

SOUTH AFRICA / JUDGMENT

Feldman v Oshry NO and Another (6752/20007) [2009] ZAKZDHC 8; 2009 (6) SA 454 (KZD) (14 April 2009) [2009] ZAKZDHC 8

COURT
Kwazulu-Natal High Court, Durban

BEFORE
Van Zyl

CASE / FILE NUMBER
6752/2006

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IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL, DURBAN

CASE NUMBER : 6752/2006

In the matter between:-

MARJORIE PEARL FELDMAN

Plaintiff

and

STANLEY OSHRY N.O.

First Defendant

BEVERLY JUNE OSHRY N.O.

Second Defendant

JUDGMENT

VAN ZYL, J.:-

1. Plaintiff is the widow of the late Lionel Maurice Feldman (hereinafter called “the deceased”), who died testate on 3 May 2005. The first and second defendants are sued in their capacities as joint executors in the estate of the deceased. To place matters in perspective, the second defendant is a daughter of the deceased by a previous marriage and she is married to the first defendant.

2. Plaintiff's claims are made against the estate of the deceased. The first is one for maintenance brought in terms of the Maintenance of Surviving Spouses Act 27 of 1990, whilst the second is for payment in terms of a deed of donation. Both claims were rejected by the defendants in the course of the administration of the estate of the deceased and they have defended the subsequent action instituted by plaintiff.
3. The plaintiff and the deceased were married to each other, out of community of property, at Durban on 27 January 1987. Plaintiff

was born on 11 August 1926 and the deceased on 14 April 1916. Thus they were respectively sixty and seventy years of age at the time of their marriage and seventy eight and eighty nine years of age when the marriage was dissolved by the death of the deceased. The marriage had endured for a little over eighteen years.

4. The marriage of the plaintiff and the deceased was a second marriage for each of them, both their first marriages apparently having been dissolved by the deaths of their respective spouses. Plaintiff has two adult sons by her first marriage, both of whom are permanently settled in the United States of America. The deceased had a son, who is settled in Australia and his daughter, the second defendant in these proceedings, as indicated above. All four children are financially independent and the only dependant's claim against the estate is that made by the plaintiff.
5. At the time of their marriage the deceased had already retired from his previous business activities and was living in a flat. The plaintiff, however, was employed as an estate agent, an occupation she continued to pursue until the age of seventy five, when she also ceased employment. Thereafter she claims that her main support was derived from the deceased. At the outset, according to the plaintiff's evidence, she and the deceased shared expenses and they used her motor vehicle for transport. They travelled overseas, entertained frequently and apparently enjoyed a happy and rewarding marriage relationship.
6. Shortly prior to their marriage plaintiff had sold her town house, intending at the time that the deceased would also sell his flat and that the two of them would then jointly purchase a residential property, to be occupied by them after their marriage. However, the deceased declined to sell his flat, so that the couple occupied this unit for the duration of their marriage. Plaintiff instead reinvested the proceeds of the sale of her town house in a flat, which she then let out. This flat she sold, on the advice of her son Anthony Klaff, who acted as her financial advisor, at the time when she stopped work and transferred the bulk of the proceeds to him for investment on her behalf in America. During the latter part of 2004, what the plaintiff and her son Anthony Klaff described as the remaining balance of her funds in America, supplemented by her sons, was used to acquire a residential unit at Eden Crescent in Durban in plaintiff's name, which she then let out. Plaintiff explained the reasoning behind this acquisition. She said that the deceased had informed her that, in the event of his death, she could stay on in his flat, but that the property itself would devolve upon his children who would be entitled to sell it, if they so wished. This was borne out by

the contents of his will, to which reference is made below. According to plaintiff she asked the deceased what then was to become of her and his response was that she would then be her sons' responsibility. As a result plaintiff felt insecure and the purchase of the Eden Crescent property represented secure alternative accommodation which would be available to her, after the death of the deceased.

