THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE
Case number: 364/2003

In the matter between:

ANDRÉ BEZUIDENHOUT APPELLANT

and

DORETTE GERARDA BEZUIDENHOUT RESPONDENT

CORAM: HARMS, SCOTT, FARLAM, BRAND *et* HEHER JJA

HEARD: 27 AUGUST 2004

DELIVERED: 23 SEPTEMBER 2004

Summary: Divorce – redistribution of assets in terms of s 7(3) of Act 70 of 1979 – 'general guide' of equal division adopted by English courts – not part of our law – consideration that traditional role of wives should not be undervalued inappropriate in matter where wife has not assumed that role._

JUDGMENT

BRAND JA/

BRAND JA:

[1] This appeal concerns an asset redistribution order in terms of s 7(3) of the Divorce Act 70 of 1979 ('the Act'). The parties to the appeal were married to each other on 25 October 1975 when the appellant (the husband) was 26 and the respondent (the wife) 20 years of age. The appellant was a qualified tool and die maker while the respondent was a secretary. They had no assets worthy of mention. The future proprietary regime of their marriage was governed by an antenuptial contract in the standard form. It excluded both community of property and of profit and loss – and thus, by implication, any form of accrual sharing – between the prospective spouses.

[2] A son, William, was born of the marriage in 1977. He is the only child of the parties. For about 25 years the marriage was a happy one. By all accounts, the parties not only cohabited as husband and wife, they were also business partners and they shared their social life. They both succeeded in building up estates of considerable proportions, though the net value of the appellant's estate exceeded that of the respondent's by a substantial margin. For reasons that are not entirely clear, this fortunate state of affairs came to an end in 2001. At the beginning of 2002, the respondent

left the common home and instituted divorce proceedings against her husband in the Cape High Court. Apart from a decree of divorce, the only substantive relief that she sought was an order for the redistribution of their assets under s 7(3) of the Act, on the basis that the combined value of their estates be divided in half. The appellant filed a counterclaim in which he also sought a redistribution order but, of course, on a basis which was materially different.

[3] On the pleadings it was common cause that the marriage could not be saved. In the light of this the court *a quo* (Pincus AJ) granted a decree of divorce. That order is not under attack on appeal. As to the claim and counterclaim for a redistribution of assets, the effect of the court's order was that the parties were to retain the assets in their respective estates, save that the appellant was directed to pay the respondent an amount of R7,8m. This was the result of the court essentially endorsing the respondent's contention that the combined net value of the assets in both estates should be divided on an equal basis. The judgment of Pincus AJ has since been reported *sub nom Bezuidenhout v Bezuidenhout* 2003 (6) SA 691 (C). This appeal against that judgment is with the leave of the court *a quo*.

[4] Broadly stated the appellant's contentions on appeal were twofold. First, that the nature and extent of the respondent's contribution to the appellant's estate did not warrant an equal distribution of their combined assets. Second, that in any event, the effect of the court *a quo's* order was that the respondent would receive more than an equal share. In support of the latter contention it was argued that, while the assets allocated to the respondent were either in the form of cash or readily realisable, the assets retained by the appellant consisted largely of shares in private companies which could not easily be sold. A proper evaluation of these contentions requires first, an outline of the nature and the net value of the assets of the parties and second, a truncated version of their marital history.

THE ESTATES OF THE PARTIES

[5] During the course of the trial, various issues arose regarding the value of some of the assets in the parties' estates. Notable amongst these were disputes relating to the value of their shares in three private companies *viz* Grinding Techniques (Pty) Ltd, Andor Abrasives (Pty) Ltd and Prosper Properties (Pty) Ltd which, as will presently appear in more detail, collectively formed the vehicle for the conduct of the family business. At the end of the

proceedings, these issues were, however, for the most part eliminated by agreement. Insofar as disputes remained for determination by the trial court, it was formally conceded by the appellant in this court that there was no reason to interfere with the court's findings in para 18 of its judgment. In the event, it can be accepted that the assets and liabilities in the estates of the parties were as follows:

The respondent's assets:

40% shareholding in Grinding Techniques	R4 614 000
9,98% shareholding in Andor Abrasives	R 641 325
27,27% shareholding in Prosper Properties	R 37 000
Keurview Share Block	R2 000 000
Audi TT motor vehicle	R 340 000
Pension or provident benefit	R 333 000
Insurance policies - surrender value	R 62 754
Standard Bank savings account	R 30 000
Old Mutual shares	R 3 240
Total	R8 061 319

Since the respondent had no liabilities, that was also the net value of her estate.

