



CHILD MAINTENANCE TRAINING MANUAL

Front line training manual for legal aid office, advices offices, NGO's, volunteers, maintenance officers

An complete training manual for front line staff dealing with child maintenance matters and maintenance enquiries

- Overview on child maintenance
 - What is maintenance?
 - Best interest of the child
- Maintenance obligation and duty to support
 - What can be claimed?
- New or first-time maintenance applications
- Increase or decrease of existing maintenance order
 - Arrear maintenance



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TRAINING MANUAL ON CHILD MAINTENANCE

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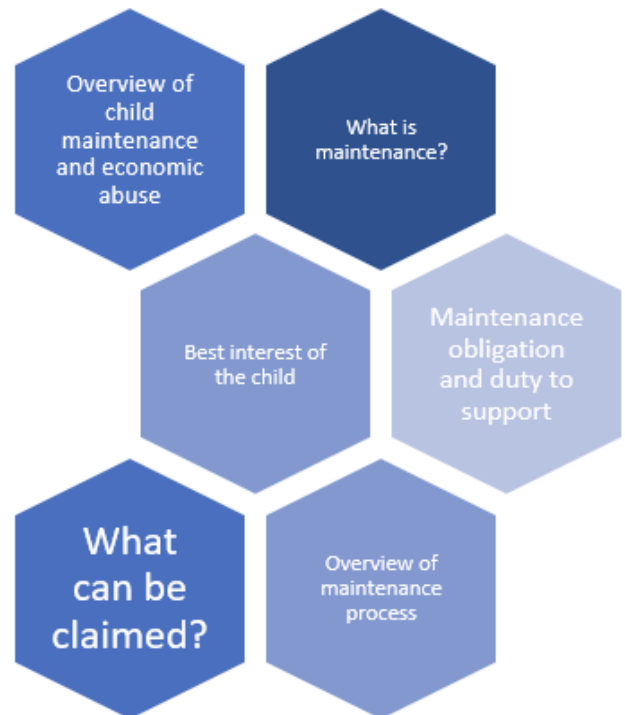
PART A: Overview of the Law of Child Maintenance in South Africa

1. Introduction

This training course is aimed at providing a comprehensive overview of the processes relevant in child maintenance and related matters. It will consider the different contexts in which a maintenance complaint may arise, and elaborates on the processes that accompany these different disputes.

The focus of this training session will be on child maintenance disputes that arise in the context of first applications, variation of orders and arrear maintenance. Disputes regarding future maintenance and international maintenance is beyond the scope of the discussion and will not be dealt with in extensive detail.

Topics for discussion under Part A:



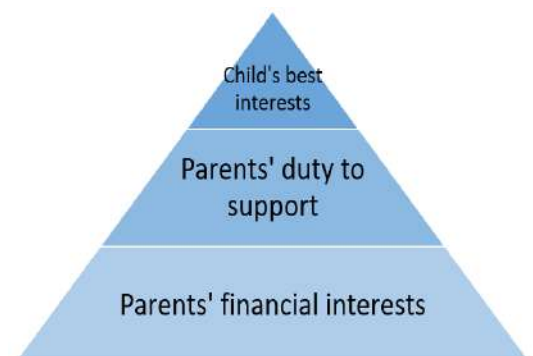
1.1 Introductory remarks

“Maintenance courts and the law they implemented were important mechanisms to give effect to the rights of children protected by s 28 of the Constitution. Failure to ensure their effective operation amounted to a failure to protect children against those who took advantage of the weakness of the system.” *Bannatyne v Bannatyne* (Commission for Gender Equality, as amicus curiae) 2003 (2) SA 363 (CC)¹.



The central and focal objective of the Act is the welfare and well-being of the child. The objective can only be effectively attained if the measures that secure recovery of maintenance are implemented, pursued and refined with clear and unswerving commitment by those upon whom law has bestowed duty to do so (*S v Seroke* 2004(1) SACR 456 (T))².

This emphasizes the nature of maintenance which is focused on the child’s best interest as a fundamental



¹ A van der Merwe’s *Maintenance Manual for Presiding Officers* 2.

² Van der Merwe’s *Maintenance Manual* 3.

principle. This means that a parent's financial interest and their duty to support must be aimed at securing the child's best interest. The best interest principle is discussed and fleshed out under a subsequent heading, but remains paramount in all child maintenance matters.

1.2 Application of Act

Section 2(1) of the 1998 Maintenance Act provides that the provisions of this Act shall apply in respect of the legal duty of any person to maintain any other person, irrespective of the nature of the relationship between those persons giving rise to that duty.

This has been affirmed by case law, such as:

- *Bannatyne v Bannatyne* (Commission for Gender Equality, as Amicus Curiae) 2003 (2) SA 363 (CC): "In enforcing a maintenance order, consideration and due weight must be given to s 28(2) of the Constitution, Act 108 of 1996, which requires that the best interest of the child be given paramountcy in all matters affecting children."
- *Khan v Khan* 2005(2) SA 283 par 11.13: "I am therefore of the opinion that partners in a Muslim marriage, married in accordance with Islamic rites (whether monogamous or not) are entitled to maintenance and thus fall within the ambit of the Act."

The 1998 Maintenance Act applies to all duties of support, regardless of the type of relationship from which it originates. Therefore, the Act applies to parent-child relationships that arise out of a number of circumstances and is not limited to arbitrary application as such.



The wide application of the Act will be seen in the training manual relating to child maintenance, but it can also be seen in the broad range of relationships to which it attaches regulation regarding support. The focus of this training will however be on child maintenance, and the discussion will not extend to maintenance of spouses, etc.

2. Overview on child maintenance (including economic abuse)

Child maintenance is generally known as a parents' obligation to provide monetary support to their child/ren's reasonable costs of living. It is a crucial obligation which is aimed at securing the welfare of children by ensuring their best interests, such as being able to eat, sleep, learn and grow in a reasonable manner. Therefore, it amounts to a purely financial obligation aimed at supporting the wellbeing and lifestyle of a child.

Since child maintenance disputes rotate around financial disputes, the economic welfare of the parties are very often in dispute. Usually what is in dispute, is the economic welfare of one parent compared to the actual welfare of the child. Disputes in this context cultivate grounds for financial abuse, especially when the mother of a child is in a vulnerable position and dependent on financial contributions while the father sees it as an opportunity to manipulate, coerce and punish³.

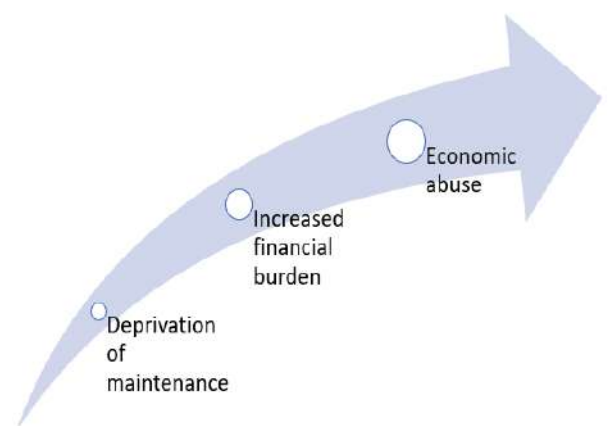


The Domestic Violence Act 116 of 1998 includes 'economic abuse' as a form of domestic violence⁴. "Economic abuse" is further defined⁵ as:

'economic abuse' includes-

- (a) the unreasonable deprivation of economic or financial resources to which a complainant is entitled under law or which the complainant requires out of necessity, including household necessities for the complainant, and mortgage bond repayments or payment of rent in respect of the shared residence;
- (b) the unreasonable disposal of household effects or other property in which the complainant has an interest;

It becomes clear that the definition of economic abuse encompasses the unreasonable failure to pay maintenance or avoidance as such. Withholding child maintenance payments amounts to financial and/or economic abuse as it constitutes an unreasonable deprivation as stated in the provision. It is also arguable that the use of delaying-tactics in maintenance matters, also amounts to a form of economic abuse. This is arguably so because unnecessary delays to the process can constitute unreasonable deprivation of financial resources which is necessary for the child's living. This is especially the case where the matter would have been settled without unnecessary delays and extra costs as such.

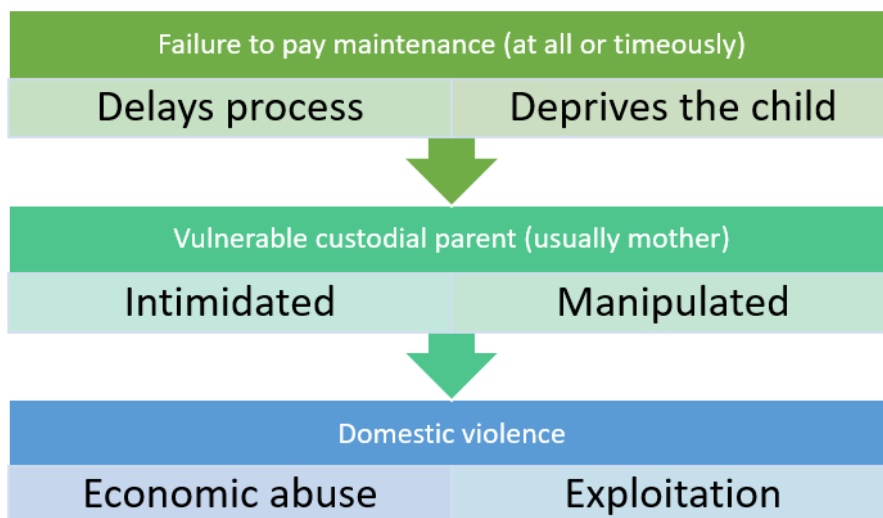


³ <https://mg.co.za/news/2021-11-22-report-slams-financial-abuse-of-women-as-a-form-of-gender-and-domestic-violence/>.

⁴ S1.

⁵ S1.

The Domestic Violence Amendment Act 14 of 2021 (not yet in operation at Feb 2023) has further proposed removal of the term ‘unreasonable’ in the above-mentioned definition of economic abuse. This means that a maintenance applicant may be a victim to domestic violence through economic abuse even if the person liable to pay maintenance acts in a reasonable manner. This widens the scope for potential economic abuse in a maintenance context. For example, a party may be acting reasonably by refusing to pay their maintenance obligations due to the fact that they have lost their job. This example would still amount to economic abuse under the amended Act, even though their actions may have been reasonable in the circumstances, it can still be seen as a deprivation of financial necessities.



As discussed under later headings, the child’s best interest is a principle that guides all maintenance matters. Therefore, if an action relating to a maintenance dispute is not taken with the child’s true needs at heart, such an action may arguably amount to a form of domestic violence against the mother or the child themselves.



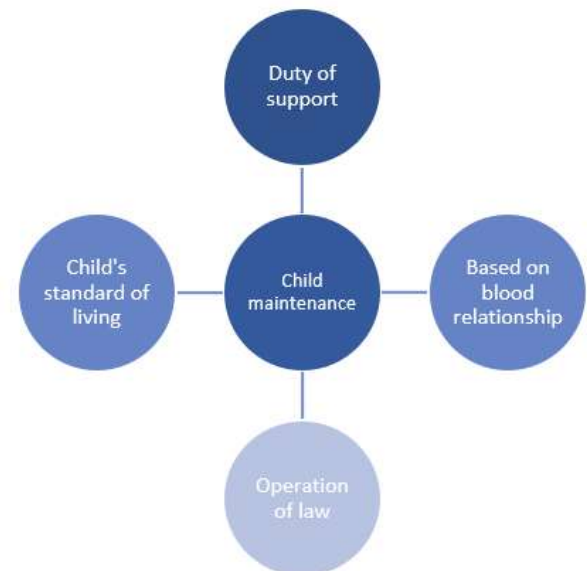
3. What is maintenance?

3.1 'Maintenance' defined

Maintenance, or alimony, can be defined under an umbrella term such as 'support'. This duty of support extends to accommodation, food, clothes, medical and dental attention and other necessities of life on a scale in line with the social position, lifestyle and financial resources of the parties⁶. Parents' duty to support their children is imposed by law and is based on blood relationship. It must be kept in mind that an adopted child must, for all purposes whatsoever, be regarded as the legitimate child of the adoptive parent, as though he was born from the marriage of such parents⁷. This means that the natural children ('blood children' or biological children), are entitled to maintenance from such a parent, but not the stepchildren or children-in-law (through affinity)⁸.

Both parents have the duty to support their natural children, legitimate or illegitimate, in accordance with their respective means. The parents' duty of support in respect of their natural child is not terminated, for example, their divorce, remarriage, or the fact that the parent does not have the custody or guardianship of the child.⁹ This idea has been confirmed in case law such as *Lamb v Sack* 1974 (2) SA 670 (T), which provided that 'the general principle is that the duty of supporting a child is a duty common to both parents, according to their respective means, and it makes no difference whether such child is born in or out of wedlock. There is no valid reason why the ordinary rule that the burden of support, resting on both parents jointly, is distributable inter se according to their respective means and income, should not also apply in respect of the natural parents of illegitimate children'¹⁰.

While food, clothing and shelter are always mentioned in any discussion of maintenance, the concept embraces much more than these necessities.¹¹ The maintenance of children includes



⁶ B Clark's *Handbook of the South African Law of Maintenance* (2016) 3.

⁷ S242(1) and (2) of the Children's Act 38 of 2005.

⁸ A van der Merwe's *Maintenance Manual for Presiding Officers* 3.

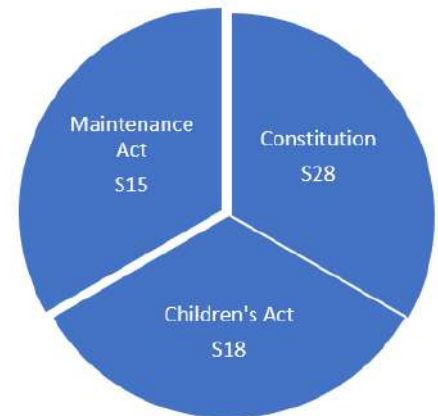
⁹ Van der Merwe's *Maintenance Manual* 4.

¹⁰ Van der Merwe's *Maintenance Manual* 5.

¹¹ Clark's *Maintenance* (2016) 3.

education, for example. Today the scope of maintenance is always determined according to the standard of living of the parties concerned.¹²

There are further many legislative instruments which deal with, and define maintenance. These provisions will be discussed below.



3.2 Legislation that defines 'maintenance'

3.2.1 Maintenance Act 99 of 1998

The Maintenance Act defines a child maintenance to the extent that parents have duties of support over their children.

The provision reads as follows:

15 Duty of parents to support their children

(1) Without derogating from the law relating to the liability of persons to support children who are unable to support themselves, a maintenance order for the maintenance of a child is directed at the enforcement of the common law duty of the child's parents to support that child, as the duty in question exists at the time of the issue of the maintenance order and is expected to continue.

This provision underpins the nature of maintenance in South African law. Maintenance is regarded as a *common law obligation* which arises upon the need of a child to be supported, and means of a non-custodial parent to pay maintenance. This common law duty is further detailed in constitutional and legislative provisions that give effect to the duty to support, as discussed below.

3.2.2 Constitution of the Republic of South Africa, 1996 ("Constitution")

The constitutional provision, in relation to maintenance, reads as follows:

28. (1) Every child has the right—

(b) to family care or parental care, or to appropriate alternative care when removed from the family environment;

(c) to basic nutrition, shelter, basic health care services and social services;

(d) to be protected from maltreatment, neglect, abuse or degradation;

¹² B Clark's *Handbook of the South African Law of Maintenance* (2016) 3.

Constitutionally, therefore, child maintenance includes considerations as to appropriate care of children, including their rights to basic living resources and the right to be protected. Maintenance therefore encompasses all these elements into a common law duty on parents.

3.2.3 *Children's Act 38 of 2005*

Legislation relating to the rights of children also provide that parents have a duty to support their children. The provision reads as follows:

18 Parental responsibilities and rights

(2) The parental responsibilities and rights that a person may have in respect of a child, include the responsibility and the right-

- (a) to care for the child;
- (b) to maintain contact with the child;
- (d) to contribute to the maintenance of the child.

Maintenance is therefore both a common law duty, but it also forms part of the statutory parental responsibilities and rights. Maintenance would largely be regarded as a responsibility on the part of the non-custodial parent, or a right on the part of the child. There are however prerequisites which must be satisfied before a claim to maintenance will be entertained.

3.2.4 *Other legislation*

Both the Divorce Act¹³ and the Domestic Violence Act (with proposed amendments)¹⁴ also cater for maintenance. In this context, spousal maintenance would be regulated by the Divorce Act and is beyond the scope of this discussion. Maintenance matters can often also deal with an element of domestic violence, similar as in divorce-related matters.

The common law also regulates parties' duty of support in the case of child maintenance.

¹³ 70 of 1979.

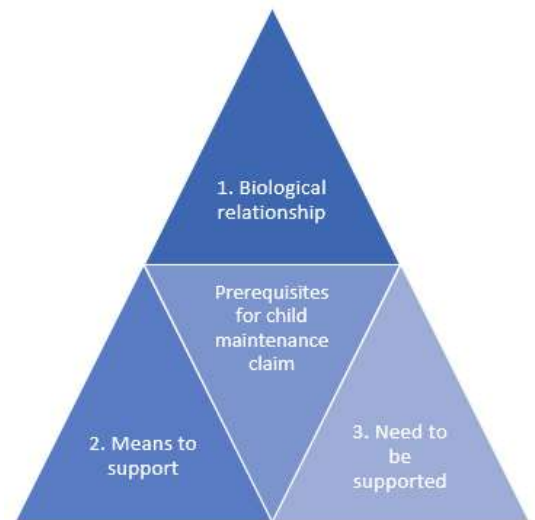
¹⁴ 116 of 1998 and 14 of 2021.

3.2 Prerequisites for a maintenance claim

The requirements for a maintenance application include¹⁵:

- 1) A (biological) parent-child relationship between the parties;
- 2) Need to be supported of the person claiming maintenance;
- 3) Adequate resources or means of the person paying maintenance.

Detail on the requirements for a maintenance claim is discussed under subsequent headings.

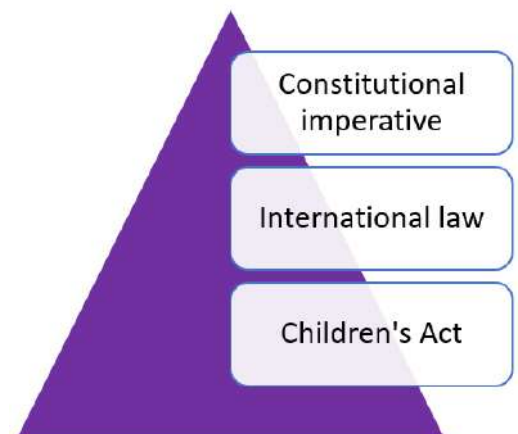


¹⁵ B Clark's *Handbook of the South African Law of Maintenance* (2016) 3.

4. Best interest of the child

4.1 Best interests as primary focus

Child maintenance hinges on the notion that the child's best interest must be safeguarded in all aspects of the duty to maintain. Section 28(2) of the Constitution places a duty on parties to consider the child's best interest as it is of utmost importance in all matters concerning children. This approach is dictated by legislation, constitutional rights and international law, as discussed below.



4.1.1 *Constitution and Bill of Rights*

The Constitution provides that, in all matters concerning children, the child's best interest is a consideration of paramount importance¹⁶. It is well-known however that the best interest principle is not an absolute right which trumps all, and that it can indeed be justifiably limited. Children's constitutional rights further include the right to family or parental care (or appropriate alternative care), basic nutrition, shelter, healthcare and social services¹⁷. The Constitution further, in its Bill of Rights, affords everyone the right to human dignity¹⁸, life¹⁹, education²⁰ and healthcare, food, water and social security²¹.

4.1.2 *United Nations Convention on the Rights of the Child ("UNCRC")*

The UNCRC also dictates that the child's best interest must be maintained, which South Africa has ratified in 1995 and is therefore bound to. Best interests are regarded as a primary consideration in all actions concerning children, therefore ensuring the child's care and protection as such²². The principle is further fleshed out as ensuring the survival and development of the child²³, recognition of both parents' common responsibilities for the upbringing and development of the child²⁴ and that an adequate standard of the child's living must be safeguarded²⁵.

¹⁶ S28(2).

¹⁷ S28(1).

¹⁸ S10.

¹⁹ S11.

²⁰ S29.

²¹ S27.

²² Article 3.

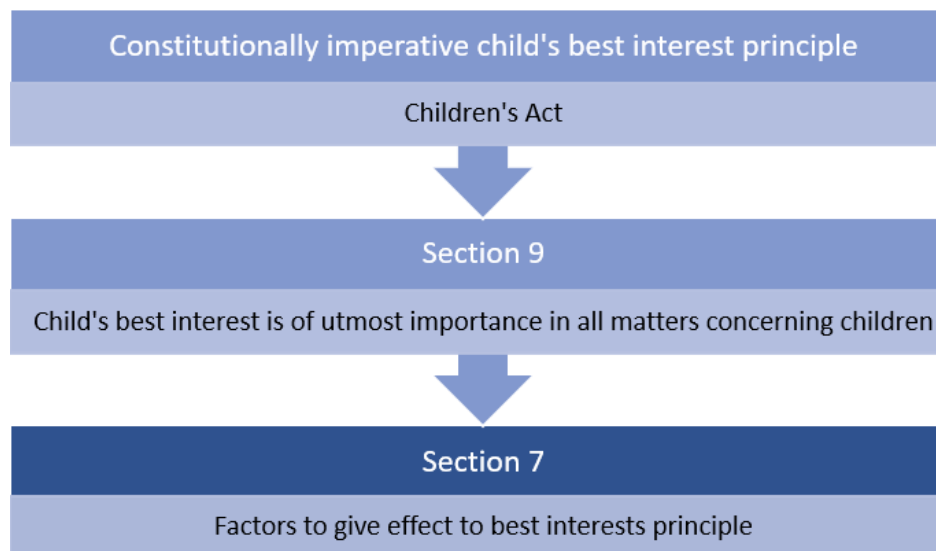
²³ Article 6.

²⁴ Article 18.

²⁵ Article 27.

4.1.3 Children's Act 38 of 2005

The Children's Act further elaborates on the meaning of the best interest principle. It provides that the child's best interest is, once again, of uppermost importance in all matters that concerns children²⁶. The meaning of the principle is set out in a list of factors that expands on what application of the principle looks like²⁷.



The factors to consider in determining the child's best interest can be seen in section 7 of the Children's Act:

7 Best interests of child standard

(1) Whenever a provision of this Act requires the best interests of the child standard to be applied, the following factors must be taken into consideration where relevant, namely-

(a) the nature of the personal relationship between - (i) the child and the parents, or any specific parent; and (ii) the child and any other care-giver or person relevant in those circumstances;

(b) the attitude of the parents, or any specific parent, towards - (i) the child; and (ii) the exercise of parental responsibilities and rights in respect of the child;

(c) the capacity of the parents, or any specific parent, or of any other care-giver or person, to provide for the needs of the child, including emotional and intellectual needs;

(d) the likely effect on the child of any change in the child's circumstances, including the likely effect on the child of any separation from - (i) both or either of the parents; or (ii) any brother or sister or other child, or any other care-giver or person, with whom the child has been living;

(continues on next page)

²⁶ S9.

²⁷ S7.

(continues from previous page)

(e) the practical difficulty and expense of a child having contact with the parents, or any specific parent, and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with the parents, or any specific parent, on a regular basis;

(f) the need for the child - (i) to remain in the care of his or her parent, family and extended family; and (ii) to maintain a connection with his or her family, extended family, culture or tradition;

(g) the child's - (i) age, maturity and stage of development; (ii) gender; (iii) background; and (iv) any other relevant characteristics of the child;

(h) the child's physical and emotional security and his or her intellectual, emotional, social and cultural development;

(i) any disability that a child may have;

(j) any chronic illness from which a child may suffer;

(k) the need for a child to be brought up within a stable family environment and, where this is not possible, in an environment resembling as closely as possible a caring family environment;

(l) the need to protect the child from any physical or psychological harm that may be caused by - (i) subjecting the child to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to violence or exploitation or other harmful behaviour; or (ii) exposing the child to maltreatment, abuse, degradation, ill treatment, violence or harmful behaviour towards another person;

(m) any family violence involving the child or a family member of the child; and

(n) which action or decision would avoid or minimise further legal or administrative proceedings in relation to the child.

(2) In this section 'parent' includes any person who has parental responsibilities and rights in respect of a child.

4.2 Child's best interest in maintenance matters

As detailed in the above-mentioned legislative provision and constitutional imperatives, these best interest-related factors *must* be considered in a maintenance matter that concerns a child or children. Therefore, the factors listed above and discussed below must be considered during the informal section 6 maintenance enquiry, and also at the formal section 10 enquiry if relevant.

4.2.1 *Children's Act section 7 factors*

The factors listed in the Children's Act gives appropriate guidance on how to consider what the child's best interest is in a maintenance dispute. These factors will now be discussed with reference to a maintenance matter, in an attempt to pinpoint what a child's best interest may look like.

The nature of the relationship between the child and parents ultimately dictates who will be the applicant for child maintenance²⁸. If the mother is the custodial parent (with sole care rights), she will be the applicant. The converse is also true, if the father is the custodial parent, they will claim maintenance from the mother. The nature of the personal relationship between the parents and child may also have an impact on who the child chooses to live with, if they are of sufficient age, maturity and development to voice their needs as such.

The attitude of the parents to the maintenance dispute is also a factor to consider in determining the child's best interests²⁹. If a parent is reckless and irresponsible, it has severe consequences on the wellbeing of a child to such a maintenance dispute. Such unforgiving attitudes must therefore be approached in a mediative manner, to allow the uncooperative parent to see the effect their actions have on the child in an attempt to make them better their attitude. Parents who are dependable, honest and cooperative during a maintenance enquiry will ensure that their child/ren's best interests are indeed considered.



The capacity of a parent to provide for the needs of a child is a very relevant factor in determining the best interest of children to maintenance disputes³⁰. This includes the emotional and intellectual needs of the child, but will be focused on the financial capacity of a parent liable to pay maintenance as well. Therefore, if a parent's capacity to maintain is severely exceeded, it will show to not be in the best interest of the child whose maintained at the cost of their parents' livelihood. This ties in with the idea that the parent's interests should also be a consideration in establishing the child's best interest.



Likely effects on children to maintenance disputes may include, for example, feelings of hopeless in the face of changing circumstances and/or feeling alienated by parents disputing what their child needs. These feelings should be addressed by the parents to ensure that their child's psychological needs are not compromised.

A *child-informed approach* to a maintenance dispute will ensure that their best interest are indeed considered. This means allowing the child's views to be heard, and even to allow the child to participate, where appropriate. Parties to a child maintenance matter must therefore have due regard to the child's age, maturity, development, gender and background³¹ to

²⁸ S7(a).

²⁹ S7(b).

³⁰ S7(c).

³¹ S7(g)(i)-(iv).

establish whether or not to allow the child's participation in the matter. This may also include considerations as to the child's physical, emotional, social and cultural context, including any disabilities and/or family violence³².

Ultimately, a decision which is in the child's best interest will minimize further legal proceedings in relation to the child³³. In a maintenance matter, this means awarding (if it is decided so) a reasonable amount of maintenance that will indeed maintain the child's needs. Awarding such a reasonable amount avoids having to approach court at a later stage if needing an increase of the amount. To contrast, awarding an unreasonable or arbitrary amount of child maintenance would not be in the child's best interest as it almost guarantees the future effort of having to approach court for variation of the order. Comprehensive calculations must therefore be done to ensure that the amount is in actuality reasonable in light of the child's needs and the liable parent's financial means.

4.2.2 Case law on best interests in child maintenance

4.2.2.1 *Bannatyne v Bannatyne*³⁴

Bannatyne dealt with an applicant who had applied for special leave to appeal against a judgment and order of the Supreme Court of Appeal. That court had set aside an order made in the High Court for committal for contempt of a maintenance order. The applicant however argued that the Supreme Court of Appeal had failed to take into consideration and give due weight to section 28(2) of the Constitution, which states that a child's 'best interests are of paramount importance in every matter concerning the child'. The Constitutional Court found that a dispute on this point did raise a constitutional matter and that the case also raised issues of gender equality relevant to the manner in which a court should approach a case such as that then before it. It admitted the Commission for Gender Equality as *amicus curiae* (friend of the court). Both matters were constitutional in nature and properly before the Constitutional Court. In addition, the applicant had reasonable prospects of success, so special leave to appeal was granted. The court stated that, while the obligation to ensure that all children are properly cared for is one which the Constitution imposes in the first instance on their parents, there is an obligation on the State to create the necessary environment for parents to do so.

Bannatyne is therefore illustrative of the important of the best interest principle. It shows how the constitutional imperative as to the best interests principle operates in a set of facts, and

³² S7(h) and (i).

³³ S7(n).

³⁴ 2003 (2) SA 359 (SCA), 2003 (2) BCLR 111 (CC).

how important it is to cater for those considerations. The best interest of the child must be considered, but it must further also be enforced and secured by the state in the maintenance-related decision that is being taken. It also amounts to contempt of court to fail to comply with a maintenance order as such.

4.2.2.2 *SS v VV-S*³⁵

SS v VV-S dealt with an applicant ("Mr S") who approached the Constitutional Court seeking leave to appeal against the judgment and order of a High Court authorising the issuance of a warrant of execution to attach and sell Mr S's immovable property to satisfy a debt that he owed Ms V-S in respect of maintenance for their only child. In May 2010 Ms V-S relocated to the United States of America, where she remained for approximately four years. During this time, Ms V-S claimed to have paid various amounts in respect of school fees, medical bills, and extramural activities for the child. Mr S paid maintenance for the child from October 2010 until close to the end of 2012, at which point he ceased making payments. Upon her return to the RSA, Ms V-S applied successfully to the High Court for the issuance of a writ of execution in the amount of R306 550,18. The Sheriff found that Mr S had insufficient movable assets to satisfy the debt. Ms V-S then applied to the High Court in terms of rule 46(1)(a)(ii) of the Uniform Rules of Court to have Mr S's residential property declared specially executable.

In August 2015 the High Court ordered execution against Mr S's immovable property. Mr S applied to have the warrant of execution set aside, which was dismissed. Mr S was ordered to pay: (i) Ms V-S's costs occasioned by the postponement, (ii) an amount of at least R150 000 on or before 30 September 2017 in respect of the arrear maintenance, and (iii) monthly amounts in respect of his maintenance obligations and other expenses in accordance with the settlement agreement. When the matter resumed on 8 November 2017, it emerged during the hearing that Mr S had not fully complied with the Court order made on 29 August 2017. In particular, he had failed to make monthly payments in respect of the basic maintenance obligations and other expenses of the child.

The Court acknowledged that the matter raised a constitutional issue, but held that it would not be in the interests of justice to grant Mr S leave to appeal. The Court ordered Mr S to pay Ms V-S's costs. Given his conduct compromising the child's best interests and the Court's integrity, his continued application could be viewed as being "so unreasonable or out of line that it constitute[d] an abuse of process". The Court held that a punitive order of costs would be justified because Mr S's conduct was the kind of "extraordinary" conduct worthy of the

³⁵ 247/2016 (1 March 2018).

Court's rebuke. Mr S was ordered to pay Ms V-S's costs relating to the proceedings of 8 November 2017 on an attorney and client scale.

This case is therefore illustrative of the harsh approach on a party who fails to consider the child's best interest in their conduct. It shows how serious misconduct and failure to abide by court orders amounts to an abuse of process, not in the best interest of the child at stake.

5. Maintenance obligation and duty to support

5.1 Maintenance obligation upon fulfilment of requirements

Although maintenance remains a common law obligation, this obligation to maintain only arises upon the satisfaction of the relevant requirements for such a cause of action. These requirements will be detailed in the headings below.

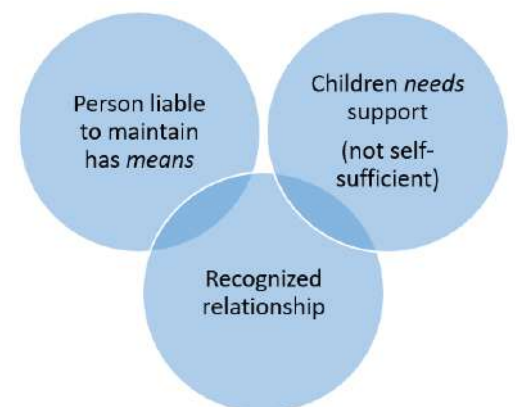
The provision providing for the duty of parents to support their children reads as follows:

Section 15(1)

Without derogating from the law relating to the liability of persons to support children who are unable to support themselves, a maintenance order for the maintenance of a child is directed at the enforcement of the common law duty of the child's parents to support that child, as the duty exists at the time of the issue of the maintenance order and is expected to continue.

General requirements for the existence of a duty of support therefore include:

- 1) That the person liable to maintain the child must have the means to supply such maintenance;
- 2) The children are incapable of supporting themselves; and
- 3) The relationship between them is of such a nature that the law recognizes the existence of a duty of support.



Therefore, when a child needs support and a biological parent can provide such support, an obligation to maintain arises. *GM v KI/2015 (3) SA 62 (GJ)* has confirmed that a biological father's duty to maintain exists regardless whether or not they are a holder of parental responsibilities and rights³⁶. This common law obligation can however be made an order of court to ensure legal efficacy in enforceability. Such court order will be classified as a maintenance order. The requirements are elaborated below.

5.1.1 Parent-child relationship

Parents' duty to support their children is imposed by law and is based on blood relationship. It must be kept in mind that an adopted child must, for all purposes whatsoever, be regarded as the legitimate child of the adoptive parent, as though he was born from the marriage of such

³⁶ S21(2) of the Children's Act also provides to this effect.

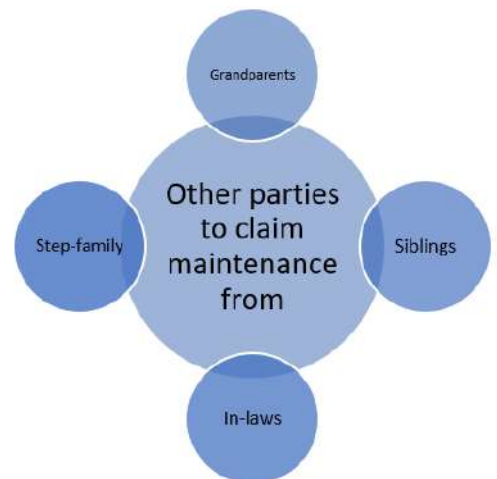
parents (see s242(1) and (2) of the Children’s Act, 38 of 2005). This means that the natural children (‘blood children’ or biological children), are entitled to maintenance from such a parent, but not the stepchildren or children-in-law (through affinity)³⁷.

Other relationships are also recognized in a maintenance context, as discussed below in relation to child maintenance.

5.1.1.1 Grandparents

If the parents are incapable of supporting the children but the grandparents are, grandparents on both sides of legitimate children are obliged to support their grandchildren³⁸. This was seen in *Jade Lee Petersen and the Maintenance Officer of Simon’s Town Maintenance Court and Another* 2004 (2) SA 56(C): “In my view it is necessary, in order to keep our common law in step with the values enshrined in the Constitution, that a duty be imposed on paternal grandparents to support their extra-marital grandchildren to the same extent to which the maternal grandparents are liable to maintain their extra-marital grandchildren. The imposition of this duty of support would be an incremental step in the development of the common law.”

However, there is no liability on the estates of grandparents to maintain the grandchildren and there exists no claim to this effect.³⁹



5.1.1.2 Brothers and sisters

Brothers and sisters are liable to maintain another if their parents and grandparents are not capable of doing so, including his/her half-brothers and half-sisters. The claimant must prove his/her own indigence and his/her brother’s or sister’s ability to provide support.

Case law on this matter further dictates:

- *Oosthuizen v Stanley* 1938 AD 322 at 331: Obiter dictum to the effect that Roman-Dutch authority favours a duty between brothers and sisters.
- *Ex parte Pienaar* 1964(1) SA 600(T) at 607E-F: It seems that this duty is not as extensive as that of a parent, for it has been held that a brother has no obligation to provide his

³⁷ A van der Merwe’s *Maintenance Manual for Presiding Officers* 3.

³⁸ Van der Merwe’s *Maintenance Manual* 5.

³⁹ *Barnard, NO v Miller* 1963 (1) SA 566 (C).

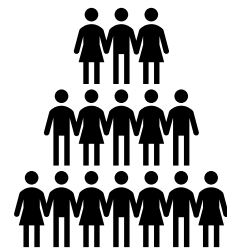
brother, who is physically and mentally healthy, with a university education after he attained majority

5.1.1.3 In-laws

There is no duty of support between more remote blood relations in the collateral line or between relations by affinity (include father-in-law and son-in-law). *Ford v Allen* 1925 TPD 5 confirms that between relatives by affinity there is no duty of support.

5.1.1.4 Step-family

There is no duty of support between more remote blood relations in the collateral line or between relations by affinity. (e.g. between stepfather and stepchild or father-in-law and son-in-law), although a marriage in community or property may have the practical effect that e.g. a stepfather shares in the support of his stepchild during the existence of the marriage.



Case law on the matter has further elaborated:

- *S v MacDonald* 1963(2) SA 431 (C): A parent married in community of property is not a person legally liable to maintain his stepchildren even though he undertook liability while there was a consortium.
- *Hartman v Krogscheepers* 1950(4) SA 421 (W): As the burden of supporting children, whether before or after a divorce, is common to both spouses - the only qualification being that it is distributable between them according to their means - it is essential that when the parent, who had been given the custody on divorce and who has remarried in community of property, applies, through the administrator of the joint estate, for an increase in the maintenance payable to the children, she should furnish particulars of the assets of the joint estate so as to enable the Court to assess the extent of the other parent's liability.
- *Ex parte Pienaar* 1964(1) SA 600 (T): A duty of support exists between brothers (including half brothers), but it is not the duty of a brother to support a brother who is physically and mentally well, after the latter has attained majority.
- *Heystek v Heystek* 2002 (2) SA 754 (T): "I am of the view that the inevitable concomitant of a marriage in community of property is the shared responsibility of both spouses for the

maintenance of the common household, which, in this case, certainly includes the applicant's children since the respondent had and has consortium with the children's mother."