7. The financial position of the couple gradually deteriorated, relative to earlier in their marriage, during the period after the plaintiff stopped work. According to plaintiff the deceased eventually told her that he was "running out of money" and requested that she speak to her sons in America to "send back money". This request, according to plaintiff, was directed not only at the repatriation of some of her own funds (prior to the acquisition of the unit in Eden Crescent), but was also a request for a contribution to be made by her sons to plaintiff's maintenance.
8. In context it would appear that the deceased had in mind that plaintiff's sons should start contributing to her maintenance from their own resources, thus relieving financial pressure upon the deceased. It is clear that the deceased also held the view that upon his death, financial responsibility for the maintenance of the plaintiff, insofar as her own resources were inadequate, would rest upon her sons. In his will, executed on 21 November 2002, the deceased bequeathed the sum of R150 000-00 to the plaintiff and recorded his "desire" that she be allowed to remain living in his flat until her death or remarriage, or until his heirs decided to sell the apartment. The balance of the estate was left to his two children.
9. After the death of the deceased plaintiff claims that she needed secure accommodation. According to her she discussed the matter with the first defendant who indicated that, if the deceased's flat were sold and plaintiff's children were unable to support her, then she should move to Beth Shalom, a retirement home for the indigent which is administered by a welfare organisation. In the result plaintiff remained in the flat occupied by her and the deceased during their marriage and during this period she received some support from the estate through the defendants. During March 2006 she moved to her apartment at Eden Crescent.
10. By letter dated as early as 27 May 2005 plaintiff's attorneys intimated her intention to claim maintenance from the estate of the deceased in terms of the provisions of the Maintenance of Surviving Spouses Act 27 of 1990, but claimed that the quantum of the claim could only be determined once actuarial assistance had been obtained. This was subsequently expanded upon by letter dated 10 August 2005 which intimated that an actuary had been retained to attend to the calculation of plaintiff's claim for maintenance. Thereafter and by letter dated 14 December 2005 a copy of an actuarial report, prepared by actuaries G. Anderson and S. Bennett and dated 6 December 2005, was forwarded to defendants in support of plaintiff's maintenance claim against the estate of the deceased. Therein the claim was expressed as a lump sum maintenance claim in the amount of R671 062-00. At its inception the actuarial report explained that the calculation is intended to place a valuation upon plaintiff's maintenance claim, by way of a lump sum required in excess of plaintiff's then current

assets, in order to reasonably provide for her maintenance until her death or remarriage. Mr I. G. Hunter, the actuary called by plaintiff to give evidence at the trial, associated himself with the report which he said he had discussed in detail with Mr G. Anderson, one of its authors. Her prospects of remarriage were assumed to be nil, her life expectancy was assumed in terms of generally recognised mortality tables and the calculations done on the basis that, upon the assumed date of plaintiff's death, nothing would be left of her existing assets or the lump sum maintenance award claimed.

11. Plaintiff's claim for maintenance is premised upon the provisions of the Maintenance of Surviving Spouses Act 27 of 1990, the object of which is stated in the preamble to be "To provide the surviving spouse in certain circumstances with a claim for maintenance against the estate of the deceased spouse; and to provide for incidental matters."

12. The relevant portions of the Act read, as follows:-

"2 Claim for maintenance against estate of deceased spouse

- (1) If a marriage is dissolved by death after the

commencement of this Act the survivor shall have a claim against the estate of the deceased spouse for the provision of his reasonable

maintenance needs until his death or remarriage in so far as he is not able to provide therefor from his own means and earnings.

- (2)

- (3)

- (a)

- (b) The claim for maintenance of the survivor shall have the same order of preference in respect of other claims against the estate of the deceased spouse as a claim for maintenance of a dependent child of the deceased spouse has or would have against the estate if there were such a claim, and, if the claim of the survivor and that of a dependent child compete with each other, those claims shall, if necessary, be reduced proportionately.

- (c)

- (d) The executor of the estate of a deceased spouse shall have the power to enter into an agreement with the survivor and the heirs and legatees having an interest in the agreement, including the creation of a trust, and in terms of the agreement to transfer assets of the deceased estate, or a right in the assets, to the survivor or the trust, or to impose an obligation on an heir or legatee, in settlement of the claim of the survivor or part thereof.

[Para.

- (d) substituted by s. 2 of Act 1 of 1992.]

3 Determination of reasonable maintenance needs

In the determination of the reasonable maintenance needs of the survivor, the following factors shall be taken into account in addition to any other factor which should be taken into account:

