THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No 401/09

In the matter between:

STANLEY OSHRY N O

First Appellant

BEVERLEY JUNE OSHRY N O **Second**

Appellant

and
MARJORIE PEARL FELDMAN

Respondent

Neutral citation: *Oshry v Feldman* (401/09) [2010] ZASCA 95 (19 August 2010)

Coram: Navsa, Mhlantla, Bosielo JJA and Saldulker AJA

Heard: 7 May 2010
Delivered: 19 August 2010
Summary: Claim by surviving spouse in terms of the Maintenance of Surviving Spouses Act 27 of 1990. Primary obligation of support rests on a spouse, and if deceased, on the estate of the latter - provided that the jurisdictional requirements are met. Lump sum award competent in terms of the Act.

ORDER

On appeal from: KwaZulu-Natal High Court (Durban) (Van Zyl J sitting as court of first instance)

The following order is made:

1. The appeal is upheld to the limited extent reflected in the substituted order set out hereafter.
2. The order of the court below is set aside and substituted as follows:

'1 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;

(a) authorised and directed to:

(i) 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;

(ii) pay to her a lump sum equal to the net value of the estate after payment of the claims of other creditors, funeral expenses, administration costs and executors' fees.

(b) directed to pay the plaintiff :

(i) the sum of R50 000-00;

(ii) 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 such costs to include the qualifying fees of the actuary Mr I G Hunter and Dr L M Kernhoff.'

3. The cross-appeal is upheld to the extent reflected in the substituted order set out above.

4. In respect of the appeal the first and second appellants are directed jointly and severally to pay the respondent's costs of appeal *de bonis propriis* on an attorney and client scale, including the costs of two counsel.

5. In respect of the cross-appeal the respondents therein are ordered jointly and severally to pay the cross-appellant's costs *de bonis propriis*, on an attorney and client scale, including the costs of two counsel.

JUDGMENT

NAVSA JA and SALDULKER AJA (MHLANTLA and BOSIELO JJA concurring)

[1] This case demonstrates just how costly litigation can be, particularly if a common sense approach is abandoned and where the issues are not clearly defined at the outset. We have before us an appeal by the two executors of a deceased's estate against a judgment of the Durban High Court (Van Zyl J),[1] in terms of which they were ordered to 'recognise' a widow's claim for maintenance in terms of the Maintenance of Surviving Spouses Act 27 of 1990 (the Act) and to pay to her maintenance in the sum of R9628.63 per month with effect from 6 October 2006, until her death or remarriage, or until otherwise varied, suspended or discharged according to law. The executors were also ordered to pay the widow an amount of R50 000, which she alleged had been a donation by the deceased to her during his lifetime, which had not been paid prior to his death. The executors were ordered to pay her costs.

[2] Careful scrutiny of the notice of appeal and the heads of argument initially filed by the appellants reveals that the primary basis of the appeal was that since the widow had been maintained by her two sons from a prior marriage, from the time of the death of her husband, and were likely to continue to do so, she had not established a need for maintenance. The appellants also contended that the evidence established that the donation claimed by the widow had been paid to her by her husband during his lifetime. The widow is the respondent. There is also a

[1] Reported as *Feldman v Oshry & another NNO* 2009 (6) SA 454 (KZD).

cross-appeal by her. She is aggrieved that the high court had held that maintenance in a lump sum was not competent in terms of the Act. She had initially claimed maintenance in a lump sum of R695 804.00. The respondent is aggrieved that the high court had rejected an application by her to amend her particulars of claim to increase her quantum. She sought an order that the increased lump sum be paid to her from 9 January 2006 (the date on which the respondent noted her claim) rather than from 6 October 2006 (the date of delivery of the appellants' plea), which was the date from which the high court ordered that maintenance be paid. Furthermore, she sought to have the costs order of the high court substituted with an order that the executors be ordered to pay her costs of trial on an attorney and client scale and that they be ordered to pay the costs of appeal on an attorney and client scale *de bonis propriis*. The appeal and cross-appeal are before us with the leave of the court below.

[3] The background facts were neatly set out by the trial court. In our description of the history of the matter, leading up to the litigation in the high court, we have borrowed substantially from the exposition by Van Zyl J.

[4] On 27 January 1987, Ms Marjorie Pearl Klaff, the respondent, and Mr Lionel Maurice Feldman, in the autumn of their lives, married each other at Durban. She was 60 years old and he was 70. The marriage was out of community of property. They each had two children from a previous marriage. Their marriage lasted 18 years, until the death of Mr Feldman, who died testate on 3 May 2005. We shall for convenience refer to Mr Feldman as the deceased.

[5] The marriage of the respondent and the deceased was the second for each of them. The respondent had two adult sons from her first marriage, both of whom live permanently in the United States of America. The deceased had a son who settled in Australia and a daughter, Beverley (the second appellant). Beverley and her husband, Stanley Oshry (the first appellant), are the executors of the deceased's

estate.

[6] At the time of their marriage, the deceased had retired from his previous business activities and was living in a flat in Hyde Park, Berea, Durban. The respondent was employed as an estate agent, an occupation in which she continued until her retirement at the age of 75. A hallmark of her life is that she always asserted her independence.

