she said that she had effected the

donation to save estate duty as part of her estate planning. The entire property was thereafter included as one of her assets in the settlement agreement. In these circumstances it seems to me fairly obvious why the entire asset was regarded as an asset ofa hers in the settlement agreement and not only three quarters thereof. Its inclusion does not support respondent's construction of the settlement agreement.

[78] It seems to me therefore that the trial court erred in valuing appellant's deposit with Barlows at the figure of R1,25 million. It should have been valued at R250 000,00.

The effect of the change in the rand/pound exchange rate

[79] Mr Hodes submitted that although the trial judge remarked in his judgment that he could not ignore the deterioration in the value of the rand, he failed to give proper effect to that variation. The list of respondent's assets set out in clause 7 of the agreement that was made an order of court on 17 November 2000, included two assets that were situate in England. The one was the property

named Queen's House (valued at R3 762 500,00) and the other was respondent's investment in HSBC bank (valued at R862 150,00). It appears from the affidavits in the urgent application (case no 7911) that an exchange rate of about R10,75 to the pound was used to calculate the value of these assets. At the time when the trial took place and when judgment was given the exchange rate had changed considerably. It appears from Smith's evidence that he and Foster, at their meeting on 10 April 2002, had agreed upon an exchange rate of R16,00 to the pound for purposes of valuing appellant's assets in England. According to a report prepared by the actuary Munro that was used for purposes of the argument on costs, the exchange rate on the date of judgment was R16,45 to the pound.

[80] Mr Weinkove, on the other hand, pointed out that the offshore assets were fixed in rand terms in the settlement agreement in the urgent application. Appellant must have been aware, he submitted, that by doing so he was discounting the risk of any depreciation of these assets occasioned by the fluctuation of the exchange rate pending the determination of the trial.

Similarly he must have known that respondent would reap the benefit of any appreciation of these assets. Appellant should not be allowed to sidestep the effect of the agreement now that it appears that the variation of the exchange rate did not favour him.

[81] It seems to me that the trial judge did not err in deciding to take the exchange rate variation into account. The obvious reason for the conversion of the values of the English assets into rand was to facilitate the calculation of the share of the combined assets that appellant was entitled to. It would have been practically impossible to make a fair redistribution of assets that were valued in terms of different currencies. The exchange rate was perhaps not a very sophisticated measure, but it had the advantages of simplicity and objectivity. The variation in the exchange rate over the period in question was an objective factor known to both parties at the time of the hearing and it was dealt with in the evidence. The trial judge included this variation as one of the factors that persuaded him to award one half of the combined assets to appellant. It is however not clear how he quantified the effect of the variation that he took into account. It seems to me that

it would just and equitable to calculate the precise effect of the variation of the exchange rate on the value of the relevant assets and then to decide separately upon the appropriate shares of the combined assets to be awarded to the parties. I propose to apply the rates mentioned above namely R10,75 to the pound that was used for purposes of the settlement agreement and R16.45 to the pound, being the exchange rate as at the date of judgment, for purposes of such calculation.

The Liberty Life retirement annuity and the Turner Trust

[82] The trial judge agreed with the submission advanced on behalf of respondent that the capitalised values of appellant's interests in the retirement annuity and the Turner Trust should be regarded as assets in his estate for purposes of the redistribution of assets. He referred to the valuations that were presented in evidence and he accepted the values of the actuary Munro that testified on behalf of appellant, namely R225 000,00 for the interest in the Turner Trust and R84 900,00 for the interest in the retirement annuity.

[83] Mr Hodes attacked these findings on the basis that appellant only received income from these two sources and that he had no right to the capital assets. In my view, however, the trial judge did not err in this regard. The issue is not whether these interests are technically to be regarded as assets or not. Given the wide discretion of the court in terms of section 7(3) of the Act it seems to me that they were properly taken into account by the trial judge. I have no reason to reject Munro's valuation of these interests.

The loan to Peter John Kirkland

[84] Mr Hodes submitted that the trial judge omitted to take into account that respondent had a claim in the amount of R500 000,00 in respect of monies lent to the parties' son Peter John. According to him it should have been regarded as one of her assets for purposes of the redistribution of assets. Mr Weinkove disputed that respondent had ever agreed that she would collect this amount from Peter. According to him it is clear from appellant's own answers under cross-examination that the loan had not yet been recovered and that neither party intended suing Peter for

repayment of this amount.

[85] I am inclined to agree with Mr Weinkove's submission. The loan to Peter John should not have been regarded as an asset of respondent. It follows that the trial judge did not err in this regard.