- *Mentz v Simpson* 1990 (4) SA 455 (A) at 460C: The Court reiterated that a parent's primary duty was to maintain his own children, and that the needs of stepchildren were legally irrelevant to the issue of the maintenance requirements of own children. It held: "The respondent may, in the event of his present marriage being one in community of property, be liable for the maintenance of his stepchildren in his capacity as administrator of the joint estate"

5.1.1.5 Illegitimate children

There have been various cases dealing with the maintenance of illegitimate children, or children born out of wedlock/ to unmarried parents. Cases in connection to the lying-in expenses of such children, have dictated:

- *Sager v Bezuidenhout* 1980 (3) SA 1005 (O) has provided that both parents are liable for lying-in expenses according to their means and that a reasonable amount of maintenance must be awarded in the absence of proof of actual maintenance.
- *Louw v Van Rensburg* 1982 (3) SA 36 (SWA) dealt with a mother claiming lying-in expenses from the father, for herself for the two months directly after the birth. The court held she was entitled as such even if she was not a virgin at the time of the intercourse, and that the amount awarded should include maintenance as such.

Regarding paternity, *D v L* 1990 (1) SA 894 (W) has provided that where the operation of presumptions indicate that two persons may be the father, the mother is entitled to choose or appoint a father in an application to declare someone the natural father of the child born out of wedlock.

Similarly, **unwanted births** also generate the duty to maintain the unwanted child based on the biological relationship created. For example, where a hospital in breach of contract fails to sterilize a woman, the maintenance payable to such child born can be recovered by the child's father.⁴⁰

⁴⁰ *Administrator, Natal v Edouard* 1990 (3) SA 581 (A).

5.1.1.6 Major children

The duty of support applies not only in regard to minor children who are in need of support but also to children who have attained majority. This is illustrated in case law and other precedent below:

- *Gliksman v Tolensky* 1955 (4) SA 468 (W) 470: The fact that a child is working does not mean he/she is necessarily self-supporting. Continued but reduced support by parents may be necessary in accordance with the family's standard of living.
- *Burse v Bursey* 1999(3) SA 35 (A): Both parents have, at common law, a duty to maintain a child of the dissolved marriage. The incidence of this duty in respect of each parent depends on their relative means and the circumstances and needs of the child from time to time. The duty does not terminate when the child reaches a particular age, but continues after majority

5.1.2 Needs of the child

The duty of support applies not only in regard to minor children who are in need of support but also to children who have attained majority. This is because a maintenance obligation only ceases upon the child's self-sufficiency. However, the fact that a child is working does not mean they are necessarily self-supporting, rather that continued but reduced support by parents may be necessary in accordance with the family's standard of living⁴¹.

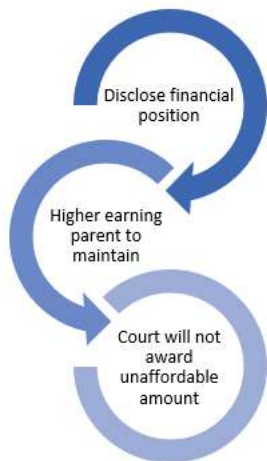
Parents must calculate the amount required per month to support their child. The calculation includes items such as food, clothing, school fees and medical aid.⁴² This calculation must consider the family's standard of living. Calculations as to the child's reasonable needs or their portion will be discussed in subsequent headings.



⁴¹ *Gliksman v Tolensky* 1955 (4) SA 468 (W) 470.

⁴² <https://www.golegal.co.za/claiming-child-maintenance/>.

5.1.3 Means of the parent



Both parents have the duty to support their natural children, legitimate or illegitimate, in accordance with their respective means. The parents' duty of support in respect of their natural child is not terminated, for example, their divorce, remarriage, or the fact that the parent does not have the custody or guardianship of the child.⁴³

Parents to a child maintenance matter must disclose their income and expenses to determine which parent, with the higher net income, has to pay most of the maintenance. In most cases, both parents will have to contribute towards the maintenance of the minor children. However, child maintenance is usually claimed from the non-custodial parent, by the parent with whom the child lives.⁴⁴

Ultimately, a court cannot (and will not) order a parent to pay maintenance that he/she cannot afford. If a parent cannot afford to pay maintenance, the court will order him/her to pay a lesser amount.⁴⁵ If a parent has no income at all, they will not be required to pay maintenance, unless they own significant assets which can be used to pay maintenance. Calculations of the parent's means or possible contributions will be discussed in subsequent headings.

⁴³ B Clark's *Handbook of the South African Law of Maintenance* (2016) 32.

⁴⁴ <https://www.golegal.co.za/claiming-child-maintenance/>.

⁴⁵ <https://www.golegal.co.za/claiming-child-maintenance/>.

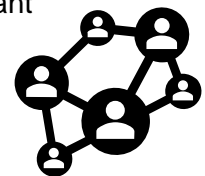
5.2 Nature of duty to support in South African law



5.2.1 Closer

relatives before distant relatives

The duty to support falls on the nearest relative, rather than on the more distant one⁴⁶. This means that a maintenance applicant can only claim from family members further removed if the closer-related family members are unable or fail to comply with the requirements for maintenance as such.



5.2.2 Reciprocal duty

Maintenance obligations are reciprocal in nature, which means that parents and children have a corresponding duty to support each other⁴⁷. This duty is of a unique (or *sui generis*) nature. It is also said to be based on piety or affection, to arise *ex ratione pietatis* (by reason of respect) or *ex aequitate caritateque sanguinis* (out of fairness and the affection of a blood relationship⁴⁸).

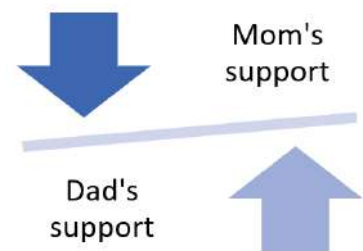
⁴⁶ B Clark's *Handbook of the South African Law of Maintenance* (2016) 4.

⁴⁷ Clark's *Maintenance* (2016) 4.

⁴⁸ Clark's *Maintenance* (2016) 4.

5.2.3 Proportionate parental support

The common law of maintenance dictates that both parents are responsible to support their child/ren in a proportionate manner, according to their respective means. This means that both parents are required to contribute to maintaining their child's standard of living. This duty is however limited according to the parties' means, or what they can afford. Therefore, one parent's financial shortcoming should be remedied by the other parent's increased contribution depending on the means.



It is however against public policy for a parent to waive child maintenance completely, or conversely, to dedicate all income to child maintenance⁴⁹.

5.2.4 Measure of child support

Maintenance is a far-reaching term, which includes the provision of food, housing, clothing, medical care and, in respect of children, (tertiary) education and probably the cost of litigation.⁵⁰ Therefore, maintenance encompasses more than the provision of mere 'bare necessities'⁵¹ and is guided by the best interest principle in respect of the meaning of 'necessities'. The level at which maintenance is provided is usually determined by the standard of living of the parents and their standing in the community, which in turn determine the standard of living of a child⁵². In addition to food, clothing and accommodation the provision of the amenities of electricity, water, linen, cutlery and laundering should be taken into account⁵³

The duty to maintain children may in certain circumstances include the duty to provide tertiary education, even if the child is self-sufficient. Whether this education falls under the head of 'necessaries' will depend on, amongst other things, the parent's financial circumstances and social status and the children's academic aptitude and achievements.⁵⁴

⁴⁹ *Shields v Shields* 1946 CPD 242; *S v Rahman* [1974] 3 All SA 211 (RA), 1974 (3) SA 280 (RA).

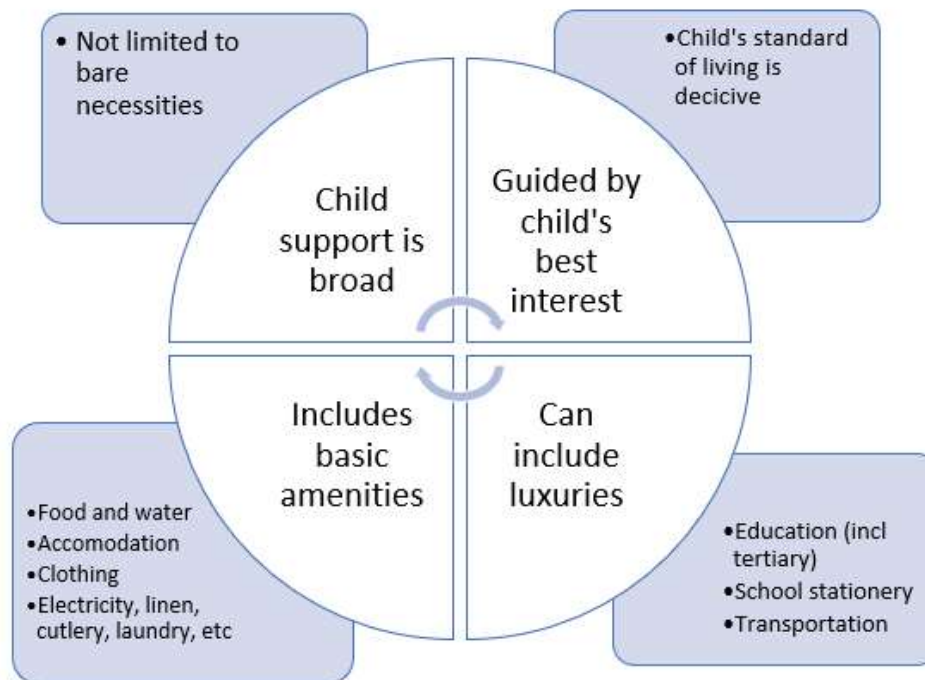
⁵⁰ B Clark's *Handbook of the South African Law of Maintenance* (2016) 9.

⁵¹ *Prophet v Prophet* [1948] 4 All SA 249 (O), 1948 (4) SA 325 (O) 328 also provided that 'need' encompasses more than mere necessities for the support of life.

⁵² Clark's *Maintenance* (2016) 9.

⁵³ Clark's *Maintenance* (2016) 10.

⁵⁴ Clark's *Maintenance* (2016) 12.



5.2.5 Duration of duty to support

The common law duty to pay child maintenance ceases when the child is self-sufficient, therefore at no particular age, but major children have the responsibility to prove their need for maintenance. *B v B*⁵⁵ similarly provided that a statement of minority does not necessarily imply that the maintenance obligation ceases upon majority, especially in the context where the major child is a student. Such maintenance obligation to a major dependent child is however only limited to necessities and such circumstances does not amount to an extension of the maintenance obligation.

5.2.6 Defences: Avoiding the duty to pay maintenance

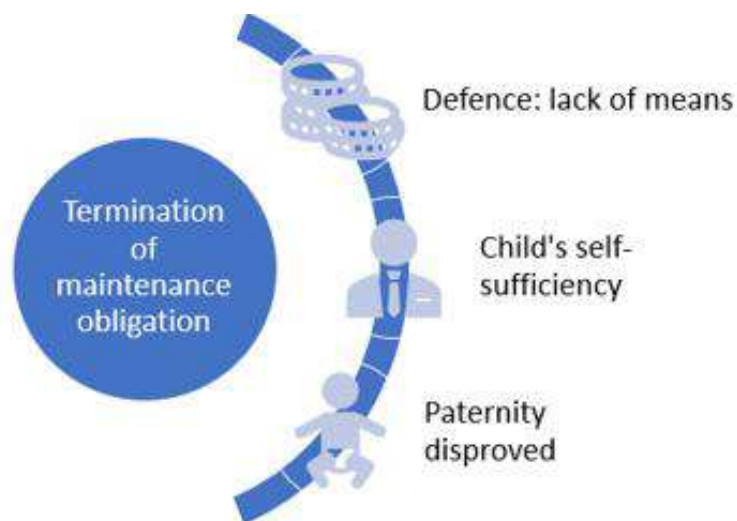
When a parent is able to provide only limited support or a limited contribution to the child's support and any particular requirement of the child is beyond the parent's financial means, that parent is not obliged and is under no duty to provide the requirement concerned. However, a parent cannot evade the duty to support by giving up work and, for example, embarking on full-time studies. Similarly, parents cannot be allowed not to realize the full potential of their earning capacity to the detriment of their children by, for example, charging abnormally low rentals on property belonging to them.⁵⁶

⁵⁵ [1999] 2 All SA 289 (A).

⁵⁶ B Clark's *Handbook of the South African Law of Maintenance* (2016) 10.

5.2.7 Termination of maintenance obligation

Parents need not support a child who does not need maintenance or who is self-supporting, but the fact that a child can support himself or herself does not always preclude a parent's duty to provide higher education, however.⁵⁷ When a child has income but the parent nevertheless maintains the child, later recovery of such contribution depends on whether such support was intended as a donation. If it was intended as a donation, the contribution cannot be recovered.⁵⁸



⁵⁷ B Clark's *Handbook of the South African Law of Maintenance* (2016) 10.

⁵⁸ Clark's *Maintenance* (2016) 10.

6. What can be claimed?



A maintenance claim will only be entertained if it is for the *reasonable* support, *necessary* for a child's *proper living and upbringing*. The qualifications to this statement is very important to ensure that the maintenance claim is indeed economical and adequate to entertain. The relevant provision reads as follows:

Section 15 (2)

The duty extends to such support as a child reasonably requires for his or her proper living and upbringing, and includes the provision of food, clothing, accommodation, medical care and education.

The court must further consider various factors in determining what maintenance amount should be awarded, if any. These factors are set out in the provision below:

Section 15(3)(a)

Without derogating from the law relating to the support of children, the maintenance court shall in determining the amount to be paid as maintenance in respect of a child, take into consideration -

- (i) that the duty of supporting a child is an obligation which the parents have incurred jointly;
- (ii) that the parents' respective shares of such obligation are apportioned between them according to their respective means; and
- (iii) that the duty exists, irrespective of whether a child is born in or out of wedlock or is born of a first or subsequent marriage.

The Act further takes cognizance of the idea that child maintenance is equal regardless of the number of children, as seen in the provision below:

Section 15(4)

As from the commencement of this Act, no provision of any law to the effect that any obligation incurred by a parent in respect of a child of a first marriage shall have priority over any obligation incurred by that parent in respect of any other child shall be of any force and effect.

In determining what to claim in a maintenance application, both parties must give proof as to their income and expenditure to allow the court to award a fair maintenance order. Fairness

in this regard does not equate to equality, necessarily, as maintenance is not calculated on a 50/50 basis. Calculations on these exact amounts will be done under subsequent headings.

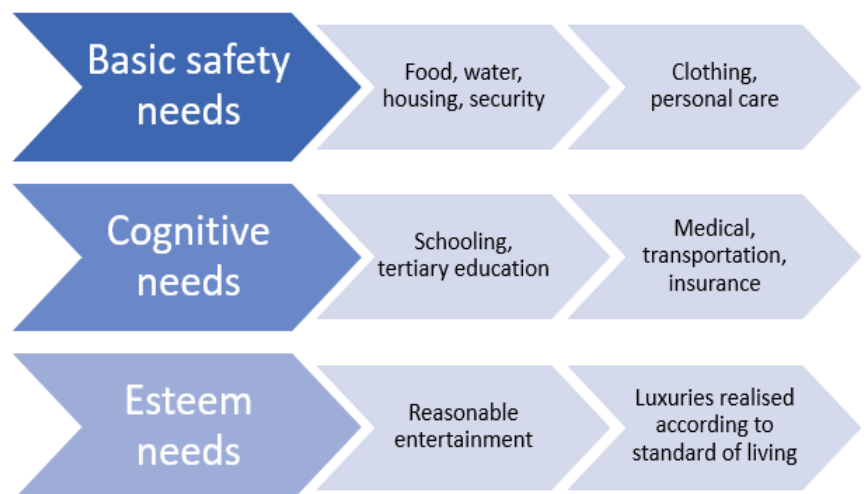
6.1 Items that can be claimed

Reasonable needs of children include food, clothing, accommodation and medical expenses. This is the basics, but if the parents can maintain a higher standard of living this may include any extramural activities as well.⁵⁹

Only once it is clear what the child in question basic needs are can an amount be determined what will constitute reasonable maintenance. Only after this amount is established it can be calculated what portion each parent or guardian must contribute, naturally still within their means. It is quite safe to expect the parent or guardian with the highest disposable income to contribute the most to the maintenance, even if this parent or guardian is not the primary caregiver of the child.⁶⁰

Items which may be regarded as necessary expenditure, include things such as:

1. Food/ groceries and water
2. Clothing and personal care
3. Housing and security
4. Education and schooling
5. Transport
6. Insurance
7. Reasonable entertainment
8. Medical expenses*



*The court may grant an order for the payment of medical

expenses, or may order that the child be registered on the medical scheme of one of the parties as a dependent child.

These above-mentioned categories of items may be claimed and will likely be entertained by the court as such. This is because expenses as to the general wellbeing and standard of living of the child should be regarded as reasonably necessary for such a child’s proper living and

⁵⁹ M Oliver & E Opperman’s *All About Maintenance: Things that you should know about Child Maintenance* (2023).

⁶⁰ Oliver & Opperman’s *Child Maintenance* (2023).

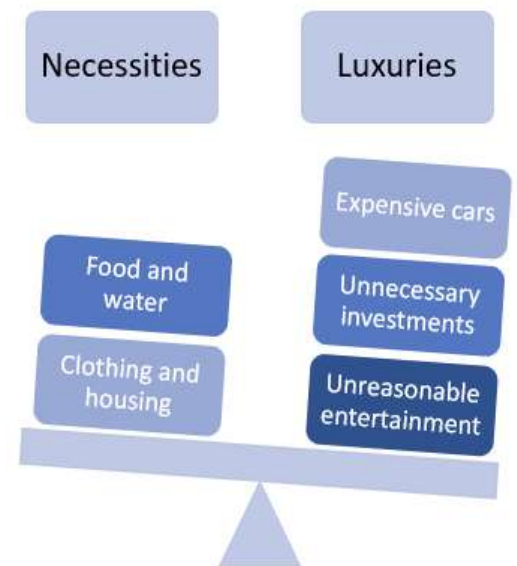
upbringing. The idea of maintenance also ultimately deals with the absolutely crucial monetary needs of a child to have a sustained standard of living. It does not extend to luxuries as such.

The court may also order the father to contribute to the payment of **lying-in expenses** and maintenance from the date of the child's birth up to the date on which the maintenance order is granted. This will include costs that the mother incurred during her pregnancy and post-natal expenditure relating to the pregnancy.

The court will ultimately consider several factors to determine what needs accord with the child's standard of living. These factors may overlap and include considerations as to⁶¹:

1. Reasonable needs of the minor child;
2. Reasonable expenses of the parents;
3. Standard of living the child was accustomed to before;
4. Earning capacity of the parents;
5. Assets of the parents;

It is clear that every child of the same age and same socio-economic background will not require the same maintenance amount, so similarities with other children with a similar background cannot be used to determine the maintenance amount⁶². Ultimately, it is the child's best interest that will guide what is economical and reasonable under a claim for child maintenance.



6.2 Items that cannot be claimed

Things that are not reasonably necessary to secure the child's proper living and upbringing should not be claimed under the guise of a maintenance application. These items can be classified as enriching the child's living, and it does not amount to the true, most basic needs of living.

Items that may be seen as uneconomical in a child maintenance claim, includes but is not limited to things such as:

- 1) Motor vehicles (instead of mere transportation costs)
- 2) Monetary amount for saving purposes only

⁶¹ M Oliver & E Opperman's *All About Maintenance: Things that you should know about Child Maintenance* (2023).

⁶² Oliver & Opperman's *Child Maintenance* (2023).

- 3) Investments for saving purposes only
- 4) Unreasonable entertainment expenses
- 5) Money used for purposes other than absolutely necessary and reasonable living costs.

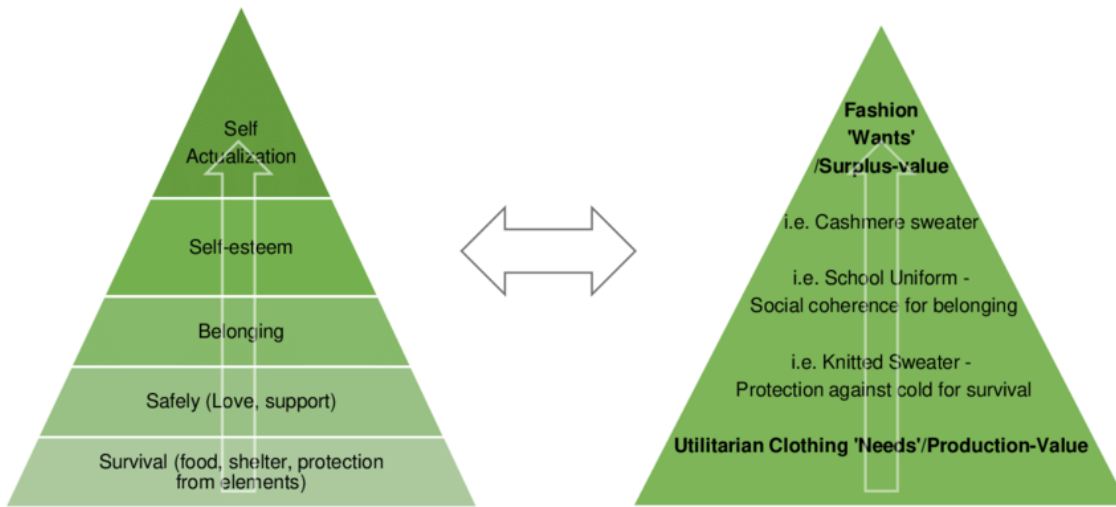
Ultimately the standard of living of the parents and what the child is accustomed to is a decisive factor. Therefore, necessities as well as luxuries can be included if the child is used to such a standard of living. The child needs to continue living at the same standard of living he/she is accustomed to as far as possible, even though this is not always possible⁶³.

Parties can use the above-mentioned guidance to establish whether or not they want to claim for a certain type of expenditure under child maintenance. However, the types of needs must be considered to ensure that an unreasonable expenditure is not detrimentally claimed. Parties can use Maslow's Hierarchy of Needs to establish whether the specific expenditure claimed is indeed regarded as a human need, and to what extent it should be included in a claim for child maintenance. The higher importance that a need (and expenditure related to that need) is regarded, the more likely that it can be claimed under child maintenance.



The bracket at the bottom of the pyramid are basic needs in order to survive, whereas the needs listed on top of the pyramid are aimed at personal growth and less at survival. The bracket aimed at physiological, safety and social needs will most likely be allowed in a claim for child maintenance. However, needs as to esteem may also be included depending on the child standard of living. Needs as to self-actualization will only be included in a claim for child maintenance insofar as they are required to sustain the child's reasonable standard of living.

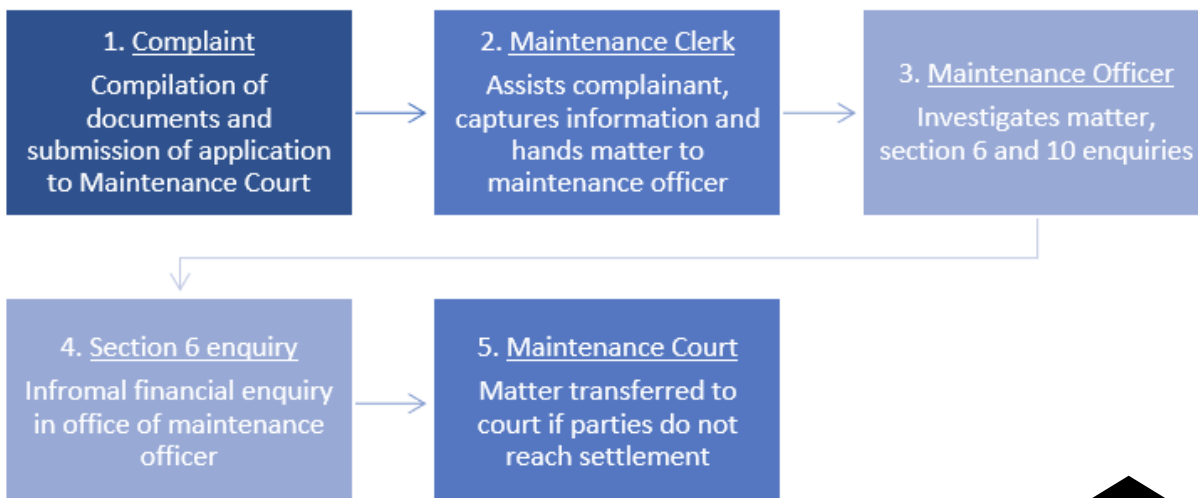
⁶³ M Oliver & E Opperman's *All About Maintenance: Things that you should know about Child Maintenance* (2023).



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https://www.researchgate.net/figure/A-Hierarchy-of-needs-B-Fashion-wants-and-needs-Adapted-from-Maslow-19431954_fig4_346017624

7. Overview of the maintenance process

The maintenance process can be summarized in steps as follows:

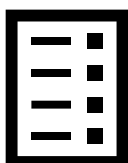


7.1 Complaint relating to maintenance order/ agreement

As seen from the illustration, the maintenance process is initiated by the submission and lodgment of a complaint relating to the matter. Such complaints include either that someone liable to pay maintenance fails as such or that good cause exists for the discharge and/or substitution of an existing or verbal /written agreement. These complaints and their relevant forms can be seen in the provision below, reading as follows:

Section 6(1) Whenever a complaint to the effect-

- (a) that any person legally liable to maintain any other person fails to maintain the latter person; **(FORM A/J101E)** or
- (b) that good cause exists for the substitution or discharge of a maintenance order, has been made and is lodged with a maintenance officer in the prescribed manner **(FORM B/J107E)**, the maintenance officer shall investigate that complaint in the prescribed manner and as provided in this Act.



Upon such complaint, the maintenance officer shall investigate the relevant complaint according to the procedure discussed below. However, the maintenance officer must first consider whether there is indeed good cause established before investigating the complaint.

7.2 'Good cause' to investigate complaint



The idea of 'good cause' can be illustrated according to case law below, which regarded the relevant circumstances as good cause to approach the court in each case:

- *Green v Green*: 1976 (3) SA 316 (RA): As children get older, the cost of maintaining increases.
- *Joffe v Lubner*: 1972 (4) SA 521 (C): Accommodation as valid reason for increase if they stay with stepfather as there was no legal obligation on the applicant's husband to whom she is married.
- *Vedovato v Vedovato*: 1980(1) SA 772 (T) 774: Factors to be examined are the needs of the children.
- *Zimelka v Zimelka*: 1990(4) SA 330 (W): "What is of importance is that the order of maintenance is ancillary to the duty to maintain. It does not follow that because there is a duty, ergo, there must be an award against the non-custodian parent. The practical incidence of the duty depends upon the facts and ability to contribute at the relevant time. Thus an order for maintenance will be made if good cause exists".
- *Van Aswegen v Van Aswegen*: 2006(6) SA 221 (SE): "In determining whether there existed 'sufficient reason' for the grant of the variation sought, changed circumstances had to be the primary consideration". Also, "...that the change in the applicant's circumstances and the resultant financial hardship, constituted 'sufficient reason' for the grant of the variation sought".
- *Russel v Boughton*: 1955 (2) SA 228 (SR): The dominant factor is the welfare of the child.
- Hahlo: South African Law of Husband and Wife: Fifth Edition page 408: Whereas the right of a former spouse to claim maintenance lapses at divorce, unless the Court granting the divorce order otherwise, a maintenance order in respect of dependant children may be made at any time. Thus, even if the Court granting the divorce did not make any order regarding maintenance for a dependant child, a maintenance court may subsequently grant a maintenance order in favour of the child.

- *Buch v Buch*: 1967 (3) SA 83 T: It is necessary that the maintenance court, in order to fix the amount of maintenance, must be fully informed as to the relative financial position of the parties.
- *Buch v Buch*: (supra) 87: At the conclusion of all evidence the presiding officer will decide whether to make an order to pay maintenance or to vary an existing order to pay maintenance. In doing so he will in no doubt consider all the relevant factors. In general he will look after the best interest of the children and see that justice is done between the parties in accordance with their means and ability to pay.
- *Prophet v Prophet*: 1948(4) SA 325 (O) and *Stone v Stone*: 1966(4) SA (C): Any change in the means, income, needs and obligations of one of the ex-spouses may be sufficient reason for ordering rescission, variation or suspension of the earlier order.
- *Clayton v Greyvenstein*: Unreported decision of the South Eastern Cape Local Division of the High Court at Port Elizabeth in 1998: “In my review there was no need to incur expenses (house and private school) and the need of the child in respect of security and schooling have been equally served by a less costly and affordable abode and a school at which the costs were affordable while still providing for the child’s needs.” The Judge dismissed the application with costs having found that the circumstances complained of were self-created and that the applicant should have lived within her means.
- *Kanis v Kanis*: 1974(2) SA 606 (RA): The respondent cannot skimp on his maintenance payments in order to voluntarily provide luxury items not reasonably necessary for the children.
- *S v Frieslaar*: 1990(4) SA 437 (CPD): A maintenance court making a maintenance order for the first time in terms of section 5(4)(a) of the Maintenance Act, 1963 (now section 16(1)(a)(i) of the Maintenance Act, 1998) is not entitled to make this order with retrospective effect.
- *Strime v Strime*: 1983(4) SA 850 (C): When a maintenance order is made by the maintenance court in substitution of an existing maintenance order such an order can have retrospective effect.

- *Sparks v Sparks* 1998 (4) SA 714 (W): Court vested with continuous authority to entertain application made for fresh order based on fresh facts extinguishing, reducing or increasing sums ordinarily to be paid. A dissatisfied former spouse is not permitted or entitled to revisit order made by court merely he or she is dissatisfied therewith. Judgment of maintenance court not capable of variation on same facts between parties.

7.3 Maintenance investigation procedure

The complaint and the documents to prove such complaint is then received by the maintenance clerk. The documents and relevant forms are then scrutinized by a maintenance officer during a section 6-enquiry, in an attempt to resolve the maintenance dispute in the maintenance officer's office. If the parties agree on an amount, such agreement will be made an order of court. If parties do not agree to an amount, the dispute will be sent to court for a formal section 10 hearing in front of a Magistrate.



It is also of utmost importance that the relevant maintenance roleplayers exercise their powers in order to fulfil their functions in an efficient manner. Failure to do as such may amount to a delictual claim against the maintenance officer who does not apply their mind to a particular instance and fails to act in the child's best interest. This was seen in the case of *Mthimunye v Minister of Justice and Constitutional Development* 2014 JDR 1066 (GP), which dealt with an applicant who applied to hold liable the respondent for arrear maintenance, but also to hold the relevant maintenance officers delictually liable for allegedly failing to take appropriate steps to enforce the payment of arrear maintenance. It was alleged that the maintenance officers' negligence in failing to attach the respondent's debts (pension) gave flesh to the delictual claim. These maintenance officers allegedly failed to apply their mind to the circumstances and merely waited for the delinquent respondent to make rights their arrears. The application for attachment was ultimately granted and criminal proceedings were instituted against the respondent, of which they were ultimately convicted. The magistrate further ruled, without reason, that the outstanding arrear maintenance amounts was to be written off. There was however no empowering provision to this effect contained in the Act and the officers should have followed section 40 and 41 to recover the arrear by converting the criminal proceedings into a maintenance enquiry. The applicant could ultimately not recover their arrear maintenance and was left with a mere hope as to future maintenance. The current case therefore amounted to a form of review proceedings, in which it was held that the arrear maintenance is payable as an order of that court.



These phases of the maintenance process can however differ depending on the type of application or complaint that the dispute revolves around. The different contexts of maintenance complaints will therefore be discussed in Part B of the course material.

7.4 Post-complaint investigation and jurisdiction

As stated above, a section 10 enquiry is relevant once the complaint has been investigated and no settlement is reached upon the initial informal enquiry. This can be seen in the jurisdictional requirements for such maintenance court to hear the matter.

The provision dealing with jurisdiction reads as follows:

Section 6(2)

After investigating the complaint, the maintenance officer may institute an enquiry in the maintenance court within the area of jurisdiction in which the person to be maintained, or the person in whose care the person to be maintained is, resides with a law to enquiring into the provision of maintenance for the person so to be maintained.

Jurisdiction in this context refers to the court's ability to hear the maintenance matter before it, or its ability to entertain the dispute. The court must have the ability to hear a matter and to enforce judgment therefore the enquiry must be instituted in the maintenance court within the area of jurisdiction in which the person to be maintained or the person in whose care such a person is, resides⁶⁴.

Jurisdiction can therefore be established by lodging a claim in either court:

1. In whose area the person to be maintained resides; or
2. In whose care the person to be maintained resides.

Case law has confirmed the above rules relating to jurisdiction:

- *Nguza v Nguza*: 1995 (2) SA 954 (TkGD): The child in respect of which an order has been made did not reside within the area of jurisdiction of the maintenance court, as the child had been placed in the care of the child's grandmother outside the court's jurisdiction. The court held that the fact did not mean that the respondent, the mother of the child, had relinquished or surrendered her personal control of the child; she could remove the child at any moment if she so wished. The court held, accordingly, that the respondent as the person in whose



⁶⁴ A van der Merwe's *Maintenance Manual for Presiding Officers* 17.

care the child was and that the maintenance court which made the order had had jurisdiction to entertain the enquiry on the basis that the respondent, as the person in care of the child, resides within its area of jurisdiction.

- *Rubenstein v Rubenstein*: 1992 (2) SA 709 (T): (Jurisdiction pertaining to the Court): Even after a decree of divorce is granted, accompanied by the maintenance order, it was pointed out that section 8 of the Divorce Act, 70 of 1979, confers jurisdiction in this regard on the High Court for variation but it is nowhere stated in that section or elsewhere in the Act, that such jurisdiction is restricted to the High Court. According to the judge the jurisdiction conferred on the Magistrate's Court in terms of the Maintenance Act is left undisturbed by the Divorce Act.
- *Troskie v Troskie*: 1968 (3) 369 WLD: The forum for maintenance complaints is the Magistrate's Court and not the Supreme Court, except in exceptional circumstances.
- *De Witt v De Witt*: 1995 (3) SA 700 (T): Held: it was clear that the definition of 'maintenance order' was indeed wide enough to include an interim order for the payment of maintenance and that the maintenance court had jurisdiction to substitute or discharge the interim order.
- *Botha v Botha*: 2005(5) SA 228 (W): Where the former spouse wishes to apply for the variation of the duration of a maintenance order in respect of maintenance payable to her or his former spouse, the appropriate forum, if regard is had to s 16(1) of the Maintenance Act 99 of 1998, is the maintenance court, from which appeal or review would lie to the High Court.

7.5 Locus standi

The Children’s Act provides for the standing of those allowed to approach a maintenance court for assistance. The provision reads as follows:

15. Enforcement of rights.

(1) Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights or this Act has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights.

(2) The persons who may approach a court, are:

(a) A child who is affected by or involved in the matter to be adjudicated;

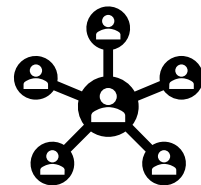
(b) anyone acting in the interest of the child or on behalf of another person who cannot act in their own name;

(c) anyone acting as a member of, or in the interest of, a group or class of persons; and

(d) anyone acting in the public interest

This section is indeed applicable to maintenance courts and matters as such. The section mentions a “competent court” and in sub-section (2) “a court” therefore the section is also applicable to a maintenance court. Section 15 is also part of the general sections. This means that these sections not only relate to matters in the new Children’s Act but to matters or incident affecting children in general.⁶⁵

(end of Part A)

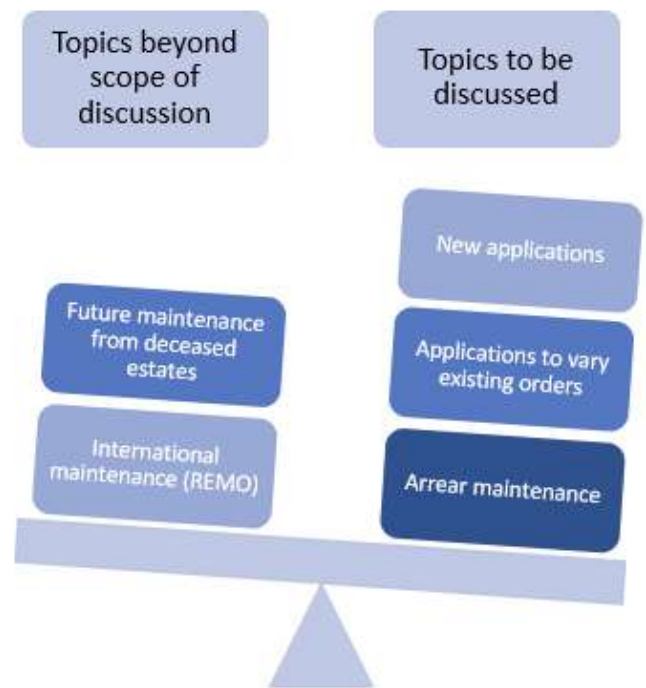


⁶⁵ A van der Merwe’s *Maintenance Manual for Presiding Officers* 20.

PART B: Maintenance complaints in context

The second part of this course outline will focus on the different types of maintenance complaints and the contexts in which disputes can arise. The main focus will be on first applications, variation of applications and arrear maintenance. Future and international maintenance are beyond the scope of this discussion, as illustrated below.

After briefly discussing the different contexts of maintenance complaints, the discussion will turn on the relevant calculations that must be done in relation to such new applications or variation of applications. Arrear maintenance will be discussed at the end of the training.