[7] Shortly before her marriage to the deceased, the respondent had sold her town house, intending at the time, that the deceased would also sell the flat that he occupied at Hyde Park and that they would then as a couple jointly purchase a residential property, where they would live after their marriage. The deceased declined to do so. In the result they lived in his Hyde Park flat for the duration of their marriage.

[8] With the proceeds of the sale of her town house the respondent purchased a flat in Rucon Glen which she then let. Later, on the advice of her son, Anthony Klaff, she sold the flat. Anthony acted as her financial advisor. After she stopped working she transferred the proceeds of the sale to him for investment on her behalf in America. During the second half of 2004 the respondent repatriated what remained of her funds in America. The investment unfortunately was not insulated from the economic downturn in America. Using what remained of her moneys, supplemented by her sons, she purchased a residential unit at Eden Crescent, a retirement village, which she then let.

[9] The reason for purchasing the unit at Eden Crescent was that the deceased had informed her that in the event of his death the Hyde Park flat would devolve upon his children. The deceased had told her that upon his death she would become her sons' responsibility. She was concerned about what would become of her. Her insecurity led to her purchasing the unit.

[10] According to the respondent's unchallenged evidence she shared expenses with the deceased from the outset and they used her motor vehicle for transport. Before their financial situation deteriorated, they travelled overseas, entertained frequently and appear to have had a fairly happy marriage. After she stopped working the respondent relied mainly on the deceased for her support.

[11] The financial position of the couple gradually deteriorated after the respondent had stopped working. The deceased told the respondent that his financial position was precarious and he asked her to turn to her sons for assistance and to seek the repatriation of her funds. This request was made before the acquisition of the unit at Eden Crescent.

[12] The deceased envisaged that the respondent's sons should start contributing to her maintenance. He also appears to have held the view that, upon his death, the respondent's sons should take over the responsibility of maintaining her. The respondent's sons have indeed been dutiful. They made financial contributions to their mother during her marriage. After the deceased's death they continued making contributions to her. In the eighteen months preceding the trial, the respondent's sons had provided her, on average, with an amount of R18 468 per month.

[13] Sadly, the deceased, when he executed his will on 21 November 2002, made wholly inadequate provision for the respondent. He bequeathed the sum of R150 000 to her and recorded his 'desire' that she be allowed to remain in the Hyde Park flat until her death or remarriage, or until his children decided to sell it. The Hyde Park flat had in fact been bequeathed to his children in terms of his first wife's will, so did not form part of the deceased's estate. The balance of his estate was left to his children.

[14] After the deceased's death, antagonism quickly developed. The respondent voiced her concern about her future security and according to her, Stanley Oshry, the first appellant, told her that she could, if all else failed, move to Beth Shalom, a

retirement home, which, although it had residents who paid their own way, also provided for indigent aged, funded by a Jewish welfare organisation.

[15] The respondent remained in the Hyde Park flat for a short period, whilst she made arrangements to move. During March 2006 she moved to Eden Crescent.

[16] Anxious about her situation, the respondent, shortly after the deceased's death, gave early indications that she would be claiming maintenance from the estate. This, in turn, caused resentment on the part of the deceased's family who considered that not enough respect was shown for the traditional Jewish period of mourning. After some correspondence between the parties the respondent resorted to an action in the Durban High Court for maintenance and for payment of the amount of R50 000.

[17] The appellants contended that after the death of the deceased, the obligation to maintain the respondent fell to her sons, who had been her main source of financial support after the death of the deceased. As stated earlier they contended that the respondent had not shown a need for maintenance and that the estate was thus excused from maintaining her.

[18] We consider it convenient first to address the appellant's R 50 000 claim against the estate and the conclusion of the court below that it was payable. During his lifetime the deceased had held a share in Taxi Liquor CC. After his share in the close corporation was sold for R50 000, the deceased undertook in writing on 7 April 1992 to invest that amount in a Liberty Life policy for the benefit of the respondent, payable to her upon his death. The respondent asserted that she had accepted the donation. She testified that the deceased had not discharged that obligation during his lifetime. It was contended on her behalf that the deceased's estate was consequently liable to her in that amount.

[19] It was the appellants' case that a single premium policy of R 50 000 issued by

Liberty Life in 1993, of which the respondent was the owner, was the policy that the deceased had intended to purchase from Liberty Life. It was submitted that he had thereby discharged his obligation in terms of the written undertaking. The record reveals that the appellants' case in this regard was based on speculation with no evidence adduced in support thereof. It is clear from the first appellant's evidence that he entertained a mere suspicion that the deceased had made good the donation but had no substantiating proof.

[20] The respondent, on the other hand, testified convincingly in regard to the policy referred to in the preceding paragraph. She testified that she had purchased it with her own funds whilst still in employment and that the deceased had played no part in its acquisition. The appellants, having pleaded that the debt had been discharged failed to discharge the burden of proof resting on them.[2] It follows that

[2] In *Pillay v Krishna & another* 1946 AD 946, it was stated that when a defendant in his plea sets up a plea of payment of money (as the executors have done in this case), the onus is upon him, and if he fails to satisfy the court that there is a sufficiently strong balance of probabilities in his favour, judgment must be given for the plaintiff.

the conclusion of the court below in this regard is unassailable.