The appellant's assets:

60% shareholding in Grinding Techniques	R8 142 000
80% shareholding in Andor Abrasives	R6 036 000
49% shareholding in Prosper Properties	R 67 000
Kaboega game farm	R6 315 000
Gyroplane	R 175 000
Muldersdrift home (in which the appellant resides)	R 975 000
Savings account	R 295 593
Loan account in Grinding Techniques (No. 1)	R1 085 034
Loan account in Grinding Techniques (No. 2)	R 423 449
Loan account in Andor Abrasives	R 196 819
Life policies - surrender value	R 194 819
Provident fund benefit	R 635 217
Shares in listed companies	R 14 096
Total	R24 455 027

The appellant's liabilities

Debit loan account in Prosper Properties	R 577 520
Amount owing on gyroplane	R 167 400
Total	R 744 920

The net value of the assets in the appellant's estate therefore amounted to R23 710 127 and the combined net value of both estates to R31 771 446. The difference between half that amount

(ie R15 885 723) and the net value of the respondent's estate (ie R8 061 319) is the R7,8m which the appellant was ordered to pay over to her.

THE MARITAL HISTORY

[6] At the time of their marriage in 1975, the parties were living in Port Elizabeth. The respondent was employed as a secretary while the appellant, though qualified as a tool and die maker, worked as a salesman for a company, Norton Abrasives. The company was involved in the manufacturing and marketing of what are known in the trade as 'abrasives', consisting mainly of grinding wheels and sandpaper products. The appellant was excellent at his job and in 1976 he was promoted by Norton Abrasives to the position of sales supervisor in Johannesburg. There the parties moved into a cottage on a smallholding which the respondent made habitable. While she continued to be employed as a secretary, she also took responsibility for running their household.

[7] In 1977 their son, William, was born and the respondent stayed at home for three years to look after him. In 1980, when William went to nursery school, she went back to work on a half day basis. She did not stay at home again for the remainder of her married life. Though the respondent appears to have been the

primary caregiver, both parties took responsibility for William until he went to boarding school at the age of about thirteen.

[8] In 1981 the appellant decided, after discussion with the respondent, to start his own business. He continued to buy and sell grinding wheels and sandpaper products, but for his own account. He did so through a company, incorporated for the purpose, by the name of Grinding Techniques of which he was the sole shareholder and director. The parties worked as a team. They operated from their cottage on the smallholding. The business was financed by a loan from a bank for which both parties signed personal surety. For their living expenses, they were largely dependent on the respondent's salary. In the evenings she also did the bookkeeping and the administration for the new business. The appellant occupied his time by canvassing orders from customers which he then physically collected and delivered. When his competition sought to prevent him from obtaining local supplies, he began importing them from abroad. Both worked very hard and long hours. As a result, they did not have much of a social life. They had little money and lived frugally.

[9] From these humble beginnings, the business grew. In 1985 there was, however, an occurrence which might very well have

stopped the business in its tracks. It came in the form of a dramatic devaluation of the rand against other major currencies. Since by then most of the products sold by Grinding Techniques were imported from overseas, the company's indebtedness to its suppliers was in foreign currency. Consequently its liabilities increased overnight in rand terms to an extent that placed it in financial difficulty. Unlike most others in his position, the appellant saw this as a business opportunity. He persuaded his banker to grant Grinding Techniques a further loan, which he then utilised to purchase second hand machinery in Europe. With that machinery the business not only survived but by venturing into the manufacturing of abrasive products continued to expand. The respondent resigned from her employment and joined the company on a fulltime basis. During more or less the same period, the parties bought a house at Muldersdrift near Johannesburg, which was registered in the name of the appellant. This became the matrimonial home where the appellant remained resident at the time of the trial.

