SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and SAFLII Policy

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

APPEAL CASE NO: A16/2023
CASE NO: 15871/16

In the matter between

J[…] E[…] R[…] (NEE O[…]) APPELLANT

AND

B[…] E[…] S[…] RESPONDENT

Date of Hearing:17 July 2022
Date of Judgment:20 November 2023 (to be delivered via email to the respective counsel)

CORAM: SALDANHA J, et BAARTMAN J AND THULARE J

JUDGMENT

THULARE J

[1] This is an appeal against a decision dismissing the claim for lifelong maintenance. The appellant had instituted action against the respondent for a divorce and lifelong spousal maintenance. The court *a quo* granted the divorce but dismissed the maintenance claim. Leave to appeal to the full court was denied. The Supreme Court of Appeal granted leave to appeal to the full court.

[2] The central issues before the court *a quo* is the appellant's need for maintenance and the ability of the respondent to pay.

[3] The appellant was 57 years old at the time of the hearing. She was in reasonable good health except for some issues with her eyes having been diagnosed with acute open-angle glaucoma. She attended to an ophthalmologist every six months to check the pressure to mitigate onset of early blindness. If she spent long periods in front of a screen she suffered dry eyes, some dizziness and migraines. The respondent paid for her hospital plan at Discovery. She needed a comprehensive medical plan which would include mammogram every two years, doctors including gynaecologist and pharmacy fees. She lived in rented property with her helper and the helper's daughter occupying the servants quarters. She also owned a dog. The rental was reduced to R25 000 per month as a result of Covid. Although the rental appeared high, the property and area provided security. It has alarms, security gates, cameras, an electric fence and a garden for the dog. It is close to her children and close to amenities, including the mountain for her walks. As she lived alone, the helper was there as a support system when she was sick. She could move to cheaper accommodation if it offered the same security, care and convenience. She did not own any immovable property. She owned an 8 year old vehicle which was a Volvo XC60. She had no investments, unit trusts, policies or a pension fund. She had a few furniture items which she had owned from 2005 estimated to be worth R70 000 as at 2018. She had no access to any other financial resources.

[4] She had an FNB Premier Credit Card account which was around R12 000-00 in debit. An FNB Cheque Account had more or less R40 000-00. She had not used the FNB Revolving loan account since she settled it in 2019. Horton Griffiths (Griffiths), a chartered accountant, had been jointly appointed by both parties to prepare a report setting out a schedule of assets and liabilities, without having to value the assets and liabilities, based on documentation made available by the parties respectively. Griffiths compiled a report detailing his finidings, which was a compilation of factual evidence provided and was not an expression of an audit opinion. The latest schedule by Griffiths indicated net assets of

R10 100 400 for the appellant and R215 437 for the appellant. The appellants assets were made of household contents and personal effects to the value of R70 000-00 as at 26 April 2018, the Volvo vehicle at R220 000 as at 14 September 2020, FNB Premier Credit Card R5 307 in debit as at 20 August 2020, FNB Cheque Account at R49 311 as at 31 August 2020, FNB Revolving Loan at 0.00 as at 11 July 2020 and Deutshe Bank 21 824 as at 31 August 2020. The liabilities were legal costs at R140 391. These were the costs as at around 2018 and she had incurred a lot of additional costs in preparation for trial. She had paid her legal costs from the revolving loan, any extra income and from what the respondent paid in terms of the Rule 43 order but since a rule 43(6) reduction she had not made any payment of her legal costs. Her ex-husband once assisted her and paid R50 000-00 which she refunded when the respondent paid up arrear maintenance.

[5] The Deutsche Bank was used for the annual commission from Vine Commission Schuler (Vine). Vine was an entity for which she did some work, which belonged to her friend, Petra Gluck (Petra). It is an account she used whilst she was in Germany. At the time that she testified, the account had about 890 Deutsche Mark, which would translate to around R15 000-00. Petra also helped her pay for the appeals and some applications. She paid Petra back partly from the 2019 commission and she was going to use her next commission to pay the balance. Petra is in bulk wine business and she had been assisting Petra in the past five years with bulk wine from South Africa. When the bulk wine is shipped from South Africa to Germany she gets paid a commission annually at the end of the year. Petra deducted what was owed, from her commission. It was the deductions in 2019 which caused her to receive nothing in commission. There was no commission from 2020 because of Covid and hopefully after Covid they could resume some business, and she would be able to refund her otherwise she had to find other means to do so. There was no one contributing to her daily living expenses other than when friends came to stay with her and made contributions towards accommodation, food or petrol.

[6] She matriculated in 1981, graduated with a BA Social Sciences majoring in History and Sociology and completed an Honours degree in Journalism. She graduated in 1986 after doing the course for the year and a six week internship at a newspaper. She could

not find work and went to London for just short of a year which included working. After her return to South Africa she worked for a family run company, Data Build, as a researcher for about six months. She then got a job as a trainee PR consultant at an advertising agency, Intermark. This included organizing events, getting caterers, tents, photographers, taking captions, writing and taking press releases to newspapers. This she did also at TWS Communications, at Neil May & Wessels and at Fine Advertising where she met her ex-husband K[…] R[…] who she married in 1995. He had two small children who were in Germany and visited during holidays and she started working from home as a freelancer. Two children were born from the marriage and after the birth of the youngest her role became that of a wife and mother. She helped her ex-husband once a week with preparation and payment of salaries and wages of his staff. She spent her earnings on extra clothes for the kids and herself, gifts, lunches, hair and luxuries. Her husband was wealthy and provided everything. They divorced in 2005. She got a once off rehabilitation maintenance of about R250 000-00. He paid maintenance for the children and she got to live in their house rent-free until the children were self-supporting.

[7] She met the respondent in 1994. Both were married at the time. They married in 2008. Following her marriage to the respondent she continued doing what she used to do, which was freelance as and when an opportunity came. It was mainly in PR, sales and generally acting as a liaison between a company and people. One of her clients was Asti which manufactured car seats. The company could not continue in around 2004/5 because the supply chain moved to China and the owner sold the business. A client in Germany offered her to continue with the business in SA. At that point she was already with the respondent who said it was a good opportunity, was present at the initial meetings and helped her with the registration of the close corporation, Safety Tots. It imported car seats for a few years. They were imported into Durban, split the goods into warehouses of different businesses and did not have to distribute to individual stores. When the model changed to delivery to individual stores, she did not have the facilities and stopped trading. The close corporation still exists but did not trade. In 2018 she closed the bank account and took the website down to reduce costs as she still paid banking fees. The

vehicle was bought by the entity and she registered the vehicle into her personal name when she closed the account and took the website down.

[8] She got involved in the wine industry in May or June 2013 when the flexi tank in the bulk wine business took off in SA. A flexi tank is a plastic foil bladder wherein about 24 000 litres of wine is pumped into. It is then transported to bottling companies all over the world. She only dealt with Germany and Italy where they then bottled for the retail industry. She started such company with Andy's Ocean, a logistics company with head office in Chile but with an office in Germany, which used this bladder to transport wine from SA to Germany. When they loaded at the cellar, she had to be there, check the correctness of the weights on the scales that the sample bottled were in the container, the correctness of the paper work, that the client was happy and to get the SA leg of the logistics in place, which was from the cellar to the port. The model did not work, Andy's Ocean terminated the deal and her company went out of business in 2015. Andy's Ocean used to lad wine from Cilmor Wine Estate. In 2015 Cilmor wanted to start bottling wine. She joined them in a three month consultancy which ended up in four months. She accompanied the winemaker to Amsterdam to introduce him to potential bulk wine buyers and locally to visit restaurants to see if they could list their bottled wines. They paid her R7500 for the June/July holidays when they started. August, September and October she was paid R15 000-00. When she submitted the invoice on the return from the Bulk Wine Fair in 2015 they declined to pay because they had paid flights and accommodation. She worked with Cilmor from June to November 2015. She invoiced them through Safety Tots when that bank account still existed. The consultancy fee received from Cilmor included all costs. This included travelling to Villiersdorp once a week, travel to restaurants to introduce the wine, entertaining clients, phone calls and all related costs. Overseas travel was invoiced separately and included flights, accommodation and subsistence.

[9] Andy's Ocean also used to load wine for Vine. She became involved with Vine from 2015. She got about 800 euros in the first year and it went up to 1000 euros the following year. The next year to 2000 euros and it stayed there and moved to just over 3000 euros. On average she received about R45 000 per month from Andy's Ocean. She was still

with Vine and if they could sell anything they would. At the Bulk Wine Fair in Amsterdam in 2015 she approached Infinity Flexi Tank, a Malaysian company to enquire if she could not provide a similar service to them like the one to Andy's Ocean. Infinity was relatively new and wanted to get into the industry. She went to Malaysia in 2016 for two or three days and got a target sales based contract for three years. She had to achieve a certain target to obtain the money that was on the contract. In the first year she came to know that the clients through which she was to earn commission were working directly with Infinity which had an impact on what she had to earn. When she addressed the issue, Infinity terminated the contract. Their relationship was for about six to eight months. She was also involved with Good Hope Logistics. It was a logistics company that was supposed to have exclusive rights to use Infinity in SA and based on that she got a consultancy agreement with them. The agreement was based on the premise that any business that Vine did in SA had to go to them. Only one shipment was done through them. It was a disaster and Vine did not want to engage them again. Because she could not commit Vine to Good Hope, Good Hope terminated their relationship. Infinity was also not selling exclusively to Good Hope but to other logistics companies in SA. She did wine trades through Safety Tots whilst the bank account was still up and running. She had done work through Safety Tots and simply continued using it.