[21] We turn to deal with the remaining issues in the appeal and cross-appeal. The primary question for consideration is whether the deceased's estate in the circumstances set out above owed a duty of support to the respondent. Put differently, the question is whether she established a claim for maintenance in terms of the Act.

[22] It is trite that one of the invariable consequences of marriage is a reciprocal duty of support between spouses. That is a primary duty owed by one spouse to another. Of course, where the party seeking support is indigent and his or her spouse is unable through lack of means to meet that obligation such spouse may look to a child with means for support. In *Oosthuizen v Stanley*[3] the following was stated:

'The liability of children to support their parents, if these are indigent (*inopes*), is beyond question; See Voet 26.3.8 . . . .
Whether a parent is in such a state of comparative indigency or destitution that a court of law can compel a child to supplement the parent's income is a question of fact depending on the circumstances of each case.'

[23] In *Manuel v African Guarantee and Indemnity Co Ltd & another*[4] it was said that where a husband has the means to support his wife, the wife cannot compel a child of the parties to support her unless she satisfies the court that she has taken all reasonable steps to enforce her rights against her husband.

[24] At common law a surviving spouse had no claim for maintenance against the estate of his or her deceased spouse. In *Glazer v Glazer NO*[5] the applicant instituted an action for maintenance against the respondent, the executor in the estate of her late husband. The claim was made on the grounds that she was indigent. The respondent excepted to the declaration on the ground that it was bad in law, for

[3] 1938 AD 322 at 327-328.
[4] 1967 (2) SA 417 (R) at 419H.
[5] 1963 (4) SA 694 (A).

failure to disclose a cause of action. The exception was upheld. The applicant applied for condonation for the late noting of an appeal against that decision. In refusing condonation, Steyn CJ, after discussing the common law position in some detail, held that her prospects of success on the merits, if there was any at all, was so slender that condonation would not be justified.

[25] In *Hodges v Coubrough NO*,[6] Didcott J stated as follows:

'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.'

[26] The Maintenance of Surviving Spouses Act 27 of 1990 altered the common law. The preamble sets out the purpose of the Act thus:

'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.' (Our emphasis.)

Section 2(1) of the Act provides:

'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 <u>own means and earnings</u>. (Our emphasis.)

(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.

[6] 1991 (3) SA 58 (D) at 62J-63A.

(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.'

[27] As can be seen, in the event of a marriage being 'dissolved by death' the primary obligation by a spouse has now been transferred to his deceased estate, in the event that it has the means to meet that obligation and provided that the surviving spouse is unable to have her maintenance needs met from 'own means and earnings'.[7] Section 2(3)(b) deals with the order of preference of a maintenance claim in relation to other claims.[8] This is an aspect to which we shall revert later in this judgment. Section 2(3)(d) provides for rapprochement between the survivor of a deceased estate and the heirs and legatees of that estate. That subsection enables an executor to enter into an agreement with these interested parties. An executor, in doing so, will of course have regard to the rights and interest of all these parties. In terms of this subsection the executor has fairly extensive powers, albeit that in executing those powers consensus has to be achieved.

[28] Section 3 of the Act sets out factors that a court should take into account in determining a surviving spouse's reasonable maintenance needs. It reads as follows:

'3. Determination of reasonable maintenance needs
In the determination of the reasonable maintenance needs of the survivor, the following factors shall

[7] The Constitutional Court in *Volks NO v Robinson* 2005 (5) BCLR 446 (CC) paras 55-56 said that the maintenance benefit in s 2(1) of the Act falls within the scope of the maintenance support obligation attached to marriage.

[8] Section 2(3)(b) of the Act places a surviving spouse's claim on par with a claim by a dependent child. A minor's claim for maintenance cannot compete with the claims of the deceased's creditors but it must be satisfied before any payment of legacies and inheritances is made. In this regard see D Meyerowitz *The Law and Practice of Administration of Estates and Estate Duty* (2007) para 21-24 and *In re Estate Visser* 1948 (3) SA 1129 (C). See also Corbett, Hofmeyr and Kahn *The Law of Succession in South Africa* 2 ed (2001) p 46.

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 subsistence 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.'

[29] Having regard to these and *any other factor* a court then arrives at a decision concerning the surviving spouse's reasonable maintenance needs. It has always been accepted that in determining an award of maintenance a court always considers the needs of the claimant and the means of the party bearing the maintenance obligation.

[30] Section 3(a) requires a court, in determining the reasonable maintenance needs of a surviving spouse, to have regard, right at the outset, to the amount in the estate available for distribution to heirs and legatees. This provision in the main relates to the estate's ability to meet a maintenance claim. The factors set out in section 3(b) and (c) relate to the surviving spouse's needs and ability to maintain herself.

