THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT)

Case No: 24960/11

In the matter between: Not reportable

BERENICE SEIDEL (born RUBIN, formerly BAUM) **APPLICANT**

And

KENNETH LIPSCHITZ N.O. **FIRST RESPONDENT**

MICHAEL JOHN ANDREW TEUCHERT N.O. **SECOND RESPONDENT**

PETER POSNIAK N.O. **THIRD RESPONDENT**

Coram: ROGERS J

Heard: **14 & 15 OCTOBER 2013**

Delivered: **24 OCTOBER 2013**

JUDGMENT

ROGERS J:

Introduction

[1] The applicant is the surviving spouse of the late Wolf Seidel ('the deceased'). They were married by Jewish rites on 16 September 1981 and by civil law on 20 May 1996. They both had children from previous marriages. The deceased died on 4 October 2010. The applicant, who is now 74, claims maintenance from the deceased estate in terms of the Maintenance of Surviving Spouses Act 27 of 1990 ('the Act').

[2] The first three respondents were cited in their capacities as the executors of the deceased estate. They were cited again as the 4th to the 15th respondents in their capacities as the trustees of four *inter vivos* trusts established by the deceased during his lifetime for the benefit of his four children from the previous marriage. The third respondent resigned as an executor after the institution of these proceedings.

[3] In her notice of motion the applicant claims maintenance from the respondents (in their multiple capacities) in the amount of R80 000 per month increasing annually by 10% or by CPI, whichever is the lesser. The respondents oppose the application, contending that the applicant is not in need of maintenance as contemplated in the Act. The applicant's current legal team took over from the applicant's previous legal representatives during September 2013. Mr F Joubert SC, leading Mr M Garces, appeared at the hearing before me on 14 and 15 October 2013 (they were not the authors of the heads of argument filed on behalf of the applicant). Ms Gassner SC appeared for the respondents.

[4] The main application was launched on 8 December 2011. On the next day the applicant filed an urgent application for interim maintenance. That application was settled by way of a consent order made on 14 December 2011. In terms of that order the executors agreed to pay the applicant a monthly amount of R45 000 and it was further agreed that the applicant would be entitled to continue living at the former matrimonial home,17 De Wet Road Bantry Bay. I was informed that the interim amount was increased to R47 500 as from June 2012. I am satisfied that the

respondents' consent to pay interim maintenance was a step taken to avoid legal costs and did not involve a concession that the applicant was entitled to that or any other amount and did not set a benchmark for her maintenance needs.

The legal framework

[5] Our common law did not accord to a surviving spouse a right to claim maintenance from his or her deceased spouse's estate. This legal position was changed by the Act which came into force on 1 July 1990. A surviving spouse's claim for maintenance is entirely governed by the provisions of the Act.

[6] In terms of s 2(1) of the Act the survivor of a marriage dissolved by death has a claim against the estate of the deceased spouse 'for the provision of his reasonable maintenance needs until his death or re-marriage in so far as he is not able to provide therefore from his own means and earnings'. Section 3 reads thus:

'**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

(c) the standard of living of the survivor during the subsistence of the marriage and his age at the death of the deceased spouse.'

[7] The expression 'own means' is defined in s 1 as follows:

'**"own means"** includes 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'.

[8] The leading authority on the approach to applications for maintenance in terms of the Act is *Oshry v Feldman* 2010 (6) SA 19 (SCA). It was held in that case, among other things, that the phrase 'existing and expected means' in s 3(b) did not

include acts of generosity (para 35). The legislature did not intend to draw a distinction between 'existing and expected means' and 'own means'. The relevant provisions of the Act had to be construed in accordance with constitutional norms and values, with dignity (particularly of the vulnerable) being 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.'

[9] The main point decided in *Oshry* was that a court may, if it is shown that the survivor is in need of maintenance, award a lump sum; the court is not confined to ordering the payment of periodic maintenance until death or re-marriage. In the course of its reasoning, the court said the following in a passage to which both counsel referred me (para 56, emphasis in the original):

'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, s 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.'

Affordability

[10] It is common cause that if the applicant's reasonable maintenance needs amount to R80 000 per month, the deceased estate can afford such maintenance. The value of the assets in the estate otherwise available for distribution to legatees and heirs exceeds R30 million.

Factors of a general nature

[11] The applicant, as noted, is now 74. She was 42 when she and the deceased were married by Jewish rites in September 1981 and 56 when they were civilly married in May 1996. Their union lasted 29 years, while the duration of their civil marriage was 15 years. Their relationship was by all accounts a happy one. There were no children born from the union. The deceased had four children from a previous marriage while the applicant had three children from a prior marriage.

[12] The deceased was an astute businessman. He built up the Cape Bag group of companies into a prosperous business. The parties maintained a comfortable upper middle-class existence. Their lifestyle was not lavish, though no doubt their means would have permitted greater extravagance than they displayed. At the time of the deceased's death they were living at 17 De Wet Road Bantry Bay ('the property'). The applicant has continued to reside there since the deceased's passing. The property is owned by Elshamar (Pty) Ltd ('Elshamar'), the shares in which are held as to one quarter each by the four children's trusts.