- (a) The amount in the estate of the deceased spouse available for distribution to heirs and legatees;
 - (b) the existing and expected means, earning capacity, financial needs and obligations of the survivor and of the marriage; and
 - (c) the standard of living of the survivor during the subsistence of the marriage and his age at the death of the deceased spouse.”
13. In terms of our common law a surviving spouse, merely by reason of their marriage, has no claim for maintenance against the estate of his or her deceased spouse. In *Glazer vs Glazer* N.O 1963 (4) SA 694 (AD) the applicant instituted action against the respondent, the executor testamentary in the estate of her late husband, to whom she had been married out of community of property and who had left her nothing under his will, for maintenance. The claim was made on the ground that she was indigent. The respondent excepted to the declaration as being bad in law for failure to disclose a cause of action. The exception was upheld. The applicant then applied for condonation of the late noting of an appeal against such decision. In refusing condonation Steyn CJ at page 707E concluded that, apart from an unsatisfactory explanation for the delay, the applicant’s “prospect of success on the merits, if there is one at all, is so slender that condonation would not be justified.”
 14. In *Hodges vs Coubrough* NO 1991 (3) SA 58 (D), Didcott J (as he then was) at page 62 J / page 63 B and following *Glazer v Glazer* (supra), remarked with regard to the common law position, that “The duty of support which each spouse owed to the other, and consequently the liability for maintenance that depended on and gave effect to the duty, were incidents of their matrimonial relationship. The termination of the relationship by either death or divorce left the duty with no remaining basis and brought it in turn to an end.”
 15. It is therefore clear that prior to the Maintenance of Surviving Spouses Act 27 of 1990 coming into effect on 1 July 1990, plaintiff would have had no claim to maintenance against the estate of the deceased. However, section 2(1) of the Act now confers a claim for maintenance against estate of deceased spouse by the survivor for the provision of her reasonable maintenance needs until her death or remarriage, but only insofar as she is unable to provide therefor from her own means and earnings.
 16. Given the fact that plaintiff only retired from working at the advanced age seventy five, there is no question regarding her further ability to generate earnings from some remunerative occupation or economic activity. What requires closer examination is her “means”, as contemplated in section 2(1) of the Act. “Own means” is defined in section 1 as including “any money or property or other financial benefit accruing to the survivor in terms of the matrimonial property law or the law of succession or otherwise at the death of the deceased

spouse.”

17. By the use of the word “include” the legislature must have intended not to define the concept of “own means” exhaustively, so that any other means possessed by the survivor should also be taken into account in determining her ability to meet her own reasonable maintenance needs. According to the New Shorter Oxford English Dictionary (1993) at page 1724, the concept of “means” includes an instrument, agency, method or course of action by which some object is or may be attained, or some result may be brought about. Also, the resources available for effecting some object, especially financial resources in relation to the requirements of expenditure and includes money and wealth. And a person of means is one having a substantial income, or being wealthy. The Standard Dictionary of the English Language (1901), Vol II at page 1094 includes money or property as a procuring medium, available resources, a measure and a plan, method or procedure, amongst the meanings of “means”. Both dictionaries remark on the fact that, whilst the plural form of the word is mostly employed, often its use is as a singular noun. In context it therefore appears to me that “means” would also denote the ability or wherewithal to achieve some object such as, in the present matter, the reasonable maintenance of plaintiff.
18. Plaintiff’s assets are relatively modest. She owns the apartment at Eden Crescent, a residence for senior citizens, which she purchased by way of share block scheme during the latter part of 2004 and prior to the death of the deceased for R210 000-00, together with her furniture and effects. She is in receipt of an annuity of R1 263-07 per month, own a Nissan motor vehicle and has an investment of R100 000-00. The deceased left plaintiff a testamentary bequest of R150 000-00 and she is claiming payment of a further R50 000-00 donation from his estate in the present action.
19. It is unnecessary in my view, for present purposes, to try and do an accurate calculation of plaintiff’s assets and income and to compare this with her claimed expenditures because it is clear that, but for contributions to her maintenance made since the death of the deceased by her sons in America, plaintiff would be unable to maintain a lifestyle even approximating that which she traditionally enjoyed.
20. The real dispute between the parties is not so much whether plaintiff’s income needs to be subsidised, but rather whether account should be taken, in calculating her means, of the voluntary contributions made by plaintiff’s two sons in America. Put differently, whether her sons’ ability and willingness to subsidise her living expenses should be included in her means, as contended by Mr Shepstone on behalf of the defendants, or whether such contributions should be excluded, as contended by Ms Julyan on behalf of the plaintiff.
21. Mr Anthony Klaff, one of the sons of the plaintiff and who was called by her in evidence, was quite candid when he intimated that whilst he and his brother both found the need to subsidise plaintiff’s living expenses a financial burden, as well as a source of discord with their respective spouses, they would not permit plaintiff to become destitute. He also confirmed plaintiff’s evidence that such funds as he previously administered for plaintiff in

the United States, had all been repatriated prior to the death of the deceased. In the absence of any convincing evidence to the contrary, this claim has to be accepted as correct.