[10] Fratelli Martini was a friend of Petra Gluck at Vine and together they produced a processo. She got involved in attempts to have the processo to SA. It was listed in Shoprite/Checkers through the help of the respondent. The processo did not work in SA as retailers demanded restaurant visibility in order to market the brand. Martini did not have it and could not find a distributor, as such it was terminated. She was involved with the processo around 2016 for about a year. She was paid an initial amount at the launch which she could not remember and earned around 800 euros commission once. In 2017 and 2018 she did local wine trade with a local supplier and still worked with Vine. In 2019 it was work with Vine and she also accommodated friends who paid for accommodation. She also edited a freelance newsletter for a friend. In 2020 as a result of covid the wine industry died and she earned nothing. By 2021 when she testified, billions of litres of wine were sitting in cellars in SA. She learned that some European countries introduced rules

to protect their wine industry in that you first buy from local producers and if not possible you source from neighbours in Europe. It is only when you are not able to secure wine in Italy, and in Spain, that you can purchase SA wines. The industry in SA struggled with the exchange rate in 2021. She did not earn anything in 2021. She appeared on a brochure of a business which was on a website, a business that never started. She met a wine barrel agent, Tibo Mongiard, who was a neighbour or Maurer in Germany. Mongiard represented Coopers in Germany and Australia. There were discussions at the end of 2019 for her to sell the barrels in SA. The plan was for KTV to be the agent. Coopers planned to come to SA after the April/May harvest and sell the barrels. Covid hit and nothing happened. Her name remained on the brochure simply because the brochure was not taken off the website.

[11] She was not involved in the small playgroup for children. The extent of her involvement was dropping off and collecting her children for the playgroup. The respondent bought the stock for a Diddle shop, which was a German stationary shop, which was an informal business years ago. Planet Baby was also another business venture tried with the assistance of the respondent, to import car seats for babies, including high chairs and rollers, from China. The supplier in China sold similar products to their clients in SA and the venture ended. Takealot also tried a baby category and wanted her involved. It turned out that her role would be as buyer merchandiser but she was out of her depth and the CEO asked her to either resign or be fired. The respondent had helped her as the CEO was a friend of his . It was terminated with the involvement of the respondent when it did not work. The respondent invested in a Lego shop and she was present at the meeting. The people in whose business he invested used the money for things he did not agree to and the relationship was terminated.

[12] When she married the respondent he paid rent and household expenses and for their holidays, lunches and all extras. She had no children with the respondent. She only paid her children's necessaries from the maintenance she received from the ex-husband. Initially she attended two fairs a year being the Pro Wine Fair in March and the Bulk Wine Fair. The parties joined those trips to be a combination with their holidays. The respondent

paid the costs and they would travel business and arrive in Germany together sometimes using the air miles earned. They would arrive in Germany together. Each would do their business and then meet up and have a holiday. She spent her income on luxuries like clothing, hair, gifts, her children and other extravagant things. On 1 May 2016 the respondent told her that they were no longer married and that he was no longer responsible for her. She was living in the common home at the time. In August 2017 she moved out. She had basic computer skills in that she could send emails, do a google search. From her experience in the wine industry she gained sufficient knowledge to talk to people. However she did not have the technical knowledge as she always used either a logistics specialist or a wine specialist to actually do the deal. She was a liaison person. She did not have a European Union passport, was fluent in English and Afrikaans and in conversational German and not business German. She could manage a few sentences in Spanish, French and a few words in Danish. She did not consider relocating to Europe.

[13] She was emotionally involved with U[…] V[…] in 2016 and had a picture with him taken in March of that year in Neustadt, Germany. She did not receive any financial assistance with V[…] and had not seen him since 2016. She did not have a partner or boyfriend. She met K[…] M[…] in May 2016 in Germany through Petra Gluck and she had a relationship with him in 2017. He terminated the relationship at the end of 2020 after her divorce proceedings were once more postponed in October 2019. He lived in Germany and they commuted during the relationship. He paid four to five flights, provided accommodation and subsistence for her to visit him in Germany between 2017 and 2019. He also paid his own expenses to come to SA to visit her twice a year, one or two weeks in September and about six weeks at the end of the year. Other than paying for flights and for her when she was in Germany, he did not assist her financially. In 2017 she visited the Seychelles. M[…]'s sister turned 50 around the same time as her own birthday. M[…] paid for her to fly there to join his family holiday. In 2018 she visited the Maldives. Her younger daughter turned 21 and did not want a birthday party but a scuba dive. Her ex-husband paid for her and her daughter to go to the Maldives for the scuba dive. In 2019 she visited Germany many times, including to visit her daughter who did a six month

internship in Germany. Some of those trips were paid for by M[…] and others by her ex-husband.

[14] After the Rule 43(6), she had to turn her world around. She had to pay off debts as soon as possible and had to close bank accounts to save costs. She cancelled DSTV and stopped going to the gym. She reduced her cellphone and wifi amounts. She did not go out. She tried not to drive her car. Other than visiting her boyfriend, she was at home. The business that the respondent was engaged in Spain used cash and the cash was not banked but given to the respondent. It happened when she was with him. In 2018 the respondent spent 92 days in Europe and in 2019 he spent 135 days in Europe. When the divorce settlement was concluded in her previous marriage, her ex-husband had to provide her with a home. If she cohabitated with somebody then that person had to pay half of the rent. The respondent moved in with her before her divorce with her ex-husband. The respondent did not pay rent initially, but only started paying after they got married. When she moved in with the respondent after marriage, she paid the respondent rent for her children to move in with them.

[15] Previously, when the appellant applied for an increase in maintenance for the children against her ex-husband, she did not disclose her income. When she invoiced, she did that in the name of Safety Tots for income that she received in South Africa. The respondent had a Deutsche Bank account, and had opened a sub-account for the appellant to use to receive funds abroad. In discovery the respondent only provided information about the appellant's bank statement from this Deutsche bank account, but in respect of his own statements for the same period, he claimed that it was impossible to get them. She did not declare tax for any of the amounts received in her bank account in 2014. During her marriage, the respondent took care of the finances and any decisions that dealt with money. This included her VAT obligations, although he was not a member of for instance Safety Tots. The appellant rendered invoices. The euro payments were made into an account which was not hers, to wit, that of the respondent. In that way, they were both able not to disclose that income. Payments derived from her business were paid into the respondent's Deutsche account until March 2016 when she opened her own

Deutsche account. This was after the respondent told her that she was no longer allowed to use the sub-account for her business. She used what was in the sub-account and did not make any new deposits. One day she discovered that the respondent had her bank account number and its online password, and she opened another account. She closed the earlier account and only remained with the latest. She did not disclose documentation relating to Vine to the respondent because Gluck told her that Gluck did not want the respondent to have access to Gluck's client base and information as the respondent threatened Gluck that if she helped the appellant, Gluck would not do work in SA. She did not supply the bank statements from her Deutsche Bank account as it was a sub-account and the respondent was the main account holder. She had given Mr Griffiths all the bank statements and told him what the payments were for, but did not draft the schedules that Griffiths prepared. The respondent was party to all the correspondence exchanged with Griffiths. Safety Tots submitted zero VAT returns to SARS from 2013 to 2020 although she actively used it to trade and render invoices and collect VAT on behalf of SARS for 2016, 2017 and 2018. Mark Dale Edwards also testified on behalf of the appellant.

[16] The respondent's case was that he met the appellant when both of them were going through a divorce with their then spouses around 2004/5. The appellant had just moved from her husband into a new accommodation. The appellant's then husband, R[…], was uncomfortable with their relationship. As part of the divorce settlement, R[...] purchased property for the appellant and the children to move in but if she was to co-habit, then that other person was obliged to pay rental. As the house still needed renovations, the appellant moved in with him at his apartment and the children moved to R[...] for a few weeks. When the respondent and appellant married in 2008, he moved in with her in the property R[...] bought, and paid rental. In 2012 he bought property in Camps Bay. The parties agreed to move to Camps Bay. There was an agreement that the children will move in with them, but that R[...] would pay rental. The appellant and R[...] had a dispute when the move had to happen with the result that the children first went to their father but ultimately joined the parties at Camps Bay. There was a housebreaking at Camps bay and the children moved out to join their father and never returned.

[17] When he met the appellant, she was on a business trip in Johannesburg. Throughout the marriage she worked. Her expertise was in baby car seats which she marketed. She travelled to China on numerous ventures into baby products business. She was the sole member of Safety Tots and he had nothing to do with the CC except that the appellant would ask for advice. He advanced money to the appellant on different basis. Some were direct expenses which were reflected as a loan account and others were simple expenses. He often paid for expenses in SA which she would reimburse through the Deutsche bank. He gave her money to cover expenses in the house but did not give her an allowance for clothing. He supported his share of the expenses in the relationship. They were both independently working, were married in an antenuptial with no accrual and they managed their own financial affairs. The cracks in their marriage started in 2014 and continued until 2016. In 2016 he discovered that the appellant was in a relationship with another man. The appellant instituted divorce proceedings against him in 2016 and in 2017 she left the common home. He paid interim maintenance as envisaged in Rule 43 including legal costs.