[13] The applicant did not pursue gainful employment during her marriage with the deceased though she seems to have earned a nominal salary from the Cape Bag group. It is common cause that she has no capacity to earn income from employment. Such means as she has to maintain herself are constituted by capital assets which do or can generate income and by rights to income which she enjoys. She is in reasonable health. There is no evidence to indicate that her life expectancy is greater or less than the average life expectancy of a woman of her age and socio-economic circumstances. Prospects of re-marriage were not canvassed in the papers. One knows that widowed people in their 70s do sometimes remarry though it is not particularly common. If the applicant were to remarry, it is likely to happen sooner rather than later.

[14] According to the first liquidation and distribution account lodged by the respondents on 15 December 2011, legatees will receive R25,35 million and the four residual heirs will receive a quarter-share each of R4 693 694. The residual heirs are the four children's trusts. Certain further assets have been uncovered

which will be reflected in a second liquidation and distribution account. These further assets will presumably also go to the residual heirs in quarter-shares. The liquidation and distribution account does not reflect the applicant as a creditor in respect of maintenance. If she were entitled to maintenance from the estate, this would reduce the amount awarded to the residual heirs and potentially the amounts that can be paid to legatees. For example, if the applicant's reasonable maintenance needs amounted to R80 000 per month (as claimed in the notice of motion) and if this were to be provided for by payment of a lump sum which would generate that monthly amount over the rest of the applicant's lifetime (based on the applicable life tables), the required lump sum (using the formula devised by the respondents' actuarial expert, Mr Munro) would be R9 104 000. Subject to the value of assets to be reflected in the second liquidation and distribution account, it seems likely that the applicant's maintenance claim in the notice of motion would result in the residual heirs getting nothing and that there might be a need to reduce legacies *pro rata*. They are legacies totalling R400 000 in favour of charitable institutions. The bulk of the legacies are in favour of family and relatives. There is no evidence before me as to the financial position and needs of the legatees or of the beneficiaries of the four children's trusts.

The applicant's means

[15] In his will and codicil the deceased made the following provision for the applicant:

[a] In the will he bequeathed to her a cash sum of R150 000. The parties were in agreement that the effect of clause 2.2.2.1(b) of the will was to constitute her interest in that sum as a usufruct so that she will only benefit from interest earned on the bequest.

[b] In the codicil he established a testamentary trust for the applicant's benefit to which he bequeathed R1 million on the basis that the whole of the net income of the testamentary trust should devolve on and be paid to the applicant for as long as she should live. On the applicant's death the testamentary trust will terminate and the

capital then held is to be distributed to the deceased's heirs in terms of clause 2.7 of the will, ie in equal shares to the four children's trusts.

[c] The deceased recorded in his will that the applicant and the deceased's four children were in equal shares beneficiaries of his pension fund and living annuity policy. (This was not a bequest as such. During his lifetime the deceased nominated these persons as the beneficiaries of the annuity upon his death.) The monthly income stream from the applicant's one-fifth share of the annuity is currently an after-tax amount of R15 393. She has been or will be awarded a pension fund death benefit of R196 000.

[d] The deceased recorded in his will that the entire contents of the house at 17 De Wet Road belonged to the applicant and did not form part of his estate. (Again, this was not a bequest.)

[e] The deceased directed his executors to purchase for the applicant the motor vehicle she was using in her capacity as an 'employee' of the Cape Bag group and to award it to her for her own and absolute use.

[16] Apart from the provisions of the will and codicil, the deceased in his capacity as settlor left certain letters of wishes regarding the four children's trusts and regarding an offshore trust known as the Kelly Trust:

[a] In regard to the four children's trusts (which own the shares in Elshamar, the company that owns the property), the deceased expressed his wish that the trustees should as far as possible so arrange matters that the applicant can continue to live in the house on the basis that the applicant should not be responsible for any expenses relating to the property or be liable for any rent. He stated that if the trustees deemed it necessary to sell the house it was his wish that the trustees provide the applicant with accommodation of similar standard and that the applicant should likewise not be responsible for any expenses relating to the new accommodation nor liable for any rent during her lifetime.

[b] In regard to the Kelly Trust, the deceased expressed the wish that the trust should pay US$ 150 000 to the applicant on his death.

[17] Pursuant to the letters of wishes relating to the children's trusts, the trustees of the various trusts formally resolved on 8 August 2012 to give effect to the deceased's wishes. They resolved *inter alia* that they would instruct the directors of Elshamar to pass the necessary board resolution allowing the applicant to reside rent-free for her lifetime either at the property or in accommodation of a similar standard; and they resolved further that they would instruct the directors to pay certain expenses directly associated with the property and where necessary engage directly with outside parties to render the required services, namely: rates and taxes; electricity, water, refuse, sewerage and service charges levied by the municipal authority, subject to the proviso that the applicant's water and electricity consumption should be reasonable; swimming pool maintenance; and the reasonable cost of maintaining the interior and exterior of the property in a sound and good state of repair, limited to the expenses set out in an annexure to the resolution.