[10] The expansion of the business over the years was remarkable. Grinding Techniques became a formidable force in a highly competitive market which won over a significant market

share from its competitors. At the time of the trial it employed 254 people. According to the respondent's own evidence, the extraordinary success of the business was mainly attributable to the appellant's rare ability to anticipate future trends in the grinding wheel market, combined with his technical expertise in the manufacturing of these specialised products and his proficiency as a salesman. The expert accountant, who was called on behalf of the respondent to testify as to the value of the parties' shares in the private companies which eventually owned the business, also ascribed its success to the application of appellant's talents, which made him an outstanding businessman and an exceptionally good manager.

[11] The respondent continued to devote herself to the business on a fulltime basis while also maintaining responsibility for the household with the aid of a domestic assistant. Initially she was directly responsible for the administration of the business. Later she became the financial director of Grinding Techniques. She remained in control of the administrative section, which eventually comprised 26 employees. As part of her responsibilities, the respondent opened new branches and trained the administrative staff. She acted as a sounding board for the appellant and she

entertained friends and customers who had dealings with the company. In the end there is no reason to doubt the accuracy of the respondent's own description that both parties 'lived, ate and slept Grinding Techniques' and that she 'worked shoulder to shoulder with [the appellant] in pulling this cart.'

[12] With the expansion of the business the company structure became more sophisticated. In essence, Grinding Techniques became the 'trading arm' of the business. The movable assets of the business were held by Andor Abrasives, while the immovable property from which the business operated was registered in the name of Prosper Properties. Although initially the appellant was the sole shareholder and director of Grinding Techniques, the respondent later on received shares in all three companies. As already indicated, she also became the financial director of Grinding Techniques. The position regarding the shareholding of the parties in the three companies, as at the time of the trial, appears from the list of their assets in para [5] above.

[13] The success of the business brought in its wake substantial financial advantages for both parties. While initially they were compelled to live modestly, their position improved rather markedly during the course of the marriage. Eventually the parties, by all

accounts, maintained the lifestyle of those with virtually unlimited funds, including extravagant entertainment and expensive holidays.

[14] In 1990, when William went to high school, he became a boarder at the school formerly attended by his father in Graaff-Reinet. He received regular visits from his parents over weekends. Since Graaff-Reinet and Johannesburg are about a thousand kilometres apart, driving up and down over weekends became somewhat of an ordeal for the parents. As a result, they decided to buy an aeroplane. First they bought a small Cessna and then a bigger one. At the time of the trial, both these aeroplanes were still owned by Andor Abrasives. In order to fly the aeroplanes both obtained private pilot's licences. In the end the respondent became so fond of flying and so accomplished as a pilot that when she left the appellant and their business at the beginning of 2002, she decided to take up flying as a career. For that purpose, she required a commercial pilot's licence. At the time of the trial, that goal, however, remained unfulfilled.

[15] With the passing of time the parties also succeeded in accumulating substantial assets in their own estates, apart from the shares in the companies. In 1992 the appellant was offered a

25 per cent shareholding in a milling company called Sebowana Mills (Pty) Ltd. He was not required to pay any money for the shares but he had to put up a bank guarantee of R1m. The transaction turned out to be an excellent investment. The guarantee was never called up and in 1996 the appellant sold his shareholding in Sebowana Mills at a profit of R2m. The appellant also acquired a game farm called Kaboega in the Port Elizabeth area. At the trial this farm was valued at R6,3m. About 1998 the parties purchased shares in a share block company, Keurview Share Block (Pty) Ltd, which provided them with two property units near Plettenberg Bay upon which they built their holiday house. These shares, which were held by the respondent, were valued at R2m.

THE JUDGMENT OF THE COURT *A QUO*

[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.