22. Ms Julyan argued that any voluntary contributions by plaintiff's sons should be disregarded in calculating her means in relation to the provisions of the Act. In her approach plaintiff's claim for maintenance against the estate of her deceased husband is analogous to a claim for maintenance upon divorce and the same considerations should apply. She equated a maintenance

obligation arising under the Maintenance of Surviving Spouses Act 27 of 1990 to an obligation to maintain *stante matrimonii*, based on the reasonable requirements of the claimant and the ability to pay, as well as maintenance claims post divorce in terms of section 7(2) of the Divorce Act 70 of 1979. In this context she submitted, on the strength of *Kroon vs Kroon* 1986 (4) SA 616 (E) at page 624 G-J, that plaintiff's apartment where she resides and her motor vehicle should not be regarded as means, but rather as capital assets needed for her own use. She did not, however, persist in the submission, to be found in paragraph 41 of plaintiff's heads of argument, to the effect that the only means to be taken into account for purposes of applying section 2 of Act 27 of 1990 are means which arise at the death of the deceased spouse and not pre-existing means.

23. Mr Shepstone for the defendants, however, submitted that a more restrictive approach is called for in applying the provisions of the Maintenance of Surviving Spouses Act 27 of 1990. He argued that this Act should be seen against the background of the common law, which decreed that the duty of support ceased upon dissolution of the marriage by the death of one of the spouses. He drew attention to the preamble of the Act which made it clear, so he submitted, that only in "certain circumstances" would a claim for maintenance arise and submitted that the Act should be restrictively interpreted, so as to make the least inroad upon the common law position. Consequently, so he submitted, the maintenance provisions of the Act were designed to give an indigent widow a right to reasonable maintenance in circumstances where the deceased, being well able to provide for her maintenance, capriciously disinherited her. The example he undoubtedly had in mind was that of *Glazer* (*supra*). The aim was therefore, so counsel submitted, to prevent a person from being left destitute and not to afford a disaffected widow a means to share in the estate of her late husband against his express wishes.
24. I am doubtful that the analogy sought to be drawn by plaintiff's counsel between, on the one hand, maintenance becoming payable upon divorce in terms of section 7(2) of the Divorce Act 70 of 1979 and on the other hand, maintenance flowing from section 2(1) of the Maintenance of Surviving Spouses Act 27 of 1990, is correct or justified. A court is not empowered in terms of section 7(2) of the Divorce Act to make a maintenance order which survives the death of the maintaining party and binds his estate (*Hodges vs Coubrough* NO 1991 (3) SA 58 (D), *Didcott J* (as he then was) at page 69E). I disregard, for present purposes, maintenance orders based upon contract and made in terms of section 7(1) of the Divorce Act and which may bind the estate of the maintaining party (*Odgers vs De Gersigny* 2007 (2) SA 305 (SCA)). The considerations motivating the grant of an opposed maintenance order

under section 7(2) of the Divorce Act, despite such opposition, traditionally include misconduct on the part of the party ordered to maintain or, conversely, the failure of such claim may be based upon misconduct attributable to the party seeking to benefit under such maintenance order. That fault principle does not apply to claims under section 2(1) of the Maintenance of Surviving Spouses Act 27 of 1990.

25. In contrast to the considerations set out in section 7(2) of the Divorce Act, section 3 of the Maintenance of Surviving Spouses Act 27 of 1990 provides as follows:-

“3 Determination of reasonable maintenance needs

In the determination of the reasonable maintenance needs of the survivor, the following factors shall be taken into account in addition to any other factor which should be taken into account:

- (a) The amount in the estate of the deceased spouse available for distribution to heirs and legatees;
 - (b) the existing and expected means, earning capacity, financial needs and obligations of the survivor and the subsistence of the marriage; and
26. It is not without significance that the maintenance obligation contemplated in both section 2(1) and section 3 of the Maintenance of Surviving Spouses Act qualifies the maintenance needs with the word “reasonable”. In my view this indicates a more restrictive or conservative approach to the determination of maintenance for surviving spouses and would be consistent with the intention of the legislature to limit unnecessary interference with the pre-existing common law position. The factors and considerations set out in section 3 of the Maintenance of Surviving Spouses Act also differ considerably, in detail and emphasis, from those contained in section 7(2) of the Divorce Act.
28. Nor do I consider that the view of the deceased, that plaintiff’s sons should assume responsibility for her maintenance after his death, can absolve his estate from a lawful liability imposed upon it, by virtue of the provisions of of the Maintenance of Surviving Spouses Act, to maintain plaintiff after his death, provided she qualified for such assistance in terms of the provisions of the said Act.
29. Disregarding any voluntary contributions made, or to be made, by plaintiff’s sons, her own means are then inadequate for her reasonable maintenance needs. I did not understand Mr Shepstone for the defendants to seriously contend otherwise. It is relevant at this stage to consider the criteria set out in section 3 of the Maintenance of Surviving Spouses Act against the facts of the plaintiff’s circumstances. According to the inventory of the estate assets, apparently completed by first defendant on 6 June 2005, these amounted to furniture and effects valued at R48 950-00 and claims in favour of the estate comprising the balances of the deceased’s banking accounts, insurance policies and shares amounting to R1 264 417-00. Curiously, there is no mention in the inventory of the deceased’s flat and erstwhile matrimonial home at 61 Hyde Park, Ridge Road, Berea, Durban, so that its value is not reflected in the inventory. The total value of the estate, as per the inventory, is R1 313 367-00.