[18] Mr Joubert did not argue that the trustees' resolutions failed to provide the applicant with legal certainty relating to her right of accommodation and to the covering of the expenses mentioned in the resolutions. I nevertheless put it to Ms Gassner for the respondents that it would be preferable for these matters to be incorporated in an agreed order. She took instructions and informed me that the trusts would have no objection to the content of their resolutions being incorporated as an order in favour of the applicant. The provision made in this way for the applicant's accommodation and for the meeting of property-related expenses does not constitute largesse of the kind contemplated in para 35 of *Oshry*. The trustees intended that their resolutions would confer a right on the applicant and this will be confirmed by the order to which the trusts have consented.

[19] In regard to the deceased's letters of wishes concerning the Kelly Trust, the corporate trustee notified the executors on 8 June 2011 that they were minded to give effect to the deceased's wishes and confirmed that they had set aside an amount of US$ 150 000 for the applicant. On 27 March 2013 the Kelly Trust paid

this sum to the applicant. The precise amount received by the applicant in rands has not been stated by the applicant but she has not challenged the respondents' assertion, based on the prevailing exchange rate, that she would have received about R1,39 million.

[20] The applicant was also the deceased's nominated beneficiary in respect of an Old Mutual life insurance policy (no mention of this was made in the will or codicil). The proceeds received by the applicant on this policy amounted to R749 935.

[21] Apart from these various benefits flowing from the deceased's will and codicil, his letters of wishes and from nominations as beneficiary in respect of pension fund and annuity benefits, the applicant at the date of the deceased's death owned capital assets worth R2 829 884 (comprising immovable properties, investments with Allan Gray, Stanlib and BOE and a container investment). She also held her own living annuities with Investec and Old Mutual which generated monthly income of R1 275 in her 2011 tax year.

[22] In summary, her financial means (excluding the benefit of rent-free accommodation and the meeting of property expenses in accordance with the resolutions of the children's trusts) are the following:

[a] Monthly income streams from her share of the deceased's annuity and from her own annuities totalling R17 668.

[b] The right to such income as can be generated from the amounts totalling R1 150 000 granted to her as usufructuary or trust benefits under the will and codicil.

[c] Capital assets (constituting her own assets at the date of the deceased's death, the award from the Kelly Trust, the proceeds of the Old Mutual policy and the death benefit from the pension fund) of R5 159 819. The respondents, in reckoning the applicant's means, have deducted from this capital value an amount of R620 615. This is the sum of expenditure incurred by the applicant on her Cape Bag credit card after the deceased's death and which Cape Bag has debited to her loan account

with the company. Whether the applicant will be obliged to repay the sum is uncertain. With the deduction of this amount, the net capital assets total R4 549 204.

[23] The respondents say that at 5,1% per annum the income benefit from the usufructuary and trust assets of R1 150 000 would generate R4 888 per month until the applicant's actual death. This rate of return has not been challenged.

[24] The respondents' actuary performed a further calculation to determine the monthly amount which the applicant's net capital assets could generate for the applicant assuming a standard investment income and assuming that by the date of the applicant's assumed death the capital would be reduced to nil. In accordance with the applicable life tables, the applicant's life expectancy would be $85^{1/4}$ years. Mr Munro used a net capital amount of R4 396 005 in his calculations (not R4 539 204) because at that stage he took the Kelly Trust award at only R1 227 900 (rather than R1,39 million) but slightly overstated the Old Mutual proceeds (R762 836 rather than R743 935). However, his methodology provides a formula for determining the monthly amount for any assumed capital sum: on his assumptions, R1 130 800 of capital would generate an after-tax amount of R10 000 per month over the applicant's assumed lifetime, with such capital reducing to nil by the date of assumed death. This formula assumes standard annual inflation of 5,4% over the remainder of the applicant's lifetime. In terms of this formula, net capital of R4 539 204 would generate an after-tax amount of R40 142 per month until the applicant's assumed death at $85^{1/4}$, increasing annually at 5,4%.[1]

[25] On this basis the applicant's means would enable her to spend R62 698 per month on her maintenance until her assumed death at $85^{1/4}$.[2] Of this amount, at least R40 142 would annually increase at assumed CPI of 5,4%. The component of R4 888 from the usufructuary and trust assets would not increase annually. It is unclear whether the monthly income from the applicant's one-fifth share of the deceased's annuity and the monthly income from her own two annuities (currently

[1] In para 20 of the answering affidavit [record 298-299] the respondents' deponent incorrectly uses a figure of R1 138 00 – the correct amount is R1 130 800 [see the Munro report at 399; the correct amount is stated by the deponent earlier in his affidavit in para 19]. Based on the original capital figures used in para 20, capital of R4 396 005 would generate R38 875 per month (not R38 630 as stated in the affidavit).