[19] In establishing the legal foundation for his decision, Pincus AJ devoted a substantial part of his judgment (paras 23, 24 and 27-39) to a relatively new approach by the English courts, which was ultimately endorsed by the House of Lords in *White v White* [2001] 1 AC 596 (HL (E)); [2001] 1 All ER 1 (HL). This accepts that as a general guide, or starting point, the combined assets of the parties should be divided equally and that this principle should be departed from only if and to the extent that there is good reason for doing so (see eg *White v White supra* 605G-H; 9e-f). Closely aligned to this approach is the question sometimes posed by the English courts, which is also referred to by the court *a quo* (paras 27-29 and 37), namely 'what more the wife could have done to justify an award of 50%?' If the answer to this is that she had done her utmost and that therefore she could not have done more, it is accepted as a matter of course that there is no justification to deviate from the equality principle (see eg *Lambert v Lambert* [2003] Fam 103 (CA); [2003] 4 All ER 342 (CA), paras 14 and 53).

[20] Though comparative legal study obviously has great value, English cases should be approached with circumspection in the present context. They emanate from the application of statutory provisions different from ours which, in turn, are to be construed against an entirely different common law system. It is clear that the English statute (s 25 of the Matrimonial Causes Act 1973 as substituted by the Matrimonial and Family Proceedings Act 1984) affords the courts an even wider discretion than s 7(3) of our Act (see eg B Clark and B J van Heerden, "Asset Distribution on Divorce – The Exercise of Judicial Discretion", (1989) 106 *SALJ* 243 at 247). So, for example, a contribution by a claimant spouse to the estate of the other spouse is not a jurisdictional prerequisite for redistribution in England as it is in terms of s 7(3). Consequently, the English courts need not consider the nature and extent of the claimant's contribution to the estate of the other spouse at all, whereas, in terms of our s 7(3), it is the pre-eminent consideration (see eg *Beaumont v Beaumont supra* 989B). Although I do not understand our legislature to require a meticulous mathematical calculation of each party's contribution, the fact remains that our courts are not entitled as a matter of course to 'divide the joint net assets of the parties equally,

regardless of their respective known and unequal contributions' (per Milne JA in *Kritzinger v Kritzinger* 1989 (1) SA 67 (A) 77F-G).

[21] As to the different common law systems underlying the different statutory provisions, it is a well known fact that our common law provides for marriages in community of property as the norm while the English system does not. The result is that, unlike in England, a marriage can in our law only be concluded out of community of property if the parties consciously elect to do so in terms of an antenuptial agreement executed before a notary public. Of course we know that these contracts often led to great inequity and unfairness, particularly towards wives who performed their traditional role. This, after all, was the *raison d'etre* for the enactment of s 7(3). Nevertheless, its formulation reflects a deliberate choice on the part of the legislature to limit the courts' discretion in interfering with the contractual election – good or bad – made by the parties when they entered into their marriage. For instance, the section only applies to marriages that were entered into prior to the commencement of the Matrimonial Property Act 88 of 1984 on the basis of an antenuptial contract. With regard to marriages entered into subsequently, in terms of an antenuptial contract, the section finds no application at all. (They are governed

by Ch 1 of the Matrimonial Property Act 88 of 1984.) Women whose marriages were entered into later and with the exclusion of the accrual system may therefore be in the same disadvantaged position as before. Some suggest that the legislature was too conservative and the reasons for its choice difficult to understand (see eg June Sinclair, *An Introduction to the Matrimonial Property Act 1984*, 49-52). One can sympathise with these views. The fact remains, however, that the courts cannot go further than the legislature allows them to go and that the legislature does not allow them to treat all marriages upon divorce as if they were in community of property and without an antenuptial contract.

[22] 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) 94B-95F; [1973] 1 All ER 829 (CA) 839b-840d – in *Beaumont v Beaumont supra* 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* 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* 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'.