Prima facie the estate has sufficient assets to meet the plaintiff's claims. Certainly defendants did not raise inability to pay as a defence or factor in the determination of the estate's liability to plaintiff. The marriage was a fairly lengthy one, extending to some 18 years despite the relatively advanced years of the plaintiff and deceased

at the time of their marriage. Finally, plaintiff was 78 years of age at the time of the death of the deceased, so that there was no suggestion that she was disqualified on this score. As already indicated, plaintiff cannot unassisted maintain a reasonable

lifestyle from her own income and by liquidating assets, such as selling her residential unit, or Nissan motor vehicle, in order to free capital for living expenses, would expose her to risk and insecurity, while being objectively insufficient in any event to maintain her for the duration of her life expectancy.

30. In my view plaintiff has established that she qualifies to claim maintenance from the estate of the deceased until her death or remarriage, whichever shall first occur.
31. It is, however, clear that for purposes of plaintiff's claim for maintenance against the estate of the deceased, such claim has at all material times been pursued on the basis of a lump sum award. Ms Julyan, for the plaintiff, submitted that this was a practical and desirable approach to disposing of the maintenance claim. Mr Shepstone for the defendants submitted that even if a claim for maintenance against the estate of the deceased were well founded, a proposition which he did not concede, then a lump sum award was incompetent.
32. There are no reported decisions on the form a maintenance order, made in terms of the provisions of the Maintenance of Surviving Spouses Act, should take. In respect of maintenance orders made in terms of section 7(2) of the Divorce Act Chetty AJA in *Zwiegelaar vs Zwiegelaar* 2001

- (1) SA 1208 (SCA) at page 1212 in paragraph 10 stated with apparent approval that -

“

- [10] The argument that maintenance in terms of s 7(2) is restricted to periodical payments is supported by the academic literature. Hahlo in *The South African Law of Husband and Wife* 5th ed at 357 stated with reference to s 7(1) and (2) of the Act respectively:

'An agreement for the payment of a lump sum, even where it is expressly stated that the lump sum is to be paid in lieu of maintenance, is not an agreement for the payment of maintenance in terms of s 7(1). Section 1 of the Maintenance Act 23 of 1963 defines a maintenance order as "any order for the periodical payment of sums of money towards the maintenance of any person made by any court . . .". [My emphasis.] It may, however, amount to an agreement as to the division of assets, which the court may embody in its order.'

And:

'Section 7(2) envisages periodical payments. It does not allow the Court to make an award of a lump sum, in lieu of maintenance.'

(See also Lesbury Van Zyl Family Law Service C36 and Joubert (ed) The Law of South Africa vol 16 (1st reissue) at D para 191.) For the purposes of this judgment I shall assume, without deciding, that s 7(2) envisages periodical payments."

33. In my view the maintenance envisaged by the Maintenance of Surviving Spouses Act, like in the case of divorce under section 7(2) of the Divorce Act, would be in the form of periodic payments, as opposed to a lump sum payment (*Schmidt v Schmidt* 1996 (2) SA 211 (W)). I am fortified in my view by the ordinary grammatical meanings of "maintain" which include to practise habitually an action, or to go on with, continue, persevere in an undertaking, or to go on with the use of something. The meanings of "Maintenance" include the action of giving aid, countenance, or support to a person in a course of action. (The Shorter Oxford Dictionary (*supra*) at page 1669) In both instances the elements of repetition and continuity are ever present and are repugnant to the concept of a single isolated occurrence, such as in a single lump sum payment. In my view provisions of the Maintenance of Surviving Spouses Act do not entitle a court to order, save in terms of an agreement, maintenance of a surviving spouse by way of a single lump sum award, as contended for by the plaintiff.
34. But even if I were wrong in my conclusion that it is not competent for a court to order maintenance by way of a single lump sum payment, as opposed to periodical payments, then severe policy concerns arise in opting for a single maintenance payment. A single lump sum payment would expose both the estate claimed from, as well as the claimant, to risk. Whilst the expenses of maintaining a person in the position of the plaintiff may be estimated and lump sum calculations based upon various assumptions, their accuracy cannot be assured. The claimant may, contrary to the life expectancy tables, die much earlier than expected, whether from illness or misadventure. In the present instance the actuaries assumed plaintiff's good health merely upon the say-so of her attorneys and it is unclear what the source of their information at the time may have been, or how authoritative the conclusion in fact is. Whilst there was no medical evidence, or formal agreement, as to plaintiff's state of health during the course of the trial, contained amongst the expert notices was a medico legal report upon plaintiff's health by a Dr L. M. Kernoff, who was not called to give evidence. Dr Kernoff is apparently a specialist physician, although no curriculum vitae accompanied the report. According to the report plaintiff enjoys good health as at the date thereof, namely 11 September 2007