[2] R4 888 + R17 668 + R40 142.

totalling R17 668) will increase annually. In response to a question from the court, Ms Gassner delivered a supplementary note attaching a letter from the relevant broker dated 16 October 2013, from which it appears that the present capital value of the applicant's one-fifth share of the deceased's annuity is R1 969 636 which is generating current after-tax income of R18 656 (somewhat higher than the after-tax figure of R15 393 stated in the papers). Because this is a living annuity, the applicant may withdraw variable sums per month within certain parameters. Ms Gassner points out, however, that if the Munro formula were applied to the capital value of R1 969 636, that sum would generate R17 418 per month increasing annually in accordance with normal inflation until the applicant's assumed death at $85^{1/4}$.[3]

[26] Mr Munro's calculation proceeds on the basis that the applicant's means include her capital and not merely the income which the capital can generate. I think that is correct. There is nothing in the Act to indicate that a surviving spouse is entitled to keep her capital intact in the assessment of the means at her disposal to fund her maintenance.

[27] The respondents' setting out of the applicant's means and the calculation of the overall monthly amount available to her until an assumed date of death at $85^{1/4}$ was not seriously challenged by the applicant. In a supplementary replying affidavit the applicant's actuaries, Arch Actuarial Consulting ('Arch'), performed calculations on three alternative scenarios. The first scenario used a life expectancy of $85^{1/4}$ (ie in accordance with Mr Munro's assumption) but assumed that maintenance inflation would be 1% above CPI of 5,48%. In the second and third scenarios Arch assumed a life expectancy of 90 and 95 respectively but allowed a 10% contingency deduction. In the first scenario Arch unsurprisingly came to an answer very similar to that of Mr Munro – namely that for every R10 000 amount of monthly maintenance a capital sum of R1 135 999 would be needed (Mr Munro's capital sum was R1 130 800). In the second and third scenarios (and after deducting the contingency allowance) the capital sum required to generate R10 000 per month increased to R1 365 674 and R1 887 842 respectively. It is not apparent from the Arch report why

[3] Ms Gassner gave the figure as R17 372 per month but that is because she erroneously used, as Munro's base amount, R1 133 800 instead of R1 130 800.

maintenance inflation was assumed to be higher than CPI. On Arch's first scenario calculation, the capital of R4 539 204 would generate R39 958 per month until an assumed date of death at $85^{1/4}$. In scenarios 2 and 3 the monthly amount drops to R33 238 and R24 044 respectively.

[28] Mr Munro and Arch performed separate calculations to determine the capital sum needed to generate R1 000 per month for medical aid, increasing in line with medical inflation. Mr Munro assumed medical inflation of 8% (ie 2,6 percentage points above ordinary inflation of 5,4%) whereas Arch assumes medical inflation at 9,14% (ie 3,66 percentage points above assumed ordinary inflation of 5,48%). However, in the answering papers the respondents as executors have tendered that the estate will pay the applicant's medical aid premiums for a reasonable comprehensive medical aid cover (but excluding excess payments or medical expenses not covered by such medical aid). Once again, Ms Gassner confirmed that this could be incorporated in an order.

The applicant's reasonable maintenance needs

[29] In the determination of the applicant's reasonable maintenance needs one must leave out of account the cost of accommodation and the other property-related expenses covered by the resolutions of the children's trusts; and one must also leave out of account the cost of membership of a reasonably comprehensive medical aid, since this has been tended by the estate. These resolutions and tender will apply until the applicant actually dies, whether that is sooner or later than her ordinary life expectancy of $85^{1/4}$.

[30] A preliminary question arises as to what assumption if any should be made regarding the applicant's life expectancy. If the applicant had no means at all, the maintenance obligation resting on the estate could be met by paying the reasonably required amount per month until the applicant actually dies or re-marries. She might die or remarry prior to or after her current life expectancy of $85^{1/4}$. There is no basis for assuming that her actual lifetime is likely to be more rather than less than the age indicated by the applicable life tables. If a monthly amount were paid, the applicant would be guarded against the risk that she might survive beyond her current life

expectancy while the estate would be guarded against the risk that she might die before her current life expectancy. However, it would generally be inconvenient for an estate to be kept open for the potentially lengthy period over which monthly maintenance might have to be paid. One possibility would be for the estate to purchase an annuity for the claimant and thus pass the mortality risk to an insurer. This possibility was not canvassed in the papers though I was told from the bar by Ms Gassner that it is not possible in this country to buy an annuity for a person who is 75 or older. The other possibility would be for the estate to meet its maintenance obligation by paying to the claimant a capital sum. Once that is done (and in terms of *Oshry* this is permissible though *Oshry* does not say that a court is obliged to reduce the maintenance obligation to a lump sum), it is inevitable that one must make an assumption as to life expectancy. If fairness is to be done both to the surviving spouse and to the legatees and residual heirs, the just course is to assume that maintenance will be needed over the remainder of the claimant's reasonably expected lifetime. The life tables used by actuaries provide the norm, and there is no reason not to use that norm in the absence of evidence to indicate that the claimant is likely to die sooner or later than the norm.