[24] These views with regard to equal division as a starting point are also in accordance with the approach of the Australian High Court, as appears from the following *dictum* by Gibbs CJ in *Mallet v Mallet* (1984) 156 CLR 605 at 610:

'… Parliament has not provided, expressly or by implication, … that there should, on divorce, either generally, or in certain circumstances, be an equal division of property, or that equality of division should be the normal or proper starting point for the exercise of the court's discretion. Even to say that in

some circumstances equality should be the normal starting point is to require the courts to act on a presumption which is unauthorized by the legislation. The respective values of the contributions made by the parties must depend entirely on the facts of the case and the nature of the final order made by the court must result from a proper exercise of the wide discretionary power … unfettered by the application of supposed rules for which the *Family Law Act* provides no warrant.'

[25] It is not entirely clear what role the court *a quo* assigned to the English decisions from which it quoted so extensively. On the one hand Pincus AJ expressly admonished himself (in para 22) that a starting point of equal division would be in conflict with the decision of Botha JA in the *Beaumont* case. He also disavowed any proposal (in para 23) of a 50/50 split as a starting point in our law. Nevertheless, he referred (in para 25) with apparent approval to two unreported judgments of the Cape High Court in which it was stated, for instance, with reference to the *White* case that:

'I agree with the approach now adopted in Britain and parts of the Commonwealth and I find no reason at all to depart from equality on the facts of the present case.'

[26] For the reasons given, the approach 'now adopted in Britain' does not form part of our law and statements like these can only lead to confusion of thought such as appears to be indicated by

the consideration expressed by Pincus AJ (in para 40), that because the respondent has done her utmost, her contribution must inevitably be afforded equal weight to that of the appellant.

[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 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. She was the financial director of a company. Her responsibility for William she largely shared with the appellant and although she took responsibility for their household, she never claimed this to have been her real contribution to his estate. That much was apparent from her pleadings and was confirmed by her counsel during oral argument. Her major contribution to his estate was through her efforts in their joint business where she spent almost all her time and where she worked, as she said, shoulder to shoulder with the appellant.

[29] Obviously, the respondent's additional contribution as mother and homemaker must be afforded due weight. That will be done. Nevertheless, in the circumstances, the considerations advanced by the court *a quo* (in para 49), as part of its reasons for splitting

the proceeds of the marriage on a 50/50 basis, that the respondent was 'a dedicated housewife, mother and housemaker' and that it would be unacceptable 'to place greater value on the contribution of the breadwinner than that of the homemaker', were clearly inappropriate. The same holds true for the further statement (in para 40) that 'the traditional role played by a South African housewife in the plaintiff's position cannot be held against her'.

[30] For the reasons given, these statements reflect a clear misdirection on the part of the court *a quo* in the exercise of its discretion. But for this misdirection, the court would have realised that in this matter, unlike in most other matters, the contributions of the parties can in fact be compared because the efforts of both were aimed at the promotion of the same business. Had this comparison been done, the court would have noted two material differences between the respective contributions of the parties. First, according to the respondent's own evidence, it was the appellant's efforts, not hers, which caused the business to be exceptionally successful as opposed to just average. Second, since the success of the whole business was dependent on the efforts of the appellant, he was also, indirectly, responsible for whatever resulted from the respondent's efforts. But for the court's

misdirection, it would therefore have realised that its conclusion (in para 49), that the contributions of the parties were equal, could not be justified. Since this conclusion formed the keystone to the court's ultimate decision, the misdirection was undoubtedly material.

[31] A further objection raised by the appellant was that the court *a quo* had failed to have regard to the nature of the assets in the respective estates. The argument in support of this objection was that some adjustment should have been made in his favour for the fact that the respondent retained her shares in Keurview (which is in effect a valuable, unbonded property), and would receive payment in the form of cash, while most of what the appellant retained is tied up in shares in private companies, which are not readily realisable. I do not believe this objection to be valid. About half of the respondent's assets are also tied up in shares in the same companies. What placed her at an even greater disadvantage, is that she is a minority shareholder in companies controlled by the appellant, which had never declared any dividend in the past and were unlikely to do so in the foreseeable future.