[18] His financial affairs are made up of two portions, He had an investment where he had an entity, Imperial Crown Trading 187 CC (ICT) which was founded through acquisition of property. ICT owned his house. He used the ICT for company administration and management of his business, whatever business he was involved in. This extended to two investments, LiquidChefs and Ajos, a retail business. The other portion which was the core of what he did for many years was a company called Yaleside Investments (Yaleside), which was a property-owning company. Yaleside managed the buildings it owned and acquired. It acquired an office block in Kloof Street, a small vacant plot behind Rosenhoff, behind the property in Kloof Street and also Dover House. His Trust, the B[…] S[…] Family Investment Trust was a shareholder of Yaleside. It owned Tramways which was a building in Diep River and Dover House in Orange Street. Yaleside was his primary source of income. The trust owned 72% and he owned 28% of Yaleside. The beneficiaries of the Trust are himself, his daughter, the appellant and his sister who is retarded, K[…] S[…]. The trustees are Mr Solomon, Mr de Beer, and independent trustee, his father and

himself. K[…] is not independent, not self-supporting and not self-sufficient. She lived with his parents and he assisted his parents with her care. His daughter finished her studies as a teacher and worked part-time, but was completing a course in Italian. She is not yet self-supporting.

[19] Edwards concluded that the total value of his assets came to about 66 million as at May 2021. He agreed with Edwards that the book value, which includes the purchase price plus improvements, on Yaleside was R25 465 000-00. He negotiated a facility and borrowing with Standard Bank and an independent valuer valued the building at R31 million and that is why he differed with Edwards when he valued the building at R33 million. Edwards had applied a capitalization rate of 9.5% to the property value based on the Aspire Properties Valuation on Dover House in Gardens. He considered the valuation done by Icon Valuations and in that they calculated taking lease income on a 10 year lease based on an anchor tenant, Caltex and the leases that were in place at Dover House and applied a capitalization rate of 9.5% which appeared to be a range within the market, and expenses. He considered the capitalization rate to be aggressive as it is an old building and there were parts of it which were deteriorating rapidly and taking its location into consideration as well. He agreed with Edwards on the reevaluation reserve, provision for CGT and he also made provision for commission fees. He reduced the figures to cost as his anchor tenant was not renewing in 13 to 14 months. More than 50% of the property will be vacant. The upper level was vacant and a further 60 metres was vacant. There were two non-paying tenants, a furniture shop and a laundry which were on the forecourt of Caltex. There were other tenants which were in arrears, the one for six months and the other for four months. To improve Dover House to be in a position to re-let required approximately R15 million. He then reduced the value to R25.465 million.

[20] The book value of Tramways Village was R26 500 000-00 which was the purchase price plus improvements as at 2021. Mr Edwards dealt with an amount of R73 million. There was a project to renovate Tramways which commenced in 2016 and only got approval in 2020 to submit plans for refurbishment. The property at the time was 70% vacant. It was a 50 year old building with asbestos and in a prime location. There was

application to Standard Bank for finance which necessitated the valuation. The income capitalization method of valuation, on completion produced a value of R73 million. The value was based on the completed development with construction tenant allowances and fully occupied. That included the cost of the property, construction and associated costs, professional fees, interest, capitalized interest and tenant installations and commission for agents that brought the tenants. The construction commenced in March and continued to fund the company through drawing down on the Standard Bank facility. The new facility has not been made available, amongst others because they do not have the final planning approval by the City although they had not been prevented from demolishing and construction of the new building, and they had not met all the conditions of the bank regarding the vetting of the leases. There was a cease work on a property occupied by an entity that did not comply with the fire regulations. The funding to do some work was from the sale of shares in Imperial Crown and loans between Imperial Crown and Yaleside and a draw down from an overdraft of R4 million in order to meet short-term obligations. He had to use the proceeds from Imperial Crown to settle an overdraft for Yaleside. There was an anchor tenant in Block C, a lease agreement with an entity which had been their tenant for 10 years. Two smaller spaces are let in Block A and to a gym at lower levels than the original viability. 1000 square metres of Block C was still vacant with no interest, which equated just over 20% of the entire complex. The anchor tenant had not paid a deposit, their overruns and TI's for their tenant allowance. Another tenant had not taken occupation. The construction itself was two months behind schedule and six weeks late contractually as their anchor tenant could not start trading. The construction itself was 90% complete. Tramways was likely to be completed at the end of February 2022. The anchor tenant was to be given occupation on 1 December 2021. Construction workto completion will be finishing Block B and C which includes loading bays for the anchor tenant, completion of the outer structure and the entrance and loading dock for Block C. Availability of a tenant will mean spending the necessary funds for tenant installations.

[21] Edwards did not accept that the general costs of R8 797 000 was accurate. The respondent prepared a feasibility document on the development. It was made up of various components which included land costs, the book value, the 26.5 million and the

improvement cost of R25.2 million, R8.7 million for additional costs and R1.8 million of capitalised interest. The R1.8 million was reduced to R5.4 million which took into account the direct costs to complete the development which included the fit-out for new tenants and specific costs related to the development. Edwards did not accept that there were any more costs related to completing the development. According to the respondent, those costs existed in order to secure the rental that was included in the valuation. These costs were incurred in the fit-out of the anchor tenant and some of the R1.8 million were being incurred. The R73 million was based on a fully complete and let building and the R51 million was taken off the forced sale value. There was 20% of the building vacant and there still costs to incur. The difference between the positon as an incomplete, not fully tenanted building was a market related value. The R51 million was taken from the forced value sale. 3.5% commission was also reduced in the case of Dover. There was no capital gains as there was a loss because the cost of the development was in excess of R51 million so the actual costs came to R59 million in order to break even. The loan from Yaleside to Imperial Crown was R5 428 000 as of May 2021. The loan was repaid from the sale of the assets of Imperial Crown. The proceeds paid the bank the debt that was lined to Imperial Crown and the surplus was transferred in order to settle the Yaleside loan.

[22] He was involved in the investment in property through a Real Estate Investment Trust (REIT), which yielded anything from 8% to 12 % in normal times, which was a higher return. He had been involved in these instruments and for him the ability to raise debt using REIT was the most effective way that he could raise debt in his portfolio and have an income so he had done that for 20 years. It was one of the source of his income for over 20 years. Under Nedbank loans he had a REIT portfolio of R21 957 000 and a REIT loan facility of R12 484 000. Nedbank was comfortable in raising the level of debt to 65% of the loan to value. For R100 on the Stock Exchange they will give you R65 of debt and was secured by the portfolio, no personal surety. The purpose of the Nedbank facility in ICT was to raise debt against the portfolio for REIT. He had sold anything from R800 000 to R1.2 million in the Nedbank loan facility in order to fund the shortfall in Yaleside for the redevelopment of Tramways because the Standard Bank loan had not been able to be

drawn down. Yaleside's core facility was a Standard bank medium term loan which was drawn down to the maximum of R25 million and there was an additional overdraft there of 3.5 million which would increase to R4 million when he paid contractors and professionals for the Tramways development. Yaleside paid R285 000 a month for the R25 million facility and on drawdown of the approved up to R40 million would enable him to repay the various short term loans and overdrafts required and it would increase the repayment to R562 000 per month. The bank had agreed that for 12 months he would pay interest only which will be about R225 000 to R250 000. If Yaleside did not get the tenants, the shortfall would be funded through the sale of assets in Imperial Crown and specifically the REIT or to sell additional assets in Yaleside if that was insufficient. He had a loan to himself in Yaleside and has a surety that was linked to the performance of the shareholders. He held a personal suretyship of R73 million as the sole director. This amount, R73 million, was the on-completion valuation of Tramways. According to him, the as-is valuation was just over R26 million. On actual reading of the details of the basis of the valuation, he did not agree with the valuation of R73 million. The R73 million valuation had been accepted by Standard Bank and utilized by that bank to approve credit. He agreed with Icon's valuation methodology, their principles and conditions but did not agree with their numbers. On that basis his view was that Edwards had an inaccurate valuation on the contractual rentals supplied to him. As an example, in respect of future income, Edwards gave the expected income in the following year, 2022, to be R12 727 million from Yaleside whilst the contractual position was R8.7 million gross income for the next year for Yaleside. As at June 2018 the respondent put the value of Tramways at R38. 750 million and Dover House at R30.750 million. The Maserati was then valued at R650 thousand. His assets as at June 2018 were R45. 427 million.

[23] The Tramways building had pure construction and a tenant fit out. The estimated costs of the construction were R26 million and the tenant fit out was R5 and a half million. The latter was the additional cost of securing a tenant, for example the anchor tenant needed installation of a generator. The vacant space is a shell. The tenant may require carpets, toilets, lighting, door handles and the landlord had to incur costs to install. The building had three blocks, A to C. The sale value of Tramways was 51 million and its

estimated net asset value was 17.5 million. The construction costs and not reevaluation in terms of where the property was. It was unfinished and untenanted so it was a forced sale. He agreed with Edwards up to the financial year 2020 and the figure R24 757 924, but the figure R45 710 belonged in 2022 and not 2021. This was because the figure attributable to a completed future development with future earnings was not applicable in that financial year. For 2021 Edwards allocated retrospectively and had a figure of R4 million when according to him the figure was R23 million. He used the figures from Yaleside financials and this differed with the amounts Edwards gave. In 2016 when he funded the share buyback in Yaleside his loan account increased dramatically to R18 million. He funded the share through Imperial Crown and Yaleside. Subsequent to that each year his income was reflected in Yaleside regarding his interest on the loan. The movement in the loan would be interest. In 2019 and 2020 he sold half of Yaleside. It sold a property and the proceeds were received in 2020. He repaid Standard Bank. He sold some of the loan account and some REIT from Yaleside to himself for R5 740 350. This enabled him to raise more debt to service his obligations and get a regular income as well. The REIT were sold to Imperial Crown. His loan account moved from R1 913 350 to R33 889 as at 31 July 2021. He paid legal fees, the appellant and other obligations related to the divorce. The trust was dormant although it held shares in Yaleside and was the dominant shareholder. He involved De Beer to help him with compliance and records. He was subsequently paid R50 000 per month before tax and deductions. Covid had a marginal impact on Tramways but had a larger impact at Dover House which provided the rental income to service the Standard Bank debt. His schedule and that of Edwards was R3 million apart. His base rental income for 2017 was R13.4 million. In 2018 it was R11.9 million, in 2019 it was R9.1 million and in 2021 R5.1 million.