[31] Where the surviving spouse, as here, is possessed of substantial means, it is likewise necessary to make some or other assumption regarding her life expectancy. Nobody would doubt in the present case that if, for example, one could predict with confidence that the applicant will die or remarry in two years' time, her existing means provide more than enough for her reasonable maintenance needs during the two-year period. In order to make any award in favour of the applicant, whether by way of monthly payments or lump sum, one needs to make some or other assumption regarding her life expectancy. For the reasons stated in the previous paragraph, the actuarial life tables provide the appropriate assumption in the absence of evidence pointing to a shorter or longer likely life expectancy. In the present case there is no reason not to use the life expectancy indicated by the life tables, namely $85^{1/4}$.

[32] It is true that on this assumption the sum awarded to the applicant (if any) might be insufficient to provide for her maintenance if she lives to a riper age. But it is equally true that if one made an award to her which assumed a longer life

expectancy, she might be given significantly more than she needs if it should transpire that she dies or remarries sooner, and this would be to the detriment of the residual heirs and potentially the legatees. In a case where there is no evidence to indicate a shorter or longer life expectancy than the norm, fairness to the claimant on the one hand and to the legatees and heirs on the other requires in my view that one use the claimant's ordinary life expectancy in accordance with the life tables (cf *Jordaan v Jordaan* 2001 (3) SA 288 (C) para 36, dealing with fixing a lump sum award in terms of s 7(3) of the Divorce Act).

[33] On this basis, the applicant's reasonable maintenance needs must be determined on the assumption that she will live until $85^{1/4}$. As will appear from the previous section of this judgment, the applicant's accommodation and property-related expenses will be met by the children's trusts while the cost of providing her with reasonable comprehensive medical aid cover will be met by the estate, in both cases for as long as she actually lives (ie life expectancy does not feature). It is the remainder of her maintenance needs which will have to be met either from her own means or, if these are insufficient, by the estate. Her own means, as explained in the previous section of this judgment, will provide her with a sum of R62 698 per month as at 1 July 2012, escalating at CPI in respect of at least R40 142 thereof. It may also be noted that a portion of the monthly total of R62 698, namely the monthly income of R4 888 from the usufructuary bequest and from the testamentary trust, will continue until the applicant actually dies (it is not clear whether the same is true of the income from the various annuities).

[34] The onus is on the applicant to establish her reasonable maintenance needs. In her founding affidavit she attached certain schedules prepared by a chartered accountant, Mr H Jedeiken ('Jedeiken'). There was no expert report from Jedeiken explaining the schedules. Although he filed a confirmatory affidavit, it is not of much help since the applicant's own founding affidavit does not explain the schedules. The schedules seek to gauge the applicant's reasonable maintenance needs with reference to the expenditure she incurred in the six-month period following the deceased's death, ie from December 2011 to May 2012. In one of the schedules, annexure FAS17, the applicant's estimated monthly expenditure is projected at

R55 510 to which Jedeiken has added various ‘provisions’ totalling R38 500, giving a grand monthly total of R94 010.

[35] I have not found it possible to reconcile the figure of R55 510 to Jedeiken’s other schedules setting out the expenditure incurred by the applicant through the Cape Bag loan account and her income statement for the year ended 28 February 2011. The estimated expenditure of R55 510 was criticised by the respondents as being exorbitant and unrealistic and as not according with Jedeiken’s other schedules of her actual expenditure. For example, there is an item of R12 000 per month for ‘medical’. Apart from the fact that the respondents have tendered to pay premiums for reasonably comprehensive medical aid cover, there is simply no evidence that the applicant is likely to incur such substantial medical expenditure. There is an item of R2 000 per month for ‘donations’ (R24 000 per annum) yet the applicant’s income statement for the year ended 28th of February 2011 reflects that her donations for the whole year amounted to only R1 980. The monthly allowance for petrol of R1 500 seems excessive for a lady of 74 living in Bantry Bay. The list also includes some expenses which will in fact be borne by the children’s trusts or the estate (rates, electricity, water, garden and repairs).

[36] The further provisions amounting to R38 500 include items which patently do not form part of the applicant’s reasonable maintenance needs, such as an allowance for making donations to her children of R6 000 per month, other gifts and bequests of R3 500 per month, and ‘additional entertainment’ of R2 000 per month (ie in addition to an entertainment allowance of R2 500 per month forming part of the amount of R55 510). Also among the further provisions is an amount for ‘possible’ medical expenditure of R10 000 per month (bringing the total monthly allowance for medical expenditure to R22 000). Jedeiken also makes a provision of R9 000 per month for possible frail care. The applicant is certainly not currently in need of frail care – the occupational therapist’s report which she filed as part of her replying papers indicates that she is able to cope quite adequately in the home. There is no evidence in the founding papers as to how the monthly allowance of R9 000 was arrived at. The respondents also correctly point out that if the applicant were required to move into a frail care facility, other expenditure for which she has made

allowance (such as the vehicle, petrol, entertainment and travel) would fall away or be significantly reduced.