First time applications

- Documents needed by court
- Relevant calculations
- What will happen at court?
- Orders that a maintenance court can make
- Interim maintenance

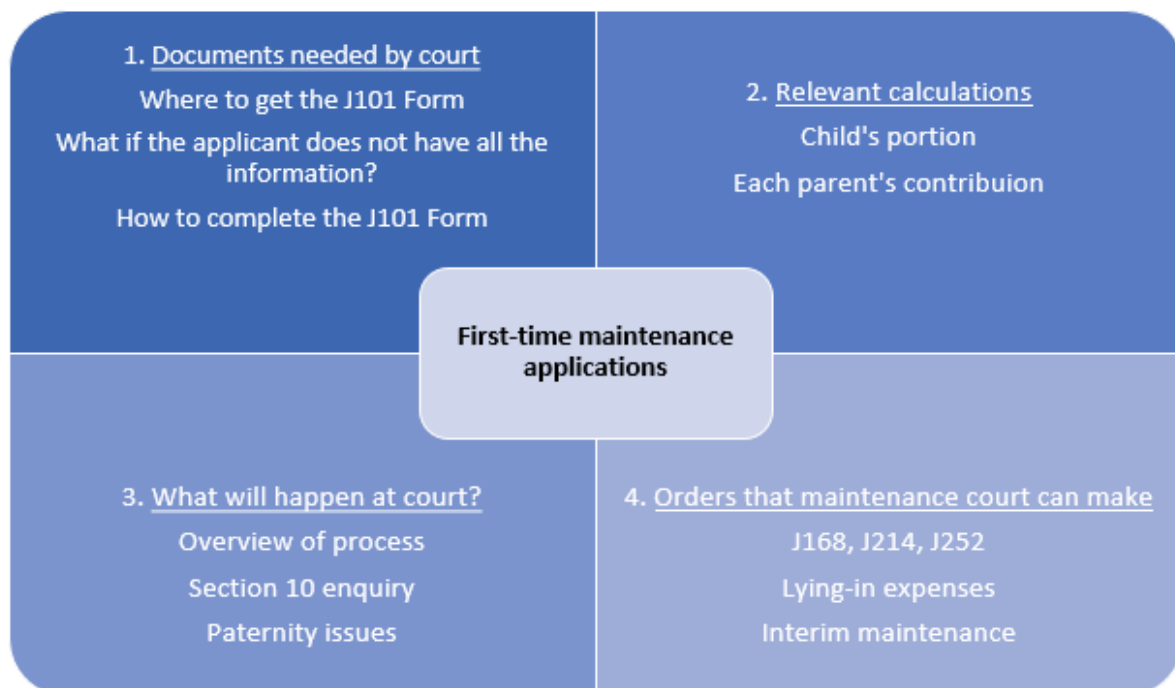
Application to vary existing order

- Requirements to vary existing order
- Factors to consider before applying for variation
- How to complete the J107 Form

Arrear maintenance

- Arrears defined
- Remedies and enforcement
- Civil remedies
- Remedies is failure to comply after 10 days
- Criminal prosecution

1. New or first-time maintenance applications



1.1 Documents needed by court

Generic documents required for a J101 Form, or a maintenance application, include⁶⁶:

1. An identity book (green book with your photo) or passport or drivers license and/or immigration permit;
2. Certified copies of the child/children's birth certificates;
3. Three months bank statement (the latest three months');
4. Three months proof of income (payslip) or the signed letter from the employer confirming your income (only necessary if you are working);
5. Proof of physical/work address of the person responsible for paying the maintenance money (i.e where you stay);
6. Proof of applicant's address. This can be a utility account or affidavit to the effect that you stay at a certain house;
7. Full name of parent/person responsible for paying the maintenance money;
8. Copy of Decree of Divorce (in the case of divorce).



⁶⁶ <https://justice.gov.za/vg/mnt.html>.

The details required of the respective parties can be summarized as follows:

| <i>Maintenance applicant:</i> | <i>Person responsible for paying maintenance:</i> |
|---|---|
| ID book/ passport/ driver's license and/or immigration permit | Full name |
| Certified copies of children's birth certificates | Proof of home or work address and details |
| Last three months' bank statements | Copy of decree of divorce (if so) |
| Three months' proof of income (payslip) | List of income and expenditure |
| Proof of address | |

The form will require applicant to list their expenditure, such as water and lights bill, till slips for groceries, school expenses; medical and travel receipts, clothing accounts, etc. Proof as to these expenses must therefore be provided to be able to apply for maintenance. The respondent will similarly also have to list their income and expenditure, and provide proof as such. From these documents, the parties' financial position will be assessed to determine what amount, if any, of child maintenance should be claimed and/or awarded.

1.1.1 Where to get the J101 Form

To apply for child maintenance, an applicant must complete the J101 Form. This form can be found at the closest Magistrate's Court in the district where either of the parties work or reside. Every Magistrate's Court is a designated Maintenance Court for the purposes of maintenance matters and can be approached as such⁶⁷.

The form itself can be downloaded from the Department of Justice's website. If an applicant can print it out and take it to court after completing it, they will save time. The form may however be difficult to complete for laypersons that are not skilled in relevant court processes, therefore an applicant may require assistance in completing their application for maintenance.

The J101 application for maintenance form can be downloaded from:

https://www.justice.gov.za/forms/form_mnt.htm

https://www.justice.gov.za/forms/maintenance/MNT_Form%20A.pdf

www.childmaintenance.org.za



⁶⁷ 1998 Maintenance Act S3.

1.1.2 What if the applicant does not have all the details of the liable person/ father?

It may be problematic for an applicant's case if they do not have all the details of the person liable to maintenance, which is usually the father of the child. Therefore, roleplayers in the maintenance process must ensure they exercise their powers and functions to assist applicants in this regard. These roleplayers include maintenance clerks, maintenance officers and maintenance investigators.



Maintenance officers have the power to delegate certain functions to a maintenance investigator. Section 7(2) of the 1998 Maintenance Act provides that maintenance investigators have the powers and functions to obtain the details of the father. The provision reads as follows:

7 Investigation of complaints

(2) A maintenance investigator shall, subject to the directions and control of a maintenance officer-

(a) locate the whereabouts of persons - (i) required to appear before a magistrate under section 8 (1); (ii) who are to be subpoenaed or who have been subpoenaed to appear at a maintenance enquiry; (iii) who are to be subpoenaed or who have been subpoenaed to appear at a criminal trial for the failure to comply with a maintenance order; or (iv) accused of the failure to comply with a maintenance order;

(b) serve or execute the process of any maintenance court in so far as it relates to the service of process of any maintenance court

(c) serve subpoenas or summonses in respect of criminal proceedings instituted for the failure to comply with a maintenance order as if the maintenance investigator had been duly appointed as a person who is authorized to serve subpoenas or summonses in criminal proceedings;

(d) take statements under oath or affirmation from persons who may be able to give relevant information concerning the subject of any complaint relating to maintenance;

(e) gather information concerning - (i) the identification or whereabouts of any person who is legally liable to maintain the person mentioned in such complaint or who is allegedly so liable; (ii) the financial position of any person affected by such liability; or (iii) any other matter which may be relevant concerning the subject of such complaint; or

(f) gather such information as may be relevant concerning a request referred to in subsection (1)(c).

Therefore, section 7(2) empowers maintenance investigators to obtain the details of the father that the applicant did not have the means or resources to obtain. The maintenance investigator can do this by locating the father's whereabouts, gathering information about their identity and financial position and serve documents and/or summons on the father. A maintenance investigator can further take legally binding statements of any persons who can testify as to the father's details or provide useful information as such.



1.1.3 How to complete the J101 Form

If you are a single parent, and the other parent of your child or children does not pay support in respect of the child or children and there is no court order, your first step will be to fill in the form called 'Application for Maintenance Order'⁶⁸.



The discussion on completing the J101 Form will extend to completion of the J107 Form (application for variation of a maintenance order) as well. Therefore, the completion of both the J101 and J107 will be done under this heading, even though the variation of maintenance orders are only dealt with in a subsequent heading. The process to complete these forms are the same.

J101 form completion can however be summarized as follows⁶⁹:

You will start the form with inserting your personal information under the section called 'the complainant'.

- At point number 1 (below your details), you will insert the details of the mother or father of your child or children. They are then called the 'defendant' or 'respondent', namely the person liable to pay maintenance.
- At point number 2, it asks why the person is liable to pay the applicant. Here the applicant is not asking the other person to maintain the applicant, but to maintain the child/ren because the applicant is the primary caregiver.
- At point number 3, the applicant must insert the details for the period that the father or mother of the children has not supported the applicant with monthly cash contributions. There is a provision made for other contributions, such as education, medical care and clothing.
- Point number 4, you will leave for the end.
- At point number 5, there is a column stating ASSETS and INCOME. The portion of the assets and income must be filled in by stating what your current assets and current income is. You have a legal duty to disclose all your information.

Furthermore, there is column set out for EXPENDITURE, SELF, CHILD(REN) and TOTAL.

- If we take a look at the first expense in the expenses column called lodging – you will, for example, spend R5000.00 a month on rent. You will insert the R5000.00 into the total

⁶⁸ <https://www.anthonyinc.co.za/about-anthony-gooden-inc/maintenance>.

⁶⁹ <https://www.anthonyinc.co.za/about-anthony-gooden-inc/maintenance>.

column. In your home, it is only yourself and your two children living in the house. You will then take the R5000.00 and divide by three (applicant + 2 children) to give yourself the total of R1666.67 and your children expense of the rental will be R3333.33 (R1666.67 times 2). You will continue with all the expenses using the same formula.

- Certain expenses are not divided and only apply to the children. For example, school fees. The school fees amount will only be inserted into the children's column and not shared amongst the family. The same will be applied for children's clothing and uniform costs.

At the end of the application form is a TOTAL EXPENDITURE. The applicant needs to calculate the total expenses for themselves, the child(ren) and the total household expense.

- After the calculation has been done, return to point number 4 and after having regard to the total need (expenses) of the child(ren), insert an amount under AMOUNT that the applicant wishes to claim for, the name of the child(ren) and the birth date of the child(ren).
- Under the box, that contains the amount you seek to claim, there is a space for OTHER CONTRIBUTION and this will include education, medical, clothing, etc.

Once the form has been completed, sign the form in front of a Commissioner of Oaths (SAPS / Bank manager / Post office) and the Commissioner of Oaths will sign in full and stamp the form with their official stamp. Therefore, an applicant must NOT sign the form beforehand. Then attach a copy of the child(ren) birth certificate, together with a copy of the applicant's identity document. An attorney or the applicant personally will then take the form to the clerk of the maintenance court. The clerk will process the application and give the attorney a page that contains the first court date.

<https://www.anthonyinc.co.za/maintenance/the-process>.

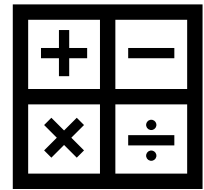
A useful guide on how to complete the J101 application for maintenance can also be found at:

<https://www.youtube.com/watch?v=qCz69nj8P2E>

www.lunchandlearn.org.za



1.2 Relevant calculations



The calculations illustrated below is relevant for purposes of both the J101 and J107, therefore in both first applications and applications for variation of maintenance orders. These calculations are crucial to prove a valid and justified child maintenance claim, by sketching out the financial landscape dealing with the needs and means requirements as previously discussed.

There is no fixed rate for child maintenance payments. The amount depends on variable factors which includes the needs of the child(ren), the parents' personal expenses and the income of the parents. Parents must contribute in accordance to their means. Thus, if the primary caregiver earns substantially more than the other parent, the primary caregiver will pay a substantial amount more in maintenance. The aim is to determine a fair contribution for each parent according to his/her means.⁷⁰

Determining the amount of child maintenance needed is no easy task. The parents' income and expenditure differ. Assets and liabilities will also be a deciding factor. This can lead to a scenario where one parent does not earn much, but own extensive assets which may result in this parent paying more maintenance. Simply put, there is no science in determining the amount of maintenance required.⁷¹

In addition to food, clothing and accommodation the provision of the amenities of electricity, water, linen, cutlery and laundering should be taken into account. In order to fulfil their obligation to support their children, parents must use their income and, if necessary, their capital.⁷²

General factors that may be considered in determining the amount of child maintenance can include things such as:

- a) The income of both parents;
- b) The income and needs of the custodial parent;
- c) Family structure;
- d) Age and status of the child;
- e) Child's standard of living before the divorce or separation;

⁷⁰ M Oliver & E Opperman's *All About Maintenance: Things that you should know about Child Maintenance* (2023).

⁷¹ Oliver & Opperman's *Child Maintenance* (2023).

⁷² B Clark's *Handbook on the South African Law of Maintenance* (2016) 11.

- f) The parent's ability to pay;
- g) Reasonable monthly needs of the child.

1.2.1 Child's portion (reasonable living needs)

The maintenance amount to be claimed must fall within the reasonable needs of the child's upbringing according to their standard of living. Thorough calculations must therefore be done to ensure that the claim is indeed reasonable and in line with what it really needed to sustain

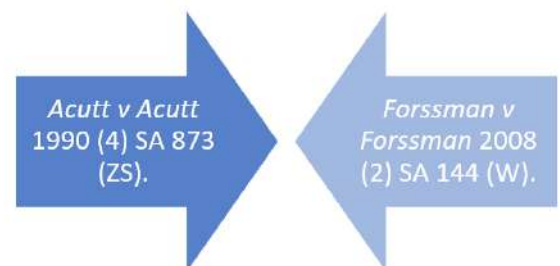


the child's standard and cost of living. Therefore, maintenance extends beyond the bare necessities of life and is not limited by monetary value. Here the best interest of the child will dictate to what extent an amount is necessary to sustain life.

1.2.1.1 Different models

In calculating how much maintenance a child should receive, the approach of first estimating what the liable parent can afford to contribute and then adapting the child's needs accordingly is incorrect.⁷³ There has ultimately been two pathways that the calculation of child maintenance can follow, either based on discretion and/or on precedent.

Precedent, or case law, on the matter has provided a rough guide on how to calculate the child's required portion in maintenance matters. Here, *Acutt v Acutt* 1990 (4) SA 873 (ZS) has given guidance in that the parties' income is to be combined and then apportioned as one share per child and two shares per adult. *Santam Insurance Co Ltd v Fourie* 1997 (1) SA 611 (A) has confirmed the Zimbabwean *Acutt*-case in South Africa law. *Forssman v Forssman* 2008 (2) SA 144 (W) has further provided that child maintenance can be calculated by dividing by five the parties' net combined incomes (after tax) and allocate two-fifths to each parent and one-fifth to the child.



In *Forssman* however, the appellant parent based his calculation of the child's maintenance needs on the combined income of the parents, without referring to their expenses. With reference to expenses shared by parent and child, he relied on *Acutt*, in which interim maintenance had been sought and in which it had been accepted as a rough guide that the

⁷³ B Clark's *Handbook on the South African Law of Maintenance* (2016) 11.

parties' incomes be combined and then apportioned as one share per child and two shares per adult. The court in *Forssman* found, however, that this approach was better suited to applications for interim maintenance and that the appellant should not have ignored the expenses incurred by the parties.⁷⁴ Therefore, the guiding principles in the *Acutt* case should act as a baseline and rough guide to determine child maintenance. Discretion however also plays a role in establishing a fair amount of child maintenance.

Examples of how the *Acutt*-principle operates can be seen below:

- The principle states that the parties' income must be combined and then apportioned as one share per child and two shares per adult.

Example 1:

- If a household has one adult and one child:
 - o One share will be allocated to the child + two shares allocated to the adult = totaling three shares overall OR
 - o Adult's 2 shares + child's 1 share = 3 shares overall.
- Thus, if rent/ bond is R5000 per month:
 - o The child's expense will be $5000 \div 3 = \underline{R1666,66}$.
 - o Mother's contribution will be $2/3$ of the rent = R3333,34.

Example 2:

- Facts: Mother lives with the grandmother and two brothers (aged 15 and 19), and the minor child (X). Food/ groceries is R4000 per month. How much will the child's (X) expense be on the grocery bill?

| <i>Adult's shares</i> | <i>Children's shares</i> |
|-------------------------------|------------------------------|
| Mother: 2 shares | 15-year-old brother: 1 share |
| Grandmother: 2 shares | *Minor X: 1 share |
| 19-year-old brother: 2 shares | TOTAL: 2 shares |
| TOTAL: 6 shares | |

- Thus: 8 shares in TOTAL (6 + 2 shares above)
- *Minor X's individual share:
 - o 1 share out of total 8 shares = $1/8$ share

⁷⁴ Clark's *Maintenance* (2016) 11.

○ $R4000 \div 8 = \underline{R500,00}$

There are however other considerations to be noted when calculating the amount of child maintenance, as discussed below.

1.2.1.2 Discretionary system

In South Africa, we follow a discretionary system as to the determination of child maintenance. This notion is contained in the Act and allows a presiding officer to exercise their judicial value judgements as to what a fair amount of maintenance may be in the circumstances.

The provision reads as follows:

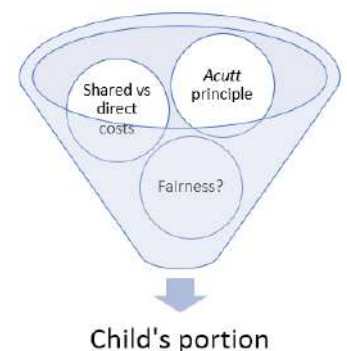
15 Duty of parents to support their children

(b) Any amount so determined shall be such amount as the maintenance court may consider fair in all the circumstances of the case.

The maintenance amount must ultimately be fair in the circumstances. A maintenance court must therefore exercise its statutory discretion to ensure that a fair amount of maintenance is ordered in light of the financial position of the parties and needs of the child. 'Fairness' in this context does not necessarily mean 'equal' and the parties may not agree with the determination as to fairness on the facts. However, a maintenance court can promote fairness by avoiding the awarding of arbitrary child maintenance amounts and by duly applying its mind to the facts at hand. Fairness in this regard will also give effect to what is truly in the child's best interest, as discussed previously.



Parties can therefore use the guidance given in the *Acutt*-principles and so forth, but they must ensure that the amount is indeed fair and reasonable. Therefore, the guidelines in case law can be used to establish a rough idea which is then further fleshed out by the specific needs of the particular child that needs to be maintained. Examples of such instances are illustrated under the heading below.



1.2.1.3 Getting to the total maintenance amount

The above-mentioned models are ways to calculate child maintenance amounts. Ultimately, the *Acutt*-principle and discretionary approach has crystalized into accepted practice and acts as a baseline to calculate maintenance.

Based on these two approaches, an applicant must consider the costs involved in the maintenance application. One must distinguish between direct costs made for the child's wellbeing, compared to shared costs which are made for the household's benefit. Whether an expense is a direct or shared cost will have an impact on whether or not it will be entertained in a maintenance claim. Below is a summary of the type of costs that may be involved:

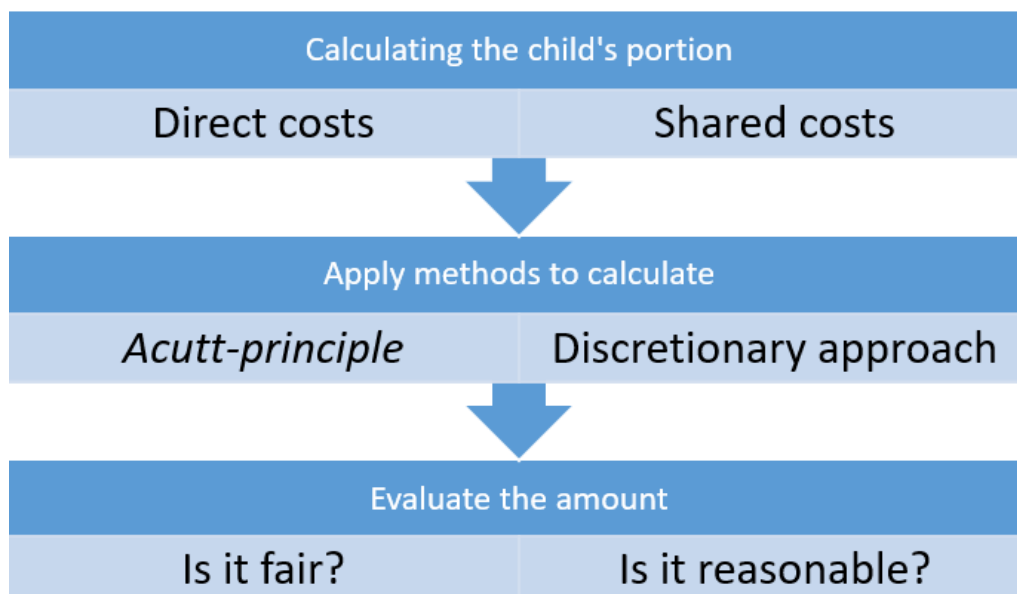
| <i>Direct costs:</i> | <i>Shared costs:</i> |
|-------------------------------------|----------------------------|
| Medical | Rent, accommodation, rates |
| Education, school clothes, bus fare | Electricity |
| Aftercare | Food and groceries |
| Pocket money | Internet |
| Stationery | Transportation (shared) |
| Holiday or vacation* | Life insurance |
| | Personal loans* |

After taking cognisance of the relevant costs that are being included in the claim for child maintenance, a calculation as illustrated below can be made to determine the child's portion.



NB! Steps to calculate the child's portion, include:

- a) Distinguish your shares vs direct costs (as highlighted above).
- b) Write down the totals in the TOTAL COLUMN.
- c) As a baseline, start with the *Acutt*-principle to allocate shares to each adult/ child in the household. This can be changed later and only acts as a rough guide.
- d) Evaluate the split to ensure it is practical, reasonable and fair.
- e) Adapt the split according to the child's specific needs and requirements.
- f) Stick to the formula applied in the specific cost range.



Below are examples of different contexts that the above-mentioned formula can operate in:

Example 1:

- Facts: Household consists of 2-bedroom house (mom and child's rooms), kitchen, living room & bathroom.
 - o Child uses 100% of their own room
 - o Child uses 50% of the kitchen, living room and bathroom
- Example of a practical split: (depending on age of child)
 - o Assume 50% split on rent/ bond, security in home, electricity, rates & taxes between mother and child OR
 - o Work out space used by child per square meter.

Example 2:

- Facts: Groceries used by teenage boy compared to 4-year-old daughter.
- Example of practical split according to *Acutt*:
 - o 1 share per child, 2 shares per adult
 - o BUT a teenage boy could eat more than the adult, meaning the amount must be adapted to the specific needs of that household (to ensure fairness).

Example 3:

- Facts: Mom's car is used for herself and driving children around.
- Example of practical split:

- Use number of kilometers travelled for benefit of children OR
- Work out % of amount travelled and apportion the child's share accordingly.

The examples above relate to the amount that is regarded as the child's portion in a maintenance matter. The child's portion however hinges on the financial capacity of the person liable to maintain and an enquiry into such parent's contribution must also be made to ensure it is reasonable and fair.

1.2.2 Each parent's contribution (financial means to support)

Parents are required to contribute to their child's maintenance insofar their financial means allow as such. The 1998 Maintenance Act also provides for the manner in which parents are required to contribute to the maintenance of their child/ren.

The relevant provision reads as follows:

15 Duty of parents to support their children

(3) (a) Without derogating from the law relating to the support of children, the maintenance court shall, in determining the amount to be paid as maintenance in respect of a child, take into consideration-

- (i) that the duty of supporting a child is an obligation which the parents have incurred jointly;
- (ii) that the parents' respective shares of such obligation are apportioned between them according to their respective means; and
- (iii) that the duty exists, irrespective of whether a child is born in or out of wedlock or is born of a first or subsequent marriage.

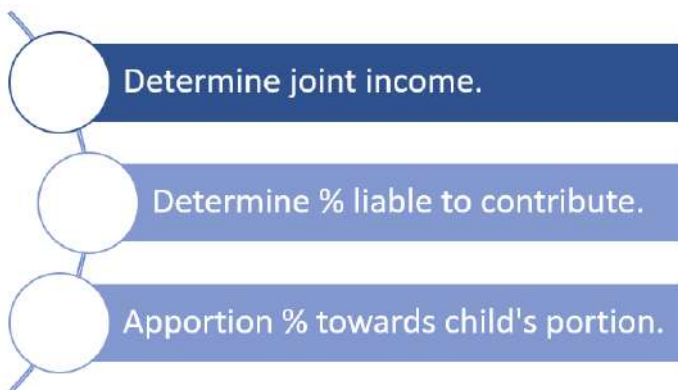
As seen from the provision, parents have an obligation to support their children according to their means. Such obligation is apportioned, or divided, between the parents according their respective financial means. Therefore, it becomes clear that maintenance is almost never a 50/50 apportionment as the parties' means usually differ to a substantial extent in a maintenance matter.



NB! To determine what the parents' apportioned means are, use this formula:

- a) Add both parents' income together. This gets the joint income of the parties.
- b) Take the applicant's salary, divide it by the joint income and multiply it by 100. This gives a % that each parent is liable to contribute.

c) Apportion the % of each parent towards the child's calculated needs.



To determine the % that each parent is liable to contribute:

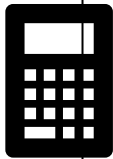
$$\frac{\text{Single parent's income}}{\text{Joint income}} \times 100$$

For example:

- Facts: Father earns R50 000 per month (after normal deductions but excluding home loans, etc). Mother earns R15 000 per month.
- Calculated apportioned means according to formula above:
 - a) Add together the income of the parties: R50 000 + R15 000 = R65 000 (joint income)
 - b) Joint income method:
 - o Take applicant's individual salary ÷ joint income: R15 000 ÷ R65 000.
 - o Multiply the amount by 100 to get a %.
 - o Therefore: $\frac{R15\,000}{R65\,000} \times 100\% = 23\%$ (mother/ applicant's contribution)
 - c) Calculate total needs of the child (as previously illustrated).
 - o For example, assume R10 000 as child's total needs.
 - o Determine apportioned share of each parent's contribution. It is very important to take other income of the parties into account here as well.
 - Mother/ applicant earning R15 000 contributes 23% of R10 000.
 - Father/ respondent earning R65 000 contributes 77% of R10 000.
 - o Therefore, each parent's contribution is as follows:
 - Applicant: R10 000 x 23% = R2300,00.
 - Respondent: R10 000 x 77% = R7700,00.

Another formula one can use to determine the parents' respective contribution is:

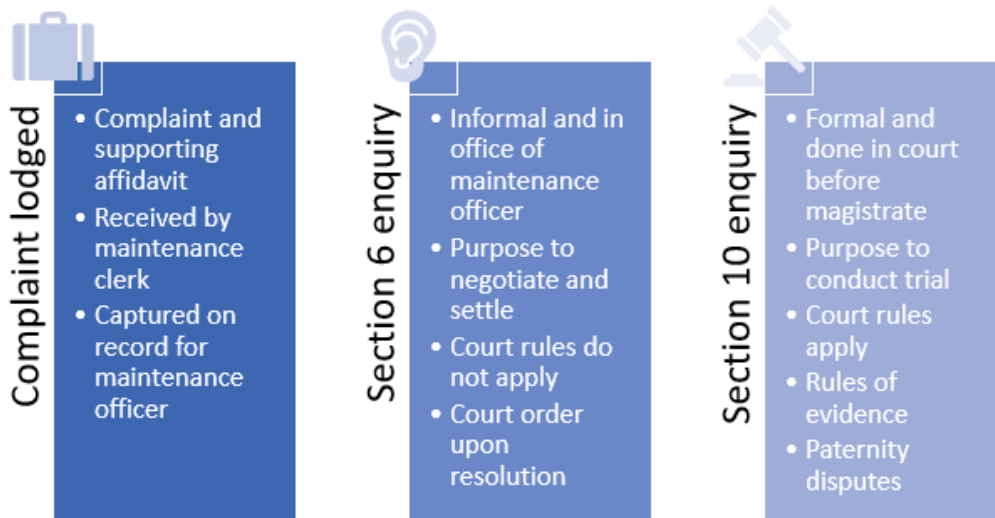
| | | | |
|--------------------------------------|---|-----------------|--|
| (parent's gross income) | | (child's needs) | |
| _____ | | _____ | |
| (total gross income of both parents) | X | 1 | |
| = R00.00 (parent's contribution) | | | |



1.3 What will happen at court?

1.3.1 Overview of the process

As discussed under Part A, the maintenance complaint initiates the process. Such complaint and accompanying documentation are received and captured by a maintenance clerk who prepares the file for the maintenance officer. A section 6 informal enquiry is then done with both the applicant and respondent, in the maintenance officer's office, in an attempt to resolve the dispute. During this enquiry, the parties' rights are explained to them and the process follows a structure of active negotiation to reach a settlement between the parties to the dispute. Issues as to paternity may likely arise in this context, but will be discussed in a subsequent heading.



Before or during such a section 6 enquiry, the maintenance officer may be required to examine relevant persons. The provision reads as follows:

Section 8(1) - A magistrate may, prior to or during a maintenance enquiry and at the request of a maintenance officer, require the appearance before the magistrate or before any other magistrate, for examination by the maintenance officer, of any person who is likely to give relevant information concerning -

(a) the identification or the place or residence or employment of any person who is legally liable to maintain any other person or who is allegedly so liable; or

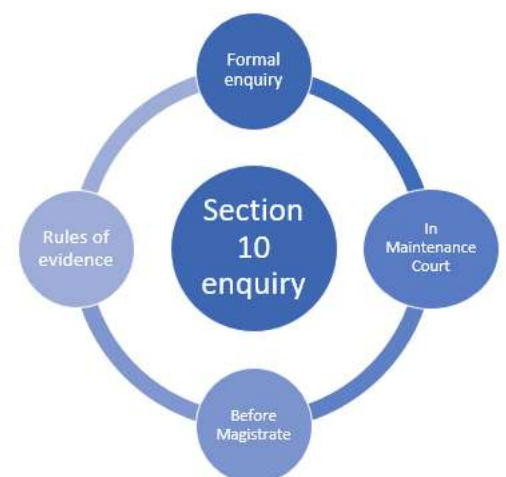
(b) the financial position of any person affected by such liability.

An agreement at a section 6 enquiry will be made an order of court by filling out a consent form (J214 Form) or if the maintenance officer grants an attachment of emoluments (thereby garnishing the salary or wages of the respondent). If there remain disputed facts, the matter will be referred to court for a formal section 10 enquiry in front of a Magistrate. This formal court process will be discussed below.

1.3.2 Section 10 enquiry

The section 10 enquiry is done when the parties cannot come to an agreement as to the maintenance dispute during the informal section 6 enquiry, and the matter has been referred to trial by the maintenance officer or upon the request of an attorney. The section 10 enquiry is a formal procedure in which the parties undergo trial in the maintenance court and in front of a Magistrate.

Since the section 10 enquiry is a formal court procedure, it is arguably akin to ordinary civil proceedings as the rules of evidence will apply in such a procedure⁷⁵. Section 10 proceedings are inquisitorial in nature, with particular no party leading the matter as all the officers bear the responsibility to produce and uncover evidence⁷⁶. This means that all the maintenance roleplayers in the proceedings, as well as the parties to the dispute, must play an active role to establish and admit evidence to resolve the matter.



⁷⁵ 1998 Maintenance Act S10(5).


⁷⁶ B Clark's *Handbook of the South African Law of Maintenance* (2016) 71.

Both parties will have the opportunity to testify their respective sides. Further, since the rules of evidence are applicable to the matter, cross-examination of the parties as to their financial evidence may be undergone. This is a process whereby a party is interrogated as to the credibility of the evidence they bring forward, which may amount to harsh questioning in a sensitive maintenance matter. The maintenance officer will then, based on the evidence presented make a recommendation upon which the court may make a ruling or award an order.

Other things to note include that the maintenance court is to administer an oath before hearing evidence from witnesses⁷⁷, and that the parties can be represented by legal practitioners if they so wish⁷⁸.

1.3.2.1 Relevant factors in case law

Useful case law on the previously-listed section 15(3)(a)'s factors regarding the amount to be awarded, include:

- *Herfst v Herfst*: 1964 (4) SA 127 W): "The general principles are that a child of divorced parents is entitled to be maintained by them, and they are correspondingly obliged to provide it with everything that it reasonably requires for its proper living and upbringing according to their means, standard of living and station in life. That obligation attaches to both parents jointly, but inter se, their respective shares of that obligation are apportioned according to the financial resources and circumstances of each of them.
- 
- *Hartman v Krogscheepers*: 1950 (4) SA 421 (W): As the burden of supporting children, whether before or after a divorce, is common to both spouses - the only qualification being that it is distributable between them according to their means - it is essential that when the parent, who had been given the custody on divorce and who has remarried in community of property, applies, through the administrator of the joint estate, for an increase in the maintenance payable to the children, she should furnish particulars of the assets of the joint estate so as to enable the Court to assess the extent of the other parent's liability.

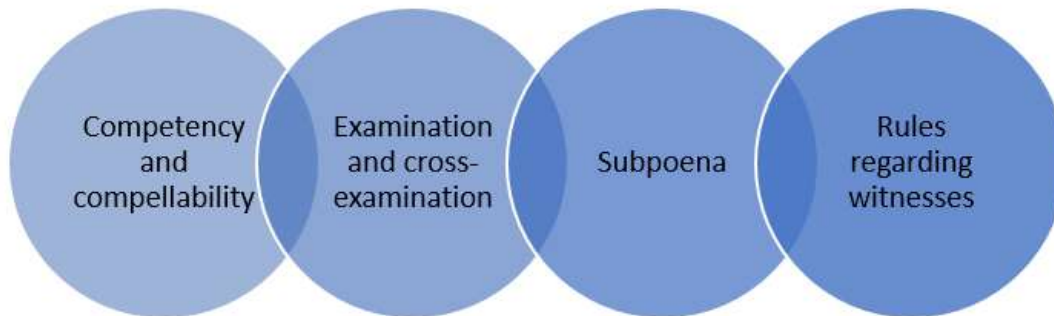


⁷⁷ S10(2).

⁷⁸ S10(3).

1.3.2.2 Evidential rules in maintenance court

The 1998 Maintenance Act provides for various prescribed procedures to ensure that the parties and witnesses attend court to give evidence as such.



The evidential rules are governed by the Law of Evidence, as provided for in the provision below:

Section 10(5)

Save as otherwise provided in this Act, the law of evidence, including the law relating to competency, compellability, examination and cross-examination of witnesses, as applicable in respect of civil proceedings in a magistrate's court, shall apply in respect of the enquiry.

The provision allowing the subpoena of relevant persons reads as follows:

Section 9(1)

(a) A maintenance officer who has instituted an enquiry in a maintenance court may cause any person, including any person legally liable to maintain any other person, to be subpoenaed **(PART A-FORM CI/ J126E)** -

- (i) to appear before the maintenance court and give evidence; or
- (ii) to produce any book, document or statement

(b) A book, document or statement referred to in paragraph (a)(ii) includes - (i) any book, document or statement relating to the financial position or any person who is affected by the legal liability of a person to maintain any other person; and in the case where such person is in the service of an employer, a statement which gives full particulars of his or her earnings and which is signed by the employer.

Other persons may also be subpoenaed as a witness in the provision reading as follows:

Section 9(2)(a)

Any person to be subpoenaed as a witness shall, subject to paragraph (b), be subpoenaed in the manner in which a person may be subpoenaed to appear before a magistrate's court in a criminal trial

However, if a person who has been summonsed to appear in court, fails, the following provision provides for an offence to such effect. The provision reads as follows:

Section 33(1)

The provisions of sections 188 and 189 of the Criminal Procedure Act, 1977 (Act 51 of 1977) shall, with the necessary changes, apply in the respect of a person subpoenaed under section 9 or 10(1) to appear before a maintenance court or who is present at a maintenance enquiry, and the maintenance court holding the enquiry may exercise in respect of that person all the powers conferred by section 170(2) of the said Act and the said section 189 on the court referred to in those sections

Such witnesses may however claim a subsistence and traveling allowance to ensure they are able to attend court. The provision reads as follows:

Section 11

- (1) Any person, other than the person against whom a maintenance order may be made under this Act, attending the enquiry as a witness shall be entitled to an allowance as if he or she were attending criminal proceedings as a witness for the State.
- (2) The maintenance court may direct that any person against whom a maintenance order may be made under this Act –
 - (a) shall be paid the prescribed allowances for subsistence and for travel to and from the court; and
 - (b) shall be paid such allowance as may be paid to a witness for the accused in criminal proceedings. **(Regulation 5)**

Foster v De Klerk NO and Another 1993 (1) SA 596 (O) has also provided that a maintenance enquiry in terms of s 4(2) of Act 23 of 1963 or a person legally liable to maintain another person qualifies as witness in terms of s181 of Criminal Procedure Act 51 of 1977.

Section 12 of the Act further deals with proof of statements and documentary evidence as such. It provides that statements in writing must be made in the prescribed manner, as set out in Regulation 6(1) and (2) below:



Regulation 6

- (1) A statement in writing by a person, other than a person against whom a maintenance order may be made, contemplated in section 12(1) of the Act, shall –
 - (a) be signed by the person who made it; and
 - (b) contain a declaration by such person to the effect that it is true to the best of his or her knowledge and belief and that he or she made the statement knowing that he or she may be guilty of an offence if he or she willfully stated anything therein which he or she knew to be false.
- (2) If the person who makes a statement in terms of sub regulation (1) cannot read such statement, the statement shall –
 - (a) be read to him or her by the person taking down the statement before the statement is signed by the person making the statement; and
 - (b) be endorsed by the person who so read the statement to the effect that it was read.

Therefore, if a maintenance officer wants to use a written statement as evidence, they must do so in accordance with the provision below. They must also do so in accordance with the prescribed notice in writing, as set out in Regulation 7 (J167E/ Form D)⁷⁹.



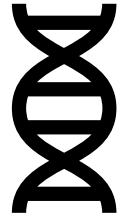
Section 12(2)

- (a) A copy of the statement, together with a copy of every document referred to in the statement as an exhibit, shall at least 14 days before the date on which the statement is to be submitted as evidence, be **served** on the person against whom a maintenance order may be made under this Act, and he or she may at least seven days before the commencement of the enquiry object to the statement being submitted as evidence under this section.
- (b) If the person –
 - (i) objects in accordance with paragraph (a) to the statement being submitted as evidence, such statement shall not, subject to paragraph (ii), be admissible as evidence under this section; or
 - (ii) does not object in accordance with paragraph (a) or come to an arrangement with the maintenance officer before or during the enquiry that the statement may be submitted as evidence, such statement may on its production at the enquiry be admitted as evidence in the enquiry.

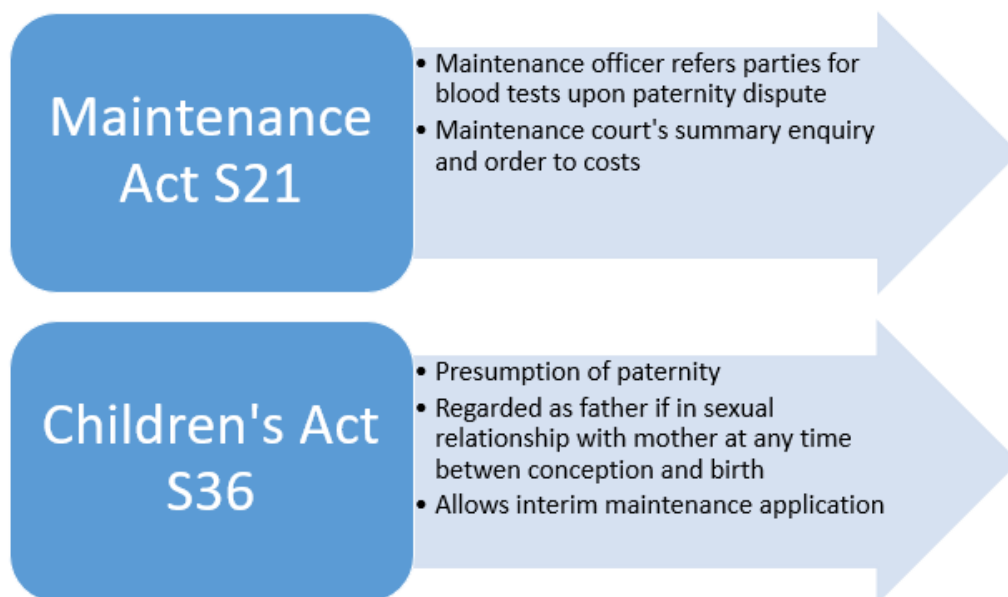
⁷⁹ A van der Merwe's *Maintenance Manual for Presiding Officers* 27.