[31] The asserted total value of the estate as per the inventory dated 6 June 2005 is R1 313 367. However, of that amount, R819 471 is the value of insurance policies the beneficiaries of which are the deceased's son and daughter. If the latter amount is deducted then the estate is left with the residual amount of R493 896. We were subsequently provided by the appellants with a schedule, dated 8 June 2010, showing the value of the insurance policies at that date in an amount of R847 355.95. The value of the assets in the estate is reflected as being R528 057.19. Of course, the R150 000 bequest to the respondent, referred to earlier, was paid to her and falls to be deducted from the asset value. If the schedule recently provided is taken at face value, a further amount of R43 028.77 has been expended in respect of funeral costs, 'creditors and winding up the estate but excluding executors' fees'. According to this schedule the costs of the high court trial, which it will be recalled the estate is liable for, amount to R 121 906.82. We will return to the value of the

policies and deal with the question whether they should be included in the estate for distribution, later in this judgment.

[32] In answering the primary question whether the respondent established an entitlement to maintenance in terms of the provisions of the Act, it is necessary to return to a consideration of s 2(1), which makes a claim by a survivor subject to her not being able to provide for her own reasonable maintenance needs from her 'own means and earnings'. We take into account that a court, in determining the survivor's reasonable maintenance needs, is required, in terms of s 3(b) of the Act, to consider the survivor's existing and expected means, earning capacity, financial needs and obligations and the subsistence of the marriage. Furthermore, in terms of s 3(c) the respondent's standard of living during the subsistence of the marriage and her age at the time of the death of the deceased are to be considered.

[33] It is necessary to deal with the expression 'own means'. It is defined as follows in s 1 of the Act:

'includes any money or property or other financial benefit accruing to the survivor in terms of the matrimonial property or the law of succession or otherwise at the death of the deceased spouse.' (Our emphasis.)

[34] The respondent has a relatively modest income, derived from a monthly return on investments. First, she receives an amount of approximately R1 200 from a Liberty Life annuity. Second, she invested what remained of a R150 000 bequest in terms of the deceased's will, namely, R100 000, in a money market account with a market related interest rate. It is clear from the first actuarial report, dated 6 December 2005, that a discount rate of 6.5 per cent per annum was 'obtained with reference to the expected return of [the respondent's] current assets, net of fees and charges'. The return on these investments would undoubtedly be part of her 'own means' as defined in the Act. It is quite clear that these two sources of income per month on their own are wholly inadequate to meet the respondent's maintenance needs.

[35] The argument advanced on behalf of the executors that the words ‘existing and expected means’, employed in s 3(b), extends the meaning to include acts of generosity such as that shown by the respondent’s sons, is entirely without substance. It was submitted that in this subsection the omission of the word ‘own’ meant that contributions from other sources ought to be taken into account. In our view, this is a fallacious argument. Contextually, ‘the existing and expected means’ must be those of the surviving spouse. The legislature did not intend to draw a distinction between ‘existing and expected means’ and ‘own means’. During his lifetime the deceased could not, if he had the means to support the respondent, have insisted that she look to her children or any other source for maintenance. Furthermore, the relevant provisions of the Act should be construed in accordance with constitutional norms and values. The dignity, particularly of the vulnerable, is a prized asset. The Act was intended to ensure, in the event that the stipulated jurisdictional requirements were met, that the primary obligation of a spouse who owed a duty of support continued after the death of that spouse. In effect, the executors of the deceased’s estate step into his shoes. To construe these provisions so as to make surviving spouses dependent on the largesse of others, including their children, defeats the purpose of the Act.

[36] Before us, apart from the contention that her sons’ acts of financial generosity fell within the ambit of ‘expected means’ as contemplated in s 3(b) of the Act, it could not be disputed that the respondent was in need of maintenance. There was some dispute about whether the court below had considered the respondent’s income from her investments and whether her maintenance needs as asserted were reasonable.

[37] The appellants contended that the court below did not have regard to the respondent’s monthly income of approximately R1 200 from her Liberty Life annuity nor of a return on an amount of R100 000 she had invested in the money market account. It is clear from what is set out above that Van Zyl J in the court below took into account the first actuarial report dated 6 December 2005 and the revised

actuarial report compiled later that month. The Liberty Life income is reflected in the first report. The respondent testified that the R100 000, which constituted the remainder of the bequest had been invested in a money market account. As stated above the actuary in the first report set out the net return on all the respondent's investments, which the court below considered in determining the award of maintenance.

[38] The respondent had sought a lump sum payment, which the court below, with reference to the decision of this court in *Zwiegelaar v Zwiegelaar* 2001 (1) SA 1208 (SCA), had held was not competent. Van Zyl J stated that even if he was wrong in that conclusion policy considerations militated against the grant of a lump sum payment. He considered that a single lump sum payment would expose the estate to risk. The learned judge was of the view that the accuracy of the assumptions made in calculating a lump sum could not be assured. The claimant for maintenance, he reasoned, could die earlier than expected or predicted by life expectancy tables. The respondent could, even at her advanced age remarry and the estate would thereby be prejudiced by the prior grant of maintenance in a lump sum. Conversely, the court below stated, a surviving spouse might outlive her life expectancy, leaving a claimant who accepted a lump sum award destitute. Van Zyl J rightly stated that an order for the periodical payment of maintenance over a long or indefinite period would cause difficulties in the administration and finalisation of a deceased estate. This would cause delay and uncertainty concerning how much of the assets of the estate had to be retained to discharge future maintenance obligations. The court below reasoned that it was for this reason that the legislature enacted s 2(3)(d) of the Act which provided for a negotiated settlement. The court below remained unpersuaded that a lump sump award was called for. At para 29 of the judgement of the court below the following is stated:

'The total value of the estate as per the inventory is R 1 313 367-00. 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'.'