[37] I thus do not think that the material contained in the founding papers provides a sound evidential basis for arriving at the applicant's reasonable maintenance needs.

[38] In their answering papers the respondents included an expert report by Grant Thornton in which the expenditure incurred by the deceased and the applicant in the six months prior to his death was analysed in order to determine the applicant's reasonable maintenance needs. According to the management of Cape Bag, all personal expenditure incurred by the deceased and the applicant in the months leading up to his death were recorded in the records of Cape Bag. Depending on the nature of the item of expenditure in question, the whole or a portion of the expenditure was allocated to the applicant. For example, two-thirds of grocery expenditure was allocated to the applicant because provision would need to be made for her and her domestic workers. Items were allocated to the applicant in full where it was inferred that the expense would be unaffected by the death of the deceased (for example, expenditure on pets and Exclusive Books). Grant Thornton on this basis concluded that over the six-month period April to September 2010 the expenditure actually incurred on the applicant's maintenance in accordance with her then lifestyle amounted to R31 860 per month, which – adjusted for inflation – came to R37 456 as at February 2012. Since the applicant and the deceased did not travel in the six months prior to his death, Grant Thornton included a provision of R4 747 per month for travel (R56 964 per year). The Grant Thornton figures excluded property-related costs which will be borne in future by the children's trust but included an inflation-adjusted monthly subscription of R3 069 to the Momentum Health Medical Aid Scheme. Since the estate has tendered to pay the premiums for reasonable comprehensive medical aid cover, the amount of R37 456 should strictly be reduced to R34 563.

[39] In the replying affidavit the applicant protested that the six-month period prior to the deceased's death was not representative because the deceased was ill. Included in the replying papers was a report by Jedeiken (though no confirmatory

affidavit). The covering letter to his report stated that it contained financial opinions provided by the applicant and did not constitute an audit assignment or an opinion presented by Jedeiken's firm. Whereas Grant Thornton had analysed historical expenditure while the deceased was still alive, Jedeiken (as he had done in the schedules attached to the founding papers) examined the expenditure incurred by the applicant subsequent to the deceased's death. Although his report provided information concerning the joint income of the household during the 2009 tax year and the applicant's projected income for the 2013 tax year, I do not find that information particularly helpful in assessing the applicant's reasonable maintenance needs. More to the point is Jedeiken's annexure C which sets out the expenditure incurred by the applicant over the period October 2010 to August 2011 as reflected in the Cape Bag loan account. This schedule as read with the accompanying notes reflected annualised expenditure of R938 145 or R78 179 per month to which Jedeiken added a provision of R12 500 per month for frail care.

[40] Annexure C was subjected to criticism by the respondents in supplementary answering papers which they were granted leave to file (bearing in mind that Jedeiken's report constituted new matter):

[a] Jedeiken's annexure incorporates items for water, sewerage, electricity, pool care, repairs and maintenance which would be covered by the resolutions of the children's trusts. These items account for R4 327 per month. Also included in Jedeiken's annexure is monthly expenditure of R3 284 on medical aid, which is covered by the respondents' tender.

[b] Certain amounts are included which cannot legitimately form part of the applicant's reasonable maintenance needs – I refer here to an allowance of R5 350 per month to pay for the applicant's grandchildren's school fees.

[c] Other amounts are with justification criticised by the respondents as excessive. For example, the grocery bill in annexure C (Pick □n Pay and Spar) has jumped up from R4 622 per month (as per Jedeiken's schedules attached to the founding papers) to R20 235 per month, which is not plausible. There is an allowance of R10 490 per month for travel and holiday expenses (R124 908 per annum). Based

on the history of prior travel and the cost of a cancelled 2008 holiday, the respondents contended that a monthly allowance of no more than R5 427 for travel was appropriate. The allowance of R5 612 per month for entertainment and hobbies was also challenged.

[d] Jedeiken allowed for petrol expenditure of R1 573 per month which was, as before, disputed. The respondents pointed out that the applicant drove a 2003 Volvo with an estimated mileage of only 65 000. Also included in Jedeiken's schedule was a provision of R7 175 per month (R86 102 per annum) for the purchase of a new vehicle. This was based on an assumption that the applicant would acquire a new vehicle every six years. The respondents pointed out that this was not in line with the car replacement history during the couple's marriage, which reflected a replacement every nine years. The respondents recognised that it would be reasonable for the applicant to replace her 2003 Volvo with a similar vehicle. That would cost R335 100 after allowing for the trade-in value of their existing car. No further replacements during her expected lifetime would be needed. Although the respondents' calculations of the applicant's maintenance needs did not incorporate a provision for the replacement of the Volvo, they contended in the supplementary answering papers that she could easily fund the cost of R335 100 from surplus capital.