The re-calculation of the value of the parties' assets

[86] It follows from my reasoning above that for purposes of the redistribution of assets in terms of section 7(3) of the Act some of the parties' assets should have been given values that differ from those given to them by the trial judge. Queen's House should have been valued at a figure which allows for the exchange rate variation from R10,75 to R16,45 to the pound. That yields a value of R5 757 500,00 instead of R3 762 500,00. For the same reason respondent's investment with HSBC should have been valued at a figure of R1 319 290,00 instead of R862 150,00. Appellant's deposit with Barlows should have been valued at R250 000,00 and not R1 250 000,00. According to Smith's evidence the value (at an exchange rate of R16,00 to the pound) of appellant's Clerical

Medical policy was R400 000,00 and that of his Barclays saving account R51 000,00. At an exchange rate of R16,45 to the pound these assets should have been valued at R427 700,00 and R52 476,00 respectively. After incorporation of these adjustments the values of the parties' assets are as follows:

Respondent's assets:

	(i)	Queens House	R5 757 500,00
(ii)	HSBC Investment	1 319 290,00	
	iii)	Proceeds of the sale of the Simonstown property	760 000,00
	(iv)	Bitouvlei	2 850 000,00
(v)	Motor cars	250 000,00	
(vi)	Furniture	1 000 000,00	
			R11 936 790,00

Appellant's assets:

	(i)	Share portfolio	R123 000,00
(ii)	Loan account in Barlows	250 000,00	
(iii)	Share portfolio in England	537 500,00	
(iv)	Surrender value Liberty life Policy	16 000,00	
(v)	Surrender value Clerical Medical policy	427 700,00	
(vi)	Barclays Saving Account	52 476,00	
(vii)	Capitalised value Turner Trust	198 200,00	
(viii)	Capitalised value retirement annuity	84 900,00	

(ix) Furniture 1 000 000,00
R2 689 776,00

The division of the parties' combined estates

[87] That brings me back to the question of the just and equitable redistribution to be made in this case. Although a redistribution may be made by way of a transfer of assets I prefer to follow the method applied by the trial judge, namely to calculate the value of the combined estates and then to make an order for the payment of money in order to arrive at the division to be achieved. In the **BEZUIDENHOUT** case, *supra,* **Brand JA** confirmed that it would be wrong to start with any general guide or starting point. What is required is a clean slate to be filled in with the facts, all relevant considerations and the final exercise of a discretion. See the following passages at 197B-E:

> "*Moreover, the acceptance of equal distribution as a starting point or general guide as part of our law would be in direct conflict with the decisions of this Court, as appears from the following oft-quoted dictum by Botha JA - with reference to the one-third starting point advocated by Lord Denning MR in Wachtel v Wachtel [1973] Fam 72 (CA) ([1973] 1 All ER 829) at 94B - 95F*

(Fam); 839b - 840d (All ER) - in Beaumont v Beaumont (supra at 998F - G):

> ***'I do not see any real difficulty in starting with a clean slate, then filling in the void by looking at all the relevant facts and working through all the relevant considerations, and finally exercising a discretion as to what would be just, completely unfettered by any starting point.'***

[23] I find myself in respectful agreement with this statement. I also believe that Courts should refrain from putting shackles on a discretionary power which the Legislature has left largely unfettered through the acceptance of 'starting points' or 'guidelines' (see Beaumont at 991G - H). Though practitioners may, understandably, prefer guidelines or formulae which may assist in settlement, the problem is that there is such 'an infinite variety of circumstances under which s 7(3) falls to be applied' (Beaumont at 990G - H) that we cannot afford to trade the wide discretion of s 7(3), once it is found to apply, for formulae albeit in the guise of 'guidelines' or 'starting points'."

[88] Mr Weinkove, I may point out, relied heavily in this regard on the judgment of **Nel J** in **MACGREGOR v MACGREGOR** 1986 (3) SA 644 (C). Although the court in that case found that the earning capacity of the husband was vastly superior to that of the wife he

made a redistribution order which resulted in the husband receiving only one third of the parties' total assets. It seems to me however that the important distinguishing feature of that case is to be found in the difference between the parties' respective earning powers at the time of the divorce. The husband was 49 years of age, relatively well paid, in secure employment and would in all probability have been able to build up further assets before the normal retiring age of 63. The wife was 44 years of age and not a member of a pension fund or a medical aid society. Her future earning capacity was said to be vastly inferior to that of the husband. In the present case, by contrast, the parties' earning powers at the time of the divorce did not differ significantly.