1.3.3 Paternity issues

Maintenance is only an obligation to a party's biological children, therefore a party may avoid paying maintenance by arguing that they are not the child's biological father. This argument can be raised at any stage in the maintenance process, but it is most likely to crop up at the section 6 informal enquiry as it is usually the first step, or the section 10 enquiry. Paternity testing may however only be done before the court makes a final ruling during the section 10 trial⁸⁰.



The maintenance court has the jurisdiction to determine paternity, which is proved on a balance of probabilities. If the mother of the child was married at the time of conception or birth or during the intervening period, the rebuttable presumption *pater est quem nuptiae demonstrant* (the father is indicated by the marriage) operates, but can be rebutted on a balance of probabilities.⁸¹ Paternity is regulated by both the Maintenance Act and the Children's Act, as will be discussed under subsequent headings.



What is paternity and who may apply for a paternity test?

Paternity tests also known as DNA tests in the context of this webinar are used in an attempt to determine whether a child and an adult are biologically related. The paternity test analyses

⁸⁰ B Clark's *Handbook of the South African Law of Maintenance* (2016) 87.

⁸¹ Clark's *Maintenance* (2016) 86.

the blood group of the person and thereby determines whether that person is biologically related to another person. If the result is positive that means that the two individuals are biologically related. These tests are used especially in maintenance disputes where either the mother or the father disputes that they are biologically related to the child on behalf of whom maintenance is being claimed.

Any person wishing to establish paternity with another person may apply for a paternity test. Moreover, lawyers and magistrate's may also apply for paternity testing. This is the situation where the Magistrate in the Maintenance court orders the father or the mother to undergo a paternity test to establish whether maintenance can in fact be claimed. Note: Maintenance can only be claimed from the biological parents of the child, and therefore if the paternity is negative that person cannot be held liable to make maintenance payments. The Children's court has the jurisdiction to hear any matter relating to the paternity of a child. This is confirmed in section 45(1)(c) of the Children's Act 38 of 2005 (hereinafter the "Act").

Documents required to apply for a paternity test:

- Identity documents (or passports) of both the mother and the alleged father;
- Birth certificate or clinic card of the minor child;
- If the child has no clinic card or birth certificate the guardian must complete an affidavit and certify that affidavit by a commissioner of oath;
- Consent form completed and signed by the legal guardian for the blood testing.

1.3.3.1 Maintenance Act

Section 21 of the 1998 Maintenance Act deals with orders relating to paternity disputes. The provision reads as follows:

21 Orders relating to scientific tests regarding paternity

(1) If the maintenance officer is of the opinion - (a) that the paternity of any child is in dispute; (b) that the mother of such child as well as the person who is allegedly the father of such child are prepared to submit themselves as well as such child, if the mother has parental authority over the said child, to the taking of blood samples in order to carry out scientific tests regarding the paternity of that child; and (c) that such mother or such person or both such mother and such person are unable to pay the costs involved in the carrying out of such scientific tests, the maintenance officer may at any time during the enquiry in question, but before the maintenance court makes any order under section 16, request the maintenance court to hold an enquiry referred to in subsection (2).

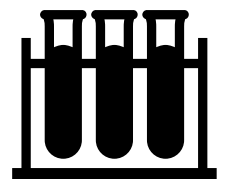
(2) If the maintenance officer so requests, the maintenance court may in a summary manner enquire into - (a) the means of the mother of the child as well as the person who is allegedly the father of the child; and (b) the other circumstances which should in the opinion of the maintenance court be taken into consideration.

(3) At the conclusion of the enquiry referred to in subsection (2), the maintenance court may - (a) make such provisional order as the maintenance court may think fit relating to the payment of the costs involved in the carrying out of the scientific tests in question, including a provisional order directing the State to pay the whole or any part of such costs; or (b) make no order.

(4) When the maintenance court subsequently makes any order under section 16, the maintenance court may - (a) make an order confirming the provisional order referred to in subsection (3) (a); or (b) set aside such provisional order or substitute therefor any order which the maintenance court may consider just relating to the payment of the costs involved in the carrying out of the scientific tests in question.

The process followed in a section 21 paternity dispute is therefore initiated by a maintenance officer, who studies file contents and the parties' relationship, needs and means. Such maintenance officer will also explain the process to the respondent who is denying paternity.

Such process in terms of section 21 usually entails DNA-testing, where the respondent is responsible to pay approximately R2300,00 for such blood test. This will be explained to the respondent. The maintenance officer will, if the respondent consents, contact a service provider for the testing (Pathcare, for example) and arrange a date on which the parties and child/ren will undergo scientific testing as such. The results will be made known to all the parties within 5 to 10 days.



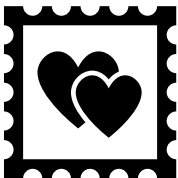
The Children's Act however provides further guidance as to paternity and presumptions as such.

1.3.3.2 Children's Act

Paternity disputes that include minor children are subject to the provisions of the Children's Act 38 of 2005. Section 36 of the Act deals with a further presumption of paternity, which may avoid unnecessary scientific testing and time spent as such. The provision reads as follows:

36 Presumption of paternity in respect of child born out of wedlock

If in any legal proceedings in which it is necessary to prove that any particular person is the father of a child born out of wedlock it is proved that that person had sexual intercourse with the mother of the child at any time when that child could have been conceived, that person is, in the absence of evidence to the contrary which raises a reasonable doubt, presumed to be the biological father of the child.



Therefore, if the applicant and respondent were in a sexual relationship at any time in which the child could have possibly been conceived, the man may be regarded (or presumed) to be the biological father if there are no other facts to the contrary. This is however only a rebuttable presumption, which can indeed be rebutted by external facts which prove the respondent cannot be the father.

If this presumption is sustained (not rebutted), it enables the applicant to apply for interim maintenance in terms of section 10(6)⁸². This is especially relevant for urgent maintenance needed pending the finalization of the DNA test. Interim maintenance is elaborated in the heading below.

1.3.3.3 Case law regarding paternity⁸³

- *S v L* 1992 (3) SA 713 (E) dealt with disputed paternity and blood tests, where a mother was refusing to allow child to undergo blood tests. It was held that the court, as upper guardian or minors, has no power to interfere with such decision. This was also confirmed in *Seetal v Pravitha* and Another NO 1983 (3) SA 827 (D), in which it was held that the court, in ordering blood tests, must do so while only taking into account the child's best interest and nothing else.
- A paternity dispute need not be corroborated. However, a court must caution in accepting a paternity dispute while acting on the complainant's allegations alone.⁸⁴
- *Eynon v Du Toit* 1927 CPD 76: The Court held that it had no power to make an order directing a plaintiff to submit himself to a medical examination required by the defendant,

⁸² 1998 Maintenance Act.

⁸³ A van der Merwe's *Maintenance Manual for Presiding Officers*.

⁸⁴ *Mayer v Williams* 1981 (3) SA 348 (A).

although it pointed out that he would be unwise not to submit himself to such examination. In *A v C* 1986 (4) SA 227 (C) held that no negative inferences should be drawn from a complainant's refusal to undergo red blood cell tests which are less conclusive than white blood cell tests.

- A curator ad litem can be appointed to enquire into the legitimacy of a young child, to ensure the child's best interests are met.⁸⁵
- Where parties contractually agree to paternity testing, the court may still order against such tests if it is not in the child's best interest. This was seen in *Nell v Nell* 1990 (3) SA 889 (T) in which the court was not prepared to allow the agreement as to paternity in the absence of evidence proving medical necessity.
- *LB v YD* 2009 (5) SA 463 (T): The court held that it will be in the best interest of the child that paternity be scientifically determined and resolved at a very early stage and ordered the respondent to submit herself and the minor child to DNA tests for the purpose of determining whether the applicant is the biological father of the child. The court further held that it, as upper guardian of all minors, can order such tests if it is in the child's best interests and the right to privacy and dignity is sustained while balancing the need for proper administration of justice. It also held that the Children's Act's presumption of paternity is only applicable if the common law presumption is not and where the child is born out of wedlock.

Whether a court can take judicial notice of the reliability of the techniques used in paternity testing, has been disputed. Although blood and tissue tests may be useful in this regard, the extent to which a South African court can take judicial notice of the techniques of blood and tissue testing and of the reliability of the results of such tests does not appear to be settled⁸⁶.

- *S v L* 1992 (3) SA 713 (EC) showed Mullins J doubt as to whether the technique of blood testing had advanced to such a degree of general recognition that a court could take judicial notice of the trustworthiness of the results of such tests. In this case the papers before court lacked any information regarding the precise nature of the proposed tests and the probative value of the results thereof. However, with the recent developments in the field of medical science, blood tests have become so sophisticated that by making use of them it can be determined almost with certainty whether a certain man is the father of a

⁸⁵ *B v E* 1992 (3) SA 438 (T).

⁸⁶ *Boberg's Law of Persons and The Family* (2nd ed) 369.

child. (See *Van der Harst v Viljoen* 1977 1 SA 795 (C) where the more sophisticated HLA system of tissue typing, instead of ordinary red blood cell test, was employed).

- In *M v R* (1989 1 SA 416 (O)) a medical doctor stated in an affidavit which served before court as evidence that the statistical probability of a certain man being the father of a child could be as high as 99,9%. For this reason the legislature created a presumption in the Children's Status Act 82 of 1987 against a person who refuses to submit to the taking of a blood test in cases where the paternity of a child is in dispute.⁸⁷ This shows the court's power in ordering blood tests without parental consent and the considerations which must be kept in mind.

1.3.3.4 Understanding how blood tests (DNA tests) work

DNA is an acronym for deoxyribonucleic acid. DNA can be found in every cell in the body of a human. DNA determines the physical qualities of a human being. The DNA of each and every person is unique. Various samples can be used for DNA testing (paternity testing). These include for example: hair, saliva and blood samples. The most common sample used is blood. This is due to the fact that doctors often use the blood to test for other things besides paternity as well. Blood samples from the mother, the alleged father and the child will be required. The DNA chains are then directly examined by experts to determine whether two people are biologically related. In other words, it involves directly examining the genetic material that a child has inherited from their biological parents.

When the paternity test is being done, the genetic characteristics of the child are firstly compared to those of the mother. The characteristics in the child which are not found in the mother have been inherited from the biological father. Therefore, if the man alleged to be the father does not have those genetic characteristics then it means that he is not the biological father.

1.3.3.5 Discussion of respondents using DNA tests as a means to delay maintenance payments

It often happens that fathers/mothers use DNA testing as a means to delay maintenance payments. However, the applicant is able to apply for interim maintenance order during the time that they await the DNA results. DNA testing can take up to a few weeks depending on

⁸⁷ Barnard, Cronje and Olivier *The South African Law of Family Persons & Family Law* 65.

the willingness and cooperation of the father/mother submitting him/herself to the DNA testing. The respondent can prolong the DNA testing and in that way avoid paying maintenance. This should be avoided as far as possible. The courts must ensure that a respondent who uses DNA testing as a means to delay the maintenance proceedings should be punished. Failure to pay maintenance in terms of a court order is regarded as contempt of court. The offending party becomes subject to a criminal charge if the custodian parent lays a complaint against him/her. Where a maintenance order has been issued on divorce, the custodian parent can approach the maintenance court in that district in relation to increase of maintenance payments or failure to pay maintenance.

1.3.3.6 Can maintenance courts force the respondent to go for paternity tests?

(a) General point of departure

The assumed answer to this question would be no and that no person can be compelled to undergo paternity testing due to the Constitution of the Republic of South Africa, 1996 (the “Constitution”) protecting their right to bodily integrity and privacy. Section 12(2) of the Constitution reads as follow: “Everyone has the right to bodily and psychological integrity, which includes the right –

- to make decision regarding reproduction;
- to security in and control over their body;
- not to be subjected to medical or scientific experiments without their informed consent.”

However, this issue is more complex as there are no legislative frameworks which explicitly deal with it. Neither the Maintenance Act nor the Children’s Act deal with this issue. Courts have had to follow a balanced approach. Balancing the right to privacy and bodily integrity of the person who must submit to a paternity testing with the best interests of the child to know who their biological parents are and a courts truth finding function. Section 28(2) of the Constitution provides that: “a child’s best interests are of paramount importance in every matter concerning the child.”

(b) Previous court decisions

Justice Murphy in *LB v YD* cited below in para 26 of the judgment stated that the court decisions before 1994 preferred the view that courts as the upper guardians of all minor children have the jurisdiction to order blood tests in respect of minor children.

(c) *LB v YD 2009 (5) SA 463 (T)*

The applicant in this judgment is the father who wishes to establish the paternity of his child. The applicant and the respondent (the mother of the child) had been in a year long intimate relationship. However, at the time that the child was born the applicant and respondent had been separated for 7 months. The respondent had entered into a new relationship, and married this person as soon as she became aware of the pregnancy. The applicant's attorney sent a letter to the respondent requesting that she and the child should voluntarily submit to DNA testing at the expense of the applicant.⁸⁸ However, the mother did not want to undergo DNA testing and was thus not cooperating with the request of the father.⁸⁹ The respondent argued that compelling her to submit to a DNA test would infringe her rights to privacy and dignity and would not be in the best interests of the child.

The court confirmed that there are no legislative frameworks which specifically deal with this issue: "whether a respondent can be forced to undergo paternity testing"?⁹⁰ Moreover, the court confirmed that previous court decisions have not been unanimous in their approach to addressing the issue at hand. The previous court decisions have balanced the need to protect the privacy and bodily integrity rights of those persons who have to subject themselves to paternity testing, with the role that courts have to discover the truth and to make use of scientific methods to establish the truth. The court ultimately found that they do have the power to compel a parent to undergo paternity testing.

1.3.3.7 What if the respondent refuses to go for DNA testing?

As has been discussed under the aforementioned headings, a parent can be compelled to undergo DNA testing if it proves to be in the best interests of the child. Moreover, refusal as a tactic to delay maintenance proceedings is punishable and is seen as contempt of court. The mother is able to approach the Children's Court for a paternity test. Both parents do however have a right to refuse to undergo a paternity test. However, it does raise questions relating to credibility. The court will make a presumption of fatherhood if there is any other evidence showing that he is the father. Moreover, it is within the power of the High Court as the upper guardian of all minor children to order paternity tests if it proves to be in the best interests of

⁸⁸ Para 11.

⁸⁹ Para 12.

⁹⁰ Para 18.

the child. In other words, the High Court's request for paternity testing will overrule a parent's refusal to undergo a paternity test.

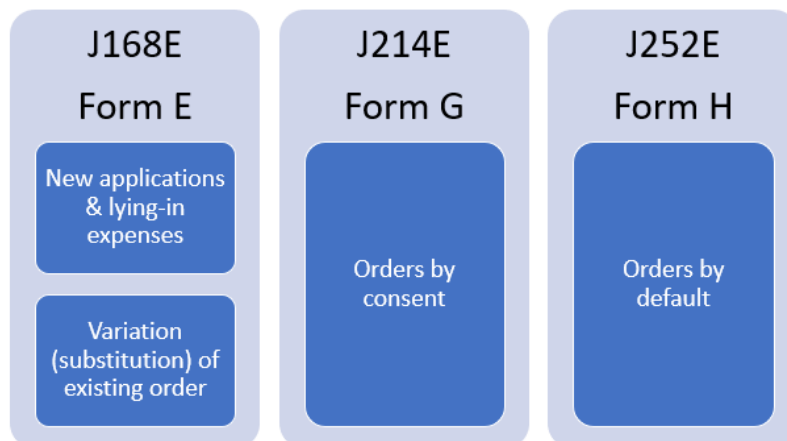
1.3.3.8 Can DNA tests be manipulated or changed by drinking muthi?

Muthi is a type of traditional medicine. Muthi is the medicine prescribed by a herbal healer, it consists of natural products usually derived from plants and trees. No, muthi cannot be used to manipulate or change DNA tests. Muthi cannot be used to alter DNA.

1.4 Orders that a maintenance court may make

A maintenance court is empowered to make various orders upon formal enquiry of the maintenance complaint. These include orders such as:

- a) Form E or J168E (wide, including):
 - New maintenance order⁹¹
 - Maintenance order for lying-in expenses⁹²
 - Order to substitute existing order⁹³
 - Order against person contractually liable to maintain⁹⁴
- b) Form G or J214E: Orders by consent⁹⁵
- c) Form H or J252E: Orders by default⁹⁶



⁹¹ S16(1)(a)(i).

⁹² S16(1)(ii).

⁹³ S16(1)(b).

⁹⁴ S16(2) and (3).

⁹⁵ S17.

⁹⁶ S18.

According to Regulation 8, any order of a court made under Chapter 4 of the Act, excluding an order by consent (FORM G (J214E)) or an order by default (FORM H (J252E)), shall substantially correspond with FORM E (J168E) of the Annexure⁹⁷. These orders will be elaborated under subsequent headings below.

1.4.1 J168E (new, lying-in, substitution, etc.)

As a point of departure, the presiding officer is able to make an order against a person who is legally liable to maintain their children. In other words, the court can make a maintenance order against any person who is legally liable to maintain their children.³ Moreover, the presiding officer is able to make an order for the payment of lying-in expenses. Lying-in expenses are those expenses which a mother has incurred during pregnancy, birth and after birth.⁴ These expenses must however be claimed when the initial maintenance application is being instituted in the Maintenance Court.

According to the Act, a presiding officer may order various things depending on whether there is an existing maintenance order or not. Such presiding officer may make the following orders:

Section 16(1) After consideration of the evidence adduced at the enquiry, the maintenance court may –

- (a) in the case where **no maintenance order** is in force – (i) make a maintenance order against any person proved to be legally liable to maintain any other person for the payment during such period and at such times and to such person, officer, organization or institution, or into such account at such financial institution, and in such manner, which manner may include that an arrangement be made with any financial institution for payment by way of stop-order or similar facility at that financial institution, as may be specified in the order ... which order may include such order as the court may think fit relating to the payment of medical expenses in respect of such other person, including an order requiring such other person, if the said other person qualifies therefore, to be registered as a dependant of such person at a medical scheme of which such person is a member; and/ or (ii) to recover from such person in respect of expenses incurred by the mother in connection with the birth of the child and of expenditure incurred by the mother in connection with the maintenance of the child from the date of the child's birth to the date of the enquiry; or
- (b) in the case where a **maintenance order is in force**: (i) make a maintenance order contemplated in paragraph (a)(i) in substitution of such maintenance order; or (ii) discharge such order; or
- (c) make no order

⁹⁷ A van der Merwe's *Maintenance Manual for Presiding Officers* 32.

Case law has also elaborated on this matter:

- *Schmidt v Schmidt*: 1996 (2) SA 211 (W): The maintenance court may make an order which includes provision for the payment of recurring and unquantified medical expenses, including expenses for treatment and therapy given by a person who is not a medical practitioner, and for the recurring costs of education.
- *Sager v Bezuidenhout*: 1980 (3) SA 1005 (O): Maintenance in connection with lying-in expenses - both parents responsible therefore according to their means. Where no clear proof of actual maintenance a reasonable amount is awarded.

These rules are similarly applicable to parties even if there is no court-ordered maintenance order in place. If the parties have come to an agreement and contracted on the terms regulating their maintenance contract, the Act will recognize it as such. The relevant provision reads:

Section 16(2)(a) Any court –

- (i) that has at any time, whether before or after the commencement of this Act, made a maintenance order under subsection (1)(a)(i) (new maintenance order) or (b)(i) (order for substitution);
- (ii) that makes such a maintenance order; or
- (iii) that convicts any person of any offence referred to in section 31(1),

shall, subject to paragraph (b)(i), make an order directing any person, including any administrator of a pension fund, who is obliged under any contract to pay any sums of money on a periodical basis to the person against whom the maintenance order in question has been or is made, to make on behalf of the latter person (respondent) such periodical payments from moneys at present or in future owing or accruing to the latter person (respondent) as may be required to be made with that maintenance order...

1.4.2 Where there is already a maintenance order in force

The maintenance court is able to make an order for the substitution of the original maintenance order. Substitution of a maintenance order means to either increase or decrease the maintenance amount that was claimed in the initial maintenance order (also known as a variation of the maintenance order). The maintenance court is also able to make an order for the discharge of the original maintenance order. This means that the original maintenance order is cancelled, and there is no longer a maintenance order in force against the respondent. Moreover, it is also possible that the maintenance court may make no order.

1.4.3 Where there is non-compliance with the maintenance order

Section 26 of the Maintenance Act deals with the enforcement of maintenance or other orders. Consult the pre-reading material for the discussion on the legislation. The maintenance court has the authority to make an order where the respondent has failed to make timeous maintenance payments in accordance with a maintenance order. These are known as the civil and criminal remedies that are available to an applicant. The maintenance court can make an order in terms of the following civil remedies (to enforce the payment of the arrear maintenance) –

- (i) An order in respect of any amount together with any interest thereon by execution against property as contemplated in section 27;
- (ii) An order in respect of any amount together with any interest thereon by the attachment of emoluments as contemplated in section 28; or
- (iii) An order in respect of any amount together with any interest thereon by the attachment of any debt as contemplated in section 30.”

1.4.4 J214E (consent order)

An order may be awarded as it corresponds to consent in writing. Even where the respondent is not there, an order may be made in accordance with their consent.

The relevant provision reads as follows:

Section 17(1)

Any order referred to in section 16(1)(a) or (b) may be made against any person not present at the enquiry, if it is made in accordance with his or her consent in writing (FORM G (J214E)) handed in by the maintenance officer at the enquiry.

An order may be awarded as it corresponds to consent in writing. Even where the respondent is not there, an order may be made in accordance with their consent. In terms of a consent order the parties do not have to be at court. The consent form that needs to be completed is the Form J214 (Form G). The Maintenance Officer may request both parties to sign a written consent form and have that made an order of the court. The court then makes an order for payment of maintenance in accordance with the agreement between the two parties. Where parties do not reach an agreement, the matter is then referred to court for formal enquiry. In other words, if the parties are in agreement regarding the amount of maintenance payable that agreement can be made an order of court.

1.4.5 J252E (order by default)

Orders by default are relevant when a respondent fails to appear at court on the date that their matter is heard. The relevant provision reads:

Section 18

- (1) If a maintenance court is satisfied on the grounds of sufficient proof or otherwise-
- (a) that any person against whom an order may be made under section 16(1)(a) or (b) has knowledge of a subpoena issued under section 9; and
 - (b) that he or she has failed to appear before the maintenance court on the date and at the time specified in such subpoena, the maintenance court may, on the application of the maintenance officer for an order by default, call upon the person who has lodged the complaint to adduce such evidence, either in writing or orally, in support of his or her complaint as the maintenance court may consider necessary.
- (2) After consideration of the evidence, the maintenance court may-
- (a) make any order by default which the maintenance court could have made under section 16(1)(a) or (b);
 - (b) make such other order as the court may consider appropriate in the circumstances of the case; or
 - (c) make no order.

The defaulter can utilize Form I or the J256E to exercise their rights and apply for setting aside or variation of the order:

Section 18(4)

- (a) The person against whom a maintenance court has made an order by default may apply to the maintenance court for the variation or setting aside of the order. (FORM I (J256E))
- (b) The application shall be made in the prescribed manner (FORM I (J256E)) within 20 days after the day on which the person became aware of the order by default or within such further period as the maintenance court may, on good cause shown, allow.
- (c) Any person who wishes to make an application under paragraph (a) shall give notice of his or her intention to make the application to the person who lodged the complaint (FORM I - Part B (J256E)), which notice shall be served at least 14 days before the day on which the application is to be heard.

1.4.6 Contemplating the question if a court can make an order pertaining to an amount in arrears except as provided for in sections 26 and 31?

The respondent is the person who is not paying the maintenance in accordance with the maintenance court order. This means that they are in arrears with the maintenance payments.

If the respondent is in arrears with the maintenance payments there are a number of remedies available to the applicant to enforce payment.

Section 26(1)(a) & (b) of the Maintenance Act reads as follow: "Whenever any person against whom any maintenance order has been made has failed to make any particular payment in accordance with that maintenance order; or against whom any order for the payment of a specified sum of money has been made under section 16(1)(a)(ii), 20 or 21(4) has failed to make such a payment, such order shall be enforceable in respect of any amount which that person has so failed to pay, together with any interest thereon –

- (i) By execution against property as contemplated in section 27;
- (ii) By the attachment of emoluments as contemplated in section 28;
- (iii) By the attachment of any debt as contemplated in section 30."

Section 31(1) of the Maintenance Act reads as follow: "Subject to the provisions of subsection (2), any person who fails to make any particular payment in accordance with a maintenance order shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding three years or to such imprisonment without the option of a fine."

1.4.7 May a maintenance court make an order that the arrear amount must be written off?

When someone is liable to pay maintenance in terms of a maintenance order, and they fail to do so as such, they are in arrears with maintenance payments. Such a person also be described as defaulting on their maintenance order, thereby failing to comply with the order as such. The primary caregiver of the child can approach the maintenance office and lay a formal complaint to this effect. The primary caregiver must further show records of payments, as well as non-payments, as it shows what amount is still owed or outstanding. The court can also be approached to order maintenance payments via the defaulting parent's employers.

Maintenance is a legal right to which a child is entitled. Both parents have a duty to support their child. Failure to pay in accordance with a maintenance court order is a criminal offence. The failure to make timeous payments amounts to contempt of court and is punishable by a fine or imprisonment not exceeding three years. The court will always make an order that is in the best interests of the child. The court ultimately permits the defaulting parent to explain why they failed to pay, but without good reason such parent could potentially face an order to the effect of paying the entire amount of outstanding maintenance or criminal charges. The court will usually order the liable parent to pay the arrear maintenance, unless they have a good

reason. Criminal charges are also possible against a maintenance defaulter. Not paying maintenance is a criminal offence and the respondent can be fined or imprisoned or both. The maintenance officer may also have the respondent blacklisted. To escape such criminal punishment, the respondent must show to the satisfaction of the court that he/she could not pay maintenance due to a lack of money or income.

Therefore, a maintenance court can never write off an amount of maintenance ever. The different types of maintenance order that a maintenance court can make include:

- (1) Before the enquiry - make an interim maintenance order.
- (2) If there is no maintenance order in force, the court can make a new section 16 maintenance order. This new order may include an order for payment by way of a stop order or similar facility at a financial institution. It may also include an order for the payment of medical expenses, including an order requiring the person to be maintained to be registered as a dependent at a medical scheme of which the person legally liable is a member. The court can also include an order for the lying-in expenses of the mother (this is the expenses incurred by the mother in connection with the birth of the child and includes maintenance for the child from the birth of the child to the date of the enquiry).
- (3) Where there is an existing maintenance order, the court can make an order substituting the existing order.
- (4) Garnishee order - Whether it is a new or a substitution order, the court can make an order directing the employer to make on behalf of the employee, periodical payments from the moneys at present or in future owing or accruing to the latter person as may be required to be made in accordance with the maintenance order. The order will thus have the effect of an emolument attachment order.
- (5) Make an order by consent (where parties agree and consent in writing, their presence at the enquiry will not be necessary).
- (6) Make an order by default (where the person legally liable to pay maintenance fails to attend the enquiry).
- (7) Orders for the recovery of arrear maintenance in terms of section 26 of the Act.

1.4.8 Can a court make an order that maintenance be deducted from a pension fund or from the benefits in a provident fund?

Money contained in a pension (retirement) fund is protected by law from any form of attachment by an order of court. However, there are exceptions to this general rule. Both the Maintenance Act and the Pension Funds Act allows an applicant to a maintenance case to claim maintenance from the pension fund of the Respondent. If the Respondent fails to make timeous maintenance payments (arrear maintenance), there are three civil remedies available to the Applicant to enforce the original maintenance order. As a last remedy the Act, under Section 30, provides for a Maintenance Court to make an order in terms of the attachment of any debt. If the complainant knows that someone else owes the respondent money, for example, an attachment of debt order can be granted, which will order the respondent's debtor to pay the monies owed to the complainant instead.

If either the order has remained unsatisfied for a period of ten days from the day on which the amount became payable or the order was made, as the case may be, or the maintenance court suspends a warrant of execution under the Act, the maintenance court may make an order for the attachment of any debt owing then or in the future or accruing to the person against whom the order was made into the amount necessary to cover both the amount that person has failed to pay, together with any interest, and the costs of the attachment or execution. The order must direct the person obliged to pay the debt to pay the amount specified in the order within a certain time and manner. On good cause shown, the maintenance court may at any time suspend, amend or rescind such an order.

The Maintenance Investigator will then find out whether the Respondent has a pension fund, and if so, the administrator of the pension fund will be served with a subpoena to release information in terms of the pension fund. The information being sought relates to the value of the fund and the benefit that is due to the Respondent. If it becomes clear from the information obtained that the Respondent does have a pension fund benefit due to them, the court will order that the maintenance amount that is outstanding be deducted from the fund benefit.

1.4.9 How and when may an aggravated party appeal against an order made by the Maintenance Court?

If a party is not satisfied with the order made by the maintenance court, that party is able to appeal the Maintenance order. The party is able to appeal the maintenance order to the High Court. The process that needs to be followed when appealing a maintenance court order is

set out the in Magistrate's and High Court rules. This is confirmed in section 25(1) which reads as follow: "Any person aggrieved by any order made by a maintenance court under this Act may, within such period and in such manner as may be prescribed, appeal against such order to the High Court having jurisdiction."

1.4.10 Discussion of the orders that can be appealed against and orders that are excluded from appeal

Section 25(4) of the Maintenance Act sets out which orders can be appealed and which orders are excluded from appeal. It reads as follow: "For purposes of subsection (1) "order" –

- (a) Does not include any order by consent referred to in section 17(1), any provisional order referred to in section 21(3)(a) or any order by default referred to in section 18(2)(a);
- (b) Includes any discharge of such order as well as any confirmation, setting aside, substitution or variation of such provisional order or such order by default;
- (c) Includes any refusal to make such order as well as any refusal –
 - (i) to make such provisional order;
 - (ii) to make such order by default; or
 - (iii) to make any provisional maintenance order under section 16 by virtue of the provisions of any other law."

1.4.11 Explanation of the process of appeal and the documents and time frames within which an appeal must be done

Rule 50 of the High Court rules deals with the process which needs to be followed. This handout will attempt to simplify the rules and explain the process. For purposes of consistency and to avoid confusion: The Appellant is the person who has now applied for the appeal, and the Respondent is the person who has not applied for the appeal. The Appellant who wishes to appeal the Maintenance order (decision by the magistrate) must note such intention to appeal. The Appellant must then within 40-days from the date of noting the intention to appeal apply in writing to the Registrar of the High Court for a date that the appeal can be heard. At the time of applying for a court date that person must furnish the Registrar with their full residential and postal address, as well as their attorney's address if represented. Moreover, he/she must also lodge two copies of the record. The record must contain a correct and

complete copy of all the pleadings, evidence and documents which are necessary for the appeal hearing.

If the Appellant fails to lodge an application for a court date, then the Respondent may before the lapse of 60 days apply for a court date. Upon receipt of the application for a court date, the appeal is deemed duly prosecuted. Once the Registrar has received the application for a court date, the Registrar must then assign a date of hearing and that assigned date must be at least 40 days after receiving the application. The Registrar must then give the appellant a written notice of the date of hearing, and that appellant will then deliver a notice of set down in writing to the clerk of the court from which the appeal originated (the maintenance court – Magistrate’s court).

1.5 Interim maintenance orders

1.5.1 Interim child maintenance

Interim maintenance orders are a useful remedy against a respondent who uses delaying-tactics just short of economically abusing their child by withholding maintenance. The Maintenance Amendment Act 9 of 2015 in this regard provides for interim child maintenance pending finalization of the relevant maintenance enquiries. Section 10(6)(b) allows such orders to be granted by a maintenance court.

The provision reads as follows:

10. Enquiry by maintenance court

(b) A maintenance court may, where a maintenance order has not been made and a postponement of the enquiry is necessary and if the court is satisfied that –

(i) there are sufficient grounds prior to such postponement indicating that one of the parties is legally liable to maintain a person or persons; and

(ii) undue hardship may be suffered by the person or persons to be maintained as a result of the postponement,

subject to paragraph (c), make an *interim maintenance order* which the maintenance court may make under section 16(1)(a).

From the provision it is evident that the requirements for an interim child maintenance claim include proof of:

1. Sufficient grounds that a maintenance obligation exists before postponement of the proceedings; and
2. That undue hardship may be suffered as a result of the postponed proceedings.

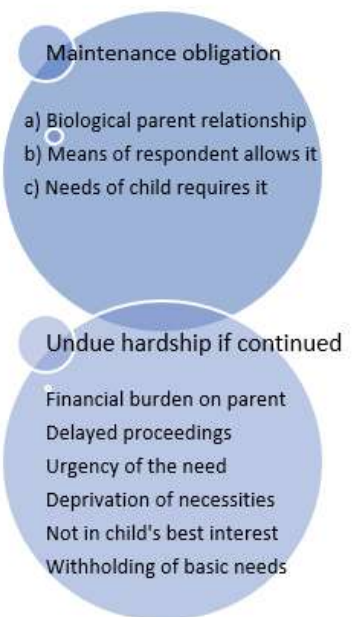
Ultimately, an application for interim maintenance can only be made if there was indeed a postponement of maintenance enquiries. However, maintenance courts are required to conduct maintenance enquiries as speedily as possible and limit the number and duration of postponement⁹⁸.

1.5.2 Interim child maintenance pending divorce

Rule 43 of the High Court Rules provides a comparatively inexpensive and speedy remedy when maintenance *pendente lite* (pending the suit) are sought by one of the parties. The equivalent is a Rule 58 in the Regional Magistrate's Courts.

The provisions of the High Court rule must however be observed strictly. The procedure laid down requires the applicant to deliver a sworn statement in the nature of a declaration setting out the relief claimed and the grounds on which it is claimed. 'Grounds' refer to factual allegations, not inferences made from facts not set out, therefore the respondent must deliver a sworn reply within ten days of receiving the statement. The registrar of the court then sets the matter down for hearing on ten days' notice to both the applicant and the respondent. If the respondent is in default, however, notice to him or her is unnecessary.⁹⁹ An order in terms of rule 43 falls within the meaning of 'maintenance order' and the maintenance court has the power to suspend the order, provided such power is exercised with caution¹⁰⁰.

The term 'maintenance *pendente lite*' in rule 43(1) 'connotes periodic maintenance payments' and does not include lump-sum payments¹⁰¹. Ultimately, such urgent interim maintenance application must guard against lengthy documentation as it defeats the point of expediency. Courts have previously issued warnings against the drafting of unnecessarily lengthy papers



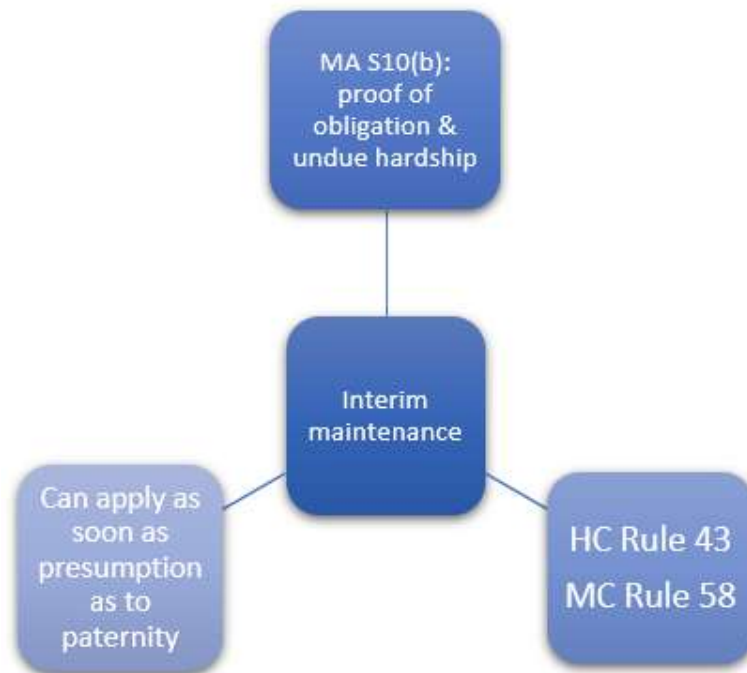
⁹⁸ 1998 Maintenance Act S10(6)(a).

⁹⁹ B Clark's *Handbook of the South African Law of Maintenance* (2016) 54.

¹⁰⁰ *Thompson v Thompson* [1998] JOL 2316 (T), 1998 (4) SA 463 (T).

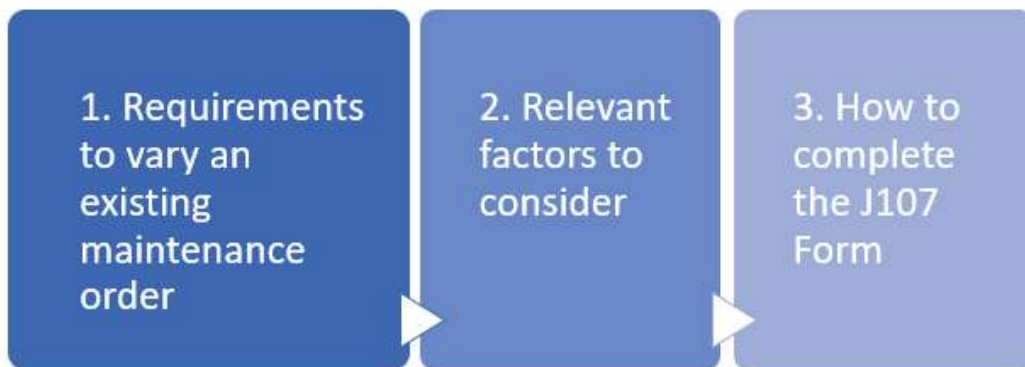
¹⁰¹ *Greenspan v Greenspan* [1999] JOL 5300 (C), 2000 (2) SA 283 (C).

and held that long-winded application in a rule 43 proceeding is an abuse of process because it defeats the purpose of the rule.¹⁰²



¹⁰² *Du Preez v Du Preez* [2008] JOL 22600 (T), 2009 (6) SA 28 (T).