[e] Regarding this frail care provision, the respondents repeated their contention that if the applicant went into frail care many other expenses would decline.

[41] These criticisms have merit. I thus do not regard the Jedeiken report attached to the replying papers as a reliable guide to the applicant's reasonable maintenance needs. Nevertheless, and in regard to provision for frail care, I raised with his Gassner whether it would not be consistent with the deceased's letter of wishes in regard to rent-free accommodation for the applicant that the resolutions of the children's trusts should be amplified to include provision for accommodation at a frail care facility if that were to become reasonably necessary. After taking instructions Ms Gassner indicated that the trusts were willing to include a tender of rent-free accommodation at a frail care facility if the applicant so elects and amended resolutions to this effect dated 13 October 2013 have been provided to me.

[42] In their supplementary answering papers the respondents included a further accounting report, this time from Mazars. In response to the criticism that the six-month period analysed in the Grant Thornton report was un-representative, the respondents by way of the Mazars report provided an analysis of the maintenance expenditure incurred by the applicant and the deceased over the 20-month period 1 August 2008 to 31 March 2010 (the period from April 2010 to October 2010 having been already addressed in the Grant Thornton report). Mazars concluded that the average monthly maintenance expenditure for the couple over this period was R60 822. This figure derived from an analysis of the deceased's loan account in Cape Bag and of his bank account. As before, expenditure relating to the property was left out of account. Mazars also excluded certain items which appeared to be abnormal or which by their nature did not constitute personal maintenance. For example, during the period under review an amount of R130 000 was given to or spent on behalf of the applicant's adult children. Certain large cash withdrawals or cheques in round figures likewise appeared to be abnormal. Once-off expenditure of R11 235 in jewellery was also treated as abnormal.

[43] To the remaining actual expenditure reflected in these documents Mazars added an allowance of R10 855 per month for overseas travel, based on a costing of R217 000 for a cancelled 2008 trip.[4] Mazars also assumed that the average monthly salary received by the applicant from Cape Bag (R6 281) was fully spent by her on her own maintenance needs – this correlated more or less with the picture presented by an analysis of her private bank account.

[44] In order to arrive at the applicant's historical maintenance needs, Mazars allocated the joint expenditure to her in varying proportions, depending on the nature thereof. In the case of the credit card expenditure debited to the company loan account, half of the joint expenditure was allocated to the applicant. Half of all medical expenditure was also allocated to her. The cost of insuring household contents was allocated in full to her as were costs relating to the employment of domestic staff. Two thirds of general bills were treated as her expenditure. The cost of the Multichoice subscription was allocated to her in full. On this basis, Mazars

[4] R217 100 ÷ 20 = R10 855. This allowance assumes an overseas trip of this kind every 20 months.

determined that the average monthly amount spent on the applicant's maintenance over the 20-month period in question was R37 456.

[45] As noted, Mazars allocated the credit card expenditure to the deceased and the applicant on a 50/50 basis. In the Grant Thornton report the credit card expenditure was allocated item for item – certain items were allocated fully to the applicant and others on a two-thirds or 50/50 basis. The Mazars report does not explain why the same approach was not adopted. I thus think it might be safer to allocate two-thirds of the credit card expenditure to the applicant. This increases her monthly average from R37 456 to R40 351. If the once-off expenditure on jewellery is averaged out over the 20-month period and treated as part of the applicant's reasonable maintenance needs, one would need to add a further R562, bringing her adjusted total to R40 913. Mazars included in their figures an amount of R2 515 in respect of medical aid. Since the respondents have tendered to pay the medical aid subscription, this amount should be deducted, giving a final figure of R38 398. This figure is not out of line with the Grant Thornton report, which concluded that the applicant's historical maintenance needs over the period April to October 2010 amounted to R37 500.

[46] The adjusted Mazars figure of R38 398 represents (on the assumptions made by Mazars) the applicant's historical maintenance needs as at 31 March 2010. The respondents filed a supplementary actuarial report by Munro. He stated that the Mazars figure of R37 455, adjusted for inflation to 30 September 2013, amounted to R44 689. If I apply the same inflation percentage (19,31%) to my adjusted amount of R38 398, I arrive at an amount as at 30 September 2013 of R45 813.

[47] Bearing in mind that the respondents bear no onus on this regard, I think no injustice will be done to the applicant if I take her current reasonable maintenance needs as being R45 813 together with the rent-free accommodation, property-related expenditure and medical aid premiums tendered by the children's trusts and the executors. Mr Joubert submitted in reply that since there was something to be said both for the Jedeiken approach and the Mazars approach, I should rather use the average of the two. I do not think that would be correct. The Jedeiken calculations are unreliable for reasons I have explained. The respondents

themselves pointed out various unsatisfactory features of his assessment of the applicant's maintenance needs. By contrast, very little has been said by the applicant in response to the detailed Mazars analysis of the actual historical expenditure on maintenance prior to the deceased's death.