[39] In deciding the periodical amount to be awarded to the respondent Van Zyl J

considered that towards the end of their marriage the deceased and the respondent's financial position had deteriorated. In coming to a conclusion on an appropriate award the learned judge stated the following at para 47:

'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.'

[40] It is clear from the judgment of the court below that it considered the proceeds of the insurance policies referred to above to form part of the assets of the deceased's estate. Even though there had been an exchange of correspondence between the parties on the issue before the trial, it is equally clear from the record, the judgment of the court below, the notice of appeal and the initial heads of argument on behalf of the appellant that the question whether the policies were rightly included in the inventory was not an issue during the trial or initially during the appeal process. It was raised for the first time during argument before us by counsel on behalf of the appellants. However, after submissions on behalf of the respondent and on the assumption that the respondent's maintenance claim rendered the deceased's estate insolvent, he appeared to accept that the proceeds of the policies were payable into the deceased's estate.

[41] Subsequent to the hearing of the appeal we requested the parties to submit further written argument on the question whether the insurance policies rightly constituted part of the total assets of the deceased's estate. The request was complied with. We proceed to deal first with that question, the answer to which is critical to a proper determination of the matter.

[42] In *Pieterse v Shrosbree NO & others* 2005 (1) SA 309 (SCA) this court considered whether the trustee of an insolvent estate was entitled, in preference to nominated beneficiaries, to the proceeds of certain insurance policies, for distribution to creditors. It had been submitted that s 63 of the Long Term Insurance Act 52 of 1998 entitled the trustee to the proceeds. Ponnan JA dealt in some detail with the nature and effect of insurance policies which were payable upon the death of an

insured. At para 8 the following appears:

‘A proposer may effect the insurance either in his/her own favour or in favour of someone else. If the proposer effects the insurance in favour of someone else, the contract of insurance is a contract for the benefit of a third party and may be accepted by such third party who thereupon becomes the owner. Policies commonly entitle the owner to nominate a beneficiary on condition that the nomination will confer no rights on the nominated beneficiary during the owner’s lifetime. The legal nature of such a nomination is a *stipulatio alteri* (a contract for the benefit of a third person).'

[43] At para 9 of *Shrosbree,* this court stated that what is required is an intention, that upon acceptance of that offer by the beneficiary, a contract will be established between the beneficiary and the insurer. Upon acceptance the beneficiary would obtain rights enforceable against the insurer. At para 10 the following appears:

‘On the death of the insured, provided that the nomination has not been revoked during the insured’s lifetime, any claim to the policy proceeds by the beneficiary against the insurance company would be based on the contract of insurance between the deceased and the insurance company. It is to the insurance company and no one else that the beneficiary would have to look for payment. Section 63 does not regulate the payment of the proceeds of the policy, because the beneficiary appointment, until revoked, has the effect that payment of the proceeds will be made to the beneficiary and not the estate of the deceased.’

[44] In para 12 Ponnan JA stated the following:

‘In the ordinary course, the proceeds of an insurance policy will go directly to a nominated beneficiary. Absent s 63, on the death of the policy holder, the trustee of such person’s insolvent estate would not have any claim to those policy proceeds. Nothing to the contrary is provided in s 63. Section 63 does not purport to divert the proceeds of an insurance policy from a nominated beneficiary to the insolvent estate of a deceased policy holder. Nor, for that matter does such a trustee, by virtue of s 63, become a creditor of the nominated beneficiary.’

[45] The provisions of the Act examined above make it clear that the means of the estate to provide maintenance is a primary consideration. Counsel for the

respondent now rightly concede that in determining the respondent's maintenance claim the amount available for distribution, from which the proceeds of the policies fall to be excluded, is the upper limit that can be recognised in her favour and that the insolvency of the deceased's estate does not arise. As is clear from what is set out above, the extent of the means of the deceased's estate has to be decided without reference to the proceeds of the insurance policies in respect of which there are nominated beneficiaries. See also in this regard what is stated by Meyerowitz *op cit* para15.35:

'Although the nomination of a beneficiary under a policy may be revocable by the deceased, if it has not been revoked, the proceeds are payable directly to the beneficiary and do not form part of the estate to be administered by the executor (other than having to be taken into account for estate duty purposes).'

[46] Constrained to accept the conclusion set out at the end of the preceding paragraph counsel on behalf of the respondent submitted that the beneficiaries must accept the benefit of a policy in order to acquire the right to payment and that in the present case there is no evidence that the beneficiaries accepted the benefit. It was submitted that the indications are that the deceased's children did not accept the benefit, especially if regard be had to the inventory. It was submitted that unless the beneficiaries accepted the benefits the proceeds of the policies remain an asset in the estate and consequently were available for distribution to creditors, including the respondent.