[24] He bought the Camps Bay property for R9 000 031. Edwards put its value at R14 million and he put it at R13 million. ICT developed the two units that he acquired. It was VAT registered and was a property development company. He charged VAT on the services rendered to Yaleside. LiquidChef was a passive investment through ICT. ICT bought franchise rights from the owners in SA. This gave ICT the rights overseas. Initially LiquidChefdid not issue shares until it was restructured and ICT acquired the shares. His

core business was real estate. LiquidChef, IOS in jewellery and OKAVAN in aircrafts were passive investments as they were non-core. They were run by management. LiquidChef was an events company and he had been a director since 2008. It managed drinks related to event industry and hospitality. He did not sign surety in favour of Barclays Ban in regard to the 250 000 pounds loan to LiquidChef. The business struggled after Covid with no events and no future in the hospitality industry and ICT sold its share and received R350 000. Other companies were liquidated. He remained a director of LiquidChef. He did not divest himself of assets for purposes of the divorce. He improved his risk by divesting certain of the passive investments. He did skydiving and together with Dennis Parker acquired a small aeroplane and that is how Sky High Partnership started. The other partner was Peter Machen. The entity acquired other aircrafts and later became Porter Partnership. The business relocated to Europe from Johannesburg. The entity sold the first aircraft in 2009, another in 2010 and the other was sold in 2015 and was the entity then wound up. Porter held all the aviation assets. Sky High Partnership was never formally dissolved. The last transaction under Sky High was the sale in 2010. The respondent exited Porter in 2015. There were no more assets and the liabilities were the loan accounts. The plane was sold in 2015 for about R5 635 496 and he was paid his share of the sale. Sky High ceased to exist and he was no longer part of Porter. He loaned Parker 162 and a half thousand pounds under a convertible loan. Parker did not convert but kept the loan. In January 2018 he made a passive investment in Okavan to acquire 25% of a Spanish company that bought a new skydiving aeroplane called Cessna Caravan. It was the only asset of Okavan. The 25% share was bought for $41 250. The aircraft had been purchased for R1. 650 million. His investment, the 25% together with its loan was R5. 235 million. The aeroplane did not fly for six months, had an engine issue and required more maintenance than was expected, the loan was in euros and the rand deteriorated. The value of the investment relative to the value of the debt was widening at an alarming rate. Covid struck which was the final straw. Parker bought the 25% share of the value of the aircraft. The respondent's personal loss was 247 000 euros. His recovery portion was zero. He conceded that 57 500 euros need not be paid to Parker. This was approximately R1 059 000. When the deal was struck in February 2018 a loan account against Okavan was generated. The repayment would occur to the partners on

a 60/40 distribution between Parker and the respondent. The allocation was first to interest and then the finance partnership. The finance partnership never had a bank account so the payment would go firstly to interest and then directly to Parker and the respondent in the partnership distribution percentages. When the money was transferred in February in the books of Okavan it was reflected as B S[...] in Okavan SL for the participation of the respondent's 25%. The loan was to fund S[...]. The shareholding in Okavan SL was in the respondent's name. The respondent only paid 750 Euros for his share in the plane but 412 500 for the loan account. The loan account together with the shares were sold and disposed to Parker in terms of the termination agreement. He ceded the whole of his loan account and no payments had been made on the loan account. The loan account reduction of some R8.4 million was accounted for in part and that amounted to over R5 million which consisted of transfer in shares from by Yaleside to ICT in 2020. The other tranche of about R5,2 million was transferred to the respondent personally. The account from which they came was pledged to Standard Bank. The respondent was not executively or operationally involved in the day to day running of the two overseas businesses, LiquidChef and Okavan. He used to be available and used to get involved where his services or input were required. It was not necessary for him to travel overseas to conduct the business. He visited the businesses as often as possible. Aerolibre managed the operation of the plane and he was not involved in Aerolibre.

[25] He had attempted to sell his vehicle, Maserati but was not successful. He also owned a BMW and a Vespa. He had art furniture, grand pianos, and computers valued at R750 000- he still owed his attorneys R500 000. The calculation of his assets amounted to R16 862 786. He received a salary from Yaleside at R50 000 per month before tax. The net amount was about R37 500. Over and above that he drew down on the loan account with ICT where possible and would continue to take an advance from the sale of REIT as and when required. The surplus between the debt and the asset value of REIT was approximately R11 million. He would sell REIT to fund himself or any obligation as well as to fund the completion of Yaleside Investments in order to complete Tramways development. If he sold REIT his income decreased. He also had to service debt of ICT on its bond on the property at R118 000 per month and he had to service R65 000 per

month on the REIT before any surplus was paid to him. He was paying the high amount on the bond because he used the property as security in raising funds for various investments. It underpinned his ability to borrow money from the bank. His expenses were on his daughter, medical cover, life insurance, car insurance, home contents insurance, pharmacy, fuel, domestic help, groceries, clothing, entertainment, hair, sport and gifts. The rates and electricity on his property, security, DSTV and mobile phone were paid by ICT. He used two private accounts to pay for personal expenses. The credit card and the current account. In 2018 and 2019 he got a salary and paid fringe benefits tax. ICT paid for expenses related to business. When he had paid for the appellant's business travel in SA, the appellant reimbursed him into his Deutsche Bank account. He had no assets overseas and had no bank accounts overseas

[26] He only had a credit card and current account in SA when the proceedings with the appellant started. The SAA Voyager card was used jointly to accumulate points. He was advised that it was imperative to distinguish expenditure. He acquired a business credit card on the profile of ICT with Nedbank in January 2017. Before the business credit card if it was expenses related to travel overseas he just claimed it as a tax expense when he compiled tax returns. After the proceedings the distinction became important. He did not have an office and worked from home. He used restaurants extensively in his business. He saw a lot of people for dinners at restaurants and entertain them. He opened a Deutsche Bank account before 2010. It was an online banking facility. It used a PIN and later a TAN. He used the account online and statements were sent to an address in Germany. The account was in the name of Juergen Specht, a friend of the appellant and R[...]. A subaccount was opened and the appellant had its PIN and TAN. He never had access to any of her bank accounts. The address in Germany was later changed to a wife of R[...]. When the parties separated the respondent did not have access to the statements. He could not access his own online bank account as the bank raised issue with him being in SA and they needed a German address. He later secured a German address but until the account was closed in 2018 he did not receive the statements for the main account or subaccount. When closing the account he asked for all the statements of the account and subaccount. Safety Tots bought a Volvo for R520 000. The

respondent agreed to fund the shortfall between the trade-in and the cost of the Volvo. The appellant had to repay him. He denied being involved in the financials of Safety Tots. Through Barefoot Capital the respondent paid for expenses incurred on behalf of Safety Tots on behalf of the appellant.

[27] In approaching the issue of his ability to pay maintenance for the appellant, the responded excluded in total any and all rental revenue achieved by Yaleside. His explanation was that he excluded the rental because no dividends have been paid since he had been in control of the company for the previous 10 years and the company was cash-flow negative and until that changes there was no prospect of receiving distributions. The rental from Yaleside had been included in the Rule 43(6) application when the respondent applied for reduction of maintenance. In 2016 in the Rule 43 application brought by the appellant, the respondent did not dispute his ability to pay maintenance. He had made an offer for R30 000 a month lifelong maintenance in order to settle the matter. However when he considered his financial position, including that he had to sell assets over the past years, it was a risk as he incurred debt. He was not comfortable with the offer and it was withdrawn. It was in January 2021 and the wine industry had started to open again and business was commencing and the opportunity for the appellant to continue with employment had changed from the earlier position. At that time the conditions with Tramways and the debt funding together with the sell down that was required in terms of ICT and that he had sold down R11.6 million of assets it became apparent that his earnings had decreased substantially and he was at risk. It was required to fund shortfalls this was going to be onerous on Yaleside and additional funding would be required. He sold R11.5 million of ICT. He repaid what he could to Nedbank Securities and transferred the rest across in terms of drawing on loan accounts and loans to Yaleside.

[28] Edwards was a forensic accountant for the past 10 years. He was instructed by the appellant's attorneys to investigate assets, liabilities and income of the respondent in the course of the parties' divorce proceedings. Yaleside had 90 issued shares. B[…] S[...] Investment Trust had 65 shares which was 72.22% and the respondent personally had

25 shares which was 27.78%. For the financial year ending February 2020 Dover House was valued at R25 465 000. He received a cash-flow forecast from Yaleside's accountant which was the basis for the revised valuation for February 2021. He applied a capitalization rate of 9.5% and arrived at an estimated property value of R33.4 million. He used 9.5% rate because that was the rate used by Yaleside for Tramways. This was directly linked to and based on the ability of Dover House to generate a rental income. He had received a schedule of the rental income from Yaleside's accountants for that period and he capitalized on that to determine the value. He received from those linked to the respondent a valuation report prepared by another entity which gave the value of Dover House at R31 million as at February 2022 in a three-year cash flow forecast. It was because of the vacancy rates applied in the calculation at February 2022 that the other entity essentially reduced the nett rental income from the property from around R34 million to about R3 million and then capitalized the R3 million and arrived at R31 million. They in essence reduced the value of the property. In capitalization valuations to take what is happening today and it is deemed essentially the *status quo* in perpetuity. The other entity' valuation basically said there will be that percentage vacancy forever. Edwards used what Yaleside's own accountants used to adjust the value of the investment properties on the balance sheet of Yaleside to a valuation as at February 2021.