2. Increase or decrease of existing maintenance order

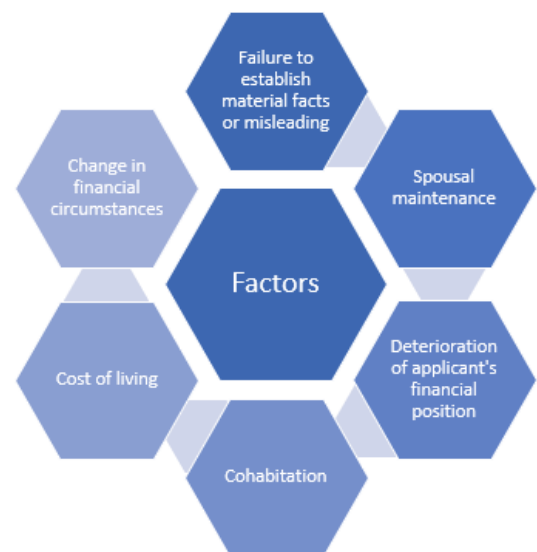


2.1 Requirements to vary an existing maintenance order

Section 8 of the Maintenance Act states that a maintenance order may be rescinded, varied or suspended if there is 'sufficient reason'. A maintenance order can be varied (increased or decreased) either because the amount has become insufficient for your needs, or if you can no longer afford to pay the amount of maintenance due. Variation of a maintenance order may therefore be in order where *good cause* exists for such variation. Once such good cause is alleged and lodged, the maintenance officer may investigate and instate an enquiry in the maintenance court.

2.2 Relevant factors to consider

A court considers various factors in determining whether an application for the variation of an existing maintenance order is justified or not. A court will not entertain such an application if it is not brought on good cause or with sufficient reason. Applicants can be guided by the factors to determine whether they should approach a court or not.



The factors below are considered by a court in assessing the material circumstances of the parties' financial positions¹⁰³:

- a) *Failure to establish material circumstances of financial position and/or any attempt to mislead the court as such.*

¹⁰³ <https://www.lunchandlearn.org.za/>.

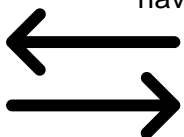
A party's failure to establish the material circumstances of their financial position will likely be detrimental to their case. This is because the court will not be likely to grant an increase or decrease in the maintenance order if the parties' financial position do not allow for it as such. A party asking for an increase must therefore show that their financial position has diminished and that they need more maintenance as a result. Conversely, a party seeking a decrease will also have to show that they have a diminished financial position and that they need a decrease in the payable maintenance as such. The following factor also illustrates how a change in financial circumstances is taken into account when deciding on maintenance.

Any attempt to mislead the court will however be detrimental to your case. This dishonest misconduct will only amount to abuse of court processes and may be fatal to a party's case for variation. Therefore, parties must never lie about their financial position when asking the court for a variation of a maintenance order.



b) Alteration in financial circumstances

A change in the parties' financial circumstances may warrant their application for variation of payable maintenance. For example, if a custodial parent's expenses have increased to such an extent that they require more maintenance for their child's reasonable needs, they may ask for an increase in the maintenance amount. Conversely, if a non-custodial parent's expenses have also increased to the extent that they are no longer able to afford the amount due, they may ask for a decrease in the maintenance amount. This illustrates how a change in financial circumstances may justify an application for variation.



There are however instances where a mere change in financial circumstances did not warrant the granting of variation of the maintenance order:

- In *Davis v Davis*¹⁰⁴, an upward variation of maintenance was not justified due to increased expenditure due to emigration. This case serves as an example that mere emigration and increased costs as such will not necessarily automatically justify a variation in maintenance. A mere alteration of financial position will not justify the variation, but it may give context as to why the variation is sought and needed as such. Therefore, a party seeking variation of a maintenance order must keep this factor in mind.
- *MS v KS*¹⁰⁵ also refused a father's application to reduce a maintenance order on grounds of reduced salary. It was refused on reason that the father could cut costs by reducing clothing and entertainment expenses and by temporarily suspending payments to

¹⁰⁴ [1993] 1 All SA 234 (SE), 1993 (1) SA 293 (SE).

¹⁰⁵ 2012 (6) SA 482 (KZP).

retirement annuities and family loans, therefore the father could sustain the maintenance amount and it was in the child's best interest to sustain the amount as such.

c) *Spousal maintenance with regard to factors in section of the 8 Divorce Act*

In an application for the variation of a child maintenance order, the granting of spousal maintenance may also be relevant. The factors considered in awarding spousal maintenance is therefore relevant and these factors include:

- Parties' conduct
- Age
- Health and
- Ability to support themselves.



Where parties comply with the requirements for spousal maintenance in that they are not regarded as sufficiently skilled to have earning capacity to cover their reasonable needs by entering the workforce, it may count in their favour when applying for variation of child maintenance amounts. If a parent is regarded as economically dependant on their divorced spouse, it may further justify asking for an increase in maintenance where other factors indicate the need as such. This factor is therefore not decisive, but will still be taken into account upon a variation application.


d) *Moral considerations*

This includes considerations as to the parties' conduct and circumstances which led to the maintenance complaint and dispute in question. It may however also include considerations as to the broader context which may dictate a sought-after outcome. For example in *Landman, NO v Landman* 1954 (2) SA 215 (W), a father who after the divorce became a mental patient and could no longer support themselves as a result. The court in that case held that the mother was able to support the child from her earnings and that the maintenance obligation now rests proportionately on the paternal grandparents (and mother) to maintain the child. The court allowed the mother's application to vary the existing maintenance order by deleting the order for maintenance payable from the father.



However, since South Africa has moved away from fault-based divorce grounds it is questionable whether moral considerations or conduct of a party truly play a role in whether a court will grant the variation of a maintenance order or not. On the other hand, a party's dishonesty and/ or vindictiveness may amount to vexatious proceedings if they do not approach the court with valid reasons for seeking the variation.

e) *Deterioration of maintenance debtor's financial position*

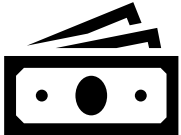


A maintenance debtor is the person who is liable to pay the maintenance amount. The above-mentioned factors have already shown how more expenses, and a diminished financial position of the person paying maintenance as such, may warrant an application to have the amount payable decreased. A downward variation of a maintenance order will however not be entertained if it is unreasonable in light of the child's needs.

A maintenance debtor must further show that the deterioration of their financial position was not due to their own control. For example, willingly moving to a more expensive neighbourhood and increasing your expenses/ decreasing your financial capacity is not beyond the control of such person and will not amount to a valid reason to apply for variation of maintenance.

f) *Cost of living*

The cost of living for both parties is considered in an application for variation of a maintenance order. This means that the maintenance amount payable will purport to cover the cost of living for the person entitled to maintenance, while still recognising that the person liable to pay maintenance must also have enough funds for their respective cost of living. An increase or decrease in the cost of living may therefore also justify applying for a variation, provided that sufficient evidence is shown as to the reasonable cost of living for the parties and their child/ children. An increase in the cost of living is however not decisive and additional factors must further show that the applicant has good cause to ask for the variation (*Louis v Louis*¹⁰⁶).



Examples of successful application to vary based on this ground, includes:

- *Vedovato v Vedovato*¹⁰⁷ is an example of successfully proved increased cost of living, which justified the application for variation as such.
- Courts have further confirmed in *Levin v Levin*¹⁰⁸ that a sudden, unexpected increase in the cost of living will constitute sufficient reason for variation of a child maintenance order or agreement.

¹⁰⁶ [1973] 2 All SA 590 (T), 1973 (2) SA 597 (T) 599.

¹⁰⁷ [1980] 3 All SA 63 (T), 1980 (1) SA 772 (T).

¹⁰⁸ [1984] 3 All SA 500 (C), 1984 (2) SA 298 (C).

Inflation may also play a role in the general cost of living:

- Courts have indeed taken judicial notice of the impact of inflation on spousal maintenance in *Joffe v Lubner*¹⁰⁹ and *Kommisaris van Binnelandse Inkomste v Steyn*¹¹⁰.
- In *Green v Green*¹¹¹, an increase in the maintenance amount payable was justified on grounds that the cost of living had increased due to money having lost its value.
- However, in *Grasso v Grasso*¹¹² it was held that inflation is not decisive and other factors must be considered in conjunction with this factor. Further, parties' intention as to annual increases and/ or escalation clauses must be very clear to cater for inflation in the maintenance agreement.



g) *Cohabitation*

Cohabitation and/ or remarriage of a divorced spouse may have an impact on their spousal maintenance order and the variation of such an order. For example in *Schlesinger v Schlesinger*¹¹³ the court held that if, in terms of a divorce order, spousal maintenance ceases upon remarriage or death, it may amount to an express or implied clause as to cohabitation.



This can also be regulated by including a *dum casta* clause in the spousal maintenance agreement, which has been discussed under the webinar relating to spousal maintenance. On the same facts, *Watson v Watson*¹¹⁴ however held the above-mentioned clause not to extend to chastity, but adultery and/or cohabitation as sufficient reason to vary the order.

2.3 How to complete the J107 Form

As explained under a previous heading, completion of the J107 is substantially similar than the J101 for initial maintenance applications and applicants can rely on that information as such. However, a short discussion on the J107 will follow below.

¹⁰⁹ [1972] 4 All SA 472 (C), 1972 (4) SA 521 (C).

¹¹⁰ [1992] 1 All SA 158 (A), 1992 (1) SA 110 (A).

¹¹¹ [1976] 3 SA 316 (RA).

¹¹² [1987] 3 All SA 47 (C), 1987 (1) SA 48 (C).

¹¹³ [1968] 2 All SA 217 (W), 1968 (1) SA 699 (W).

¹¹⁴ [1979] 4 All SA 177 (A), 1979 (2) SA 854 (A).

The form that needs to be processed at court in the event of any of the above situations is called “SUBSTITUTION OR DISCHARGE OF EXISTING MAINTENANCE ORDER” or a J107 Form.

Below is a short summary of how to complete the J107 form or application for variation of a maintenance order¹¹⁵:



- Start the form with inserting the applicant’s personal information under the section called ‘the deponent’.
- At point number 1 (below applicant’s details), insert the details of the mother or father of the child or children’s details, or the person against whom the maintenance order was made.
- Then continue to fill in the amount that that is currently being paid or received in respect of the child(ren).
- Continue to list any additional contributions that are made towards the child(ren).
- Attach a copy of the existing order to the application form.
- At point number 2, it is asking for the amount to increase or decrease the existing maintenance amount to.
- At point number 3, it is asking why the applicant should receive an increase in maintenance for the child(ren) or why they are seeking a reduction of maintenance in terms of the existing order. Such reasons will be dealt with below.
- At point number 4, there is a column starting with ASSETS and INCOME. The portion of the assets and income must be filled in by stating what the applicant’s current assets and current income is. The applicant has a legal duty to disclose all your information.
- Furthermore, there is column set out for EXPENDITURE, SELF, CHILD(REN) and TOTAL.
- The same formula dealt with in the Application for Maintenance Order above will be applied to the situation, whether asking for an increase or decrease.
- At the end of the application form is a TOTAL EXPENDITURE. You need to calculate the total expenses for yourself, your child(ren) and the total household expense.

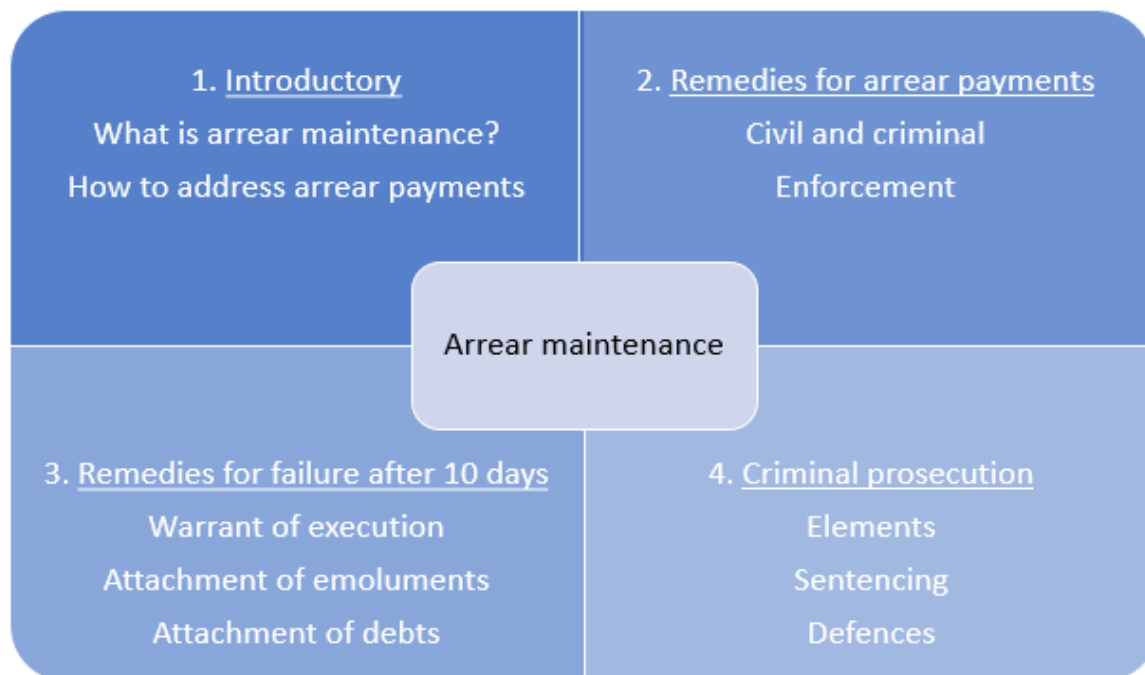
Once the form is completed, sign the form in front of the Commissioner of Oaths (SAPS / Bank manager / Post office) and they will sign too. Therefore, do not sign the form beforehand. Then attach a copy of the child(ren) birth certificate, together with a copy of applicant’s identity document.

¹¹⁵ <https://www.anthonypinc.co.za/maintenance/the-process>.

The same process will be followed by court for the Substitution or Discharge of existing Maintenance Order as the process for Application for Maintenance Order, therefore the section 6 to 10 process will not be repeated under this heading.

<https://www.anthonyinc.co.za/maintenance/the-process>.

3. Arrear maintenance



3.1 What is arrear maintenance?



When someone is liable to pay maintenance in terms of a maintenance order, and they fail to do so as such, they are in arrears with maintenance payments.

Such a person also be described as defaulting on their maintenance order, thereby failing to comply with the order as such. The primary caregiver of the child can approach the maintenance office and lay a formal complaint to this effect. The primary caregiver must further show records of payments, as well as non-payments, as it shows what amount is still owed or outstanding. The court can also be approached to order maintenance payments via the defaulting parent's employers. These remedies will be elaborated below.

The same principles applicable to arrear maintenance, is also applicable to circumstances where a mother was deserted to born the expense of child maintenance herself.¹¹⁶

¹¹⁶ *Woodhead v Woodhead* 1955 (3) SA 572 (SR).

3.2 Remedies if liable person is in arrears or defaults

3.2.1 Civil and criminal remedies

Section 26 of the Maintenance Act makes provision for any party who is in possession of a maintenance order to approach a Maintenance Court and recover any arrear maintenance, as well as interest on the arrear amount from a party against whom such an order was made and/or defaulted to perform in terms of such an order¹¹⁷.

The provision reads as follows:

26 Enforcement of maintenance or other orders

(1) Whenever any person - (a) against whom any maintenance order has been made has failed to make any particular payment in accordance with that maintenance order; or (b) against whom any order for the payment of a specified sum of money has been made under section 16 (1) (a) (ii), 20 or 21 (4) has failed to make such a payment, such order shall be enforceable in respect of any amount which that person has so failed to pay, together with any interest thereon –

- (i) by execution against property as contemplated in section 27;
- (ii) by the attachment of emoluments as contemplated in section 28; or
- (iii) by the attachment of any debt as contemplated in section 30.

(2) (a) If any maintenance order or any order made under section 16 (1) (a) (ii), 20 or 21 (4) has remained unsatisfied for a period of ten days from the day on which the relevant amount became payable or any such order was made, as the case may be, the person in whose favour any such order was made may apply to the maintenance court where that person is resident –

- (i) for the authorisation of the issue of a warrant of execution referred to in section 27 (1);
- (ii) for an order for the attachment of emoluments referred to in section 28 (1); or
- (iii) for an order for the attachment of any debt referred to in section 30(1).

As seen from the provision above, when a person fails to comply with any type of maintenance order, they have the section 26 remedies at their disposal. A complainant may therefore enforce such maintenance order by:

- a) Execution against property (Form L or J397E);
- b) Attachment of emoluments (Form O or J448E);
- c) Attachment of any debt.



The court ultimately permits the defaulting parent to explain why they failed to pay, but without good reason such parent could potentially face an order to the effect of paying the entire amount of outstanding maintenance or criminal charges. The court will usually order the liable parent to pay the arrear maintenance, unless they have a good reason.

¹¹⁷ <https://www.dupwest.co.za/NewsResources/NewsArticle.aspx?ArticleID=4801>.

Criminal charges are also possible against a maintenance defaulter. Not paying maintenance is a criminal offence and the respondent can be fined or imprisoned for up to 1 year, or both. The maintenance officer may also have the respondent blacklisted. To escape such criminal punishment, the respondent must show to the satisfaction of the court that he/she could not pay maintenance due to a lack of money or income.¹¹⁸ A discussion on criminal remedies will follow under the last heading of the training course.

3.2.2 Enforcement of order upon failure after court order

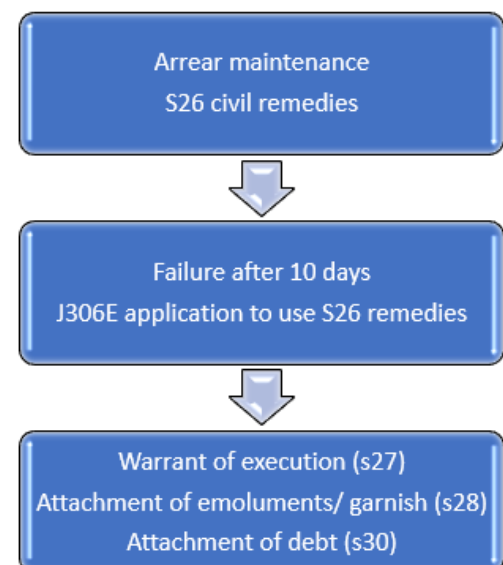
Furthermore, the Act provides three distinctive ways in which arrear maintenance may be recovered from a party in default of a maintenance order. These include the attachment of emoluments, debt or assets (as stated previously). These remedies are however only there to enforce a court order to the effect that arrear maintenance is payable, and where the liable parent fails to comply with such court order for a period of ten days. These further remedies will be elaborated below.



3.3 Remedies for failure to comply with court order after 10 days

The non-compliance with an order that is made by a Court, which includes a maintenance order, is a criminal offence and is punishable by way of imprisonment or on the alternative a fine¹¹⁹. Therefore, a defaulting parent may face criminal charges if they fail to comply with a court order to pay outstanding maintenance. Criminal offences will be discussed in the last heading of the training course.

There are however other less strenuous remedies to recover maintenance, because payment is made difficult when the defaulting parent is placed in detention. Where a defaulting parent fails to comply with a court order as to arrear maintenance for a period of ten days, the complainant may apply to the maintenance court where the defaulting parent is resident for further remedies. These remedies are contained in section 27 to 30 of the Maintenance Act and are only applicable in the case where the order has remained unsatisfied for a period of ten days



¹¹⁸ <https://www.divorcelaws.co.za/maintenance-defaulters.html>.

¹¹⁹ <https://www.dupwest.co.za/NewsResources/NewsArticle.aspx?ArticleID=4801>.

from the day on which the amount became payable or the order was made, as the case may be¹²⁰.

However, a complainant must first obtain authorization to use any of the above-mentioned remedies regarding arrear maintenance. The provision requiring this, is detailed below:

Section 26(2)(b)

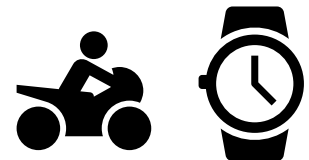
The application shall be made in the prescribed manner (**FORM K/ J306E/ Regulation 16**) and shall be accompanied by -

- (i) a copy of the maintenance or other order in question; and
- (ii) a statement under oath or affirmation setting forth the amount which the person against whom such order was made has failed to pay.

Therefore, application must be made with the required documentation in accordance with a J306E Form, to be able to use the remedies detailed below.

3.3.1 Warrant of execution (attachment of assets)

Section 27 of the Act provides for the sale of the movable property of the person in default of a maintenance order and provides that a



Maintenance Court can make an order for the sale of the immovable property of such a person, should the value of the movable property be insufficient and the circumstances surrounding the matter provides for such an order to be made¹²¹. This means that these warrants may be issued against the movable property of a person against whom such an order has been made and, if the movable property is insufficient, against his or her immovable property¹²². A warrant of execution is a method of enforcing judgments and empowers a court sheriff to attend a judgment debtor's address to take goods for sale¹²³.

The warrant of execution must be firstly, prepared by the person in whose favour the order was made; secondly, issued by the clerk of the maintenance court; and finally, executed by the sheriff or maintenance investigator. The person in whose favour the order was made must be assisted by the maintenance investigator or, in the absence of a maintenance investigator, by the maintenance officer to take the prescribed steps to facilitate execution of the warrant.¹²⁴

¹²⁰ B Clark's *Handbook of the South African Law of Maintenance* (2016) 93.

¹²¹ <https://www.dupwest.co.za/NewsResources/NewsArticle.aspx?ArticleID=4801>.

¹²² B Clark's *Handbook of the South African Law of Maintenance* (2016) 93.

¹²³ <https://www.divorcelaws.co.za/maintenance-defaulters.html>.

¹²⁴ Clark's *Maintenance* (2016) 93.

The refusal to authorize a warrant of execution is appealable, if an applicant or complainant is aggrieved by their failed application to attach the respondent's assets.¹²⁵

Relevant provisions on attachment of assets, include:

What the court may do after receiving an application:

Section 27(1)

The maintenance court may, on the application (FORM K (J306E)) of a person referred to in section 26(2)(a), authorise the issue of a warrant of execution against the movable property of the person against whom the maintenance or other order in question was made and, if the movable property is insufficient to satisfy such order, then against the immovable property of the latter person to the amount necessary to cover the amount which the latter person has failed to pay, together with interest thereon, as well as the costs of the execution.

What the person against whom a warrant of execution has been issued can do:

Section 27(3)

A maintenance court may, on application in the prescribed manner (FORM M (J435E)) by a person against whom a warrant of execution has been issued, under this section, set aside the warrant of execution if the maintenance court is satisfied that he or she has complied with the maintenance or other order in question.

An aggrieved party may however apply to have the warrant of attachment set aside. Below reads the provision dealing with what a maintenance court may do when receiving an application to set aside the warrant of execution:

Section 27(4) A maintenance court may -

- (a) in a summary manner enquire into the circumstances mentioned in subsection (5); and
- (b) if the maintenance court so decides, suspend the warrant of execution and make an order -
 - (i) for the attachment of emoluments referred to in section 28 (1); or
 - (ii) for the attachment of any debt referred to in section 30 (1).

¹²⁵ *MV v CV 2014 (3) SA 1 (KZP)*.

The court will further consider various factors at the relevant enquiry in determining whether the warrant of execution should be set aside or not. These factors include:

Section 27(5) Factors in setting warrant of execution aside

- (a) The existing and prospective means of the person against whom the warrant of execution has been issued;
- (b) the financial needs and obligations of, or in respect of, the person maintained by the person against whom the warrant of execution has been issued;
- (c) the conduct of the person against whom a warrant of execution has been issued in so far as it may be relevant concerning his or her failure to satisfy the maintenance or other order in question; and
- (d) the other circumstances which should, in the opinion of the court, be taken into consideration.

Discussion of the legislation and case law

The Maintenance Act provides applicants with remedies for the recovery of arrear maintenance where there has been non-compliance with a maintenance order by the respondent. Moreover, the Act renders failure to pay the maintenance amount in accordance with the order a criminal offence. Section 26(1)(a)(i) of the Maintenance Act reads as follow: “Whenever any person against whom any maintenance order has been made has failed to make any particular payment in accordance with that maintenance order such order shall be enforceable in respect of any amount which that person has so failed to pay, together with any interest thereon by execution against property as contemplated in section 27.”

In other words, section 26(1)(a) and (b) of the Maintenance Act makes provisions for the civil recovery of the arrear maintenance by enlisting the following three civil remedies –

- warrant of execution;
- attachment of emoluments; and
- attachment of debt.

Section 27(1) of the Maintenance Act reads as follow: “The maintenance court may, on the application of a person referred to in section 26(2)(a), authorise the issue of a warrant of execution against the movable property of the person against whom the maintenance or other order in question was made and, if the movable property is insufficient to satisfy such order, then against the immovable property of the latter person to the amount necessary to cover the amount which the latter person has failed to pay, together with any interest thereon, as well as the costs of the execution.” In other words, section 27(1) provides that if the movable property of the Respondent proves to be insufficient to satisfy the arrear maintenance amount,

the immovable property of the Respondent can then be attached and sold in execution to cover the arrear maintenance amount. The court in *Kroon v Kroon* 1986 (4) SA 616 (E) stated that “means of support” includes the monetary value of property that is attached and sold to cover the arrear maintenance and to produce income.

A warrant is issued in accordance with the provisions of rule 36 and form 32 in the Magistrate’s Court. Moreover, section 62(1) of the Magistrate’s Court Act reads as follow: “Any court, which has jurisdiction to try an action, shall have jurisdiction to issue against any party thereto any form of process in execution of its judgment in such action.” Therefore, the Maintenance Court has jurisdiction in these types of matters. Section 66(1)(a) of the Magistrates Court Act reads as follow: “Whenever a court gives judgement for the payment of money or makes an order for the payment of money in instalments, such judgement, in case of failure to pay such an amount of money forthwith, or such order in case of any failure to pay instalments at the time or manner ordered by the court, shall be enforceable by execution of the movable property.”

What items may be judicially attached to secure payment of arrear maintenance and what items are excluded?

- **Property eligible for attachment**

Section 68 of the Magistrate’s Court Act reads as follow: “The messenger executing any process of execution against movable property may, by virtue of such process, also seize and take any money or bank notes, and may seize, take and sell in execution cheques, bills of exchange, promissory notes, bonds, or securities for money belonging to the execution debtor.” Therefore, any kind of property can be attached, provided that it has been authorised by a court. Moreover, property which is in the possession of the Respondent, but which belongs to someone else cannot be attached.

- **Property exempted from execution/attachment in terms of section 67**

Section 67 of the Magistrate’s Court Act deals with the property that is protected from seizure and which cannot be attached and/or sold to satisfy the judgment debt (arrear maintenance). This includes the following –

- “The necessary beds, bedding and wearing apparels of the execution debtor or his family;
- The necessary furniture (other than beds) and the household utensils in so far as they do not exceed in value the sum of R2000;

- Stock, tools and agricultural implements of a farmer in so far as they do not exceed in value the sum of R2000;
- The supply of food and drink in the house sufficient for the needs of such debtor and his family during the month;
- Tools and implements of trade, in so far as they do not exceed in value the sum of R2000;
- Professional books, documents or instruments necessarily used by such debtor and his profession, in so far as they do not exceed in value the sum of R2000;
- Such arms and ammunition as such debtor is required by law, regulation or disciplinary order to have in his possession as part of his equipment.”

Section 3 of the State Liability Act 20/1957 reads as follow: “No execution, attachment or the like process shall be issued against the State in any action or proceedings against the State or against any property of the State. The amount which may be required to satisfy any judgment or order given or made against a nominal defendant or respondent in any such action or proceedings may be paid out of the Consolidated Revenue Fund or the Railway and Harbors Fund as the case may be.”

Section 2(1) of the General Pensions Act 29/1979 reads as follow: “No annuity or benefit or rights in respect of an annuity or benefit payable under a pension law shall be liable of attachment or subjected to any form of execution under a judgment or order of a court of law.”

Moreover, any right to a benefit or gratuity to which any person is entitled under the Occupational Diseases in Mines and Works Act 78 of 1973 is not subject to execution of a judgement or order of court, except at the instance of the Compensation Commissioner for Occupational Diseases in proceedings to recover an amount to which the payee is not entitled.

Section 2(3)(a) of the Matrimonial Affairs Act 37 of 1953 reads as follow: “No remuneration, compensation, deposit, share, dividend, proceeds, amount, right, tool, or implement belonging to the wife shall be attached or sold in execution for any liability incurred by the husband for or in connection with the supply of intoxicating liquor.”

What happens if the respondent owns nothing?

The civil remedy for the warrant of execution against property is used as a last resort. Therefore, the other civil remedies are available to the applicant in the event that the Respondent does not own any property. The most common civil remedy that can be used is the garnishee order (“attachment of emoluments”) provided that the Respondent is employed.

Explanation of the procedure of issuing a warrant of execution and what it means?

(a) General point of departure

The process of execution takes the form of a warrant or writ of execution. The process is initiated once the clerk of the court issues a writ of execution after application has been made to the maintenance court. The warrant of execution is addressed to the Sheriff, authorising him/her to raise on the movable property of the judgment debtor (Respondent) an amount sufficient to satisfy the judgment debt, the cost, and the cost of the Sheriff. The applicable form is Form 32 (J912) for the warrant of execution against property. The person wishing to apply for the warrant must duly complete the aforementioned form and hand it to the clerk of the court. Moreover, Rule 41 of the Magistrate's Court Act deals with the procedure for issuing a warrant of execution.

(b) Attachment of property

The warrant of execution is directed to the sheriff. Once the sheriff has received the warrant he/she must go to the residential address of the Respondent where the movable property is to be attached. The sheriff is allowed, in so far as it is necessary to execute the warrant, to open any doors on any premises of the Respondent. If the Respondent refuses to open the door, or if the Respondent is not present at the time when the sheriff executes the warrant, the sheriff may then if necessary use reasonable force to execute the warrant. The sheriff must show the Respondent the original warrant of execution, and the sheriff must then hand a copy thereof to the Respondent, or leave a copy on the premises.

The sheriff must when he arrives at the residential address demand payment of the judgment debt and cost, and in the event that no payment can be made, the sheriff must demand the Respondent to point out the movable property that can be attached and sold to satisfy the warrant. Upon the pointing out, an inventory and valuation of the property is then made by the sheriff. It should be noted, that should the Respondent fail to point out the property, the sheriff will still proceed to make an inventory and valuation of the property belonging to the Respondent as the sheriff deems sufficient to satisfy the warrant. If the Respondent pays the amount demanded by the sheriff or at least a part thereof, the sheriff will endorse the amount paid and the date of payment on the original and copy of the warrant. The endorsement will then be signed by the sheriff and counter signed by the Respondent.

(c) Removal of the property

The applicant or his/her attorney must instruct the Sheriff in writing to remove the movable property from the premises of the Respondent. The Sheriff must then without delay remove the property from the premises of the Respondent, and place the property in the custody of someone on his/her behalf. That person in charge of the property is not allowed to use, let or

lend the property, and is not allowed to permit the property to be used, let or lent. Moreover, that person shall not do anything which would decrease the value of the property.

(d) Sale of the property

The movable property will then be sold publicly and for cash. Alternatively, if the magistrate agrees thereto, the property can be sold by an auctioneer or another person appointed by the sheriff to the highest bidder. The applicant must after consultation with the Sheriff prepare a notice of the sale and must furnish two copies thereof to the Sheriff. This is done to allow the Sheriff to copy one and to affix the other one no later than 10 days before the sale on the notice board, or the door of the court or near the place where the sale is to be held.

The date for the sale must not be less than 14 days after the attachment has taken place. In the event that the property is of a perishable nature, or where the Respondent has agreed/consented thereto, the date for the sale may be changed to sooner than as seen fit in the circumstances. As soon as a sufficient amount of money has been raised to satisfy the warrant of execution and the cost of the sale, the sale in execution will be stopped.

Assistance by the state in paying the costs of a warrant of execution

It is possible for the applicant to apply to court for the cost of the execution order to be paid by the state. The Department of Justice Code 26 of 2015 paragraph 40.1.5 provides: “Where a warrant of execution was authorised the Maintenance Officer must in facilitation amongst others, whether a person in whose favour a warrant of execution was authorised, is in a position to pay the cost of execution. Where the Maintenance Officer determines that the Applicant is not in a position to pay the costs of execution, he/she must approach the Court to request the State to bear the costs of the execution.”

The applicant must file a supporting affidavit. In the supporting affidavit the applicant must explain that she is unable to afford the sheriff’s cost (R5000 to R6000) to attach the immovable or movable property of the defaulting Respondent. The maintenance officer can then submit a request in writing to the magistrate where the maintenance officer states that they had done an enquiry and found that the applicant does not have the means and is not in a position to pay the costs of the execution. The maintenance officer can then request that the costs of the execution order be paid by the state.

3.3.2 Garnishee order (attachment of emoluments)

Section 28 of the Act provides for a Maintenance Court to make an order for payment in terms of an emolument attachment order against the salary of the defaulting party,



until such unsatisfied arrear maintenance and interest is paid in full¹²⁶. This is the case where a court order remains unsatisfied for a period of ten days or upon suspension of a warrant of execution¹²⁷. Garnisheeing or the attaching of emoluments is the process of deducting money from an employee's monetary compensation (including his/her salary), sometimes as a result of a court order¹²⁸. Form K or the J306E is used to apply for such attachment of emoluments.

This attachment should be in the amount necessary to cover both the amount that person has failed to pay, together with any interest on that amount, and the costs of the attachment or execution. The order must authorize that person's employer to make on his or her behalf the payments specified in the order from his or her salary or earnings until the amount, interest and costs have been paid in full.¹²⁹ *S v Raseemela* SACR 2000(2) 98 has provided that a magistrate contemplating an order under s 28(1) for the attachments of emoluments should afford an employer an opportunity to comment upon the feasibility of such an order before such order is made. As the employer, in truth, is made a party to the matter, he is entitled to be heard.

An employer further has certain obligations to aid in fulfilment of the order. These obligations on the employer to an employee with garnished wages, include:



Section 29

(2) Whenever any person to whom the notice relates leaves the services of the employer, that employer shall, within seven days after the day on which he or she so leaves the service, give notice thereof in the prescribed manner (**Regulation 20(4)(a)+(b)**) to the maintenance officer of the court where the order in question was made.

(3) Any employer on whom a notice has been served for the purposes of satisfying a maintenance order shall give priority to the payments specified in that notice over any order of court requiring payments

(4) If any employer has failed to make any particular payment in accordance with that notice, the maintenance order may be enforced against that employer in respect of any amount which that employer has so failed to pay, and the provisions of this Chapter shall, with the necessary changes, apply in respect of that employer, subject to that employer's right or the right of the person against whom that maintenance order was made to dispute the validity of the order for the attachment of emoluments referred to in section 28(1).

¹²⁶ <https://www.dupwest.co.za/NewsResources/NewsArticle.aspx?ArticleID=4801>.

¹²⁷ B Clark's *Handbook of the South African Law of Maintenance* (2016) 93.

¹²⁸ <https://www.divorcelaws.co.za/maintenance-defaulters.html>.

¹²⁹ Clark's *Maintenance* (2016) 95.

Application can also be brought to have a garnishee order suspended, amended or rescinded according to Form N or the J438E in terms of section 28(2)(b).

Explanation of what an emolument attachment order is and how it works?



Emoluments Attachment Order (also known as a “garnishee order” or EAO) is one of the civil remedies available to a complainant to enforce the payment of arrear maintenance. This is confirmed in section 26(1)(a) of the Maintenance Act. Section 26(1)(a)(ii) reads as follow: “Whenever any person against whom any maintenance order has been made has failed to make any particular payment in accordance with that maintenance order such order shall be enforceable in respect of any amount which that person has so failed to pay, together with any interest thereon by the attachment of emoluments as contemplated in section 28.”

It is a court order that allows for deduction of money owed directly from a respondent’s salary or wage. This means that a portion of the respondent’s earnings is automatically deducted from their paycheck and paid directly to the complainant until the court terminates the maintenance order. The court order is issued as part of the maintenance order. The maintenance order is a court order requiring one person to provide financial support to another, such as a parent providing support for their child or a spouse providing support for their ex-partner.

The garnishee order is then served by the sheriff (or messenger) on the respondent’s employer, ordering the employer to make deductions from the salary or wages of the respondent in order to pay the arrear maintenance. In the case of a maintenance order, the emoluments of attachment order are used to ensure that the person who is supposed to be receiving support actually gets the money they are owed, even if the person responsible for paying the support is not willing or able to make the payments voluntarily. Section 29(1) of the Maintenance Act reads as follow: “In order to give effect to an order for the attachment of emoluments referred to in section 28(1), the maintenance officer shall, within seven days after the day on which such order was made by the maintenance court or whenever it is afterwards required, in the prescribed manner cause a notice together with a copy of such order, to be served on the employer concerned directing that employer to make the payments specified in the notice at the times and in the manner so specified.”

Section 65J (2) of the Magistrates Court Act 32 of 1944 provides the following: “an emoluments attachment order may be issued by a Clerk of the Magistrates Court:

- if the judgment debtor consents thereto, and/or

- if the judgment creditor has sent a registered letter to the debtor informing him or her that an emoluments attachment order will be issued pursuant to the judgment debt if such debt is not paid in full, and such letter must also be filed with the Clerk of the Court together with an affidavit.”

It is important to note that an emoluments of attachment order can only be issued by a court and must be based on a valid court order, such as a maintenance order. Additionally, there are limits to the amount that can be deducted from a person's salary or wage, based on their income and other factors. If the respondent becomes unemployed the employer must give notice to the maintenance officer within seven days. Section 29(2) of the Maintenance Act reads as follow: “whenever any person to whom the notice relates leaves the service of the employer, that employer shall, within seven days after the day on which he/she so leaves the service, give notice thereof in the prescribed manner to the maintenance officer of the court where the order in question was made.”

The constitutional court in *Bayport Financial Services v Mziwoxolo* (2018) clarified that an EAO can only be granted after a court has determined that the debtor is able to pay the amount owing. The court also emphasized the importance of ensuring that EAOs do not lead to excessive or unfair deductions from an individual's salary. Moreover, the High court of South Africa in *Ramikosi v Viljoen and Others* (2018) held that a garnishee order could not be granted against an individual who was already subject to an Emoluments Attachment Order (EAO) for maintenance. The court held that the priority should be given to the EAO for the maintenance of the debtor's dependents.