[47] These submissions on behalf of the respondent are without substance. The benefit was not revoked during the deceased's lifetime. An executor is obliged to deal with an estate according to legal prescripts. A liquidation and distribution account has, in any event, not been finalised. The beneficiaries of the policies have to be afforded the opportunity of accepting the benefits intended for them. Given that they are the children of the deceased who have opposed the respondent's claim for maintenance in any amount at all the probabilities are overwhelming that now, being aware of the correct legal position, they will undoubtedly accept the benefits to which

they are entitled. The correspondence between the parties preceding the trial makes this clear. Certainly, as accepted on behalf of the respondent, at least, in respect of two Liberty Life insurance policies, the deceased's two children sought payment of the proceeds. Thus they were intent on accepting the benefits due to them.

[48] Critically, the deceased's children contended that they are entitled to all the assets of the estate (after claims by other creditors) including the policy proceeds, to the respondent's exclusion. It is that contention that the executors seek to enforce. The submissions on behalf of the respondent, understandably, are a desperate attempt to avoid the consequences that follow on the exclusion of the policies from the deceased's estate. Respondent's legal representatives ought to have appreciated at an earlier stage the full implications of the inevitable failure on this issue.

[49] If it had been specifically brought to the attention of the court below, or if it had *mero motu* appreciated what is set out in the preceding paragraphs, it would necessarily have come to the conclusion that the amount available for an award of maintenance to the respondent was limited. Assuming it to be competent, a lump sum award, might in the circumstances be the most appropriate. The court below held that such an award was not competent.

[50] In our view, for the reasons set out above and those that follow, it is necessary to consider the issue raised by the respondent in her cross-appeal, namely, whether a lump sum payment is competent and secondly whether it is appropriate in the present circumstances.

[51] We turn to deal with the first question. On behalf of the executors it was conceded for the first time in argument before us that a lump sum maintenance payment is competent in terms of the Act. Earlier cases, seemingly to the contrary, were decided either when the definition of maintenance in the Maintenance Act 26 of 1963 (the 1963 Act) prevailed, before that Act was repealed, or they failed to take

into account that the definition was no longer in operation.[9] The court below relied on those cases when it held that a lump sum award was not competent.[10]

[52] The Maintenance Act 23 of 1963 (the 1963 Act) was repealed and replaced with the Maintenance Act 99 of 1998 (the 1998 Act). Under the 1963 Act the prevailing view was that a lump sum could not constitute a maintenance payment, because that Act defined a maintenance order as 'any order for the periodical payment of sums of money towards the maintenance of any person made by any court'.

[53] The 1998 Act came into operation in November 1999 and defines a maintenance order as 'any order for the payment, including the periodical payment, of sums of money towards the maintenance of any person issued by any court in the Republic. . . .'

[54] Although there is no particular reference to lump sum payments in the definition of a 'maintenance order' in the 1998 Act, its other provisions do not expressly exclude the payment of maintenance by way of a lump sum.

[55] The court below noted 'policy considerations' militating against a conclusion that maintenance in a lump sum could be awarded in terms of the Act. The concerns

[9] In *Zwiegelaar v Zwiegelaar* 2001 (1) SA 1208 (SCA) paras 6-10, the court (Chetty AJA) referred to the Maintenance Act 23 of 1963 for the definition of a maintenance order (which excluded lump sum payments). However, in 1999, a new definition of maintenance order (which did not exclude lump sum payments) had come into effect with the Maintenance Act 99 of 1998. The court below referred to the old definition and appears to have been persuaded by the reasoning in *Zwiegelaar*, see para 32-33 of the judgment;Joubert (ed) *The Law of South Africa* (reissue) vol 16 para 191; Boberg *Law of Persons and the Family* 2 ed (1999) p 286 fin 34; See also, Schäfer *Family Law Service* C36; *Bannatyne v Bannatyne* 2003 (2) SA 359 (SCA).

[10] The court below held that the maintenance envisaged by the 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)'.The court reasoned that the respondent was entitled to periodical payments relative to the actuary's initial computation as at December 2005 but made allowance for the fact that these figures at the time represented an inflated claim well exceeding the 'reasonable maintenance needs' of the respondent as contemplated in s 2(1) and s 3 of the Act. The court below concluded that a periodical payment was justified on the basis that 'accepting the claim as at December 2005 of R12 838.17 per month at face value, I consider that 75% thereof, or R9628.63 per month, would meet the demands of the situation.'

expressed by the court below are set out in para 38 above. The difficulties with estimating an appropriate lump sum award by reference to certain assumptions that might later prove to be unfounded do not present insurmountable difficulties. In delictual claims, for example, damages in relation to loss of support are estimated with regard to the life expectancy of a claimant and on the basis of other assumptions. There too, total accuracy can never be assured. Courts do the best they can. This does not mean that a court assessing a claim for maintenance should not take these factors into account in the totality of the presented circumstances in deciding an appropriate award.

[56] In claims under the Act the rights of beneficiaries and legatees are implicated. Section 3(a) of the Act obliges a court to take into account the amount in the estate available to heirs and legatees. This, of course, has to be balanced against the factors that bear upon the claimant for maintenance as set out in s 3(b) and s 3(c) of the Act, referred to in para 28 above. These include the claimant's needs and financial means and obligations, the subsistence of the marriage and the couple's standard of living during the marriage. Importantly, section 3 states that these factors must be considered together with *any other factor* that should be taken into account. A court is thus obliged to consider the totality of the circumstances of a case to arrive at a just result.