and long after the actuaries prepared their report during December

2006. Another uncertainty is that, against the odds, plaintiff

may form another emotional relationship and enter into a marriage with another partner, thereby negating the assumption, apparently

based purely on plaintiff's age, that she will not remarry. In either event, if a lump sum payment had been awarded, the estate of the deceased and his heirs would have been prejudiced, potentially seriously, by such award.

35. Conversely, a claimant may outlive the life expectancy prediction so that once the expected date of mortality has passed and theoretically all of his/her capital expended, the claimant who accepted the lump sum award is left destitute, a result which the provisions of the Maintenance of Surviving Spouses Act were specifically designed to avoid. The same adverse result may follow an unexpected and unforeseen subsequent increase in inflation, or the cost of living, rendering the actuarial calculation of the lump sum award both inaccurate and inadequate.
36. Of course, an order for the periodical payment of maintenance to a surviving spouse over a long or, in practise, an indefinite period, would cause difficulties in the finalisation and administration of a deceased estate. Not only does such an obligation bring about delay, but the executors would be uncertain how much of the assets of the estate to retain in order to discharge the future uncertain quantum of the maintenance to be claimed from the estate. In that sense Ms Julyan may have been correct when she submitted that a lump sum award represents a more practical solution. However, the legislature was not blind to this difficulty and enacted section 2(d) of the Maintenance of Surviving Spouses Act, which provides an executor with room for negotiation and agreement between all interested parties. Subject to agreement being reached, many of the difficulties which would otherwise result, may be alleviated.
37. However, in all the circumstances and even if I had a discretion in the matter, I remain unpersuaded that the present matter calls for the award, by the court, of maintenance by way of a lump sum. Plaintiff's claim for maintenance, as formulated, therefore cannot succeed. However, maintenance, but in the form of periodical payments, is justified.
38. Before considering the vexing problem of quantifying the periodical maintenance payments to which plaintiff may be entitled, it is relevant to consider the remaining claim for payment of the alleged donation based upon the written document forming annexure "A" to the particulars of plaintiff's claim dated 26 June 2006. This document, a formal letter by the deceased addressed to plaintiff on 7 April 1992, offers to donate the capital sum of R50 000-00 to plaintiff, the donation to become effective upon the date of the death of the deceased. The source of the capital is a debt which the deceased expected one of his debtors to settle shortly after the date of the document, which is signed by the deceased, as well as by plaintiff declaring that she accepted the terms thereof.
39. In pleading to this cause of action, defendants averred in paragraphs 16(iii) and (iv) of their plea dated 6 October 2006 that -

“3(iii) During his lifetime and approximately 1 year after the 7th April 1992, the deceased paid the capital proceeds of the sale of his interest in Taxi Liquor CC into an investment insurance policy issued by Liberty Life Insurance owned by the Plaintiff;

(iv) The Plaintiff accordingly received the benefit alternatively the subject matter of the alleged donation during the lifetime of the deceased;”

40. In evidence it was established that a single premium policy for R50 000-00 was issued by Liberty Life in the name of the plaintiff to commence on 1 August 1993. Plaintiff’s evidence in regard thereto was that she had taken out this policy at a time when she was still working and doing well. According to her she financed the policy from her own resources and this policy had nothing to do with the undertaking by the deceased, as evidenced by annexure “A” to the plaintiff’s particulars of claim. First defendant, in giving evidence, stated that he assumed that this policy was in fact the donation contemplated in annexure “A”, namely the letter of 7 April 1992, because of the coincidence. Mr Shepstone submitted on behalf of the defendants that, in these circumstances, plaintiff has not discharged the onus resting upon her of showing that the promised donation was still outstanding. Accordingly, so the argument ran, defendants should be absolved from the instance on this claim, with costs.
41. I do not agree. It is apparent that defendants were constrained in the circumstances to admit the deceased’s obligation to make the donation to plaintiff. They then effectively pleaded over, claiming that the deceased had duly performed, by 1 August 1993, the obligation to donate, as assumed by him in annexure “A” on 7 April 1992. Plaintiff gave direct evidence that she purchased the Liberty Life policy with her own funds. It is so that she produced no material corroborative evidence, either documentary or by way of viva voce evidence from some other witness, but the only countervailing evidence is that of first defendant. The high water mark of