When can you apply for an emoluments attachment order and what documents need to be completed?

The respondent is the person who has failed to pay maintenance in accordance with the maintenance court order. The applicant (“creditor”) is able to apply for the attachment of emoluments –

- At any time by consent (J214);
- During a section 6 enquiry;
- During court proceedings (section 16(2));
- If the respondent is in arrears for more than 10 days (J306);
- Application to court (section 28).

Section 26(2)(a) of the Maintenance Act reads as follow: “if any maintenance order or any order made under section 16(1)(a)(ii), 20 or 21(4) has remained unsatisfied for a period of 10

days from the day on which the relevant amount became payable or any such order was made, as the case may be, the person in whose favour any such order was made may apply to the maintenance court where that person is resident for an order for the attachment of emoluments referred to in section 28(1).” The applicant must complete the J306 (Form K). This is the application form for the enforcement or other order in terms of section 26 of the Maintenance Act (civil remedies for recovery).

The application for a garnishee order must include the prescribed application form (J360E) and the following documents:

- An affidavit stating who the person is that owes the maintenance amount;
- Confirmation (copy) of the order that was made in favour of the applicant;
- The full outstanding amount of debt and how much will be deducted every month.

How is an emoluments attachment order enforced?

(a) General point of departure

The emoluments attachment order is served on the respondent’s employer by the sheriff. The employer then has an obligation to make the necessary deductions from the salary/wage of the respondent and pay that amount to the applicant for the arrear maintenance. It is enforced against the employer of the respondent, and not the respondent him/herself. If the employer fails to make the necessary deductions, he/she can be held liable for the payments.

The constitutional court in *Carelse v Carelse* (2007) ruled that the maintenance of children is a fundamental right and that parents have a legal obligation to provide for their children. The court also affirmed the validity of EAOs as a means of enforcing maintenance orders.

(b) Suspension of the EAO

An EAO may be suspended on good cause shown for the following reasons:¹³⁰

- The debt has been paid in full;
- The court order has been set aside;
- The EAO was issued incorrectly or unlawfully;
- If the debtor's financial circumstances have changed and they are no longer able to afford the amount being deducted from their salary, the EAO may be suspended or amended to reflect their current financial situation;

¹³⁰ S28(2)(a) of the Maintenance Act.

- If the EAO is causing undue hardship to the debtor or their dependents, the court may suspend or amend the order to alleviate the hardship.

Can the employer refuse to deduct money from the respondent's salary/ wage?

(a) General point of departure

The employer cannot refuse to deduct the money from the respondent's salary or wage because he/she is legally obliged in terms of the court order to commence with the deductions immediately upon being served with the order. An emolument attachment order is a court order that directs an employer to deduct a specified amount from an employee's salary/wage and pay it to the creditor who obtained the order, and the employer has a legal obligation to comply with the terms of the order. If an employer refuses to deduct money from an employee's salary in accordance with an emolument's attachment order, the creditor can take legal action against the employer. The creditor may also apply for an order compelling the employer to comply with the terms of the EAO and make the required deductions from the employee's salary. Moreover, non-compliance with the notice by the employer is a criminal offence (section 38(a)).

(b) Rights of the employer

Employers also have certain rights when it comes to deducting amounts from an employee's salary in accordance with an EAO, these include:

- *The right to deduct the correct amount:* Employers have a responsibility to ensure that they deduct the correct amount specified in the EAO, including any interest or other costs that may be included in the order.
- *The right to deduct the amount in installments:* Employers may be permitted to deduct the amount specified in the EAO in installments, rather than as a lump sum. This can help to ensure that the employee is not left without any income as a result of the deduction.
- *The right to charge a fee:* Employers may be permitted to charge a reasonable fee for processing the deduction and making payments to the creditor specified in the EAO. However, this fee must be reasonable and in accordance with any regulations that may apply.
- *The right to seek legal advice:* Employers have the right to seek legal advice if they have any questions or concerns about their obligations under an EAO or if they receive conflicting orders or demands from different creditors.

Remedies in case of failure of the employer to deduct:

Section 29(2) reads as follow: “Whenever any person to whom the notice relates leaves the service of the employer, that employer shall, within seven days after the day on which he or she so leaves the service, give notice thereof in the prescribed manner to the maintenance officer of the court where the order in question was made.”

Section 29(3) reads as follow: “Any employer on whom a notice has been served for the purposes of satisfying a maintenance order shall give priority to the payments specified in that notice over any order of court requiring payments to be made from the emoluments due to the person against whom that maintenance order was made.”

Section 29(4) reads as follow: “If an employer on whom a notice has been served for the purposes of satisfying a maintenance order has failed to make any particular payment in accordance with that notice, that maintenance order may be enforced against that employer in respect of any amount which that employer has so failed to pay, and the provisions of this chapter shall, with the necessary changes, apply in respect of that employer, subject to that employer’s right or the right of the person against whom that maintenance order was made to dispute the validity of the order for the attachment of emoluments referred to in section 28(1)”. In other words, this means that if the employer fails to deduct the necessary amount in accordance with the garnishee order, that employer shall be held liable for the amount owed. That maintenance order will then be legally enforceable against the employer.

The Labour court of South Africa in *South African Post Office v Member of the Executive Council: Department of Education, KwaZulu-Natal* (2019) held that an employer could be held liable for failing to deduct amounts from an employee's salary in accordance with an EAO. The court emphasized that employers have a legal obligation to comply with EAOs and that failure to do so could result in legal action. The constitutional court in *Mahlangu v Minister of Police* (2020) ruled that EAOs can be used to enforce maintenance orders against members of the South African Police Service. The court also noted that employers have a responsibility to ensure that EAOs are enforced and that deductions from employees' salaries are made in accordance with the law.

3.3.3 Attachment of debt

As a last remedy the Act, under Section 30, provides for a Maintenance Court to make an order in terms of the attachment of any debt¹³¹. If the complainant knows that someone else

¹³¹ <https://www.dupwest.co.za/NewsResources/NewsArticle.aspx?ArticleID=4801>.

owes the respondent money, for example, an attachment of debt order can be granted, which will order the respondent's debtor to pay the monies owed to the complainant instead¹³².

If either the order has remained unsatisfied for a period of ten days from the day on which the amount became payable or the order was made, as the case may be, or the maintenance court suspends a warrant of execution under the Act, the maintenance court may make an order for the attachment of any debt owing then or in the future or accruing to the person against whom the order was made into the amount necessary to cover both the amount that person has failed to pay, together with any interest, and the costs of the attachment or execution. The order must direct the person obliged to pay the debt to pay the amount specified in the order within a certain time and manner. On good cause shown, the maintenance court may at any time suspend, amend or rescind such an order.¹³³



There are conflicting precedents on whether an order for the attachment of debt can only be made final after granting a *rule nisi*. The debate in this regard rests on the irreconcilable views that either an attachment of debt may be awarded upon an applicant's application as such, or that it must only be granted after the granting of a *rule nisi* to allow other to oppose the application. The debate is fleshed out in case law:

- *Johanna Susanna Louw vs Pieter Christoffel Louw*: High Court Review Case no. 78/06, Northern Cape Division; not yet reported: [2006] JOL 17526 (NC): "It is in my view, completely inconceivable that the legislature could have intended an order attaching a debt owing to a person to be made without notice to such a person. It would mean, inter alia, that the applicant would be afforded the opportunity of presenting evidence to the effect that the person against whom the maintenance order has been made is in arrears with payments, while such person would not have the opportunity of rebutting such evidence. Such an interpretation would infringe upon one of the most basic and important rules of law, viz the audi alteram partem rule." & Par 21 supra: "it is however, equally inconceivable that the legislature could have intended a process whereby pension funds and other debtors would not be afforded the opportunity to participate in proceedings which are aimed at placing a particular obligation upon them."
- *GEPF vs Francina Bezuidenhout and Philip Bezuidenhout*: Appeal no. 2113/04 (not yet reported): "Ideally it must be joined as a party before the court makes an order. If it has not been joined as a party the court cannot grant a final order. The court must issue a rule

¹³² <https://www.divorcelaws.co.za/maintenance-defaulters.html>.

¹³³ B Clark's *Handbook of the South African Law of Maintenance* (2016) 97.

nisi calling upon the fund to give reasons why an order must not be made. That will afford the fund the opportunity to explain its position before a final order is made.”

3.4 Criminal prosecution

As briefly mentioned previously, it is a crime in failing to comply with a maintenance order, unless one can prove lack of means as a defence.



This is seen in the provision relating to maintenance offences and penalties:

Section 31(1)

Subject to the provisions of subsection (2), any person who fails to make any particular payment in accordance with a maintenance order shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding one year or to such imprisonment without the option of a fine.

The Children’s Act further criminalizes the unjustified failure to pay maintenance. The provision provides:

305 Offences

(4) A person who is legally liable to maintain a child is guilty of an offence if that person, while able to do so, fails to provide the child with adequate food, clothing, lodging and medical assistance,

A parent is therefore fully entitled to lay a criminal charge against a person who is obliged to pay maintenance in terms of a court order if he/she fails to stick to the terms of the order. Although this step will likely result in a person’s arrest, it will not necessarily result in receiving payment.¹³⁴

3.4.1 Sentencing

There are no clear guidelines on the enforcement of maintenance for children. A court may impose some of the following sanctions upon a maintenance defaulter¹³⁵:

- a) **Fine:** Usually the defaulter cannot pay the fine, but even if he/she can, it is undesirable that the money should go to the state.

¹³⁴ <https://www.divorcelaws.co.za/what-happens-if-you-dont-pay-child-maintenance.html>.

¹³⁵ <https://www.divorcelaws.co.za/what-happens-if-you-dont-pay-child-maintenance.html>.

- b) Imprisonment: The sentence for failure to pay maintenance arises from failure to obey a court order, which is a criminal offence. Defaulters can be imprisoned for a period not exceeding one year.
- c) Suspended sentence: Suspended sentences are often imposed against maintenance defaulters. It is desirable that a sentence be suspended because someone who is sentenced to prison may lose his/her job, and will consequently be unable to maintain his/her dependents. One of the principal objects of the maintenance act is to ensure that minor children are properly supported by their parents and therefore it is often inappropriate to send transgressors to prison.
- d) Correctional supervision: Correctional supervision is community-based punishment and highly suitable for maintenance defaulters. It may include house arrest, compensation, employment when possible and necessary, and supervision by a probation officer.

Case law has further elaborated on appropriate sentencing in this regard:

- *S v Visser*: 2004(1) SACR 393 (SCA): Trial court recommending that amount of hours to be served to be reduced for every R500 paid off on arrear maintenance. Sentence not legally able to be carried out by relevant department. No provision in Correctional Service Act 8 of 1959 and in regulations made in terms of the Act empowering either the Commissioner of Correctional services or any other official of the Department of Correctional services to reduce number of hours of periodical imprisonment imposed on maintenance defaulter in proportion to amounts of arrear maintenance paid by or on behalf of such defaulter. Therefore, sentence envisaged not properly able to be given effect to.
- *S v November and Three Similar Cases*: 2006(1) SACR 213 (C): Where it was condition of suspension of sentence that defaulter pay off maintenance arrears, proper account should be taken of defaulter's financial means. Failure to enquire into defaulter's financial means can result in inappropriately lenient terms for payment of arrears.
- *S v Seroke*: 2004(1) SACR 456 (T): The Maintenance Act has various provisions designed and intended to ensure recovery of periodical maintenance. These are sections 16, 17, 26, 27, 28, 29 40, 41. The primary objective is not the wielding of the awesome powers judicial officers are granted by law but dedicated and focused objective of the recovery of maintenance for the child. Imprisonment will almost certainly result in loss of employment by the defaulting parent or person responsible for the payment of maintenance. There is greater equity and fairness in ensuring that whatever money a person is obliged to pay

maintenance has is paid towards maintenance rather than towards legal representation or fines imposed by courts.

3.4.2 Elements of the s31(1) offence

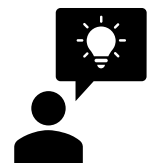
To charge a person of the offence under section 31(1) for failure to comply with a maintenance order, the elements of the relevant crimes must be proven. These requirements have crystallized in case law¹³⁶ to include:

- a) A maintenance order directing the accused to an amount of money towards the maintenance of a specific person;
- b) Failure on the part of the accused to comply with such a maintenance order or to make a particular payment;
- c) At the time when the accused failed to comply with the maintenance order, the accused (a) possessed of the means to comply with the maintenance order; or (b) failing above, and if the accused has raised the defence of lack of means, that the accused's lack of means was caused by his own *unwillingness to work, or by his misconduct; and
- d) A guilty mind including knowledge of the wrongfulness of his or her action not to comply with the maintenance order.



A guilty mind can include: wilful intent not to comply with the maintenance order, constructive intention to the same effect, or a negligent failure to comply with the maintenance order [S v Mphuti 2006 (2) SACR 391 (T) par [9] at 394 where the accused believed that the maintenance had been deducted from the money he was receiving]¹³⁷.

*When proved that the accused's lack of means was caused by his unwillingness to work, it will be immaterial which of these forms of guilty mind underlay his unwillingness to work as the statute only requires proof of "unwillingness to work" and by implication, knowledge of unlawfulness.¹³⁸ There are therefore multiple defences which can arise out of the elements of the crime of failing to pay maintenance.



¹³⁶ S v Magagula 2001 (2) SACR 123 (T) at par [105] 170-171.

¹³⁷ A van der Merwe's Maintenance Manual for Presiding Officers 65.

¹³⁸ Van der Merwe's Maintenance Manual 67.

3.4.3 Defences

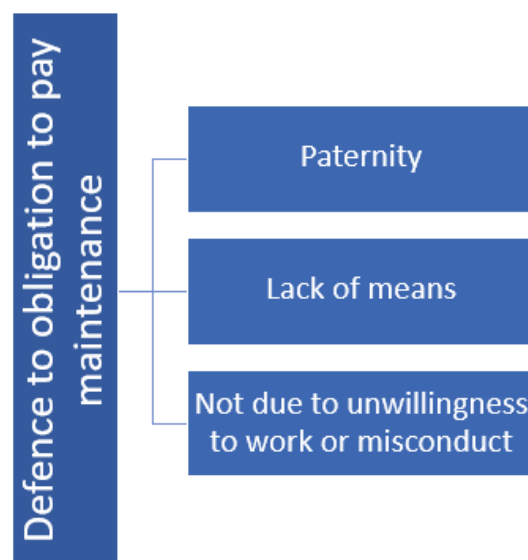
The 1998 Maintenance Act affords a respondent a defence against the offence of failing to pay maintenance. The provision reads as follows:

Section 31(2)

If the defence is raised in any prosecution for an offence under this section that any failure to pay maintenance in accordance with a maintenance order was due to lack of means on the part of the person charged, he or she shall not merely on the grounds of such defence be entitled to an acquittal if it is proved that the failure was due to his or her unwillingness to work or misconduct

Case law has further given flesh to defences against maintenance offences:

- *S v Murray*: 1999 (2) SACR 554 (W): Defence of lack of means due to irregular income must succeed.
- *S v Pieterse*: 1993 (3) SA 275 (C): The criminal trial is not used to determine or re-evaluate the duty of maintenance or the correctness of the obligation. For these purposes, the enquiry procedure is used.
- *R v Moss*: 1959(2) SA 738 (SR): Accused leaving employment without first having made certain that other employment is available - not per se misconduct.



On whom does the onus rest of proving the cause for lack of means? *S v Nduku*: SACR 2000(2) 420: "There is a notable difference in the wording of the offence between present offence and its predecessor (s 11(3) of Act 23 of 1963). Clear indication that Legislature intended to remove the onus of proving cause for lack of means from the accused and place it on the prosecution. To hold otherwise would not only go against the ordinary meaning of

the language of s 31(2) but would also be inconsistent with the constitutional principal that precludes the creation of a reverse onus.”

Regarding burden of proof, *S v Mphuti* 2006 (2) SACR 391 (T) provided that the charge under s 31 is a criminal matter, the State having to prove the case beyond reasonable doubt.

Case law has also given substance to the defence as to legal liability to maintain:

- *Milton and Cowling* Chapter F2, 12-13: When the accused, in criminal proceedings, raises a defence that he has no legal liability to maintain, his legal liability must be presumed and that liability can only be challenged by means of a conversion of the proceedings in terms of section 13 to a section 5 enquiry.
- *S v Olivier* 1976(3) SA 186(O): Section 11(3) sets out the only defence to a criminal charge of failing to comply with an order. If any other ‘defence’ is raised properly, the matter must be converted in terms of section 13 to enquire into this ‘defence’ in terms of a section 5 enquiry under old legislation.
- *S v Pieterse* 1993(3) SA 275(C): If a person against whom a section 5 order has been made is dissatisfied with that order, he has a right to appeal against it. If he does not appeal, the order is valid and he cannot in a criminal prosecution in terms of section 11(1) raise as a defence that the order is not valid. If however, he avers that there is not an obligation on him to pay maintenance because of some or other reason that came into existence after the order was made, he is entitled to raise it, but the matter must than not be adjudicated on as to determine whether this is a valid ‘defence’, but must be dealt with as a ground for conversion of the proceedings.
- *S v Sohlezi* 2000 (2) SACR 231(NC): Where there is information that indicates that it is desirable to convert the proceedings so that the dispute as to paternity should be properly investigated, the court should do so even as early as the plea stage. Where there is insufficient information to help the court in this decision, the court should enquire further into the matter as to why the accused disputes paternity. The validity of the order because of for example the dispute as to paternity is therefore not a valid defence but a ground for conversion.

4. Subsistence & travel allowance, Jurisdiction, and inter-province applications

4.1 Subsistence & travel allowance for applicants travelling to court and having to take off work

Section 11 of the Maintenance Act deals with subsistence and travel allowances for applicants who have to take time of work in order to travel to court. Section 11(1) reads as follow: “Any person, other than a person against whom a maintenance order may be made under this Act, attending the enquiry as a witness shall be entitled to an allowance as if he/she were attending criminal proceedings as a witness for the State”.

Section 11(2) reads as follow: “The maintenance court may direct that any person against whom a maintenance order may be made under this Act shall (a) be paid the prescribed allowances for subsistence and for travel to and from the court; and (b) shall be paid such allowances as may be paid to a witness for the accused in criminal proceedings.”

4.2 Will the court pay the travel fees of the respondent or myself to come to court?

The wording of section 11(1) does not expressly make provision for the applicant to claim subsistence and travel allowances therefore some courts might not grant such allowances. However, the wording “any person” by implication includes the applicant. The applicant who is applying for maintenance is not acting in her own interests, but is rather acting in the best interests of her child (section 28 of the Constitution). In acting for her child’s best interests, the applicant had to miss a day of work, and by implication lose a day’s wage. It is clear from section 11(2) that a respondent may claim an allowance for subsistence and for travel to and from the court. This is expressly provided for in the subsection.

Therefore, it is possible for both the respondent and the applicant to claim a travel and subsistence allowance from the court. This is done by way of an application to court. The respondent must inform their employer that they have been subpoenaed to court and the employer must allow them to attend court. In terms of section 11 of the maintenance act, a witness testifying in a maintenance matter is entitled to an allowance as if he or she were attending criminal proceedings as a witness for the state. A witness may be paid an allowance for subsistence and for travel to and from the court.

4.3 Discussion on how to establish jurisdiction or which court should be used for a maintenance application, increase or decrease application

An application for maintenance can be made against a respondent (person against whom the maintenance is being claimed) at any Maintenance court in the district where the applicant (person who is claiming for maintenance) or the child, on whose behalf maintenance is being claimed, resides or is employed. Therefore, the Maintenance Court has the jurisdiction to hear any matter relating to maintenance, including the increase or decrease of existing maintenance orders.

Every District Court is also a Maintenance Court within its jurisdiction. The Maintenance Court has jurisdiction to receive maintenance complaints from individuals who reside within that Court's district. This means that the aggrieved party will have to lodge their complaint at the District Court in the area where they live and pursue the matter there. Complaints regarding new or even existing maintenance orders can be made in this Court.

4.4 Explanation, with practical examples, on how to conduct a maintenance inquiry where the respondent is living or working in another province

Section 6 maintenance inquiry:

The section 6 inquiry can be conducted remotely i.e., skype. This is done to save the Respondent a trip to a different province. The section 6 enquiry is an informal enquiry and consists mostly of negotiations between the parties.

How would this work?

The maintenance officer will request that the applicant and the respondent submit their documentation electronically. These documents include i.e., J101, J107, founding affidavit, index page, financial disclosures form and supporting financial statements. The parties will then via skype have a joint session. The maintenance officer will then do a caucus with both parties individually and return to a joint session later on in the maintainancy enquiry.

Section 10 maintenance inquiry:

Section 10 is however a formal inquiry. The court can at any time subpoena any person to come and testify at court if the court deems it necessary that such evidence is needed. During any stage of the enquiry, the court may refer the matter to a Family Advocate for investigation.

A maintenance court shall conclude maintenance enquiries as speedily as possible and shall ensure that postponements are limited in number and in duration. If a postponement is necessary, the court may make an order for interim maintenance pending finalization of the inquiry.

4.5 Discussion of sections 23(1) and 19(a) and regulation 14

Section 23 of the Maintenance Act deals with how files (maintenance court orders) can be transferred from one maintenance court to another court for example in another province. The provision reads as follow:

- (1) "Subject to the directions prescribed in connection with the transfer of maintenance orders, the maintenance officer may in writing direct the clerk of the court where a maintenance order was made to transmit the maintenance order, together with the prescribed records, to the clerk of the maintenance court within the area of jurisdiction of which the person in whose favour the maintenance order was made, or the person in whose care that person is, resides, carries on business or is employed.
- (2) On receipt of the maintenance order, the clerk of the maintenance court shall register such maintenance order in the prescribed manner.
- (3) Any maintenance order registered in terms of subsection (2) shall for the purposes of this Act be deemed to be a maintenance order made under section 16 by the maintenance court where the order has been so registered."

Regulation 14 in terms of the Regulations to the Maintenance Act reads as follow:

- (1) The clerk of the court where a maintenance order was issued shall, when the maintenance order is to be transferred in terms of section 23(1) of the Act –
 - retain certified copies of all orders or judgements, including previous amended orders, and documents with regard to the record of payment which are applicable to the particular case; and
 - send by registered post all the original documents referred to in paragraph (a) to the clerk of the maintenance court where the person in whose favour the maintenance order was made resides.
- (2) On receipt of the maintenance order referred to in subregulation (1), the clerk of the maintenance court shall register the order by numbering it with the following consecutive number for maintenance cases for the year during which it was received.

5. How to transfer a file from one court to another?

5.1 Circumstances under which a file could be transferred from one court to another

It is possible that a maintenance file can be transferred from one court to another. The most common situation where this would happen is where the applicant in whose favour the court order was made moves to a different province. The maintenance file will then have to be transferred from the previous province to the new province in order to allow the applicant to approach the maintenance court in their area of jurisdiction for any issues relating to the maintenance order.

The Applicant now has a choice to register her/his maintenance file at her/his convenience at the closest court where she/he resides or where she/he is employed.

There are two scenarios:

- (1) Where the applicant already relocated to the new residential area or;
- (2) Where the applicant intends on relocating or wishes his/her file to be transferred for convenience close to his/her place of employment to ensure that he/she can return to work (since some courts do not regard the applicant as a any other witness in terms of section 11 eligible for witness fees (subsistence and travel allowance).

5.2 Discussion of the application for transfer and explanation of the internal procedure that the maintenance officer/ clerk of the court needs to follow

The applicant wishing to transfer the file will have to complete an application for transfer either at the court where they have opened the maintenance file or the court in the new area where they are currently residing. It is recommended that the applicant submit the form to the clerk where the original maintenance file was opened, and that clerk will scan and transfer the application for transfer to the new court closest to where the applicant is currently or intends on residing or is employed (i.e., after relocation).

Once the clerk of the court where the applicant intends on residing or area where the applicant is employed receives the application for transfer, that clerk must make a copy thereof and hand the applicant a copy and keep a copy. A copy is then scanned and emailed to the old court of origin. Once the old court of origin receives the application form that clerk will hand it to the maintenance officer. The maintenance officer is then responsible for checking that all the court documents are in order and signed, and must check that the minimum standards in the Department of Justice Code 26 of 2015 are complied with.

Once the maintenance officer has done this, he/she has to take the maintenance file to the magistrate in chambers to request that the magistrate order the transfer of the file to the new magisterial district. Once the court order to transfer the file is obtained the clerk of court will copy and certify all court orders including the J214, and all other court documents and archive the copied documentation in the court archive. The respondent and employer must be informed that the maintenance file was transferred to a new magisterial district to ensure that the respondent files a J107 reduction/variation application at the correct court.

The original file will then be handed to the messenger who has to sign for the maintenance file before taking receipt of the maintenance file. If the new court is within the messenger's delivery area the messenger can drop the file at the new court and ensure that he/she obtains the signature of the person taking receipt of the file. Once the file is received the clerk must register the maintenance file with the new court number and acknowledge receipt by email to the old court of origin. At the old court of origin, the new number and acknowledgement of receipt will be filed with the copied maintenance file in the court archives.

Checklist for requesting your file to be transferred:

- Applicant filed application for transfer form;
- Maintenance officer checked that all of the court documents are correct and have been signed;
- File was taken to the magistrate in chambers in order for it to be transferred to the new court;
- The clerk has made copies of the file and all copies have been certified and kept for the archives;
- The clerk has complied the DOJ letter to accompany the original file to the new court;
- A messenger has been arranged and confirmed to dispatch the original file to the new court, or the file will be sent via registered mail;
- The clerk of the new court has confirmed receipt of the file, and the confirmation of receipt has been filed with the copied file in the archives.

5.3 Reference to the DOJ Codified Instructions 26/2015 (paragraph 35)

Paragraph 35 of the DOJ Codified Instructions 26/2015 deals specifically with the transfer of the maintenance file in terms of section 23 and regulation 14.

35.1) The Clerk of the Maintenance Court must upon receipt of a request for transfer of a maintenance order, file it immediately on the appropriate file and hand the file to the Maintenance Officer for a directive.

35.2) In terms of section 23(1), the Maintenance Officer must give a directive to the Clerk of the Maintenance Court which includes inter alia the following:

- certified copies of the application/directive for the transfer of file;
- certified copies of all orders or judgments, including previous amended orders;
- certified copies of documents with regard to the record of payment which are applicable to the particular case where applicable, from the maintenance report on the JDAS System;
- all other documents contained in the file;
- Section 212 of the Act 51 of 1977, statement in respect of the payments;
- dispatch by registered post all the original documents referred to above to the Clerk of the Maintenance Court where the beneficiary resides/ employed;
- notify the Respondent and Employer of the transfer of the file and the particulars of the new Maintenance Court by Registered mail;
- the file must also be transferred on the Maintenance Module – JDAS system.

35.3) Receipt of the maintenance file from another court. In terms of Section 23(2) and Regulation 14(2):

- The Maintenance Officer of the court receiving the transferred file, if needs be, must approach the court to vary the terms of the order to reflect the new details or particulars of that courthouse (for example, the banking details of the new district in instances where the place of payment is the courthouse) to facilitate the payment;
- Clerk of the Maintenance Court, who receive the maintenance file must by registered mail notify the Applicant, the Respondent and the Employer of the of the file, the new file number and particulars of the new courthouse.

(end of part B)

PART C: Other aspects of maintenance explained

1. How to apply for international maintenance

1.1 Discussion of the Reciprocal Enforcement of Maintenance Orders Act

International maintenance, or cross-border maintenance, is the manifestation of the common law duty of support that we recognize in South Africa. This duty of support is not limited to South African citizens only and such South African obligation to maintain can be enforced in another country.

There are recognized countries to which South Africa has undertaken reciprocal enforcement obligations to. This means that these countries have agreed to enforce South African child maintenance orders in that country, if the respondent resides or works in that foreign country. This arrangement allows maintenance orders in one country to be enforced in the other. Therefore international maintenance, in this context, may be described as the enforcement of South African maintenance orders in foreign, proclaimed countries and vice versa.

In some instances, it is known that the terms of a maintenance order will have to be enforced in a foreign jurisdiction at a later stage, even though it is granted by a South African Court. In such a case parties can for instance include an obligation in the Order to cause Mirror Orders to be obtained in the stipulated foreign jurisdiction. This will then assist them with legal recognition and enforceability of their rights, under the South African Order, in that foreign jurisdiction.¹³⁹

If international enforcement of a maintenance order in future was not contemplated and no mirror order provisions are included in the Order, parties may have to look to other procedures that may be available to assist them if they require international enforcement. There are different options. Parties could for instance apply for a variation of the Order provided that the variation sought is possible, appropriate and lawful in the circumstances. Variation of an Order can be obtained by agreement. If, however, there is no agreement about a variation of an Order the party seeking a variation may apply to the relevant Court with jurisdiction for such a variation.¹⁴⁰

There are also certain international instruments, conventions, procedures and/or laws in force which can assist parties with international enforcement of certain rights that may be regulated

¹³⁹ <https://www.mdtcinc.co.za/maintenance-on-the-move-where-do-you-stand/>.

¹⁴⁰ <https://www.mdtcinc.co.za/maintenance-on-the-move-where-do-you-stand/>.

in terms of a South African Order and also, in some instances, where no Order is in place yet. A child's right to maintenance is one such an example.¹⁴¹

There are however many steps in the process before such reciprocal enforcement is created and sustained, as correspondence from the foreign country on the matter is crucial to ensure legal efficacy. These processes are contained in the Reciprocal Enforcement of Maintenance Orders Act 80 of 1963, as detailed below.

Applicable legislation

The applicable legislation to international maintenance matters, include:

- Reciprocal Enforcement of Maintenance Orders Act 80 of 1963;
- Reciprocal Enforcement of Maintenance Orders (Countries in Africa) Act 6 of 1989.

Section 2 of REMO Act 1963 reads as follow: "This Act shall apply in respect of any country or territory designated by the Minister by notice in the Gazette". Section 2 therefore provides that reciprocal enforcement obligations exist on countries as determined by the Minister of Justice. These countries are known as 'proclaimed countries' and have reciprocal obligations to enforce South African maintenance orders. These two statutes regulate international maintenance and countries that are recognised as proclaimed with reciprocal enforcement obligations.

Proclaimed countries:

Countries (or territories) that have reciprocal enforcement obligations in relation to maintenance orders are relevant in international maintenance matters. State parties to such a reciprocal enforcement agreement are known as 'proclaimed, or designated countries', as detailed below:

| Reciprocal Enforcement of Maintenance orders Act 80 of 1963 | Reciprocal Enforcement of Maintenance orders Act 6 of 1989 (Africa Countries) |
|--|--|
| Australia Capital Territory - New South Wales - Northern Territory - State of Queensland South Australia - Tasmania - State of Victoria - Western Australia | Botswana, |
| Botswana | Kenya, |

¹⁴¹ <https://www.mdtcinc.co.za/maintenance-on-the-move-where-do-you-stand/>.

| | |
|---|------------|
| Canada Alberta - British Columbia - Province of Manitoba - North West Territories - Province of Ontario | Lesotho, |
| Cocoa (Keeling) Islands | Malawi, |
| Cyprus | Namibia, |
| Fiji | Nigeria, |
| Germany | Swaziland, |
| Guernsey (Bailiwick of) | Zambia and |
| Hong Kong | Zimbabwe |
| Isle of Jersey | |
| Isle of Man | |
| Kenya | |
| Lesotho | |
| Malawi | |
| Mauritius | |
| Namibia | |
| New Zealand | |
| Nigeria | |
| Norfolk Island | |
| Sarawak | |
| Singapore | |
| St Helena | |
| Swaziland | |
| United Kingdom England - Northern Ireland - Scotland - Wales | |

| | |
|---|--|
| United States of America California - Florida | |
| Zambia | |
| Zimbabwe | |

1.2 Navigating step-by-step through the maze and paperwork of enforcing and applying for a maintenance order where the respondent is working or living outside of South Africa

1.2.1 How to apply for international maintenance?

The process is initiated by an applicant's completion of a deposition affidavit. The applicant will submit copies of any agreements between the parties as to maintenance obligations. These agreements can include mere verbal agreements, or a maintenance court order, to allow the relevant to take note as such. Such maintenance file is then registered with Pretoria's Department of Justice National Office, by Mrs. Mary Ann Wilson, who is responsible for international relations.

The applicant must complete a description of the respondent (typically the father) in Annexure V of the relevant forms and attach a recent picture or photo of the respondent as such.

A provisional order, Annexure X, to the applicant's case may be granted only when the respondent has received (confirmed) the order in the proclaimed country that they are residing or working in.

Therefore, applicants must be assisted to compile the initiating deposition affidavit and Annexure V (respondent's description), as well as noting any grounds which the respondent may raise to oppose the application. Four copies of the deposition, grounds, Annexure V and X is then again sent to Mrs. Wilson at Department of Justice International Relations. It will then be considered whether the relevant country is proclaimed and the process to obtain a provisional maintenance order is initiated. Further documents needed and steps required are detailed in a subsequent heading regarding application requirements.

1.2.2 Documents needed to apply for international maintenance

The following documents are required to apply for international maintenance in respect of the proclaimed countries and territories. **Four (4) copies of these documents are required:**

- Four certified copies of the provisional court order.

- An affidavit by the complainant or an officer of the court as to the amount of arrears due under the order.
- The deposition affidavit or evidence of the complainant.
- Birth certificate(s) of the child or children.
- The marriage certificate (if applicable).
- A photograph and description of the defendant.
- The exhibits referred to in the complainant's deposition, affidavit or evidence duly endorsed as prescribed above.
- Three certified copies of the documents referred to in (b) and (c) above and in the event of the High Court, four copies as well as an additional copy of the order of court are required.
- Physical residential and or working address of the defendant in a proclaimed country.

1.2.3 Requirements to apply for international maintenance

Four (4) copies of the above-mentioned documents will be sent to the Department of Justice in Pretoria (International Relations by Mrs. Mary Ann Wilson: MWilson@justice.gov.za) once the court awards a provisional order. A discussion on the enforcement of international maintenance by court orders will follow in subsequent headings. These documents, and the order in which they are presented, are crucial for applicants to ensure they comply with the requirements to apply under the REMO Act.

Applicants must further comply with the following requirements¹⁴²:

1. Completion of the attached Application Form in terms of section 6 of the Maintenance Act 99 of 1998 read with section 8 of the Reciprocal Enforcement of Maintenance Act 80 of 1963 must be completed together with four (4) certified copies thereof.
 - **J101E**: for a first application for a maintenance order; or
 - **J107E**: for the substitution or discharge of an existing maintenance order.
2. Documentary proof of all claimed expenses in support of the application is required - the original documentation; together with four (4) certified copies thereof.

¹⁴² H.E Smit's *Requirements for a provisional order to be made in terms of the Reciprocal Enforcement of Maintenance Orders Act 80 of 1963*.

3. A detailed affidavit in which the applicant clearly states:
 - Reasons for the said application;
 - Basis and justification for the application;
 - Any other relevant information relating to the application.

4. Four (4) certified copies of each of the following required documentation to with:
 - the final order of Divorce and/or of the current Maintenance Order;
 - the identity document of the Applicant;
 - the birth certificates and/or identity documents of the Beneficiaries;
 - the photograph (preferably in color) of the Respondent.

5. The attached Questionnaire in respect of the particulars of the person that needs to be traced in the reciprocating country must be completed; together with four (4) certified copies thereof.

6. Please be advised that the applicant is obliged to submit the original bundle of documentation which the applicant intends to use in the said application, together with (4) four certified copies of same. **[NB: See below for the required order of the documentation]**

7. A court date when the enquiry in terms of section 10 of the Maintenance Act, Act 99 of 1998 read with section 8 of the Reciprocal Enforcement of Maintenance Act, Act 80 of 1963 will take place in front of the Magistrate; must be arranged with the Maintenance Officer AFTER all the necessary documentation has been obtained.

NB! The said bundle of original documentation MUST BE in the following order *before* the four (4) certified copies are made:

1. Application form (either the J101E or the J107E);
2. the documentary proof of all the supporting documentation and/or sworn affidavit in respect of the expenses claimed;
3. the final order of Divorce and/or of the current Maintenance Order (if applicable);
4. the identity document of the Applicant;
5. the birth certificates and/or identity documents of the Beneficiaries;
6. the questionnaire;
7. the photograph (preferably in color) of the Respondent.

1.3 Discussion of the enquiry to make a provisional order against someone in a proclaimed country and procedures when provisional order is remitted back to the court of origin

1.3.1 Section 8 of REMO

In considering whether to award international maintenance, relevant officers will first enquire into the matter and investigate the allegations. Section 8 of the REMO Act dictates:

8 Provisional maintenance orders against persons resident in proclaimed countries

(1) Notwithstanding anything to the contrary in any law contained, an enquiry may be held under the Maintenance Act, 1998, in the absence of any person resident in a proclaimed country who may be legally liable to maintain any person in the Republic, provided the evidence of all witnesses at the enquiry is read over to and signed by them.

(4) Upon confirmation of a provisional maintenance order in terms of this section, it shall be deemed to be an order made under paragraph (a) or (b) of section 16 (1) of the Maintenance Act, 1998, as the case may be, by the court which made the provisional order.

Therefore, an enquiry in terms of section 8 of the Reciprocal Enforcement of Maintenance Orders Act 80 of 1963 should be held under section 10 of the Maintenance Act 99 of 1998, in the absence of the person/ respondent residing in a proclaimed country or territory who may be legally liable to maintain any person in the Republic. The evidence of all witnesses at the enquiry should be read over, adhered to and signed by them. The court is to make a provisional order with a view to have such order confirmed in the proclaimed country.

Requirements for provisional orders in this context, include:

1. Statement as to amounts of maintenance payable (in respect of spouse and children if that is the case);
2. Statement as to duration of maintenance – i.e. until what age maintenance will be paid in respect of each child;
3. Express statement that it is a provisional order and that is of no effect unless and until confirmed by a competent court in the relevant proclaimed country;
4. Relevant information as to the identity and whereabouts of the defendant;
5. Confirmation of order via transmission to proclaimed country.

In case where a provisional order is made against a respondent in a proclaimed country towards the maintenance of both his wife and children, two separate sets, one applicable to the wife and

another to the children, together with the grounds on which the making of the order might have been opposed, should be furnished.