Conclusion

[48] Since the applicant's current means enable her to expend R62 698 per month on her maintenance and since her current reasonable monthly maintenance needs do not exceed R45 813, she is able to provide for her reasonable maintenance needs from her own means. I do not lose sight of the fact that, out of the total current monthly means of R62 698, it is possible that only R40 142 will increase annually at assumed CPI though it seems likely from the supplementary information provided by Ms Gassner that the applicant's one-fifth share of the deceased's living annuity may well generate an after-tax amount per month exceeding R17 000 in current terms and increasing annually with inflation until the applicant's assumed date of death. If the full R62 698 were to increase at CPI, Munro's formula indicates that at the applicant's assumed death at $85^{1/4}$ she would have remaining capital of R1 909 356[5]. To the extent that the difference between R62 698 and R40 142 (ie R16 885) does not increase at CPI, there will nevertheless be for some time a substantial surplus between the applicant's monthly means and her reasonable monthly needs, and this accumulated surplus will, if necessary, provide a source from which the applicant will be able to meet her monthly needs in later years. The surplus will also enable her to buy a new Volvo if she wishes to do so.

[49] It follows that the application must fail save for the granting of orders to give effect to the tenders made by the respondents.

[50] As to costs, the respondents initially sought costs against the applicant on the scale as between attorney and client. After taking instructions, Ms Gassner informed me that the respondents did not press for costs against the applicant. I think this was a correct and fair decision. Normally costs follow the result but they are always

[5] R62 698 – R45 813 = R16 885. R1 130 800 ÷ 10 000 x 16 885 = R1 909 356.

in the discretion of the court, though naturally such discretion must be exercised judicially. We are not dealing here with ordinary commercial litigation. I do not think it was unreasonable for the applicant to believe that she was entitled to maintenance from the estate, even though the assessment of her expenditure may have been extravagant. It is important to remember, furthermore, that certain important events bearing on the assessment of her maintenance needs occurred only after she had launched the application on 8 December 2011. It was only in June 2012 that the trustees of the Kelly Trust confirmed that they had set aside an amount of US$ 150 000 for the applicant in accordance with the deceased's letter of wishes, and it was only in March 2013 that the sum was actually paid to her. Old Mutual only paid the proceeds of the deceased's life policy (R743 935) to the applicant in June 2012. And importantly, it was only on 8 August 2012, shortly before the filing of the answering papers on 13 August 2012, that the children's trusts passed the resolutions previously mentioned. The applicant only learnt in the answering papers of these resolutions and of the executors' tender to pay her medical aid premiums.

[51] Although the applicant can be criticised for having persisted with the application after the filing of the answering papers and in particular after the filing of the Mazars report in the supplementary answering papers, she was no doubt acting on advice. The whole question of her maintenance was understandably one of great importance and potential anxiety for her. While I do not think that her claim had sufficient merit to justify the meeting of her costs out of the estate, I do not think she should be required to pay the respondents' costs, either of the main application or of the interim application (the costs of which were reserved for later determination). The one exception are the wasted costs of one day occasioned by the postponement of 7 August 2013, which wasted costs the applicant has already been ordered to pay.

[52] I make the following order:

[a] With the consent of the respondents in their capacities as the trustees of the Lauren Seidel Trust (T54/1972), the Elaine Seidel Trust (T54/1072), the Mark Seidel Trust (T53/1972) and the Sharyn Seidel Trust (T55/1972) (collectively 'the trustees'), it is ordered

(i) that the trustees shall take all reasonable and necessary steps to ensure that the applicant is provided with rent-free accommodation until her death or remarriage, on the terms and conditions set out in the resolutions dated 16 October 2013 which have been adopted by each of the trusts, copies of which are annexed hereto as 'RES1' to 'RES4' respectively;

(ii) that the trustees are directed to sign all documents and take all such other steps which are reasonably necessary to give full force and effect to all the undertakings given in favour of the applicant in terms of paragraphs 1 to 4 of the resolutions.

[b] With the consent of the respondents in their capacities as executors in the estate of the late Wolf Seidel, the executors of the said estate from time to time shall pay from the estate the medical aid premiums for a reasonable comprehensive medical aid cover for the applicant (but excluding any excess payments or medical expenses not covered by such medical aid).

[c] Save as aforesaid, the application is dismissed with no order as to costs (save for those costs which the applicant has already been ordered to pay in terms of this court's order of 7 August 2013).

[d] The parties shall bear their own costs in relation to the application for interim relief brought under case 25017/2011.

[e] The respondents are authorised to defray from the estate the reasonable costs incurred by them in the present case and in case 25017/2011.

ROGERS J

APPEARANCES

For Applicant:	Adv F Joubert SC & Adv M Garces
	Instructed by:
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	Cape Town
For Respondents:	Adv B Gassner SC
	Instructed by:
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