first defendant’s evidence is that he suspected that the deceased may have fulfilled his promise, but that he had no personal

knowledge to this effect. His suspicion was based solely upon the alleged coincidence that plaintiff would have taken out a policy with Liberty Life some 16 months after plaintiff made his promise and for the identical amount of R50 000-00. In my view the onus of proof of the performance of his obligations by the deceased rests upon the defendants. Where a defendant, in such circumstances, fails to discharge the burden of proof on a preponderance of probabilities, absolution is not a competent verdict. The proper order is one of judgment for the plaintiff.

42. In my view it would be unfair to non-suit plaintiff entirely because she only sought maintenance by way of a lump sum and not, at least in the alternative, by way of periodical payments. As I have indicated, a lump sum payment is neither competent, nor called for. Monthly maintenance payments are, however, a different matter and should have been claimed by plaintiff at the outset. Summons was served upon first defendant on 28 June 2006 and upon second defendant on 6 July 2006. Appearance to defend was delivered for both defendants on 30 August 2006 and their plea delivered on 6 October 2006. By that date, at the

latest, defendants should notionally have recognised plaintiff's entitlement to maintenance and should have tendered such in principle, even if the quantum thereof was still in issue.

43. When the original actuarial report dated 5 December 2005 was prepared, it indicated the plaintiff's annual living expenses, as "estimated" by her, at R120 206-00. This amount was incorrect because of the alleged omission of certain recurring expenditures in the information originally supplied to the actuaries. As a result and by an amended calculation on 23 December 2005 the additional expenditures were listed and expressed as a monthly figure of an additional R2 821-00 per month, which translates to R33 852-00 per annum. Added to the earlier annual figure the plaintiff's claimed annual living expenses came to R154 058-00, or to R12 838-17 per month. In evidence the actuary Mr Hunter arrived at a revised calculation of the alleged lump sum figure and as a result, in paragraph 51 of plaintiff's heads of argument, Ms Julyan sought an amendment of the lump sum claim in prayer 1 of the particulars of plaintiff's claim from R695 804-00 to R1 270 400-00. The application to amend was opposed by Mr Shepstone for the defendants who submitted that the defendants would be prejudiced if the belated amendment was allowed because no proper foundation therefore was laid during the trial, defendants were not alerted during Mr Hunter's, or plaintiff's, evidence to the intention to amend, so that cross examination was not directed to test the accuracy of the allegedly revised figures which were, in any event, only reflected under heads of expenditure and defendants provided with insufficient detail.
44. In view of the conclusion to which I have come above that a lump sum payment is not permissible, the argument relevant to the amendment of the plaintiff's (lump sum) maintenance claim has become academic. However, for the calculation of monthly maintenance I am also disinclined to consider the revised figures, such as they are, allegedly replacing plaintiff's earlier monthly expenditures. For instance, the court was favoured during the trial with a schedule of plaintiff's claimed expenditures during the period June to August 2007. Again these figures reflect expenditures under heads of expenditure and the accuracy of the figures cannot be verified.
45. Where a claimant is entitled to "reasonable maintenance" it may not be inopportune to look to the criteria for fixing maintenance pendente lite pending a divorce hearing to follow in due course. This is so because there, as here, a conservative approach to the determination

of the quantum payable is generally called for, although for entirely different reasons. As a rule it is not usually justified to include in such maintenance extraordinary or luxurious expenditure, even in a case such as, for example *Glazer v Glazer*, 1959 (3) SA 928 (W), where the husband was described by Williamson, J. (as he then was), as "very wealthy" or "very rich". The quantum of maintenance payable should, in the final result, depend upon a reasonable interpretation of the facts before the court, as is also contemplated and intended by Rule 43 of the Consolidated Rules of Court. It is also, not infrequently, useful to take cognizance of the respective approaches made in the evidence by the plaintiff or applicant, as well as the defendant or respondent respectively. As was said by Hart, AJ in *Taute vs Taute* 1974 (2) SA 675 (E) at page 676 H-J, a claim supported by reasonable and moderate detail carries more weight than one which includes extravagant or

extortionate demands and similarly that more weight will be attached to the evidence of a party who evinces a willingness to implement his lawful obligations, than to the evidence of one who is obviously seeking to evade them.