It is clear that these requirements all hinge on the facts that the provisional order may only be granted if sent to the proclaimed country for similar confirmation. This requirement and related procedures are discussed in the heading below, but can be summarized in simple steps as follows:

The relevant judicial officers will ensure that these procedural steps are complied with:

1. Get information from applicant: which country, photos of respondent, address or work place in foreign country
2. Register maintenance file with file number
3. Compile deposition affidavit of complainant
4. Compile questionnaire of bodily features of respondent in foreign country
5. Supporting documentation: Divorce order, birth certificates, identity document of applicant
6. Compile court order for court to make provisional order
7. On court date: Maintenance officer inform court – proceedings in terms of section 8 of REMO under section 10 of the Maintenance Act

Magistrate: “The maintenance officer informs the court that these proceedings are in terms of the Reciprocal Enforcement of Maintenance Order 80 of 1963 with the view of applying for a provisional maintenance order and confirming of the Provisional Order in a proclaimed country, to wit (name of country). “

The Applicant hands in the following documents:

- (a) Certified copy of an application and expenses as Exhibit “A”: J101 or J107
- (b) Certified copy of the passport of the Defendant as Exhibit “B”.(or identity document or recent photos)
- (c) Certified copy of the identity document of the Applicant as Exhibit “C”
- (d) Certified copy of any minor children’s birth certificates as Exhibit “D”.
- (e) Certified copy of the provisional Order J281 Exhibit “E”
- (f) Statement of the grounds which the order might be opposed Exhibit “F”
- (g) Photograph & contact details of the Respondent Exhibit “G”

1.3.2 Transmission and confirmation of SA provisional order

It is clear that a provisional order may only be granted in this context if such an order is transmitted via diplomatic means to an authority as recognized by the Minister, in the proclaimed country. The aim of this is to obtain confirmation of the provisional order in the foreign country. The order must be accompanied by certified witness depositions, grounds of opposition and information regarding the identity and locality of the person against whom the order has been made. This is seen in section 8(2) of the REMO Act:

8 Provisional maintenance orders against persons resident in proclaimed countries

(2) The court holding the enquiry may make a provisional maintenance order only, against the person so resident and shall, with a view to confirmation of the provisional maintenance order, forward to the Minister for transmission through diplomatic channels to an authority of the proclaimed country recognized for the purpose by the Minister, a certified copy of the order together with the depositions of witnesses, a statement of the grounds on which the order might have been opposed and such information as may be available for the identification and location of the person against whom the order has been made.

The provisional order awarded in South Africa is to be forwarded, with the relevant documentation, to the Department of Justice and Constitutional Development for transmission through diplomatic channels. The following documents must be *forwarded* as such:

1. Four certified copies of the provisional order;
2. The deposition or evidence of the complainant together with three certified copies of the deposition or evidence;
3. Birth certificate(s) of the child(ren);
4. Marriage certificate (if applicable);
5. A statement of the grounds on which the making of the order might have been opposed together with three certified copies of the statement;
6. A photograph and description of the defendant – in prescribed format;
7. The original exhibits referred to in the complainant's evidence (These exhibits must be duly endorsed in prescribed format).

In order to facilitate the identification of the defendant and tracing his whereabouts in the proclaimed country or territory, all relevant information with regard to that person must be furnished. The DOJ&CD Head Office will notify the magistrate concerned of the place and

date of registration of the maintenance order, who – in turn - should notify the complainant. It would be at such stage that the respondent, if they so wish, can oppose the application. Grounds to oppose international maintenance applications are detailed in a subsequent heading.

In case of a provisional order is made whereby the defendant is required to contribute towards the maintenance of both his wife and the children, two separate sets, applicable to the wife and children respectively, on the grounds on which the making of the order might have been opposed, should be furnished.

Once confirmed by a court in the proclaimed country, the order needs to be sent via diplomatic channels, back to the court in RSA where provisional order has been made, as a final order. Final orders are discussed in a subsequent heading.

1.3.3 If provisional order is remitted to country of origin

There may however be instances where the relevant court cannot confirm the South African provisional order due to outstanding evidence. The matter is then remitted to the Maintenance Court, which proceeds with the enquiry as if the provisional order was never made. Such court may then consider the witnesses' depositions given in the court for which the order has come for confirmation. Section 8(3) of the REMO Act provides to this effect:

8 Provisional maintenance orders against persons resident in proclaimed countries

(3) If the court before which the provisional maintenance order has come for confirmation remits the case for further evidence, the maintenance court shall proceed with the enquiry as if no provisional order had been made and may take into consideration the contents of depositions of witnesses in the court before which such order has come for confirmation.

The maintenance court may then take into consideration the contents of the depositions of witnesses in the court before which such an order has come for confirmation.

Section 5 of REMO (Countries in Africa) Act 6 of 1989 further provides for:

- A defendant resident in an African country to *consent in writing* to the provisional order;

- Proof of receipt of sufficient notice by the defendant to attend proceedings at which provisional order has been made to be forwarded with provisional order together with relevant documentation.

1.4 Dealing with confirmations of provisional orders in proclaimed countries (section 4 of REMO)

Once the court has confirmed a provisional order, it must ensure that all the documents are certified with the words: “RECIPROCAL ENFORCEMENT OF MAINTENANCE ORDERS ACT”. The certificate to the effect that the document is a true copy of original should appear on the document itself and not by annexure or attachment. Four certified copies must then be sent to the relevant proclaimed country for similar confirmation. The maintenance officer will then enquire in the maintenance court to confirm the respondent’s citizenship. The officer may cause any person, including a person who is legally liable for maintenance to be summoned to appear before the maintenance court. Such person will give evidence or produce a book or statement, including a statement by his employer setting out his full earnings.

As previously detailed: Once the provisional order is obtained the documentation will be sent in fourfold (4 copies) to the Department of Justice in Pretoria (International Relations to Mrs. Mary Ann Wilson MWilson@justice.gov.za). Only English letters will be accepted by Mrs. Wilson and such copies must also be sent via registered mail to DIRCO (Department of International Relations and Cooperation), then the SA Embassy in the relevant proclaimed country and then to the foreign address where the father/ ex-husband is resident.

The Sheriff of the foreign county will take the respondent/ father/ ex-husband’s picture with him to serve the documents and establish the father/ ex-husband’s where he work or reside and submit a set of the copies to him. The other 3 sets will be used in a foreign country’s court on the date the father is summoned to appear in the foreign country’s court.

The foreign country’s court will either confirm the provisional order or amend it according to the means of the respondent. The applicant will be informed in about 6 to 8 months of the confirmation of the order or if it was amended.

If the applicant does not receive any feedback within six months, they can contact the court manager and the Regional Head of the Department of Justice and request progress on the applicant’s matter. It takes approximately 12 months for an order to be registered in proclaimed countries.

1.5 Registration of final orders (section 3 of REMO and section 4 of Act 6/89)

Section 3 of the 1963 REMO Act and Section 4 of the 1898 REMO Act provides for the registration of final orders, to obtain force and effect as a court order.

When documents relating to a final order are forwarded by Head Office to the Magistrate of the district where the defendant resides, the final order must be registered in terms of section 3 of the Act by entering the particulars of the orders in a register kept for the purpose of the registration of maintenance orders. The registration of an order must be effected immediately and on no account be kept in abeyance.

When a certified copy of a maintenance order issued by a court in a proclaimed country is delivered in the prescribed manner to the Minister of Justice, the Minister or a person acting under the Minister's authority delivers a copy of the order to a maintenance court which then registers it in the prescribed manner.¹⁴³

Other relevant requirements in this context, include¹⁴⁴:

1. The particulars of the order must be entered into a register kept for this purpose and the entry should include the date, place and proclaimed country in which the order was made;
2. DOJ&CD head office must be notified of the date of registration of the order;
3. Notice must be sent to the defendant via registered mail to his last known address calling upon him to effect payment.

2. How to file a complaint in terms of section 305 of the Children's Act 38 of 2005

2.2 Explanation of section 305(3) & (4) of the Children's Act (abandonment of a child)

Section 305 (3) of the Children's Act reads as follow: "A parent, guardian, other person who has parental responsibilities and rights in respect of a child, care-giver or person who has no parental responsibilities and rights in respect of a child but who voluntarily cares for the child either indefinitely, temporarily or partially, is guilty of an offence if that parent or care-giver or other person –

- (a) abuses or deliberately neglects the child; or

¹⁴³ B Clark's *Handbook on the South African Law of Maintenance* (2016) 120.

¹⁴⁴ DOJ&CD Codified Instructions.

(b) abandons the child.

Section 305 (4) reads as follow: “A person who is legally liable to maintain a child is guilty of an offence if that person, while able to do so, fails to provide the child with adequate food, clothing, lodging and medical assistance.”

2.3 Explanation of section 110 of the Children’s Act (duty to report abuse)

2.3.1 What does the provision read?



Section 110 of the Children’s Act 38 of 2005 (“the Act”) deals with the reporting of abused or neglected child and child in need of care and protection. The provision reads as follow:

- (1) Any correctional official, dentist, homeopath, immigration, official, labour inspector, legal practitioner, medical practitioner, midwife, minister of religion, nurse, occupational therapist, physiotherapist, psychologist, religious leader, social service professional, social worker, speech therapist, teacher, traditional health practitioner, traditional leader or member of staff or volunteer worker at a partial care facility, drop-in centre or child and youth care centre who on reasonable grounds concludes that a child has been abused in a manner causing physical injury, sexually abused or deliberately neglected, must report that conclusion in the prescribed form to a designated child protection organisation, the provincial department of social development or a police official.
- (2) Any person who on reasonable grounds believes that a child is in need of care and protection may report that belief to the provincial department of social development, a designated child protection organisation or a police official.
- (3) A person referred to in subsection (1) or (2) –
- (a) must substantiate that conclusion or belief to the provincial department of social development, a designated child protection organisation or police official; and
 - (b) who makes a report in good faith is not liable to civil action on the basis of the report.
- (4) A police official to whom a report has been made in terms of subsection (1) or (2) or who becomes aware of a child in need of care and protection must-
- (a) ensure the safety and well-being of the child concerned if the child’s safety or well-being is at risk; and

- (b) within 24 hours notify the provincial department of social development or a designated child protection organisation of the report and any steps that have been taken with regard to the child.
- (5) The provincial department of social development or designated child protection organisation to whom a report has been made in terms of subsection (1), (2) or (4), must –
- (a) ensure the safety and well-being of the child concerned, if the child's safety or well-being is at risk;
 - (b) make an initial assessment of the report;
 - (c) unless the report is frivolous or obviously unfounded, investigate the truthfulness of the report or cause it to be investigated;
 - (d) if the report is substantiated by such investigation, without delay initiate proceedings in terms of this Act for the protection of the child; and
 - (e) submit such particulars as may be prescribed to the Director-General for inclusion in Part A of the National Child Protection Register.
- (6) A designated child protection organisation to whom a report has been made in terms of subsection (1), (2) or (4) must report the matter to the relevant provincial department of social development. The provincial head of social development must monitor the progress of all matters reported to it in terms of paragraph (a).
- (7) The provincial department of social development or designated child protection organisation which has conducted an investigation as contemplated in subsection (5) may –
- (a) take measures to assist the child, including counselling, mediation, prevention and early intervention services, family reconstruction and rehabilitation, behaviour modification, problem solving and referral to another suitably qualified person or organisation;
 - (b) if he or she is satisfied that it is in the best interest of the child not to be removed from his or her home or place where he or she resides, but that the removal of the alleged offender from such home or place would secure the safety and well-being of the child, request a police official in the prescribed manner to take the steps referred to in section 153; or
 - (c) deal with the child in the manner contemplated in sections 151, 152 or 155.

(8) The provincial department of social development or designated child protection organisation which has conducted an investigation as contemplated in subsection (5) must report the possible commission of an offence to a police official.

2.3.2 *Mandatory reporting of child abuse in South Africa*

Applicable legislation

The Constitution of the Republic of South Africa, 1996 (“the Constitution”) addresses the rights of children in section 28 thereof. Section 28(1)(d) of the Constitution reads as follows: “every child has the right to be protected from maltreatment, neglect, abuse and/or degradation”. The Act defines a child as a person under the age of 18 years. Children are subjected to a full spectrum of abuse, including verbal, physical, emotional and sexual abuse. Section 110 specifically deals with the protection of children and resonates with the UN Convention and the AU Charter on the protection of children’s rights.

Section 110 of the Act places an obligation/duty on certain professional sectors to report any suspected cases of child abuse, neglect or maltreatment as soon as the suspicion is formed on reasonable grounds. The professional has an obligation to report the abuse to any one of the following persons:

- Police official;
- designated child protection organisation; or
- provincial department of social development.



Who has a duty to report child abuse?

Section 110(1) states that the following persons have an obligation to report suspected child abuse, neglect or maltreatment.

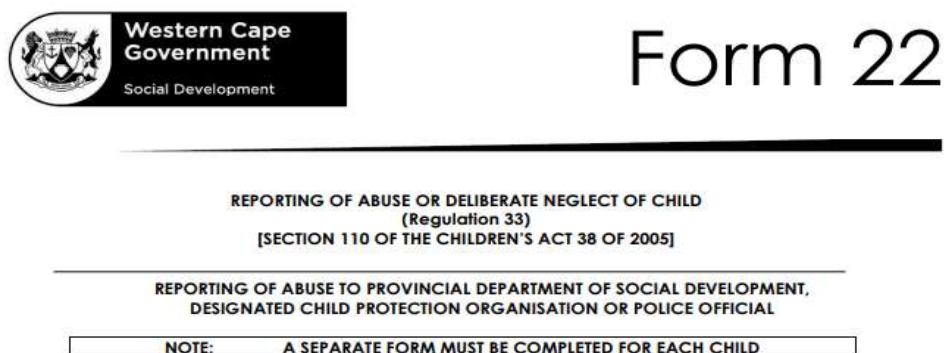
“(1) Any correctional official, dentist, homeopath, immigration, official, labour inspector, legal practitioner, medical practitioner, midwife, minister of religion, nurse, occupational therapist, physiotherapist, psychologist, religious leader, social service professional, social worker, speech therapist, teacher, traditional health practitioner, traditional leader or member of staff or volunteer worker at a partial care facility, drop-in centre or child and youth care centre who on reasonable grounds concludes that a child has been abused in a manner causing physical injury, sexually abused or deliberately neglected, must report that conclusion in the prescribed form to



a designated child protection organisation, the provincial department of social development or a police official.”

Section 110 does not compel ordinary citizens to report suspected cases of child abuse, neglect or maltreatment but gives them a discretion. However, the Sexual Offences Act makes it clear that all persons who are aware, or who subsequently become aware of any sexual abuse to a child are compelled to report such conduct to the police.

2.4 Form 22: Reporting of abuse and deliberate neglect of a child (section 110 of the Children’s Act)



Western Cape Government
Social Development

Form 22

REPORTING OF ABUSE OR DELIBERATE NEGLECT OF CHILD
(Regulation 33)
[SECTION 110 OF THE CHILDREN'S ACT 38 OF 2005]

**REPORTING OF ABUSE TO PROVINCIAL DEPARTMENT OF SOCIAL DEVELOPMENT,
DESIGNATED CHILD PROTECTION ORGANISATION OR POLICE OFFICIAL**

NOTE: A SEPARATE FORM MUST BE COMPLETED FOR EACH CHILD

Form 22 is a formal way to report child abuse in any form. Form 22 is accompanied by an affidavit outlining the reasonable grounds of suspicion of child abuse, neglect or maltreatment.

If any professional persons suspect that a child is being abused or neglected (there must be reasonable grounds), it is not optional but ordered that such person report it. This can be done by completing Form 22 and submitting this form to a designated child protection organization, the Department of Social Development or a police official.

A person who makes such a report in good faith, cannot be liable for civil action. To guarantee the child's safety, the social worker looking into the situation must determine if the report is accurate or unsubstantiated and take appropriate action.

When a police officer learns about this report, they have 24 hours to ensure the children described in it are safe and to contact the Department of Social Development or another certified child protection agency.

2.5 Discussion of arguments that non-payment of maintenance amounts to abuse and neglect in terms of the Children's Act

The non-payment of maintenance is a contravention of the Maintenance Act and amounts to a criminal offence. It also constitutes a form of domestic violence. Financial abuse is a type of domestic violence that can take many different forms. Typically, it involves one spouse stealing from the other or controlling the other's finances.

After a relationship ends, refusing to pay child support is a tactic used to maintain power over the other person. Refusing to help support a child is a way of forcing the parent with care to put all of their assets into a joint responsibility, in turn ensuring they remain at a disadvantage financially.

Withholding child maintenance is both a crime of omission (in neglecting a child's needs and failing to provide for them) and a crime of commission (in financially abusing the parent with care).

Section 1 of the Children's Act defines care quite extensively and makes it clear that children should not be subjected to abuse, neglect, maltreatment or any other physical or emotional harm (and this also includes financial abuse).



2.6 Step-by-step guide on how to complete an affidavit to file at SAPS

SAPS has a pre-format affidavit which can be completed at your nearest police station. An affidavit is a written statement made under oath. You can also approach an attorney to assist you in drawing up the affidavit (this affidavit accompanies the Form 22).

The title describes the purpose and nature of the affidavit i.e., report for suspected child abuse, neglect or maltreatment. Title found in the tram lines = "Founding affidavit in terms of section 305(3) and (4) of the Children's Act 38 of 2005 (as amended)".

The following words are used directly under the title: "I, the undersigned (indicate your full name and surname) hereby declare under oath".

The following information must be contained in paragraphs 1 – 7:

- (1) The person making the affidavit will state “I am in the applicant in this matter and confirm that the facts contained herein are within my personal knowledge and belief true, unless the content indicates the contrary.” – this follows directly after the oath declaration. In this part of your affidavit, you swear that your facts are honest and to the best of your knowledge. The statement is equivalent to standing in front of a courtroom and swearing under oath. It is written in the first person context, where you also identify yourself in the confirmation.
- (2) The following paragraph will indicate the name & surname, gender, age, occupation and place of residence of the applicant.
- (3) The following paragraph will indicate the cell-phone number and email address of the applicant.
- (4) The following paragraph will indicate the applicant’s full 13-digit South African identity number.
- (5) This paragraph will set out the name, surname, age, gender, occupation and place of residence of the Respondent (last known address).
- (6) The following paragraph will indicate the cell-phone number and email address of the Respondent.
- (7) The following paragraph will indicate the Respondent’s full 13-digit South African identity number.

Because you must list each fact you are aware of, this section of the affidavit may be the longest. As long as the information is accurate, the section's length is unconstrained. The facts, including names, dates, times, and addresses, must remain precise, impartial, and concise. Try to present your information chronologically, with each fact being expressed in a separate paragraph and being accompanied by supporting documentation.

The affidavit must then be dated and signed by yourself and a Commissioner of Oaths.

2.7 What are the next steps that will be taken when FCS division of SAPS get involved and what might be possible outcomes?

SAPS Family Violence, Child Protection and Sexual Offences Units (FCS). The FCS Units fight against sexual offences against children, person-directed crimes (where the family is involved), illegal removal of children under the age of 12 and crime facilitated through the electronic media. The FCS division of SAPS will then investigate the allegations.

2.8 Practical advice on how to use your rights in terms of the Children's Act when it comes to child maintenance

2.8.1 *Am I entitled to apply for child maintenance?*

Section 18 of the Children's Act 38 of 2005 deals with parental responsibilities and rights. Section 18 (2) reads as follow: "The parental responsibilities and rights that a person may have in respect of a child, include the responsibility and the right— (a) to care for the child; (b) to maintain contact with the child; to act as guardian of the child; and (d) to contribute to the maintenance of the child."

Section 15(1) & (2) of the Maintenance Act reads as follow: "Without derogating from the law relating to the liability of persons to support children who are unable to support themselves, a maintenance order for the maintenance of a child is directed at the enforcement of the common law duty of the child's parents to support that child, as the duty in question exists at the time of the issue of the maintenance order and is expected to continue. The duty extends to such support as a child reasonably requires for his or her proper living and upbringing, and includes the provision of food, clothing, accommodation, medical care and education."

In terms of the common law both parents must support their children proportionately, according to their means. Thus the fact that in the past the father almost invariably was, and today often still is, in the stronger economic position does not mean that the mother has no liability, even though the father has adequate means.

2.8.2 *How does visitation work?*

Visitation rights are limitation or restrictions on a parent right to have contact and care (previously known as custody and access in terms of the common law) with their child. Upon dissolution of a marriage, or the breakup of a relationship, parents can either acquire sole or shared/ joint custody. In most cases parents will have shared custody. Courts are hesitant to withhold contact rights because children should be allowed to have a close and healthy relationship with both their parents. The child has a right to visit and be visited by both their

parents. Visitation rights can however be limited in the following ways: supervised and phased in visitation rights.

Section 1 of the Children's Act (the Act) defines care quite extensively and makes it clear that children should not be subjected to abuse, neglect, maltreatment or any other physical or emotional harm. It is possible for children to be removed from the care of their parents/guardians. Point of departure would normally be to obtain a court order for the removal of the child from their home and placement into alternative care.

Therefore, if a parent has a history of violence or abuse (especially sexual abuse) towards either the child or the other parent, courts will give that parent no or limited contact with their child. This will be done where a court is of the opinion that the child will be exposed to danger, or it would be in the best interests of the child to not have contact with that parent given their history and violent tendencies. If a court considers the parent to be stable and perceives the child not to be exposed to danger, the court will order that parent supervised or phased in contact (limited contact).

2.8.3 Can my visitation be denied by the other parent if there is non-payment of maintenance?

No, refusing contact would amount to a criminal offence. The other parent (the aggrieved parent) is able to lay a complaint at the police station, and the primary parent will face punishment in the form of a fine or imprisonment for up to one year. Moreover, the aggrieved parent can apply to the Children's Court or the High Court for the committal of contempt of a court order.

3. How to oppose an application for decrease where the respondent is in arrears

3.1 When can an application for a decrease in maintenance be brought by the respondent

If you are the maintenance payer and can no longer afford to pay the agreed maintenance amount, you can apply for a decrease order at the Magistrate's Court that your maintenance order was made at. A person who wishes to apply for a reduction of maintenance must substantiate their claim by proving the following:

- A reduced income; and
- the inability to pay the current maintenance otherwise.

In cases where a person cannot objectively prove a change in circumstances, an application for a reduction in maintenance will not succeed.

The J107 Form must be completed in order to apply for the variation of a maintenance order. The J107 form will ask you to detail your current financial position (income and expenses). This must be done as comprehensively as possible to show any potential increases in cost of living, etc. It must be clear from your current financial position that some change in circumstances justify your application for a variation. Therefore, it is wise to take supplementary documentation to illustrate your financial landscape. The J107 will further require you to detail your reasons for asking for a variation of the maintenance order. This form is substantially similar to the J101 application form that is completed when you first claim maintenance.

3.2 What are the grounds that the court would consider for a reduction in the maintenance amount?



3.2.1 “Sufficient reason” or “adequate cause” as a prerequisite

Section 16(1)(b) of the Maintenance Act (“the Act”) reads as follow: “After consideration of the evidence adduced at the enquiry, the maintenance court may in the case where a maintenance order is in force –

- (i) Make a maintenance order contemplated in paragraph (a)(i) in substitution of such maintenance order; or
- (ii) Discharge such maintenance order.”

Section 8 (1) of the Divorce Act 70 of 1979 reads as follow: “A maintenance order or an order in regard to the custody or guardianship of, or access to, a child, made in terms of this Act, may at any time be rescinded or varied or, in the case of a maintenance order or an order with regard to access to a child, be suspended by a court if the court finds that there is sufficient reason therefor: Provided that if an enquiry is instituted by the Family Advocate in terms of section 4(1)(b) or (2)(b) of the Mediation in Certain Divorce Matters Act, such an order with

regard to the custody or guardianship of, or access to, a child shall not be rescinded or varied or, in the case of an order with regard to access to a child, not be suspended before the report and recommendations referred to in the said section 4 (1) have been considered by the court.”

In other words, section 8(1) of the Divorce Act states that a maintenance order may be varied if the court finds that there is sufficient reason therefor and Section 10 (2) of the now repealed Matrimonial Affairs Act 37 of 1953 required good cause for a variation. A maintenance order can be varied (increased or decreased) either because the amount has become insufficient for your needs, or if you can no longer afford to pay the amount of maintenance due. Variation of a maintenance order may be in order where good cause exists for such variation.

Once such good cause is alleged and lodged, the maintenance officer may investigate and instate an enquiry in the maintenance court. This has been confirmed by the court in *M v M* (A301/17) [2018] ZAGPPHC 607. The court stated that Maintenance Act in itself does not provide a test to be applied when an application is made for the variation or discharge of a maintenance order.

The court in *Roos v Roos* 1945 TPD provided the following: “Variation will be ordered not only in cases of breach by either party, but because there has been such a change in the conditions that existed when the order was made, that it would now be unfair that the order should stand in its original form.” The court in *Havenga v Havenga* 1988 (2) SA 438 stated that the court will generally only vary an existing maintenance order where there has been a change in conditions, otherwise there would not be a sufficient reason for a change.

3.2.2 *Frequency of application*

The frequency of applying for variation of a maintenance order may also have an effect on the successfulness of such application. This is especially the case where an applicant constantly applies to have their maintenance increased or decreased, without a valid or true reason for it. Such troublesome applications may amount to vexatious proceedings, and applicants must therefore take care to only apply for a variation of a maintenance order if they really do need it and have adequate cause to apply as such. Case law has elaborated on when a court will regard frequent applications for variation as a vexatious proceeding. In both *Cohen v Cohen* and *Greyvenstein v Clayton*, the court regarded repeated variation applications as a vexatious step.

The frequency of applying for variation in maintenance order may however not be fatal to an application for variation of a maintenance order. In *Watson v Watson*, the court held that a short time between the initial maintenance order and application for variation may still warrant

a variation if it is within the children's true interests. However, in *Dawe v Dawe* it was held that frequent variation of a child maintenance order is ultimately undesirable and unpractical.

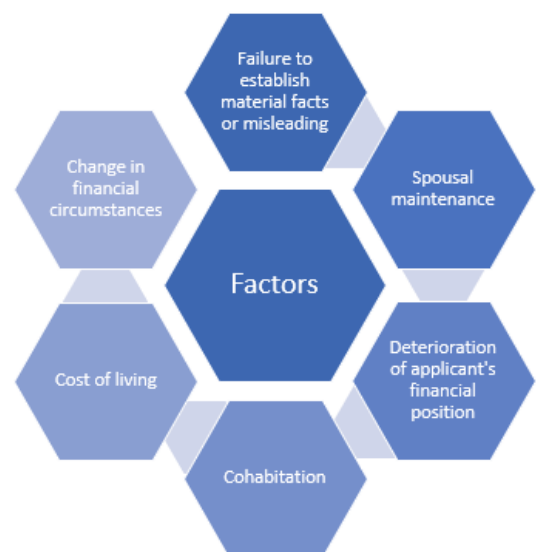
3.3 What is meant by "good cause"

Maintenance Courts may vary an existing maintenance order if good cause exists. Whether or not good cause exists has to be assessed on the particular facts of each case. Good cause, or 'sufficient reason' is a prerequisite to applying for a variation of a maintenance order. This does not mean that a change in financial position is required, but it can establish good cause as such. The burden to prove good cause for variation is on the party seeking variation to show sufficient reason for such variation in the High Court or Magistrate's Court. Maintenance-related court officials do however have the responsibility to place such evidence before the maintenance court.

The following factors play a role in establishing whether good cause exists:

a) *Failure to establish material circumstances of financial position and/or any attempt to mislead the court as such*

A party's failure to establish the material circumstances of their financial position will likely be detrimental to their case. This is because the court will not be likely to grant an increase or decrease in the maintenance order if the parties' financial position do not allow for it as such. A party asking for an increase must therefore show that their financial position has diminished and that they need more maintenance as a result. Conversely, a party seeking a decrease will also have to show that they have a diminished financial position and that they need a decrease in the payable maintenance as such. The following factor also illustrates how a change in financial circumstances is taken into account when deciding on maintenance.



Any attempt to mislead the court will however be detrimental to your case. This dishonest misconduct will only amount to abuse of court processes and may be fatal to a party's case for variation. Therefore, parties must never lie about their financial position when asking the court for a variation of a maintenance order.

b) Alteration in financial circumstances

A change in the parties' financial circumstances may warrant their application for variation of payable maintenance. For example, if a custodial parent's expenses have increased to such an extent that they require more maintenance for their child's reasonable needs, they may ask for an increase in the maintenance amount. Conversely, if a non-custodial parent's expenses have also increased to the extent that they are no longer able to afford the amount due, they may ask for a decrease in the maintenance amount. This illustrates how a change in financial circumstances may justify an application for variation.

There are however instances where a mere change in financial circumstances did not warrant the granting of variation of the maintenance order. In *Davis v Davis*, an upward variation of maintenance was not justified due to increased expenditure due to emigration. This case serves as an example that mere emigration and increased costs as such will not necessarily automatically justify a variation in maintenance. A mere alteration of financial position will not justify the variation, but it may give context as to why the variation is sought and needed as such. Therefore, a party seeking variation of a maintenance order must keep this factor in mind.

c) Spousal maintenance with regard to factors in section 8 of the Divorce Act

In an application for the variation of a child maintenance order, the granting of spousal maintenance may also be relevant. The factors considered in awarding spousal maintenance is therefore relevant and these factors include:

- Parties' conduct;
- Age;
- Health and;
- Ability to support themselves.



Where parties comply with the requirements for spousal maintenance in that they are not regarded as sufficiently skilled to have earning capacity to cover their reasonable needs by entering the workforce, it may count in their favour when applying for variation of child maintenance amounts. If a parent is regarded as economically dependent on their divorced spouse, it may further justify asking for an increase in maintenance where other factors indicate the need as such. This factor is therefore not decisive, but will still be taken into account upon a variation application. The variation of spousal maintenance is further elaborated under the last heading of this webinar.

d) Moral considerations

However, since South Africa has moved away from fault-based divorce grounds it is questionable whether moral considerations or conduct of a party truly play a role in whether a court will grant the variation of a maintenance order or not. On the other hand, a party's dishonesty and/ or vindictiveness may amount to vexatious proceedings if they do not approach the court with valid reasons for seeking the variation.



e) Deterioration of maintenance debtor's financial position

A maintenance debtor is the person who is liable to pay the maintenance amount. The abovementioned factors have already shown how more expenses, and a diminished financial position of the person paying maintenance as such, may warrant an application to have the amount payable decreased. A downward variation of a maintenance order will however not be entertained if it is unreasonable in light of the child's needs.

A maintenance debtor must further show that the deterioration of their financial position was not due to their own control. For example, willingly moving to a more expensive neighborhood and increasing your expenses/ decreasing your financial capacity is not beyond the control of such person and will not amount to a valid reason to apply for variation of maintenance.

f) Cost of living

The cost of living for both parties is considered in an application for variation of a maintenance order. This means that the maintenance amount payable will purport to cover the cost of living for the person entitled to maintenance, while still recognizing that the person liable to pay maintenance must also have enough funds for their respective cost of living. An increase or decrease in the cost of living may therefore also justify applying for a variation, provided that sufficient evidence is shown as to the reasonable cost of living for the parties and their child/ children. An increase in the cost of living is however not decisive and additional factors must further show that the applicant has good cause to ask for the variation (*Louis v Louis*).



Vedovato v Vedovato is an example of successfully proved increased cost of living, which justified the application for variation as such. Courts have further confirmed in *Levin v Levin* that a sudden, unexpected increase in the cost of living will constitute sufficient reason for variation of a child maintenance order or agreement.

Inflation may play a role in the general cost of living. Courts have indeed taken judicial notice of the impact of inflation on spousal maintenance in *Joffe v Lubner* and *Kommisaris van Binnelandse Inkomste v Steyn*. However, in *Grasso v Grasso* it was held that inflation is not decisive and other factors must be considered in conjunction with this factor. Further, parties' intention as to annual increases and/or escalation clauses must be very clear to cater for inflation in the maintenance agreement.



g) Cohabitation



Cohabitation and/or remarriage of a divorced spouse may have an impact on their spousal maintenance order and the variation of such an order. For example in *Schlesinger v Schlesinger* the court held that if, in terms of a divorce order, spousal maintenance ceases upon remarriage or death, it may amount to an express or implied clause as to cohabitation. This can also be regulated by including a *dum casta* clause in the spousal maintenance agreement, which has been discussed under the webinar relating to spousal maintenance. On the same facts, *Watson v Watson* however held the above-mentioned clause not to extend to chastity, but adultery and/or cohabitation as sufficient reason to vary the order.

Concluding remarks on child maintenance in South Africa

The rules and procedures pertaining to child maintenance in South Africa appear to bear some burden to applicants (or complainants) who make use of the system. The system, as described in this training manual, is a complicated and lengthy process which laypersons are vulnerable to. Therefore, education and empowerment on the rules and regulations will assist applicants to go through with the procedure and to ensure that that children's best interests are indeed being met.

Since there is no set formula to determine what an applicant must claim for maintenance, it is often the result that uneconomical expectations are placed on such a claim. Maintenance Courts are however notorious in disregarding such uneconomical claims (for good reason), but this creates more problems of delay, costs and other financial burdens to maintain. Therefore, applicants must take care as such not to place all their eggs in one basket, or to reach for the (unrealistic) stars in their claim in hopes that they are awarded a more realistic

amount. Applicants must from the outset understand that expectations must be managed and that the principles of fairness will ultimately dictate whether the claim is economical or not.

As discussed under the calculations heading, the discretionary approach focuses on this consideration as to the fairness of a maintenance claim. This means that broad guides (such as the share apportioning in *Acutt*, *Santam* or *Forssman*) can be used, but that considerations of practical reality must prevail. This means that an upwards variation of the share apportionment may be required where the child is older – the older the child the more equal they will share in the costs with their custodial parent. This translated into the common sense that a male child of, for example, 17 years old, would most likely eat more than their adult mother. In such a case it would make sense to apportion more than 1 share to such male child compared to the 2 shares their mother would be apportioned. An arbitrary age, such as 14, may arguably warrant the upward variation of the child's portion as the principles of fairness would dictate that such 14-year-old child does not necessarily need to apportion half of the shares that their parent would have gotten. It makes sense to apportion more shares, the older the child is. This must however be determined on a case-by-case-basis to ensure that due consideration is given to the actual needs of the particular child at stake, depending on their age, level of development and expenses.

An understanding of how the maintenance procedure works, and what is regarded as reasonable in light of fairness-principles, will guard against failed cases due to unmanaged expectations. An applicant's managed expectations therefore increase the likelihood of the success of their claim, thereby imposing an approach which is in the child's best interest.

Bundle of relevant unreported case law:Applications for maintenance

- *Sikatele and Others v Sikatele and Others* Case No: 1193/95 14-12-1995 and 15-2-1996 TkD Miller AJ 6 pages + 5 pages Serial number: 0512/96 CD 18/1996: Application for not finalised after approximately three years — Applicant wife bringing application for an order on first respondent calling on him to show cause why he should not be ordered to pay maintenance — Respondent raising the defence of *lis alibi pendens*— Held that such not an absolute bar to proceedings in which the defence is raised — Purpose of the Maintenance Act 23 of 1963 was to expedite and simplify procedure relating to maintenance orders, and Court not satisfied that *lis alibi pendens* had been proved and the applicants were properly before the Court — Rule accordingly extended to give applicants an opportunity to file supplementary affidavits and the same applied to the first respondent — In a subsequent judgment on resumption of the matter the parties' respective financial positions examined and appropriate maintenance orders issued.

Applications for increase

- *Girdwood v Girdwood* Case No: A 1100/93 4-11-1994 CPD Van Zyl J, Lategan J SCD 25/1994: Application for increase — Waiver of right to apply for alleged — Agreement incorporated in order of Court — Such providing that 'in full and final settlement of all issues in dispute between the parties and neither party shall have any claim against the other from whatsoever cause and howsoever arising' — Respondent raising point in limine based on such clause and point upheld by magistrate — Applicant appealed — Court considered current authorities and concluded that respondent unable to prove any waiver of appellant's statutory right to apply for variation of maintenance order and point in limine should have been dismissed — Appeal allowed with costs.
- *Beukes v Beukes* Case No: 101/94 3-11-1994 OPD Van Coller J, Wessels AJ SCD 25/1994: Application for increase — For minor son of parties — Respondent obliged to pay R200 per month in respect of minor son — Appellant testified whereafter magistrate mistakenly gave absolution from the instance — Magistrate misdirected himself — Ought to have taken a much more active role in the proceedings and ought not to have approached matter on basis of an ordinary civil case — Alteration in financial circumstances of an applicant not required before court can amend a maintenance order — Matter remitted for magistrate to consider whether good cause exists for interfering in existing order.

Arrear maintenance

- *Motwanama v Motwanama* Case No: A350/2018 22-10-2020 GP N V Khumalo J (Wanless AJ concurring) Serial No: 2424/2020: Arrear maintenance — Interest on — Appeal against order for payment of — Construction of order — Restrospectivity — Sections 16 and 22 of Maintenance Act — Appeal against magistrate's finding on retrospectivity of order upheld.
- *Sentinel Retirement Fund v Mtambo* Case No: 75404/2013 not--supplied GP Jansen J Serial No: 1401/2015: Arrear maintenance — Pension fund receiving order to pay arrear maintenance from the member's benefit (second respondent's) to first respondent and to withhold benefit for indefinite period — In issue whether required to pay lump sum for future maintenance or monthly payments — Court holding latter contrary to s 37 of Act — Pension Fund Act 24 of 1956, s 37.
- *Martin v Martin* Case No: AR 331/96 9-9-1996 NPD Howard JP, Combrinck J 14 pages Serial No: 0735/96 CD 23/1996: Arrears — Action instituted in Supreme Court but transposed to magistrate's court, which made an award — Appeal to Supreme Court on the ground that magistrate ought to have allowed a special plea that the Court had no jurisdiction to entertain the action — Submission that respondent could only recover arrear maintenance by levying execution or by instituting criminal proceedings — Held that respondent's action could have been defeated by the exceptio rei judicatae but that this defence had to be specifically pleaded and there was no such plea — Not correct that Legislature impliedly indicated that criminal prosecution the only remedy for enforcement of maintenance orders — Respondent could validly include her claim for arrear maintenance in her action — Respondent had choice of remedies — Not incumbent on her to resort only to criminal proceedings.
- *Nkubungu v Nkubungu* Case No: 571/2007 31-5-2007 TkD Tshiki AJ 19 pages Serial No: 0959/2007 — CD 25/2007: Arrears — Application for an order to freeze respondent's bank account, applicant having discovered that he had funds aplenty — Applicant had shown a clear right in protecting the rights of her minor children's entitlement to maintenance — No reason for not granting relief — Ordered accordingly.