[32] What should in my view have been of more concern to the court *a quo*, was the appellant's objection that if he were

compelled to pay an amount as large as that which the court eventually decided upon, it could place the companies in jeopardy. The appellant's evidence in this regard was that the companies had an overdraft facility of R10m of which about R4,5m had been taken up. According to his further undisputed testimony a business that operates close to the limit of its overdraft runs the risk of having its overdraft facilities reduced. In cross-examination, various suggestions were made to the appellant as to how a payment to the respondent could be funded. It was apparent, however, that each of these suggestions would create difficulties or disadvantages of its own. So, for instance, the suggestion that one or both of the aeroplanes owned by Andor Abrasives – which were valued at about R2,3 and R1,4m, respectively – could be sold, was met by the response that a substantial portion of the proceeds of the sale would be payable to the fiscus, since the sale would constitute a recoupment of past tax deductions. The suggestion that Kaboega game farm could be sold as a whole or in part, raised the difficulty that, since the farm formed part of the bank's security for the overdraft of the companies, the sale of the farm would probably cause the overdraft limit to be reduced. The court *a quo* dismissed these problems with the comment (in para 51) that, if the appellant 'wishes to borrow money, as opposed to

selling what the parties called his "toys", then he must "bear the costs of so doing" '. This in my view amounted to an over simplification of the undisputed difficulties for the companies raised by the appellant, which could be to the detriment of both parties.

EXERCISE OF DISCRETION BY THIS COURT

[33] Given the misdirections found, this court is obliged to substitute its own exercise of the discretion afforded by s 7(3) for that of the court *a quo*. In doing so, the first consideration is that both parties have contributed to the substantial financial success of the business and that they have both given their all. The respondent was also the primary caregiver for William and she took responsibility for their household as well. These are obviously considerations in her favour. On the other hand, while the efforts of the parties were aimed at the same goal and although their efforts might have been comparable, the appellant was much more influential in achieving this goal. Without him the business would, by all accounts, be no more than average. Under his management it became an exceptional success. For the reasons I have given, I believe that it would be wrong not to regard this as an important factor in his favour.

[34] Another consideration advanced by counsel for the appellant was that the respondent had already been compensated for her efforts through the privileges of the affluent lifestyle that the parties enjoyed during `the later years of their marriage. That, of course, is true. But, the same holds true of the appellant. I therefore do not agree that this is a consideration in favour of the appellant at all.

[35] On behalf of the appellant, much was also made of the fact that the substantial profit of about R2m on the Sebowana Mills transaction (see para 15 above) was made exclusively through his efforts. For reasons of both law and fact, I do not agree that this transaction deserves any special treatment. As a matter of law, s 7(3) does not require a causal link between the claimant's contribution and every asset in the estate of the other spouse. As a matter of fact, it is apparent that, but for the success of the business, the appellant would not have been able to put up the R1m bank guarantee required for the transaction. As a consequence, the transaction was made possible through the success of the business to which the respondent had made her contribution.

[36] In all the circumstances, the just redistribution contemplated in s 7(3) will in my view be achieved if the appellant is ordered to

pay the respondent the sum of R4,5m. This will result in a division of their joint assets in the ratio of about 60:40 in favour of the appellant. The reduction in the amount determined by the court *a quo* would also avoid the danger to the financial survival of the companies which that determination might have caused.

[37] Pending this appeal, the appellant has made certain payments in partial performance of the court *a quo*'s judgment. The parties were in agreement, however, that we should not concern ourselves with those payments, nor with the *mora* interest that has in the meantime become payable, in the formulation of our order. In accordance with this agreement, I propose merely to substitute the sum of R4,5m for the R7,8m awarded by the court *a quo* and to leave the arithmetical calculation of the exact amount still owing by the appellant to the parties. The respondent's counsel also agreed that the appellant should be afforded a period of three months from date of this order to make payment of the amount still owing by him. The order I propose to make should obviously be understood against the background of these agreements.

[38] For these reasons, the appeal is upheld with costs, including the costs of two counsel, and the following order is substituted for para (b) of the order of the court *a quo*:

'(b) The defendant is ordered to pay to the plaintiff the sum of R4,5m.'

.....
F D J BRAND
JUDGE OF APPEAL

Concur:

HARMS
SCOTT
FARLAM
HEHER JJA