[29] Edwards valued Tramways at R26 500 000 for the 2020 financial year. Yaleside accountants provided him with a report prepared on behalf of Standard Bank in consideration of a further development loan against the property, for Standard Bank to lend money. The report indicated that renovations were already underway in December 2020 and it was expected that the property would increase in value substantially after the renovations were completed. The as-is valuation was R27 million and an on-completion valuation was R73 million. There was an increase of around R46 000 4000. The on completion value was accepted. What was in dispute was what expenses needed to be incurred to get that value. R8 978 000 was gross rental income less the vacancy of 5%. That was the figure used in February 2020. The valuer calculated a value in perpetuity of the future rental income from this property assuming a 5% vacancy rate on average over

time. It is not the actual vacancy rate, but the assumption within the capitalization calculation. Edwards allowed for some R26 million to be deducted from the R73 million in order to get to a net value. This was because there were issues with regard to expenditure that should be taken into account. There was a quantity surveyor's report which quantified, for Standard Bank purposes, the costs to be incurred in the renovation project that was to be funded from the new loan. That report reflected a figure of R24 million which Edwards originally used. For a notional balance sheet for Yaleside, Edwards notionally assumed that the value of the property was going to increase by the cost of the project, and used that figure of R24 million. He then received an updated quantity surveyor's report from which it was clear that the Tramway project was under construction as the report was an active project management report in process. He then updated the costs to be in line with that quantity surveyor's report dated 11 May 2021. That report had a summary cost schedule which included the value of the principal contract, the provisional sums, the direct contract, fees, disbursements, professional fees, contingencies etc. The total was R26 191 000. This amount was what the quantity surveyor's final development cost would be.

[30] Edwards did not agree with the respondent that there should be an additional provision for the cost of capitalized interest, being the interest to be incurred on the loan facility during the construction process. This was because that expense was essentially being paid for as an expense through Yaleside's ongoing financial statements. Any interest expense incurred on that loan facility to date was already reflected in the net profit and loss statement of Yaleside upon which he relied for purposes of coming up with the rest of the balance sheet. The general costs like the provision for vacancies was already recognized in the income of Yaleside as at 28 February 2021 through the fact that Yaleside had not earned that rental income that it may otherwise had done. There was potential that if one were to provide for these costs which reflected earlier, one actually ended up double-counting for the same expenditure. The extent of that was about R10 million worth of additional costs which would take the cost estimate for the renovations of Tramways from R26.1 million to about R36 million. The respondent effectively withdrew R12 516 023 from his Yaleside loan account over the financial years 2019 to 2021. This

included the transfer of R5 740 350 worth of listed investments from Yaleside to the respondent himself. A total of R3 123 546 accrued to the loan account in interest over this period and the respondent declared it as his income in his personal tax returns. The loan account owed to the respondent by Yaleside was worth R9 412 361 as at 28 February 2021.

[31] Edwards summarized the respondent's loan account in Yaleside. For 2019 the opening balance was R17 869 675, the drawings paid to him were R400 000, legal fees were R153 716, there was no transfer of shares to him, interest accrued was R1 359 191. There was no unexplained balancing item. For 2020 the opening balance was R18 675 150, drawings paid were R4 510 113, legal fees were R489 094, transfer of shares to him were R5 740 350, interest accrued was R1 317 044 and unexplained balancing item was R431 411. For 2021 the opening balance was R9 684 048, drawings paid to him were R743 883, legal fees were R478 867, there was no transfer of shares to him, interest accrued was R447 311 and unexplained balancing item was R503 751. The closing balance was R18 675 150 in 2019, R9 684 048 in 2020 and R9 412 361 in 2021. The net drawings for the financial years 2019 to 2021 was R8 457 314. The effective interest rate was 7.44% in 2019, 9.29% in 2020 and 4.68% in 2021. The loan account decreased from R17.8 million to R9.4 million over three years. 1 617 000 shares in Tower Property at a market value of R3.55 share together with other shares of the respondent's personal investment portfolio were transferred into ICT on 30 April 2020. The shares were transferred to the respondent personally and then to ICT. Yaleside did not provide information to assess the extent if any, of the respondent's personal expenses it paid. However, Edwards noted some significant transactions. In December 2019 there was R19 876-60 for the respondent's daughter's birthday party. In November 2020 there was R45 697-49 for roofing the respondent's parents' home. For the same reason R29 977-81 was used on December 2020 and R58 820 was used on art gallery. These transcations appeared private in nature but were not reflected in the respondent's loan account with Yaleside. Edwards sought a copy of the full general ledger of Yaleside and ICT for the financial years 2019 to 2022, a full set of bank statements for both entities covering 1 March 2018 to the date when he compiled the report and once the transactions were

identified, provision of supporting documents. This would help establish the value of the respondent's earnings in the form of undisclosed fringe benefits. Yaleside did not declare dividends during the period under investigation. Edwards summarized the estimated market value of Yaleside, on a net asset basis as 27.78 percent shareholding by the respondent with the net asset value at R12 630 016, his Family Investment Trust with 72.22% shareholding with nett asset value of R32 838 041 and the combined 100% shareholding with a net asset value of R45 468 056.

[32] In respect of ICT Edwards noted that the respondent held 100% of the shares. He valued the property at Camps Bay at R14 million which he accepted as the net asset value. There was a mortgage bond over the property. ICT held 70% shares in LiquidChefs prior to its sale in December 2020. The loan to LiquidChefs was R1 715 776 before a 50% write-down of the asset value to R857 888. The book value of the investment into LiquidChefs was not based on a market based valuation of the shareholding. According to the respondent's statement of assets and liabilities as at May 2018 the value of the 70% share held by ICT was R6 240 150. In the year to 31 May 2019 LiquidChefs produced a net profit of GBP82 872 after tax. 70% of that net profit was GBP58 010 or R1 129 588 at the then prevailing exchange rate. ICT wrote down the value of the investment from R1 715 776 to R857 888 as at February 2020. The reason is provided as Covid 19. The business was historically very profitable and cash generative. It made payments to ICT totaling R2.9 million during August 2017 to October 2018. The historic profitability and rapid pre-covid growth trajectory suggested that the prospective future value could be substantially more than the price at which the shares were sold. The business, at GBP15 000, was sold substantially less that the current net asset value. At 28 February 2021 ICT had a REIT portfolio with a cost price of R22 025 142 and a liability of R12 122 395 which was a REIT loan facility from Nedbank. To quantify the market value Edwards assumed an increase in market growth in line with the share price actually achieved in other portfolio of shares that were transferred from the respondent to ICT on 30 April 2020 and estimated the value of the REIT portfolio as at 12 May 2021 to be R36 529 285. Edward provided for deferred tax on the capital growth.

[33] Edward discussed the loan account owed to respondent by ICT. In his summary, in 2019 the opening balance was R5 572 620. Drawings paid to respondent were R1 276 543. There was movement of shares at R325 032, there was a member's remuneration declared at R240 000. In 2020 the opening balance was R4 861 109, the drawing paid to respondent was R1 761 098, the member's remuneration declared was R240 000. To 21 January 2021 the opening balance was R3 340 011, the drawing s paid to respondent was R837 314, the transfer of shares from respondent to ICT R3 914 750, the cession of respondent's loan to Parker R4 568 028, the correction to loan cession R1 058 082. Edwards could not determine the members' remuneration for 2021 because there were no year- end journals included. The closing balance in 2019 was R4 861 109, in 2020 R3 340 011 and in 2021 R2 908 501. The net drawings for the financial year period 2019 to 2021 was R2 664 119, The amounts in all three opening balances, in the movement of shares in 2019, in the transfer of shares in 2021, in the correction to the loan account in 2021 and in the members; remuneration declared in 2019 and 2020 all reflect amounts owed to the respondent. For the financial year period 2019 to January 2021 the respondent effectively withdrew R3 874 955 from his ICT loan account. A total of R4 239 782 accrued to the loan account from the transfer of assets into ICT over that period. A net amount of R3 508 946 after correction, was ceded to Parker upon dissolution of Okavan. Member's remuneration declared accrued to the loan account in the amount of R480 000. No member's remuneration was reflected in the management accounts of ICT as at 31 January 2021. The respondent's loan account owed to him by ICT was worth R2 908 501 as at 28 February 2021. This amount reflected as a liability in Yaleside and as an asset in the respondent's personal estate. Edwards did not dispute that Parker paid an amount of 182 000 pounds to ICT since April 2019.