[89] I return to the facts of present case. In my view the combined effect of three main considerations, judged in the context of all the evidence, must be weighed up. The first consideration is that appellant undoubtedly made the major financial contribution to the growth and maintenance of the parties' estates. The second consideration that the major part of the parties' combined assets was in fact transferred to respondent and

ended up as part of her estate. That is in my view indicative of an intention on their part that they did not belong to appellant exclusively but rather to both of them. The third consideration, in my opinion, is the principle of equality as applied to the facts of this case. In **BEZUIDENHOUT v BEZUIDENHOUT**, *supra,* **Brand JA** referred to this principle as follows:

> *[27] A thesis which obviously weighed heavily with the Court a quo and to which it also devoted a substantial part of its judgment (paras [40] - [48]), was that it would be in conflict with the anti-discrimination provisions in s 9 of our Constitution (the Constitution of the Republic of South Africa Act 108 of 1996) to undervalue the role of housewife and mother traditionally conferred upon women by society. In developing this theme, Pincus AJ referred, for example (in para [45]), to the following statement by the Supreme Court of Canada in Moge v Moge [1992] 3 SCR 813:*
>
> > ***'Fair distribution does not, however, mandate a minute detailed accounting of time, energy and dollars spent in the day to day life of the spouses . . . . What the Act requires is a fair and equitable distribution of resources to alleviate the economic consequences of marriage or marriage breakdown for both spouses, regardless of gender. The reality, however, is that in many if not most marriages, the wife still remains the economically***

disadvantaged partner. . . .

A division of functions between the marriage partners, where one is a wage-earner and the other remains at home will almost invariably create an economic need in one spouse during marriage. . . .

Women have tended to suffer economic disadvantages and hardships from marriage or its breakdown because of the traditional division of labour within that institution.'

[28] I find myself in agreement with the thesis that the traditional role of housewife, mother and homemaker should not be undervalued because it is not measurable in terms of money. The plain fact is, however, that this consideration has nothing to do with the facts of this case. The respondent never assumed the traditional role….."

On my understanding of this judgment, **Brand JA** did not reject the principle of equality as such. He found that it did not fit the facts of that case. In the present case the principle of equality, combined with the two other main considerations, all weighed in the context of the evidence as a whole, lead me to the conclusion that a distribution of one half of the combined assets to each of the parties, would be consistent with justice and fairness.

Conclusion

[90] I agree therefore with the measure of division applied by the

trial judge, namely that one half of the parties' combined assets should be awarded to appellant. In view of the fact that I have placed different values on some of the assets the result that I arrive at will, however, differ from his. The combined value of respondent's assets and those of appellant, according to the above calculations, amounted to R14 626 566,00. In order to achieve an equal division of the combined assets each party must therefore receive assets to the value of R7 313 283,00. Respondent would therefore have to pay a total amount of R4 623 507,00 to appellant, *ie* an amount of R1 693 178,00 additional to that which she was ordered to pay in terms of the judgment of the court below. The amount thus awarded to appellant is approximately 57% more than the award made by the trial judge. The difference, in my view, is such a striking disparity that this court is entitled to substitute its own order for that of the trial judge. In my opinion it would be fair to allow respondent a period of say five months in which to make payment of the balance owing by her, provided that interest will accrue on this amount at the rate of 15,5% per annum from the date of this judgment.
[91] Mr Hodes asked that respondent be ordered to pay interest on the award made to appellant from the date of judgment in the court below. In my view it would be competent for this court to make such an order as part of a just and equitable order for the redistribution of assets in terms of section 7(3) of the Act. In the circumstances of this case, however, I am not persuaded that it would be just and equitable to make such an order. Respondent paid the amounts to appellant that she was required to do in terms of the order of the court below. Appellant's claim was at all times one for a redistribution of assets. It is only in terms of this judgment that it became finally quantified in monetary terms. Respondent, furthermore, might have to incur costs in realising assets for the purpose of the payment to be made to appellant.

[92] In the light of the redistribution of assets order made in this judgment, some of the questions relating to costs in the court below have fallen away. The amount now awarded to appellant exceeds the amounts tendered by respondent. Respondent should therefore be liable for appellant's costs in the court below, except that there is no reason to interfere with the cost order made by the trial judge in respect of the urgent application.

[93] Appellant has been successful on appeal and is entitled to the costs of appeal. In regard to the application to lead new evidence however, respondent was successful. Mr Hodes submitted that she should be penalised by way of a deprivation of costs for her conduct in acting in breach of a court order. It seems to me, however, that her contraventions were not that serious. In my view costs should follow the result. Appellant should therefore be liable for respondent's costs relating to the application for the admission of new evidence on appeal.

[94] In the result the appeal is upheld with costs, including the cost of two counsel and including the costs relating to the application for leave to appeal and the petition to the Supreme Court of Appeal, save that appellant is ordered to pay respondent's costs, including the cost of two counsel, relating to the application for the admission of new evidence on appeal. The orders made by the court below are set aside and replaced by the following:

1) *Plaintiff is ordered to pay a total amount of R4 623 507,00 to defendant, such payment to be made on or before 31 November 2005 provided that interest shall accrue on the unpaid balance of that amount at the rate of 15,5% per annum as from 10 June 2005.*

(2) *Plaintiff is ordered to pay defendant's costs, including the qualifying fees and expenses of Mr Stephanus Smith.*

(3) In matter no 7911/2000 (the urgent application) each party is to pay his or her own costs.

A P BLIGNAULT

VELDHUIZEN J: I agree

A H VELDHUIZEN

DLODLO J: I agree

D V DLODLO