46. The best information available of plaintiff's claimed, or estimated, annual living expenses during December 2005 came to R154 058-00 per annum, or to R12 838-17 per month, as indicated above. These were the figures upon which she based her claim for maintenance (although in the form of a lump sum payment) when summons was issued during June 2006. The nature of the evidence before the court does not lend itself to exact calculation of the actual costs, at the time, of maintaining plaintiff. Due to the elapse of time since December 2005 those figures were claimed to be outdated and resulted in the awkward attempt at amendment during the course of presenting plaintiff's argument after the conclusion of the trial. The periodical maintenance order to be made below, like other maintenance orders, will no doubt be sought to be amended from time to time to allow for the ravages of inflation, or changed circumstances. This is so despite the conservative approach to the determination of the quantum of maintenance payable, which I believe is required in the application of the Maintenance of Surviving Spouses Act 27 of 1990 and which distinguishes such maintenance orders from those made, for instance, in terms of section 7(2) of the Divorce Act 70 of 1979.

47. It is clear from the evidence that the standard of living enjoyed by plaintiff and the deceased during the latter part of their married life gradually deteriorated and became less lavish than the standard which prevailed during the initial years of marriage. It therefore becomes a matter of some difficulty to apply the "standard of living" consideration contemplated in section 3(c) of the Maintenance of Surviving Spouses Act 27 of 1990. My impression from

plaintiff's estimates of her living expenses is that she would like to be able to maintain, by way of the maintenance order against the estate of the deceased, that standard of living to which she aspired during the earlier part of her marriage to the deceased, whereas the reality of their later years together is probably much more frugal. There is also the fact that the more lavish the inroads made upon the limited assets of the estate of the deceased, the less likely it is that its capital will endure for the remainder of the life of the plaintiff, particularly if she were to outlive the life expectancy table for her category.

48. In the circumstances and in the light of the considerations which form the subject for discussion above, I am constrained to arrive by way of a reasonable interpretation of the facts before the court, at an estimate of the quantum of monthly maintenance to be payable to plaintiff. In so doing I take account of the fact that the figures upon which the estimation is based date back to December 2005, but I also make allowance for the fact that those figures, at the time, represented an inflated claim well exceeding the "reasonable maintenance needs" of the plaintiff contemplated by section 2(1) and section 3 of the Maintenance of Surviving Spouses Act 27 of 1990. Accepting the claim as at December 2005 of R12 838-17 per month at face value, I consider that 75% thereof, or R9 628-63 per month, would meet the demands of the situation.

49. Given the fact, as already indicated, that plaintiff's claim for a lump sum payment was misconceived and that the monthly maintenance award is made in her favour despite her failure to claim this in the alternative, I consider that the effective date for the commencement of the maintenance order should coincide with the date upon which defendants delivered their plea without making tender, namely 6 October 2006.
50. Which brings me to consideration of a suitable costs order in the unusual circumstances and outcome of this case. Arguably plaintiff has been successful, in that she succeeded in obtaining a maintenance order, as well as an order for the payment of the donation claimed in prayer 2 of the particulars of plaintiff's claim. Given the fact that a claim for maintenance, based upon the provisions of the Maintenance of Surviving Spouses Act 27 of 1990, is novel and that there is little if any direct authority to have guided defendants, plaintiff's claim for a punitive attorney and client costs order is unjustified. The claim for the costs of the actuary, employed by plaintiff at the outset in the misconceived belief that a lump sum order was called for, is likewise unjustified. I have considered whether a suitable order should not be to make no order as to costs. However, upon reflection I have come to the conclusion that plaintiff was nevertheless sufficiently successful not to be deprived of her costs.
51. In result I make the following order:-
- a. Defendants, in their capacities as executors in the estate of the late Lionel Maurice Feldman, who died on 3 May 2005 ("the estate"), are hereby;
 - i. authorized and directed to;
 - (1) recognise Plaintiff's claim against the estate in terms of section 2(1), read with section 3 of the Maintenance of Surviving Spouses Act 27 of 1990, for payment of her reasonable maintenance needs until her death or remarriage and in so far as she is unable to provide therefor from her own means and earnings; and
 - (2) directed to pay such maintenance to plaintiff in the sum of R9 628-63 per month, with effect from 6 October 2006 and monthly thereafter on or before the 6th day of each succeeding month, until plaintiff's death or remarriage, or until otherwise varied, suspended, or discharged according to law;
 - ii. directed to pay to plaintiff;
 - (1) the sum of R50 000-00;
 - (2) interest thereon at the rate of 15,5% per annum with effect from 6 July 2006 to date of payment, both dates inclusive;
 - iii. directed to pay plaintiff's costs of suit.

JUDGMENT

RESERVED: 6TH DECEMBER 2007

JUDGMENT

HANDED DOWN: 14TH APRIL 2009-04-08

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Prepared on 12 October 2026 · Esheria