[34] Parker and the respondent formed a partnership, Okavan Finance Partnership. In their personal capacities they make loans into it. The respondent USD40 000 and Parker USD370 000. The partnership made a loan of that sum of USD412 500 to the respondent in his personal capacity. The USD412 000 that the respondent puts into that business equates to 24% of the purchase price of the aeroplane which was USD1 625 000. The partnership gets collapsed and the respondent sold his 25% shareholding in Okavan

Aviation SL for 163 000 euros to Parker. The shares that the respondent paid 750 euros for are sold for 163 000 euros. The money owed by S[...] to Parker effectively gets moved into a loan account in ICT owing to Parker. The debt owing to Parker got moved from the partnership into ICT through a cession of the respondent's loan account in order to arrive at a position where ICT owed Parker. It was not a value destroying transaction but a restructuring of loan accounts. The USD412 000 was loaned to the respondent in his personal capacity and he bought a share in Okavan Aviation SL and paid 750 euros for 25% shareholding and the formation of the company and the rest was recognized as a loan account owing to him by Okavacion or Okavan Aviation SL in his personal capacity. The sale of shares contract is silent and makes no mention of the existing loan agreement between the respondent and Okavan Aviation SL which was outside the partnership. There was no evidence of the cancellation of the loan agreement between Okavan Aviation SL and the respondent, which amount was owing. It was 337 000 euros plus interest. It equals about R5.7 million and another R500 000 on accrued interest. The loan was structured such that every calendar year earnings before interest, tax, depreciation, amortization also called operating profit and termed EBITDA were considered. 25% of the operating profits were to be repaid as an instalment on the loan. It was variable and depended on the financial performance and interest on the loan accrued at 3% which was the legal maximum rate and penalty interest of 20% was payable if the loan was not repaid.

[35] Porter Partnership was between Parker and the respondent and was set up the finance the purchase of three skydiving aeroplanes utilized by a company that ran a drop zone and skydiving club in Spain. The planes were bought in SA and used as skydive planes in Spain. As at 31 December 2018 Okavan Aviacion income tax returns reflected that the respondent owned shares with a nominal value of 750 euros. The balance of the investment was recorded as a loan to Okavan Aviaion. Various loans were reflected in the 2018 tax return but insufficient detail was available to determine the specific creditors, whether it was banks or shareholders. No dividends or interest earned relating to Okavan Aviacion was declared by the respondent in his SA tax returns. No income and expenses have been declared in respect of the Okavan Finanace Partnership in the respondent's

SA income tax returns. The dissolution of Okavan Finance Partnership resulted in significant prejudice to the respondent in that the loan owed to him by Okavan Finance Partnership was transferred to Parker without any compensation to the respondent. This resulted in a further 57 437 euros or R1 059 086 destruction. In the financial year 2015 Porter recorded the sale of an unidentified aircraft for R5185 000 and the proceeds of the sale were distributed equally between the respondent and Parker. The respondent alleged that the planes were sold but could not provide any underlying documentation. After the purported sale of all aircraft, Porter received income and immediately after each receipt into Porter's account the money was transferred to the respondent. The income total between September 2014 and May 2016 was R3 737 269. This income was received until 2017. No explanation was provided to Edwards for the income into Porter's account after 28 February 2015 at which date all aircraft had allegedly been sold and all loan accounts owing to Parker and the respondent in the Porter partnership had been repaid.. Edwards was not provided with documentation that enabled him to conclude as to who was the current owners of the aeroplanes. They may or may not be owned by the respondent directly or through some other structure and if sold, to whom and for what value.

[36] The respondent started to trade in listed investments from September 2017. His financial position deteriorated, to a large degree as a direct result of those discretionary investments which resulted in substantial losses. Between September 2017 and February 018 he lost R1.476 million and a further R R363 000 as a normal investment loss. Thereafter there were further losses of R3. 443 million in the financial year 2019 and a further loss of R113 000. In 2021 the loss was R2.5 million. He purchased 25 000 Growthpoint Properties shares which had a 74% surge in 2021and purchased a much bigger portfolio of shares in ICT. The respondent did not provide the full ledgers of Yaleside and ICT. Yaleside had an existing loan with Standard Bank for R20 million with a repayment of R285 000 per month. Interest was payable on the loan throughout the duration of the construction project. The interest is already funded by existing rental income from Dover House by dividend payments on the REIT portfolio, both assets that have been partially purchased with that R20 million loan facility. That is why Edwards did

not include the capitalized interest costs. Some provision for finance costs, particularly on the development costs to be incurred should reasonably be provide for because you have a finance cost related to a non-productive asset until the construction is complete.

[37] Section 7(2) of the Divorce Act, 1979 (Act No. 70 of 1979) reads as follows:

"7. Division of assets and maintenance of parties
(2) In the absence of an order made in terms of subsection (1) with regard to the payment of maintenance by the one party to the other, the court may, having regard to the existing or prospective means of each of the parties, their respective earning capacities, financial needs and obligations, the age of each of the parties, the duration of the marriage, the standard of living of the parties prior to the divorce, their conduct in so far as it may be relevant to the break-down of the marriage, an order in terms of subsection (3) and any other factor which in the opinion of the court should be taken into account, make an order which the court finds just in respect of the payment of maintenance by the one party to the other for any period until death or remarriage of the party I whose favour the order is given, whichever event may occur first."

In 'The Law of Divorce and Dissolution of Life Partnerships in South Africa, J Heaton (Editor), Cape Town, South Africa, Juta, (The Law of Divorce) at 126 it was said:

"The foundation of the duty of support is the order the court makes by virtue of the power that section 7(2) of the Divorce Act confers on it. The only yardsticks in respect of making an order in terms of section 7(2) are that the factors set out in the section must be considered70 and that the court order must be just.
It is obvious that the factors contained in section 7(2) are not exhaustive or exclusive and that the court has a wide discretion in the matter of whether to grant a maintenance award and, if an award is granted, for how long and for which amount. Although, in practice, certain factors, such as the age of the spouses, the duration of the marriage, and the spouses' earning capacities, are considered to be central, it should be noted that it has been held that no single factor should predominate and that '[t]he proper approach . . . is to consider each case on its own merits in the light of the facts and circumstances peculiar to it and with regard to those factors set out in this particular section'."

There is no automatic right to maintenance on divorce. In *AV v CV* 2011 (6) SA 189 at para 9 it was said:

"[9] It follows therefore that the respondent is not entitled to maintenance as of right, but must persuade the court to exercise its discretion in her favour. In doing so, she has to provide a factual basis for maintenance award to be made before quantum and duration thereof are determined by the court."

In principle, every healthy adult should be responsible for his or her own livelihood [Sonnekus, JC 'Onderhoud na Egskeiding' 1988 TSAR 440; 'Statutêre Begrensing van Versorgingsaansprake na Egskeiding — Die Nederlandse en Duitse Voorbeelde' 1994 *TSAR* 607 at 609–610 and 'Grense aan Kontrakvryheid vir Eggenote én Voornemende Eggenote? (Deel1)' 2010 *TSAR* 53 at 66 and 68].

In *EH v SH* 2012 (4) SA 164 (SCA) at para 13 it was said:

"[13] It is trite that the person claiming maintenance must establish a need to be supported. If no such need is established, it would not be 'just' as required by this section for a maintenance order to be issued."

[38] The appellant had to prove the need for maintenance in order to succeed to get an order in terms of section 7(2). The factors that a court should consider in section 7(2) are those which the Legislature deemed necessary to assist the court in its consideration for the court to conclude that a claimant in the position of the appellant had amongst others established a need and as a consequence it was just to make the order. The decision of the court a quo to depart from these principles and to make the need a stand- alone inquiry, absent consideration of these factors, was correctly criticized by the appellant, and was wrong. The need is the first, the means is the second pillar in the structure to sustain the duty to maintain another [*Union Government v Warneke* 1911 AD 657 at 663 and 672]. It follows that it would be unjust to make a maintenance order against a person who is destitute. It is against this background that, for instance, the existing or prospective means of the parties as a factor must be considered as envisaged in section 7(2). The determination whether or not a maintenance order is to be made is entrusted by the

Legislature to the wholly unfettered discretionary judgment of the court as to whether it would be just to do so. What the court is enjoined to do, is to effect justice as between the parties [*Buttner v Buttner* 2006 (3) SA 23 (SCA) at 35B-C]. A globular, equitable approach is appropriate. The factors to be considered in section 7(2) overlap and cannot be considered in isolation. The factors necessary to determine the need of the claimant and the means of the respondent are inherently embedded in consideration of the factors in section 7(2). The factors set out in section 7(2) are a guide not only to determine the need and the means, but also the amount and duration of the maintenance award [*Pillay v Pillay* 2004 (4) SA 81 (SEC) at 86F; *Botha v Botha* 2009 (3) SA 89 (W) para 47].

[39] The appellant was married to the respondent for 14 years. The appellant had no assets, and no pension. She did not have any fixed employment and generally worked for commission. The parties were in a two- breadwinner model of marriage. The appellant was clearly the secondary income earner. The respondent was the primary income earner. Even in these marriages, courts should guard against undue hardships, social and economic subordination visited upon such spouses by divorce. The appellant managed to establish a stable career during marriage. Covid-19 in 2020 and 2021, despite her devotion to her career, resulted in an unstable and interrupted working life. After Covid-19, she could not make up for lost ground. This was not because of her absence from the labour market, but because of the nature of the environment in the recovery of the wine industry. She was unable to attain a state of economic independence on divorce or soon thereafter. The post Covid-19 reality rendered it impossible for the appellant to support herself fully from her work on divorce. This is the context in which spousal maintenance is sought and to which the judgment must respond. I am not persuaded that income derived from charging some lodging for friends using her home, clearly as part of mitigation for her poverty, was sufficient to negate a need. She had no income whatsoever for 2020 and 2021, that is, over two years before the judgment. She lived on the maintenance provided by the respondent. This was a contribution of R40 000-00 per month and payment of a monthly premium to retain her as a dependent on the respondent's medical aid which was an order of a court following the respondent's Rule 43(6) application. She had did not own any immovable property. The relationship

between the appellant and men she got involved with after their separation, whether she visited them or they visited her, was no reason to dismiss her claim. None of them had been shown to fully maintain her. Living with another intimate partner is no automatic bar to recovery of maintenance. The question was whether the appellant proved that she was entitled to maintenance [*EH v SH* at para 11].