[57] Additional extended administration burdens, including costs attendant upon the grant of a periodical payment that might also prove to be longer than initially envisaged is another issue for consideration.[11] In our view, for the reasons set out above the concession that a lump sum was competent under the Act was rightly made on behalf of the appellants. Accordingly, the court below erred in holding to the

[11] In the master's report to the court below he stated the following:
'6. In practice for practical reasons and in the interest of every one having an interest in a deceased estate a once-off payment in full and final settlement of the maintenance claim seems to be the way by which all the claims have been disposed off.
7. There seems to be no practice or policy suggesting the payment of instalments in satisfaction of a maintenance claim of a surviving spouse as this will not bring administration of the estate to finality thereby prejudicing creditors and the heirs of the estate.
8. I abide by the decision of the Honorable Court.'

contrary.

[58] The legislature in its wisdom introduced a provision in the Act for a negotiated settlement between affected parties. If common sense was to prevail such settlements would be the order of the day. Human experience has proved that when disputes arise and often in litigation, common sense, ironically, is a rare commodity. This is an aspect, in relation to this case, about which more will be said later.

[59] Having correctly made the concession that a lump sum maintenance award was competent, counsel on behalf of the appellants, nonetheless, contended that it was undesirable in the present circumstances, because of the advanced age of the respondent and because of the relatively modest estate. In the further written submissions it was contended that in the event that the policy proceeds were excluded and if the costs of litigation and the executors' fees were taken into account no amount at all should have been awarded. We disagree and in the paragraphs that follow we deal with this question and whether a lump sum payment was appropriate in the circumstances.

[60] By the time the judgment of the court below was delivered the respondent had not received a cent in maintenance for approximately four years. More than a year has passed since then. The respondent had been married to the deceased for close to two decades. She is now an octogenarian. During the subsistence of the marriage the respondent had made significant contributions to the common household and had not been extravagant in her maintenance claims. The deceased's children, by virtue of the policy proceeds, will be better off in respect of financial benefits flowing from the deceased's death. They also appear to be persons of means. Without the generous support of her sons the respondent will be in dire straits. The award of costs in her favour in the court below, against the executors in their official capacities, meant the net value of the estate was further diminished. This did not trouble the court below because of the view it took of the value of the estate.

[61] According to the appellants' recently provided schedule the residual value of the estate - after deducting the respondent's costs of trial, the administration costs and funeral expenses, other creditors' claims as well as deducting the bequest to the respondent and her portion of the shared assets is R204 827.60. Executors' fees to be determined by the Master have not been deducted from that amount.

[62] The court below rightly held that the respondent was in need of maintenance. Given the passage of time during which she was not in receipt of any maintenance and considering the limited value of the estate and the respondent's advanced age no useful purpose would be served by ordering periodical maintenance payments. Simple arithmetic dictates that if the arrears of the periodical amount ordered were brought up to date it would wipe out the entire asset value of the estate, were the policy benefits to be excluded. This would be so even if the bequest to the respondent was brought back into account.

[63] There is no reason why the court below could not have ordered maintenance in a lump sum, which would result after the deduction of all the items listed in para 61 above and executors' fees, after the bequest to the respondent was brought back into account. Such an award was clearly viable. Whilst the accuracy of the figures supplied by the appellants, in the recently provided schedule, might well be contested, it is clear that on their own version an order in the terms referred to earlier in this paragraph was viable at the conclusion of the trial in the court below.

[64] To sum up: The respondent established a right to maintenance in the court below, albeit not in the amount claimed or awarded. The court below erred in concluding that a lump sum award was not competent and ought to have granted a lump sum in the terms spelt out above. Given the limited funds available and the order envisaged no purpose will be served by making a further order in respect of interest on that sum.

COSTS

Mr I G Hunter, the actuary

[65] In the light of its conclusions that a lump sum payment was not competent, the court below disallowed the qualifying fees of the respondent's expert, the actuary Mr I G Hunter. Given the contrary conclusion reached on appeal that order obviously cannot stand.

Dr L M Kernhoff

[66] The respondent also sought the qualifying fees in respect of the medical doctor, Dr Kernhoff, who was due to testify in relation to her life expectancy. In her heads of argument, the respondent contended that the evidence of Dr Kernhoff became unnecessary only by reason of an agreement reached at the doors of the court on the first day of the trial, as appears from the opening address recording the mutual agreement, a copy of which was attached to her heads of argument. In our view, the qualifying fees of Dr Kernhoff should have been allowed as part of the costs order in favour of the respondent.

Costs of suit, of appeal and cross-appeal

[67] The respondent sought an order in terms of which the order of costs in her favour in the court below on the ordinary scale be set aside and substituted with a costs order on the attorney and client scale. It was never advanced on her behalf that the costs order in the court below ought to have been paid by the appellants in their personal capacities. It is the scale of costs that is contested. The respondent also sought an order that the appellants, in their personal capacities, should pay the costs of the appeal and of the cross-appeal on an attorney and client scale.