[40] In my view the court *a quo* based its decision primarily on what happened at least two years before its decision. The understatement of income and overstatement of expenditure in rule 43 proceedings, which the appellant denied, happened 6 and 4 years before, respectively. The failure to declare income to SARS and the ability to generate an income were all before 2020. The alleged support by a boyfriend was between 2017 and 2019. They did not relate to the current or future position of the appellant to maintain herself. Nothing countervailed the evidence that the appellant earned nothing in 2020 and that billions of litres of wine as at 2021 sat in cellars in SA and Spain, which is the industry where she made a living. At the date of judgment and in the foreseeable future, I was unable to find any proper consideration of the ability of the appellant to maintain herself in the judgment of the court *a quo*. The appellant needed accommodation, food, clothing, medical care including specifically that which related to her eye problems, reproductive organ care for women and general old age related health care, amongst other needs. There is nothing which suggested that the appellant could merely resume a full-time job and quickly advance to a state of equal economic independence on divorce. It was not in dispute that the appellant's income in the last four years prior to the judgment was solely in the form of commission derived through the limited export bulk wines from South Africa to Germany. As a result of Covid, all exports of bulk wine from SA to Europe ceased.

[41] The value of the respondent's business at Dover House was R31 million. The value of Tramways, his other business was between R26 766 064 and R34 million. It was under construction and its value at completion was R73 million. The expected rental income of Yaleside after full restoration of Tramways was R12.7 million per year. It was R11. 552 million in 2017 and because of Covid-19 and renovations had reduced to R5.186 million in 2021. LiquidChefs, his other business, had 250 000 pounds sitting in its account. There

would be greater value in him liquidating than selling his shares. His sale of LiquidChefs was a material destruction of value that would have been available if he had chosen liquidation. On his own version, the respondent was a property developer whose income was very much tied up in the business entities, especially but not limited to, Yaleside and ICT, which he established, which owned the properties. In 2017 on a statement he had signed reflecting his own version, the respondent's net assets were R45. 427 million. His net assets at as at May 2021 was R42 million. The projection of his net assets were more than R60 million. The income and assets of the respondent's business entities fell to be taken into account in determining his ability to pay maintenance.

[42] The respondent copied the format used by Edwards, compiled schedules and inserted updated numbers where he deemed them appropriate from his consideration of the financials and other relevant subitems. In so doing he got figures that were asset wise for himself personally and for Yaleside, which were less than those of Edwards. The purpose of the schedules was to put his case before the court. In the schedules he gave the market value of Yaleside as at May 2021 as per valuation of Icon at R73 million. He considered the Icon valuation as he used it for the bank in order to grant finance. He got Dover House at R25.4 million. Edwards had Dover House in excess of R30 million. The respondent alleged that his income was wholly dependent on the cash flow that Yaleside and ICT were able to generate. Since 2016 the respondent made the operational decisions in discussion with shareholders which included the Trust. He as the minority shareholder contributed more than the Trust. The direct payments from the sale of assets in order to fund Yaleside took place through ICT and the respondent. It was easier for him and ICT to raise funds than it was for the Trust. When the respondent claimed inability to pay, he was not taking into account ICT's ability to fund its 100 percent shareholder, being himself. Yet, ICT credit card was used, in the same period that he claimed inability to pay maintenance, to pay for his travel overseas, when he was not involved either operationally or executively in the running of his businesses overseas. He claimed poverty, yet he was able to travel overseas for a total period of 135 days in one year, flying business class on four accasions in one year. The respondent conceded that he did not have to spend time in Madrid or in London for business, as he worked for himself with a laptop. Whether he

was in Cape Town or London, he continued to work including on the majority of his investments, including property development, wherever he was. He chose to spend time in Europe as he always ensured that he took full advantage of the cost of the flights and took advantage of whatever time he spent, in Europe. His investment in Okavan was a passive investment. His personal liability for maintenance of the appellant was discharged amongst others by payments made through ICT. The respondent believed that the appellant's maintenance should be limited because according to him she had worked and continued to work, she was being supported by a third party, they had no children and they were married in ante-nuptial contract. In 'The Law of Divorce' the learned authors in discussing the first factor, said the following at 128:

"The word 'means' refers to all a person's 'financial resources'. 'Means' therefore include not only capital assets but also income from employment or earning capacity and any other source from which gains or benefits are received, together with money that a person does not have in his or her possession but that is available to such person. To a certain extent this factor overlaps with the next factor, namely the respective earning capacities of the parties."

[43] The respondent made the greater financial contribution to the assets acquired, which were used by the parties. For instance, through the business entities he was the brain behind, they established a common home in Camps Bay and lived in a house worth R14 million. Through him, financially, the couple went on holidays in Europe. Expensive art was provided for the common home. These are not examples of a couple in which each lived independently. The nature and extent of support that the respondent provided to the home, was such that the appellant was able to spend most of her income on luxuries. This is not uncommon for wealthy families. Both are business people. The respondent was more knowledgeable around finances and the appellant was his understudy. The division of labour and expense between the parties was a conscious choice made by both of them and fairness demands that effect be given, on divorce, to the principles they consciously applied during the marriage [*Buttner* at 35C-E].

[44] In *MB v NB* 2010 (3) SA 220 (GSJ) at para 33 and 34 it was said:

"[33] Cross-examination by counsel for the defendant seemed to be directed at showing that some of her listed expenses were too high, if judged by some supposedly objective standard of reasonableness. If this were indeed the approach, then I must say that I think it is wrong. Fairness is the test and, in the absence of factors justifying a deprivation of the right to be maintained, the proper approach is to postulate that the parties should each continue, following divorce, to live in the style to which they have become accustomed for so long as this was permitted by the resources at their disposal. If, as so often happens, the capital and income are insufficient to meet this standard, then each should abate their requirements accordingly. In this limited sense the touchstone is subjective: the issue is not what people generally would regard as reasonable, a standard far too amorphous to be useful, but what the parties have come to depend on, subject always to the criterion of affordability.

[44] In a case such as the present, the first step is to determine the claimant's past and potential income from employment or any other source- that is, current and potential future earnings – in order to determine whether it is or will become sufficient to maintain the prevailing lifestyle. The next step is to decide whether the other spouse earns enough, after making proper provision for the maintenance of a comparable lifestyle, to make good any shortfall in the claimant's income that is exposed by the initial assessment"

The appellant had no income for or any other source of earnings for 2020 and 2021. Her future earnings depended on the recovery of the wine industry, which was uncertain. The respondent had means sufficient to maintain himself in the lifestyle they were accustomed to, and nothing suggest that the respondent cannot make good the shortfall in the appellant's means. The respondent cannot expect the court to attribute a notional earning capacity under these circumstances [*Kroon v Kroon* 1986 (4) SA 616 (ECD) at 631H-I]. The appellant's ability to earn an income did not *per se,* disentitle the court from ordering the respondent to pay her maintenance [*Pommerel v Pommerel* 1990 (1) SA 998 (ECD) at 1003F-G]. In the consideration of the question of her ability to support herself from her own efforts, the question as regards why she was not earning sufficient to support herself must be considered on its reasonableness [*Pommerel* at 1002D; *Kooverjee v Kooverjee* 2006 (6) SA 127 (C) at 138D–F].

[45] The financial needs and obligations of the parties are also to be considered. This means that the court should take into account, *inter alia,* the financial needs, obligations and responsibilities which each of the parties has or was likely to have in the foreseeable future. This meant what one would think it means in every parlance, that is, how much money does each party need for day-to-day living, and how much of the income or resources of each has to be spent on some obligatory purpose [*Kroon* at 633B-C; The Law of Divorce at 130]. The appellant required no more than to provide for the normal living requirements. The respondent on the other hand, had other obligations to be considered related to the business from which his livelihood depended. As regards the age of each party and the duration of the marriage, both are in the late stages of mid-life. The appellant was 58 and was two years short of being an older person by law. In *Grasso v Grasso* 1987 (1) SA 48 (C) at 57H–I it was said.

"Middle-aged women who have for years devoted themselves full-time to the management and care of the children of the marriage, are awarded rehabilitative maintenance for a period sufficient to enable them to be trained or re-trained for a job or profession. Permanent maintenance is reserved for the elderly wife who has been married to her husband for a long time and is too old to earn her own living and unlikely to re-marry."

It seems the skittish steed of life has bolted for one to consider re-training for the appellant. She has qualifications and did not work in the environment for which she was qualified. She was advanced in age to be considered for ordinary employment in contemporary SA. As is naturally the case in the business environment, she made a success through acquaintances' and friends' mouth to ear of those connected to decision-makers. Her income generation is in the fate of the recovery of the wine industry.