[68] The appellants adopted an intractable and obstructive attitude from inception

of the respondent's claim for maintenance. The second appellant is a beneficiary in the estate and she and her husband should have been alert not to be motivated by selfish personal interest but to act in the interests of the estate.[12] The antagonism between the parties has led to protracted litigation that could have been avoided had common sense prevailed. The executors could have attempted to reach an accord with the respondent, which would have avoided a waste of money and the depletion of the estate's not very substantial assets. They were unwilling to do so. As stated above the respondent proved an entitlement to maintenance in terms of the Act. It was submitted in the court below that she was entitled to a punitive costs order. Van Zyl J, having regard to the respondent's claim for a lump sum payment and the dearth of authority in relation to such a claim under the Act, and after describing the 'circumstances and outcome' of the case as unusual, considered that the appellants rightly sought to have the court's guidance on the issue. The learned judge consequently declined to order costs on a punitive scale. Whilst it is true that the appellants were being obstructive, that hardly justifies our interfering with the costs order in the court below. In any event, an increased costs order, for which the estate would be liable, would have the effect of further reducing the value of the respondent's maintenance entitlement. We are thus disinclined to interfere with the costs order in the court below.

[69] We turn to deal with the costs of the appeal and cross-appeal. The appellants' persistent obstructive attitude, beyond the decision of the court below, is a matter of grave concern. The appeal did not succeed on any of the bases set out in their notice of appeal. They conceded very late in the day that a lump sum payment was competent. The submission on their behalf, that in the circumstances of the present case a lump sum award was undesirable, has also been rejected. Furthermore the appeal in respect of the R50 000 claim was entirely without merit. The appellants

[12] In *Estate Orr v The Master* 1938 AD 336 342, the court stated that '[t]he proceedings have not been brought in the interests of the heirs or for the interpretation of difficult provisions in the will but merely in the interest of the executors personally. Having been unsuccessful in the court below, there seems to me to be no reason why the executors should be entitled to bring an appeal at the expense of the estate.' See also: *Adkins and Hunter v MG Crosbie and FW Crosbie*, and *MM Crosbie's Executors* 1916 EDL 357 at 364.

were ultimately successful on a point that was raised and seemingly abandoned during oral argument, and which, in the practical result, bore no real benefit for the estate. Therefore, ultimately the estate would not by virtue of the inclusion of the proceeds of the policy benefits be worse off. The estate's indebtedness for maintenance at the time of the decision of the court below extended beyond its full true asset value. Loss would have been endured by the beneficiaries of the policies, the deceased's children and not by the deceased's estate. When the court below granted leave to appeal it presented an ideal opportunity for a negotiated settlement. If the net asset value of the estate was the real dispute between the parties then a careful consideration of the law would have presented clear authority that the policy proceeds fell to be excluded.

[70] No doubt, from their perspective, the appellants bore no risk as they were litigating at the expense of the deceased's estate. The personal antagonisms that the record reflects that had arisen between the appellants and the respondent, stultified mature reflection and judgment. It is regrettable that the executors adopted the attitude referred to above. It is equally regrettable that the respondent who is aged and vulnerable was put through protracted litigation because the issues were not properly defined at the outset. The parties are the poorer for it, materially as well as in human currency.

[71] The appeal is successful to the limited extent that the proceeds of the policy, which fall outside of the estate, is to be excluded when the respondent's maintenance entitlement is calculated. The cross-appeal succeeds on the principal point. In the totality of circumstances, a costs order against the appellants in their personal capacities, on an attorney and client scale, both in respect of the appeal and cross-appeal is wholly justified.

[72] Finally, it is necessary to record that our colleague Van Heerden JA, who with us heard the appeal, has by reason of subsequent indisposition, become incapable of being a party to the final decision. In terms of s 12(3) of the Supreme Court Act 59 of 1959 the judgment of the remaining members of the court consequently becomes

the judgment of the court.

[73] The following order is made:

1. The appeal is upheld to the limited extent reflected in the substituted order set out hereafter.
2. The order of the court below is set aside and substituted as follows:

'1 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;

(a) authorised and directed to:

(j) 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;

(ii) pay her a lump sum equal to the net value of the estate after payment of the claims of other creditors, funeral expenses, administration costs and executors' fees.

(b) directed to pay the plaintiff :

(i) the sum of R50 000-00;

(ii) 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 such costs to include the qualifying fees of the actuary Mr I G Hunter and Dr L M Kernhoff.'

3. The cross-appeal is upheld to the extent reflected in the substituted order set out above.

4. In respect of the appeal the first and second appellants are directed jointly and severally to pay the respondent's costs of appeal *de bonis propriis* on an attorney and client scale, including the costs of two counsel.
5. In respect of the cross-appeal the respondents therein are ordered jointly and severally to pay the cross-appellant's costs *de bonis propriis*, on an attorney and client scale, including the costs of two counsel.

M S Navsa
Judge of Appeal

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H Saldulker
Acting Judge of Appeal

APPEARANCES

APPELLANTS:	A Stewart SC (with him W Shapiro) Instructed by Tate, Nolan & Knight Inc, Durban North Matsepes Inc, Bloemfontein
RESPONDENTS:	J Julyan SC Instructed by J H Nicolson Stiller & Geshen Durban Honey Attorneys Inc, Bloemfontein