[46]) As regards the parties' standard of living during the marriage, the comments in 'The Law of Divorce are worth citing verbatim:

"The essence of what this factor entails133 was summarised strikingly by Brassey
AJ in *MB v NB*:

"[T]he proper approach is to postulate that the parties should each continue, following divorce, to live in the style to which they have become accustomed for so long as this was permitted by the resources at their disposal. If, as so often happens, the capital and income are insufficient to meet this standard, then each should abate their requirements accordingly. In this limited sense the touchstone is subjective: the issue is not what people generally would regard as reasonable, a standard far too amorphous to be useful, but what the parties have to depend on, subject always to the criterion of affordability."

However, *Botha v Botha* seems to run counter to this view. In this case, it was held that merely establishing that the poorer spouse's income is insufficient to enable her to sustain the standard of living the spouses enjoyed during the marriage and that the other spouse can afford to pay maintenance does not necessarily entitle her to maintenance. The judgment therefore creates the impression that the marital standard of living is an unimportant consideration if the poorer spouse is employed, which is, of course, incorrect because all factors are of equal importance."

I am unable to follow *Botha* on this point and I am more in favour of the position as advanced by the authors in The Divorce Law. The appellant is not entitled to be placed in the position of the living standard of the respondent [*Strauss v Strauss* [1974 (3) SA 79 (AA) at 83D]. The marital standard of living of the parties remains of equal importance as a factor to be considered. The court *a quo* based its judgment primarily on the Botha judgment.

[47] The conduct of the parties in so far as it may be relevant to the breakdown of the marriage, in this matter, is a somewhat difficult factor. Each one of them refers to a painful experience of the other. The appellant said the relationship started disintegrating the day the respondent, whilst still married to her, told friends at a dinner table that his wife was still his ex-wife, the mother of his child. It seems that they had already started reconciling and were seeing each other. The respondent on the other hand alleged the starting day was when he came across photos of the appellant in a compromised position with another man. I am persuaded in the view that both parties are usually to blame for the breakdown of the marriage and that this approach is more fluid and equitable [*Swart v Swart* 1980 (4) SA 364 (OPA) at 368-9]. Some reasons advanced may be symptoms but not causes of a marriage breakdown. Much depends amongst others on the emotional intelligence of the parties. In my view the approach is just and equitable under the circumstances

[*Kooverjee* at para 11.6.3]. There was no discussion of any distribution order as envisaged in section 7(3), in this matter.

[48] The respondent spent R665850-91 in 2016 on luxuries and holidays which included overseas trips, bicycles, bicycle tours, skydiving, restaurants, entertainment and travelling, which were not necessities. In 2017 that amount went to R916 695-22, in 2018 it was R653 672-54 and in 2019 it was R881 312-89. The overseas trips were for about two or three weeks longer. Two to three days would be spent on business and the rest of the time was spent where his future wife lived and where he intended to live after divorce. He flew business class or upgraded to business class. The respondent had a loan account against Okavan Aviation and had understated his assets by 6.3 million. He initially denied the loan account, but later admitted it and claimed that the loan account was transferred to Parker at termination. This was after he had been confronted about a letter which sought to suggest that the loan account should be reflected as S[...] on behalf of Okavan Finance Partnership and had always incorrectly reflected as S[...] since January 2018. The letter was generated to create a false impression that it was not the respondent's loan account but that of Okavan Finance and that to the extent that the respondent was involved, it was on behalf of Okavan Finance. The loan was going to be repaid. The respondent received shares from Yaleside and held on them for about 6 months and on 24 February 2020 transferred those shares to ICT together with other additional shares, 8000 Tower shares and 25 000 Growthpoint shares. This transfer became the start of a portfolio of listed investments in ICT worth R3.7 million effectively on the first day of the financial year of 2021. The Tower shares in particular grew greatly. In addition, ICT amassed through funding from the Nedbank loan together with other funds and ploughed all of its available cash into that portfolio during that financial year 2021, to the value of R25 million. The 3.9 million in the respondent's loan account in ICT in 2021 reflects transfer of shares from himself to ICT meaning ICT owed him the additional R3.9 million. From 2019 to 2021 the respondent drew a net withdrawal of R2.6 million against ICT. The agreed market value of the respondent's shareholding which was sold to Parker was R163 000 euros. 353 000 less 163 000 was 190 000 euros. However the parties agreed that after transfer the balance owing to Parker was reduced to 247 000 euros. 247 00

euros was recorded in the respondent's loan account in ICT. The amount ceded to Parker was overstated by R1 050 000. The transactions did not make mention of the loan account between the respondent and the Okavan Aviacion. If that loan account was sold together with the 25% shareholding then the respondent sold to Parker a loan account worth 350 000 euros for 163 000 euros. The respondent sold an asset for half its value. The shares should have been based on the value of the Okavan Aviacion. The value of the loan owing to the respondent from Okavan Aviacion together with interest accrued was worth about R6 million. Essentially, the dissolution of Porter in February 2015 seems to have amounted to a transfer of all loans, operations and everything within Porter into a new entity, Skyhigh Partnership.

[49] The respondent's business life included the creation and dissolution of entities, acquisition and transfer of loans and shares, reduction or transfer of assets to liabilities. The evidence established a failure to appropriately keep record, cession of loan accounts and undervaluing and abandonment of claims and assets. This had the sole purpose of and sought to diminish the respondent's estate. The evidence provides no other reason other than this being done for purposes of his divorce. Although the Trust was dormant, and had no income and expenses and merely held majority shares in Yaleside, the respondent sought to suggest that the Trust prevented him from drawing on a loan account and ICT and paid him a salary. The Trust never had a bank account, never contributed anything to Yaleside developments and has never withdrawn any funds from Yaleside. The appellant cannot be faulted for her submission that the Trust was the respondent's *alter ego*. The payment of a salary commenced after the commencement of the divorce proceedings and as part of his being asked to fully disclose his financial position. It was directly related to his financial position for purposes of the divorce.

[50] Marriage is not a bread ticket for life [*Singh v Singh* 1983 (1) SA 781 CPD at 788]. The appellant was not wholly financially dependent on the respondent and worked for a living. But for Covid-19, it may be that she would have gone on working after divorce. She is on the eve of being an elderly woman too old to be generally employable. In *Botha* at para 45 the court said:

"[45] What is 'just' has been considered in the context of insolvency and liquidation. In *Pienaar v Thusano Foundation and Another* 1992 (2) SA 552 (B), Friedman AJP said the following:

By their very nature the words 'just and equitable' are incapable of an all-embracing and exhaustive definition, and it is not surprising that the Court have been unable to define them in an all-encompassing manner. (At 578J)

In its plain, grammatical meaning, 'just means *inter alia* correct, appropriate, fair-minded, sound, deserved, fitting, reasonable, justified and 'equitable' means *inter alia* even-handed, fair, honest, reasonable, right.

This in effect connotes and signifies that, if the Court, in exercising its discretion judicially, comes to the conclusion that it is correct and appropriate and fair and reasonable to wind up a company, it will do so.

To put it another way, in its process of reasoning, the Court is guided by 'broad conclusions of law, justice and equity', and in doing so it must take into account competing interests and determine them on the basis of a judicial discretion of which 'justice and equity' are an integral part. The Court has to balance the respective interests and tensions and counterbalance the competing forces and resolve and determine them in a fair, proper and reasonable manner." (At 580D/E-G).

[51] Both parties derive their livelihood from commercial activity. It is an environment which always carry the risk in the possibility of occurrence of unfavourable events that has the potential to lower the profits or threaten survival of business. The risk factors include causes beyond the control of the business itself or those involved in it as public health crises like Covid-19 had shown. On the other hand the business climate and operational decisions may positively affect the competitive position and growth prospects of the business. Section 8 of the Act, which provides for the rescission, suspension or variation of the order, is available for both the appellant and the respondent should the need arise. After consideration of all these factors, the evidence established the appellant's need for maintenance, and the respondent's means to pay. In the circumstances the court *a quo* was wrong in its decision on the spousal maintenance post –divorce. The appellant should be awarded lifelong maintenance, as this seems to me to be the only possible way in which she could be sustained over the rest of her life, unless circumstances change. On the other hand, the respondent's means, by their very nature,

would continue to flow irrespective of his age. I find it just and equitable to make an order in respect of the payment of maintenance by the respondent to the appellant for the rest of her life or until her death, remarriage or cohabitation with another person in an intimate relationship, whichever event may occur first. A just amount, in my view, is R40 000 per month. The indeterminate medical need require a separate attention. The tension between the parties need some mitigating intervention. An annual escalation clause headline as issued by Stats SA, at 5%, is a good starting point.

[52] I would make the following order:

(a) The appeal is upheld with costs, such costs to include costs of two counsel.

(b) Clause 54(ii) of the order of the court *a quo* is set aside and replaced with the following order:

(ba) The respondent shall pay maintenance to the appellant for herself until her death, re-marriage or cohabitation with another in an intimate relationship, whichever event may occur the earlier, at R40 000-00 per month ante dated to the date of judgment of the court *a quo,* to wit, 18 January 2022.

(bb) The amount of R40 000 per month shall increase based on the annual consumer price index of each subsequent year.

(bc) The respondent shall keep the applicant registered as a dependent on his current medical hospital plan or a medical aid with similar cover and shall continue to pay the monthly levy in respect of her membership to the said medical aid and make payments for, inter, alia, all reasonable medical, dental, psychological, opthalmological and pharmaceutical expenses not covered by the hospital plan.

DM THULARE
JUDGE OF THE HIGH COURT

I agree.

ED BAARTMAN
JUDGE OF THE HIGH COURT

I agree it is so ordered

V SALDANHA
JUDGE OF THE HIGH COURT