By parent in respect of his major child

- *Booyens v Booyens* Case No: A502/04 29-11-2004 TPD Du Plessis J, Southwood J, Van Rooyen AJ 18 pages Serial No: 0153/2005 — CD 5/2005: Maintenance — By parent in

respect of his major child — Parents' duty under common law to maintain children did not cease automatically on their children attaining majority but could extend thereafter — Richter v Richter 1947 (3) SA 86 (W) and Gold v Gold 1975 (4) SA 237 (D&CLD) distinguished — Effect of parents' duty to maintain dependant on interpretation of the relevant court order — In casu, reference to 'minor children' intended to identify them, not make the order applicable only to minors.

Children

- *Banjatwa v Maintenance Officer for the District of Butterworth* Case No: 779/2014 28-05-2014 ECM Stretch J Serial No: 1082/2014: Maintenance — Children — Failure by executor of deceased estate to pay maintenance — Maintenance officer refusing to investigate claim — Whether Maintenance Act applying to the investigation of claims against deceased estates, which claims are ordinarily regulated by the Administration of Estates Act — Administration of Estates Act 66 of 1965; Maintenance Act 99 of 1998, s 6.

Claim for interim maintenance

- *Venter v Venter* Case No: I 4602/2009 07-02-2012 Nm Geier AJ Serial No: 0436/2012: Maintenance — Claim for interim maintenance — Parties required to make a frank and full disclosure of all their assets to enable the court to determine the maintenance needs and liabilities of the parties' properly — the parties' failure to do so will negatively impact on their claims — court in casu reducing applicant's claim for interim maintenance at the same time increasing respondent's offered amount in regard to interim maintenance.
- *Yazbek v Du Plessis* Case No: 2170/2020 1-12-2020 ECG MJ Lowe J Serial No: 2889/2020: Interim maintenance — Duty to maintain child and grandchild pending challenge to will — Resources and needs.

Contempt of court order for payment of maintenance

- *. AC v FB* Case No: 51721/2011 not--supplied GP Msimeki J Serial No: 1972/2015: Maintenance — Contempt of court order for payment of — Whether respondent in contempt due to non-payment — Answer in affirmative — Respondent given suspended prison sentence.

Conversion of trial to enquiry

- *S v Moore* Case No: D881/2013 14-12-2015 GP N Ranchod J and NP Mngqibisa-Thusi J Serial No: 0045/2016: Maintenance — Conversion of trial to enquiry — In which

circumstances — After conviction but before sentence — Conviction needs to be set aside before it can be converted into an enquiry — Maintenance Act 99 of 1998, ss 31 and 41.

Duty of child to maintain parent

- *Gajoo v Road Accident Fund* Case No: 13128/2013 17-11-2015 GP JA Motepe AJ Serial No: 2540/2015: Maintenance — Duty of child to maintain parent — Hindu customs — Plaintiffs (parents) failing to discharge onus to show indigence or that deceased was able to or in fact did support them — Absolution from instance granted.

Duty of support

- *McDonald v Young* Case No: 292/10 24-03-2011 SCA Mpati P, Cloete JA, Snyders JA, Theron JA and Petse AJA Serial No: 0233/2011: Maintenance — Duty of support — By operation of law — Parties were involved in relationship and had cohabited, as man and wife, for approximately seven years — Law might distinguish between married people and unmarried people and might, under certain circumstances, accord benefits to married people which it did not accord to unmarried people — There was no legal duty of support on unmarried cohabitants.

Eight year old child

- *Clayton v Greyvenstein* Case No: 2955/97 10-12-1997 SECLD Pillay J 5 pages Serial No: 0171/98 CD 5/1998: Maintenance — Eight year old child — The existing order by consent for payment of R1 500 per month — Application for an increase to R2 500 per month plus an amount of R500 for child care during the school vacation — Applicant recently purchased a house for the safety and security of the minor child — Applicant had burdened herself with an amount of R4 541 at least after she had entered into the agreement with the respondent — This amount alleged to be necessary — Applicant experienced financial difficulties after she had purchased the house and enrolled the minor child at a certain school — Unclear what respondent can afford, but his ability to afford the lifestyle for the minor child as mapped out by applicant is not the determining factor — What is important is what is reasonably required to maintain the child and whether respondent can afford that — An increase in the amount of R1 500 is unreasonable in the circumstances — Despite her position, the applicant could take steps to alleviate such — The circumstances were created by her and the court not disposed to granting relief set out in prayers b and c of the notice of motion — Application accordingly dismissed with costs.

Enquiry in terms of s 6 of Maintenance Act 99 of 1998

- *Swanepoel v Marais* NO Case No: A4469/2002 14-3-2003 CPD Thring J, Yekiso J 13 pages Serial No: 0397/2004 — CD 18/2004: Maintenance — Enquiry in terms of s 6 of Maintenance Act 99 of 1998 — Irregularity — Applicant not informed of her rights before participating as witness in the proceedings — Proceedings, in any event, irregular — Court, on appeal and review, substituted magistrate's order and made no order, leaving existing order extant.

Failure to pay

- *S v Abrahams* Case No: 985/98 15-5-1998 CPD Traverso J, Louw J 7 pages Serial No: 0537/98 CD 13/1998: Maintenance — Failure to pay — Contravening s 11(1) Act 23 of 1963 — Magistrate had wrongly reasoned that conviction had to follow if accused's evidence of his non-ability to pay unconvincing — Complainant unable to say whether accused employed — Her evidence inadequate — Accused had discharged onus.
- *S v Masuku* Case No: A60/2006 30-1-2006 TPD Botha J, Du Plessis J 6 pages Serial No: 0144/2006 CD 7/2006: Maintenance — Failure to pay — Contravening s 31 of Maintenance Act 99 of 1998 (10 counts) — Whether on 10 counts justified — Basis of conviction and fairness dictated that accused should have been charged and convicted on one count — Conviction altered accordingly and sentence confirmed.
- *Lebeloane v Lebeloane* Case No: 99/11666 15-9-2000 WLD Wunsh J 22 pages Serial No: 0568/2000 CD 21/2000: Maintenance — Failure to pay — Proper forum for enforcement of order — Despite new legislation, a woman obliged to have recourse to the Maintenance Court is faced with inordinate delays — The High Court also not generally a suitable tribunal for adjudication of such matters — Applicant granted alternative relief in terms of her prayer for such and respondent's obligations clarified.

Maintenance order

- *Vilakazi v Ntshangase* Case No: A3024/15 13-05-2016 GJ R Keightley J and M Mbongwe AJ Serial No: 1181/2016: Maintenance — Maintenance order — Appeal against magistrate's order — Magistrate erred — Appeal succeeding.
- *JO v HO* Case No: 24384/2009 not--supplied GNP DD Magotsi AJ Serial No: 0374/2014: Maintenance — Maintenance order — Contempt of court arising out of failure to pay maintenance in terms of agreement of settlement — Sentence of 60 days imprisonment suspended for two years on condition that shortfall payment made.

- *Yudkoff v Raidoo* Case No: 421/07 12-06-2009 KZP Steyn J Serial No: 0086/2012: Maintenance — Maintenance order — Enforcement of maintenance order in terms of s 26 of the Maintenance Act 99 of 1998 — An application to enforce a maintenance order must be accompanied by a statement under oath or affirmation setting forth the amount which the person against whom such order was made has failed to pay — Affidavits in support of the application in casu reflected that the appellant was the deponent but were signed by one J Nel who purportedly took an oath swearing that the contents of the affidavits were true and correct — Affidavits clearly irregular and no order should have been issued on the basis of such affidavits — Maintenance court had accordingly correctly rescinded the writ of attachment issued pursuant to the application to enforce the maintenance order — Appeal against rescission dismissed.
- *Bannatyne v Bannatyne* Case No: 177/2001 16-5-2002 SCA: Maintenance — Maintenance order — Section 16 of Maintenance Act 99 of 1998 — Order by Maintenance Court replacing order of High Court, which ceased to be of force — Application for committal of appellant for contempt dismissed.

Minor child

- *Schmidt v Schmidt* Case No: 94/20349 3-11-1995 WLD Wunsh J 29 pages Serial No: 0777/95 SCD 25/1995: Maintenance — Minor child — Parents in perpetual state of animosity — Family Advocate's report and clinical psychologist's report considered — No case for disturbing the current custody regime — Not necessary or advisable to refer matter for an oral hearing.
- *S v Van Vuuren* Case No: CCT 14/05 6-4-2005 CC Chaskalson CJ, Langa DCJ, Madala J, Mokgoro J, Moseneke J, Ngcobo J, O'Regan J, Sachs J, Skweyiya J, Yacoob J 3 pages Serial No: 0512/2005 — CD 13/2005: Maintenance — Minor children — Failure to pay — Three sentences imposed by magistrate — Application to Constitutional Court not complying with the rules — No relief specified — Appeals to High Court and SCA dismissed — Complaints related to factual findings — No constitutional matter involved — Application dismissed.

Non-compliance with maintenance obligations

- *SS v VV-S* Case No: CCT 247/16 01-03-2018 CC Zondo ACJ and Cameron J, Froneman J and Jafta J and Kathree-Setiloane AJ and Kollapen AJ and Madlanga J and Mhlantla J, and Zondi AJ Serial No: 0275/2018: Maintenance — Non-compliance with maintenance obligations — Writ of execution against immovable property — Non-compliance with court

orders — Proceedings analogous to formal contempt — Biowatch principle on costs not applicable — Costs on attorney client scale — Punitive cost order — Uniform Rules of Court, rule 46(1)(a)(ii).

Non-payment

- *Bates v Bates* Case No: 3236/02 19-1-2004 CPD Yekiso J 19 pages Serial No: 0004/2004 — CD 8/2004: Maintenance — Non-payment — Contempt of court — Respondent justified non-payment firstly on existence of a revised agreement and secondly on existence of a compromise — Respondent had not been bona fide in raising such defences.
- *Deyssel v Deyssel* Case No: 19869/2005 25-11-2005 TPD Van Rooyen AJ 4 pages Serial No: 1443/2005 CD 3/2006: Maintenance — Non-payment of — Respondent failed to show his inability to pay as ordered — Respondent ordered to pay by instalments.

Of major children

- *Mbhele v Mbhele* Case No: AR 118/10 3-6-2010 KZP Swain J, Pillay J, Koen J 10 pages Serial No: 0676/2010 — CD 15/2010: Maintenance — Of major — From first respondent's pension benefit held by second respondent — Relevant order initially made during beneficiary's minority — On special review, guardian advised to apply for appointment as curator bonis.

Orders

- *S v Kapitango* Case No: CA 01/2015 25-07-2016 NmO M Cheda J Serial No: 1390/2016: Maintenance — Order — Appeal against — Citation of parties in appeal — State not party to proceedings — State, including presiding magistrate should not be cited as respondents in appeals — Mothers or guardians of minors should be cited as respondent, being persons against whom appeals were noted — Failure of citing mother or guardian of minors depriving them of right to be heard, rendering proceedings a nullity — Maintenance Act 9 of 2003, s 47(1)–(3).
- *Matenke v Malotle* Case No: 24/92 1-10-1992 BGD Comrie J, Khumalo J SCD 2/1993: Maintenance — Order — Validity of — At end of enquiry no order made as defendant unemployed — A year later enquiry reconvened when defendant appeared — Order made without applicant having given evidence at this hearing — Matter submitted for review — Court held that it had no review powers and it was for parties to appeal if they so wished.

- *Shadrack v Kgatle* Case No: 179/92 24-9-1992 BGD Comrie J, Stewart JP SCD 2/1993: Maintenance — Order — Validity of — Order made without there being any enquiry or consent on part of defendant — Maintenance officer directed to bring matter on review to Supreme Court after giving notice to parties.

Order unlimited as to time

- *Brandt v Brandt* Case No: A234/2000 1-6-2001 CPD Foxcroft J, Van Heerden J 20 pages Serial No: 0535/2001 CD 19/2001: Maintenance — Order unlimited as to time — Effect — Order which existed as matter of law before de cuius turned 21 years of age was not ipso jure discharged when she reached majority — Maintenance order ancillary to common law duty of support — Attainment of majority alone not decisive of continuation of liability — Claim for fresh order after attainment of majority — De cuius entitled to maintenance for period before she became self-supporting.

Payment of

- *Louw v Louw* Case No: 78/06 30-5-2006 NCD Majiedt J, Olivier J 13 pages Serial No: 0474/2006 CD 15/2006: Maintenance — Payment of — Compelling of — By attachment of pension benefits of the de cuius in terms of sections 26 and 30 of Maintenance Act 99 of 1998 — No advance notice given to the person responsible for payment of maintenance nor to the pension fund — Lack of prior notice sufficient in itself for rescission of the order — Inconceivable that the legislature intended that an order attaching a debt could be made without prior notice — The pension fund also had sufficient interest to entitle it to receive prior notice — Ordered provisionally that the magistrate's order of attachment be set aside, with applicant permitted to enroll matter for further hearing after notice to the de cuius and the pension fund.
- *Burger v Burger* Case No: 12728/05 3-4-2006 D&CLD Ntshangase J 12 pages Serial No: 0305/2006 CD 11/2006: Maintenance — Payment of — Maintenance Act 99 of 1998 — The Act contains no provision for establishment of a fund to secure future monthly instalments of maintenance — Court under a duty to continue development of the law — A child's interests are paramount — Where a person under duty to provide maintenance did not exert himself to provide therefor but was due to receive a capital sum from sale of his property, such was ordered to be retained by obligee's attorney to secure future maintenance payments.

Recovery of amounts for medical, dental and related expenses payable in terms of settlement agreement incorporated in divorce order

- *Butchart v Butchart* 17-11-1995 WLD Wunsh J 13 pages Serial number: 0140/96 CD 5/1996: Maintenance — Recovery of amounts for medical, dental and related expenses payable in terms of settlement agreement incorporated in divorce order — Writ of execution competent.

Repayment of

- *EE v LB* Case No: 2237/2013 11-09-2013 WCC Boqwana AJ Serial No: 2049/2013: Maintenance — Repayment of — Claim for — Claim based on alleged unjustified enrichment.

Variation

- *Van der Westhuizen v Mkhanzi* NO Case No: 5766/2007 22-8-2007 TPD Seriti J 13 pages Serial No: 0742/2007 — CD 22/2007 Maintenance — Variation — Application for — First respondent (trial magistrate) had dismissed the application for variation on grounds that applicant had failed to make out a prima facie case — Applicant's former husband (second respondent) had testified concerning an agreement entered into between himself and applicant — The evidence further considered — Magistrate was entitled to suspend the enquiry — Application dismissed.
- *W v W* Case No: 469/10 07-09-2010 EC Smith J Serial No: 1012/2010: W, an educare teacher, sought maintenance pendent lite from her husband, a joiner, in respect of herself, and her minor children H and L.

What constitutes

- *Zwiegelaar v Zwiegelaar* Case No: 607/98 28-11-2000 SCA Smalberger JA, Zulman JA, Melunsky AJA, Mthiyane AJA, Chetty AJA 11 pages Serial No: 0805/2000 CD 1/2001: Maintenance — What constitutes — See 'Family law — Husband and wife -'.

Whether agreement between spouses regarding maintenance payable beyond majority of child of the marriage is a stipulatio alteri in favour of the child

- *Burseley v Burseley* Case No: CA 226/97 2-10-1997 ECD Nepgen J, Lang AJ, Van Rooyen AJ 24 pages Serial No: 0790/97 CD 24/1997: Maintenance — Whether agreement between spouses regarding maintenance payable beyond majority of child of the marriage is a stipulatio alteri in favour of the child — No indication of a positive intention to empower the third party to adopt and become a party to the contract if he so wishes — *Kemp v Kemp* 1958 (3) SA 736 (N) at 741E-F, referred to — Finding that clause in question not a stipulatio alteri.

CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 18/02

NADENA BANNATYNE

Applicant

versus

LAURIE NOËL BANNATYNE

Respondent

COMMISSION FOR GENDER EQUALITY

Amicus Curiae

Heard on : 7 November 2002

Decided on : 20 December 2002

JUDGMENT

MOKGORO J:

Introduction

[1] This case concerns the responsibility of the judiciary to ensure that maintenance orders are observed. Ms Nadena Bannatyne, the applicant in this matter, approaches this Court in terms of rule 20 of the Constitutional Court Rules for special leave to appeal against a judgment and order of the Supreme Court of Appeal (SCA). The High Court had made an order at the instance of the applicant committing the respondent, Mr Laurie Noël Bannatyne, for contempt of a maintenance order. On appeal to the SCA, that contempt order was set aside. The applicant applied for

special leave to appeal to this Court on the basis that, in its finding regarding when a High Court is competent to make an order for contempt, the SCA failed to take into consideration and give due weight to section 28(2) of the Constitution which requires that the best interests of the child be given paramountcy in all matters affecting children.

[2] The parties were directed to deal with the following issues:

- “(a) Whether the issue concerning the High Court’s jurisdiction to make an order committing the respondent for contempt of court on the grounds of his failure to comply with a maintenance order made by the Magistrates Court is within the jurisdiction of the Constitutional Court; and if it is,
- (b) Whether in the light of the provisions of section 28(2) of the Constitution, or any other provision of the Constitution, the question whether the High Court should or should not have made an order in the circumstances of the present case, raises a constitutional matter, or an issue connected with a decision on a constitutional matter; and if so
- (c) Whether in the circumstances of the present case, such an order ought to have been made by the High Court; and if so,
- (d) Whether the Supreme Court of Appeal erred in setting aside the order that had been made.”

[3] The Court admitted as *amicus curiae* the Commission for Gender Equality (CGE)¹ which lodged empirical data on the state of the maintenance system in South

¹ The CGE is a state institution established in terms of chapter 9 of the Constitution. Its constitutional mandate is set out in section 187 of the Constitution which requires that it “promote respect for gender equality and the protection, development and attainment of gender equality”. Furthermore, section 11 of the Commission on Gender Equality Act 39 of 1996 sets out its powers and functions which include the power to monitor, investigate, research, educate, lobby, advise and report on issues concerning gender equality. Its interest in this matter arises from the fact that since its inception, the CGE has viewed the administration of maintenance payments as a major obstacle to women fully attaining equality.

Africa and its effect on the rights of women and children in seeking effective relief pursuant to the Maintenance Act (the Act).² This evidence proved most useful and gave the necessary context by providing information regarding the frailties inherent in the functioning of the maintenance system and more particularly its effect on the promotion and advancement of gender equality in this country. The Court is indebted to the CGE for this evidence and its argument.

The relevant provisions of the Act

[4] The Act provides both civil and criminal remedies against defaulters. Chapter 5 of the Act makes provision for maintenance orders to be enforced by civil execution. This includes execution against property, the attachment of emoluments and the attachment of debts.³ A failure to comply with a maintenance order is also a criminal offence for which a defaulter can be sentenced to imprisonment or ordered to pay a fine.⁴ Chapter 6 of the Act makes provision for a court to convict a person for failing

² Act 99 of 1998.

³ Section 26(1) provides:

“Whenever any person—

(a) against whom any maintenance order has been made under this Act has failed to make any particular payment in accordance with that maintenance order; or

(b)

such order shall be enforceable in respect of any amount which that person has so failed to pay, together with any interest thereon—

(i) by execution against property as contemplated in section 27;

(ii) by the attachment of emoluments as contemplated in section 28; or

(iii) by the attachment of any debt as contemplated in section 30.”

⁴ Section 31(1) of the Act stipulates that

“ . . . any person who fails to make any particular payment in accordance with a maintenance order shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding one year or to such imprisonment without the option of a fine.”

to pay maintenance. Section 40 of the Act specifically deals with the recovery of arrear maintenance and provides:

- “(1) A court . . . may, on the application of the public prosecutor and in addition to or in lieu of any penalty which the court may impose in respect of that offence, grant an order for the recovery from the convicted person of any amount he or she has failed to pay in accordance with the maintenance order, together with any interest thereon, whereupon the order so granted shall have the effect of a civil judgment of the court and shall, subject to subsection (2), be executed in the prescribed manner.
- (2) A court granting an order against a convicted person may—
- (a) in a summary manner enquire into the circumstances mentioned in subsection (3); and
 - (b) if the court so decides, authorise the issue of a warrant of execution against the movable or immovable property of the convicted person in order to satisfy such order.
- (3) At the enquiry, the court shall take into consideration—
- (a) the existing and prospective means of the convicted person;
 - (b) the financial needs and obligations of, or in respect of, the person maintained by the convicted person;
 - (c) the conduct of the convicted person in so far as it may be relevant concerning his or her failure to pay in accordance with the maintenance order; and
 - (d) the other circumstances which should, in the opinion of the court, be taken into consideration.
- (4) Notwithstanding anything to the contrary contained in any law, any pension, annuity, gratuity or compassionate allowance or other similar benefit shall be liable to be attached or subjected to execution under an order granted under this section.”

Provision is also made for criminal proceedings in respect of the non-payment of maintenance to be converted into a maintenance enquiry. This must be done if

“ . . . it appears to the court that it is desirable that a maintenance enquiry be held, or when the public prosecutor so requests . . . ”⁵

[5] Chapter 3 of the Act governs the functions and powers of maintenance officers in the enforcement of maintenance orders. Section 6 requires the maintenance officer to take steps to investigate a maintenance complaint and thereafter institute a maintenance enquiry. The investigation of a complaint includes obtaining statements under oath from persons with information regarding the complaint;⁶ investigating the identity or whereabouts of the alleged defaulter⁷ and any other relevant information for the purposes of the maintenance enquiry. A maintenance officer is also empowered to enlist the assistance of a maintenance investigator to assist in the performance of such functions.⁸ At the maintenance inquiry, the maintenance officer is entitled to subpoena witnesses to give evidence or to produce documentary evidence relating to the financial position of the parties.⁹

[6] After setting out the factual background, I shall deal with the question whether this is a constitutional matter, then whether a High Court has jurisdiction to commit for contempt a person who defaults in terms of an order of a maintenance court.¹⁰ If it

⁵ Section 41.

⁶ Section 7(1)(a).

⁷ Section 7(1)(b)(i).

⁸ Section 7(2).

⁹ Section 9(1).

¹⁰ The SCA was prepared to assume that the High Court has such jurisdiction.

is found that the High Court enjoys such jurisdiction, the next leg of this inquiry is to consider the circumstances in which it may exercise such jurisdiction so as to provide effective relief to maintenance complainants.

Factual background

[7] The parties were married in 1986. They have two young children born of the marriage. On 4 February 1999 the parties were divorced in the Pretoria High Court. Incorporated into their decree of divorce was a settlement agreement making provision for the payment of maintenance by the respondent to the applicant for herself and their two children. The amounts specified were R1750 per month per child and R1000 per month for the applicant for a period of five years. The respondent also undertook to retain the children on his medical aid scheme at his cost and to pay all reasonable medical expenses incurred on their behalf. The agreement also made provision for either party to bring an application for a variation of the amounts owing in respect of maintenance.¹¹

[8] The respondent did not pay maintenance regularly. Towards the end of 1999 he brought an application in the maintenance court for the reduction of the maintenance payable to the applicant and the children. This led to the court making an order on 5 January 2000 in terms of section 16(1)(b) of the Act, which reduced the maintenance payable for the children to R1500 per month per child, but left unaltered the

¹¹ The Act permits this to be done. According to section 3 of the Act every magistrate's court is a maintenance court. A maintenance order is defined as meaning "any order for the payment . . . of sums of money towards the maintenance of any person issued by any court in the Republic . . .". A court is defined in section 1 of the Act as including a High Court. The Act goes on to provide in section 16(1)(b) that a maintenance court may make an order in substitution of a maintenance order made by any court.

maintenance for the applicant. The effect of this order was to discharge the High Court order and to substitute for it the order made by the maintenance court.¹²

[9] Despite having secured the reduction of the maintenance payable, the respondent fell into arrears. The applicant approached the maintenance court for assistance in March 2000 and as a result the respondent made payment of the arrears in April 2000. Almost immediately, however, he fell into arrears again. In contravention of the maintenance court order, he paid a reduced amount of R1200 in respect of each child for the months of June and July 2000 and removed them from his medical aid scheme, refusing to make any payment of medical expenses incurred on their behalf. He made no further payments after July 2000.

[10] The applicant approached the maintenance court repeatedly to seek to enforce the maintenance order. Apart from the first approach in March 2000, which led to payment of the arrears in April 2000, her attempts to secure payment of maintenance and of the arrears failed. Two writs of execution were issued, but both failed to produce any money. On the first occasion property was attached. It was subsequently released from the attachment as a result of interpleader proceedings instituted by a woman with whom the respondent was then cohabiting, and children from a former marriage, who claimed that the property had been sold to them by the respondent.

¹² Section 22 provides:

“Whenever a maintenance court–

- (a) makes an order under section 16(1)(b) in substitution of a maintenance order; or
 - (b) discharges a maintenance order under section 16(1)(b),
- the maintenance order shall cease to be of force and effect . . .”

The second writ also failed when it appeared that a motor vehicle which had been attached was subject to a hire-purchase agreement and did not belong to the respondent.

[11] It is not clear exactly what happened after that. The applicant says that when she wanted to lay a charge for the non-payment of maintenance, the respondent applied for the children's maintenance to be reduced to R600 per month. This led to a new enquiry which was repeatedly postponed. A final postponement was granted until 1 February 2001 but the prosecutor in Louis Trichardt, at the instance of the respondent, arranged with the prosecutor in Pretoria for a further postponement. This was done on 31 January 2001 without reference to the applicant. She merely received a message on her cellular phone from the respondent saying that the application would again be postponed to 20 February 2001 because he had made other arrangements. She, however, attended court on 1 February 2001 only to find that the application had been removed from the roll.

[12] By this time the applicant was in parlous circumstances. She was earning R3500 per month and, though living modestly, incurred monthly expenses of R3600. She had used up all her savings, had surrendered insurance policies taken out for the children and had no other source of income to maintain herself and the children. She was desperate and believed that the respondent was maliciously disposing of his assets and frustrating the maintenance court proceedings. It was in these circumstances that she applied to the High Court for an order that the respondent be committed to prison

for contempt of court for failing to comply with the maintenance order but that the imprisonment be suspended on condition that he paid the arrear maintenance and continued payments thereafter timeously. The matter was heard in the High Court on 21 February 2001.

[13] In her Notice of Motion in the High Court the applicant asked that the respondent be committed for contempt of court for failing to comply with the order made on 4 February 1999 at the time of their divorce. That order had in fact been discharged by the order made by the maintenance court.¹³ Although the founding affidavit referred to the fact that the order made at the time of the divorce had been varied by the maintenance court and was the subject of proceedings before that court, the attention of the judge who dealt with the matter in the High Court was not drawn to the provisions of section 22 of the Act, or to the decision of the Appellate Division in *Purnell v Purnell*.¹⁴

[14] Had the judge's attention been drawn to this he would have had to consider whether it was competent to enforce the order of the maintenance court by way of contempt proceedings in the High Court. He did not consider this question. Instead, he ordered that the respondent be committed for contempt of court for failing to comply with the order made at the time of the divorce. This was not a competent

¹³ See para 8 above.

¹⁴ 1993 (2) SA 662 (A). In this case it was held that an application under the Divorce Act to vary a maintenance order made by the High Court at the time of a divorce, which had subsequently been varied by the maintenance court, was fatally defective because the latter order had discharged the former.

order. When application was made to him for leave to appeal against the order, and his attention was drawn to section 22 of the Act and to *Purnell's* case, he immediately granted leave to appeal.

[15] The SCA correctly did not deal with the appeal on a technical basis. At issue was maintenance due to children. It approached the matter on the assumption that the High Court could have committed the respondent for contempt of court for failing to comply with the order of the maintenance court, but concluded that the applicant had not established factual and legal grounds for the granting of such relief.

[16] For reasons which appear later in this judgment I do not agree with the finding that the applicant had not established a factual and legal basis for the granting of a contempt order. I agree, however, that this was the issue that had to be considered, and that it is the issue which arises for consideration in the appeal to this Court.

Whether the issue is a constitutional matter

[17] First it is necessary to consider whether the case concerns a constitutional matter within the jurisdiction of this Court. The respondent contended that the High Court did not have jurisdiction to commit him for contempt for his failure to comply with an order of the maintenance court. The High Court's powers are embodied in section 169 of the Constitution.¹⁵ Any issue as to the nature and ambit of those

¹⁵ Section 169 of the Constitution provides:

“A High Court may decide—
(a) any constitutional matter except a matter that—

powers necessarily raises a constitutional question. Furthermore, the applicant challenges the test set by the SCA for determining the circumstances in which a High Court should exercise its jurisdiction, on the basis that it failed to take into consideration and give due weight to the best interests of the children in this matter and the state of the maintenance system in South Africa and its effect on gender equality. Section 28(2) of the Constitution enjoins a court to give paramountcy to the best interests of the child “in every matter concerning the child”. A dispute as to whether this was done by the SCA raises a constitutional matter. As appears in paragraphs 29-30 below, this case also raises issues of gender equality relevant to the manner in which a court should approach a case such as this. Inquiries into these issues are constitutional matters and are properly before this Court. Given this and the fact that applicant has reasonable prospects of success, it is in the interests of justice for special leave to appeal to be granted.

Inherent jurisdiction of the High Courts

[18] Although money judgments cannot ordinarily be enforced by contempt proceedings, it is well established that maintenance orders are in a special category in which such relief is competent.¹⁶ What is less clear is whether it is competent for a High Court to make an order for contempt of court for the failure to comply with an order made by a magistrate’s court. This question was left open by the SCA in this

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- (i) only the Constitutional Court may decide; or
 - (ii) is assigned by an Act of Parliament to another court of a status similar to a High Court; and
 - (b) any other matter not assigned to another court by an Act of Parliament.”

¹⁶ *Hofmeyr v Fourie; B.J.B.S. Contractors (Pty) Ltd v Lategan* 1975 (2) SA 590 (C) at 594C-D.

case. While it was willing to assume that the High Court had such jurisdiction, it concluded on the evidence that the applicant had not pursued her remedies under the Act “fully and diligently” and that there were accordingly insufficient grounds for the High Court to have made the order that it did.

Circumstances in which a High Court should exercise its inherent jurisdiction

[19] In terms of section 8 of the Constitution the judiciary is bound by the Bill of Rights.¹⁷ Courts are empowered to ensure that constitutional rights are enforced. They are thus obliged to grant “appropriate relief” to those whose rights have been infringed or threatened.¹⁸ In *Fose v Minister of Safety and Security*¹⁹ Ackermann J said:

“... I have no doubt that this Court has a particular duty to ensure that, within the bounds of the Constitution, effective relief be granted for the infringement of any of the rights entrenched in it. In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to ‘forge new tools’ and shape innovative remedies, if needs be, to achieve this goal.” (Footnote omitted.)

¹⁷ Section 8(1) provides, “The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.”

¹⁸ Section 38 of the Constitution states,

“Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights . . .”

¹⁹ 1997 (3) SA 786 (CC); 1997 (7) BCLR 851 (CC) at para 69.

[20] There is however no need to forge new remedies permitting the High Court to enforce a maintenance order made by the maintenance court. Process-in-aid is an appropriate remedy for this purpose. It is the means whereby a court enforces a judgment of another court which cannot be effectively enforced through its own process.²⁰ It is also a means whereby a court secures compliance with its own procedures.²¹ Although process-in-aid is sometimes sanctioned by a statutory provision or a rule of court,²² it is an incident of a superior court's ordinary jurisdiction.²³ Contempt of court proceedings are a recognised method of putting pressure on a maintenance defaulter to comply with his/her obligation.²⁴ An application to the High Court for process-in-aid by way of contempt proceedings to secure the enforcement of a maintenance debt is therefore appropriate constitutional relief for the enforcement of a claim for the maintenance of children.

[21] This does not mean that High Courts can be seized of all claims for maintenance. Process-in-aid is a discretionary remedy. In *Troskie v Troskie*²⁵ the court dealt with the question of whether it should exercise a discretion which it had

²⁰ Van Zyl *The Theory of the Judicial Practice of South Africa* Vol. 1, 3rd ed. (Juta: Cape Town, 1921) at 370 describes process-in-aid as "an authority from a higher tribunal to supplement the jurisdiction of a lower tribunal."

²¹ See *Nel v Le Roux NO and Others* 1996 (3) SA 562 (CC); 1996 (4) BCLR 592 (CC) at para 11; and *De Lange v Smuts NO and Others* 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (CC) at paras 7, 14, 21, 33, 36, 84 and 91.

²² See, for instance, *Ex Parte Rabinowitz NO: In re Estate Sirkin v Zahrt* 1948 (4) SA 286 (SWA) at 288.

²³ *Riddle v Riddle* 1956 (2) SA 739 (C) at 745H.

²⁴ *Sparks v Sparks* 1998 (4) SA 714 (W) at 725H.

²⁵ 1968 (3) SA 369 (W) at 370G-371D.

under the rules of court as they then existed,²⁶ to conduct an enquiry into the financial position of a person who had failed to make payment in terms of a maintenance order and to grant appropriate relief in the light of such examination. In developing the test for the exercise of the discretion, Trollip J said the following:

“Now the important factor relating to the exercise of such discretion by the Court is the existence of the Maintenance Act, 23 of 1963, as amended by Act 19 of 1967. In that Act ample provision is made for the enforcement, and the variation if necessary, of any order for maintenance made by a Supreme Court by the appropriate magistrate’s court by means of a simple, inexpensive and effective procedure.

....

Those provisions were obviously designed to expedite and to simplify the procedure relating to maintenance orders, and, above all, to avoid the necessity of the parties having to resort to the far more costly procedure of applying to the Supreme Court for relief. A further object must have been to relieve the Supreme Court from having to deal with the somewhat frequent applications that, in the past, were directed to it to enforce or vary maintenance orders.

It seems to me, therefore, that this Court, in the exercise of its discretion, should not entertain any application under Rule 45(12)(i) to enforce payment of the arrears of a maintenance order, unless there are good and sufficient circumstances warranting it.”

[22] Process-in-aid will not ordinarily be granted for the enforcement of a judgment of another court if there are effective remedies in that court which can be used.²⁷ However, there may well be instances in which the facts of a particular case justify approaching a High Court for such relief. Although *Troskie* was concerned with the

²⁶ Rule 45(12)(h)-(j). These sub-rules have been repealed.

²⁷ *Bosman v Bredell* 1932 CPD 385 at 388.

circumstances in which a High Court should invoke rule 45(12) of the Supreme Court Rules which requires the Court to conduct an investigation into the financial position of a person for the purposes of enforcing payment of a High Court maintenance order, the policy considerations underlying that test are equally applicable in this case.

[23] It is for the applicant to show that there is good and sufficient reason for the High Court to enforce the judgment of another court. What constitutes “good and sufficient circumstances” warranting a contempt application to the High Court will depend upon whether or not in the circumstances of a particular case the legislative remedies available are effective in protecting the rights of the complainant and the best interests of the children. This much is confirmed in section 38 of the Constitution which permits a court to grant appropriate relief where it is alleged that a right in the Bill of Rights has been infringed or threatened.

[24] The right in question in children’s maintenance matters is contained in section 28 of the Constitution.²⁸ Section 28(2) provides:

²⁸ Section 28(1) of the Constitution provides:

- “(1) Every child has the right–
- (a) to a name and a nationality from birth;
 - (b) to family care or parental care, or to appropriate alternative care when removed from the family environment;
 - (c) to basic nutrition, shelter, basic health care services and social services;
 - (d) to be protected from maltreatment, neglect, abuse or degradation;
 - (e) to be protected from exploitative labour practices;
 - (f) not to be required or permitted to perform work or provide services that–
 - (i) are inappropriate for a person of that child’s age; or
 - (ii) place at risk the child’s well-being, education, physical or mental health or spiritual, moral or social development;
 - (g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be–

“A child’s best interests are of paramount importance in every matter concerning the child.”

Children have a right to proper parental care. It is universally recognised in the context of family law that the best interests of the child are of paramount importance.²⁹ While the obligation to ensure that all children are properly cared for is an obligation that the Constitution imposes in the first instance on their parents,³⁰ there is an obligation on the state to create the necessary environment for parents to do so. This Court has held that the state

“... must provide the legal and administrative infrastructure necessary to ensure that children are accorded the protection contemplated by s 28.”³¹

-
- (i) kept separately from detained persons over the age of 18 years; and
 - (ii) treated in a manner, and kept in conditions, that take account of the child’s age;
 - (h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and
 - (i) not to be used directly in armed conflict, and to be protected in times of armed conflict.”

²⁹ International law also affirms the “best interests” principle and many countries have subsequently incorporated it into their constitutions or child and family legislation. Article 3(1) of the United Nations Convention on the Rights of the Child, 1989 requires that “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.” Similar pronouncements are found in article 4(1) of the African Charter on the Rights and Welfare of the Child, 1990 (African Children’s Charter). It is significant that the preamble to the Act refers to South Africa’s commitment under these international instruments. South Africa ratified the United Nations Convention on 16 June 1995 and the African Children’s Charter on 7 January 2000. See also *Du Toit and Another v Minister for Welfare and Population Development and Others* 2002 (10) BCLR 1006 (CC) at n 19.

³⁰ *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC) at para 77; *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* 2002 (5) SA 721 (CC); 2002 (10) BCLR 1033 (CC) at para 77.

³¹ *Grootboom* id at para 78.

[25] As reflected in the preamble to the Act, our country has committed itself to giving high priority to the constitutional rights of children. It has provided the legal infrastructure through the Act thereby giving effect to the imperative contained in section 28 of the Constitution.³² The Act is a comprehensive piece of legislation designed to provide speedy and effective remedies at minimum cost for the enforcement of parents' obligations to maintain their children. This Act followed the highly criticised Maintenance Act 23 of 1963 in an attempt by the Department of Justice to address the systemic failures of the maintenance system.³³ The Act includes a number of innovations, including the introduction of maintenance investigators. Established in terms of section 5 of the Act,³⁴ the maintenance investigator, acting subject to the directions and control of a maintenance officer, investigates any complaint relating to maintenance and gathers relevant information, including information on the financial position of any person affected by the liability created by a maintenance order. In terms of section 27(2)(b) of the Act, when a complainant applies for a warrant of execution against the movable property of a maintenance

³² The preamble of the Act specifically provides that the "Constitution of the Republic of South Africa, 1996, as the supreme law of the Republic, was adopted . . . to improve the quality of life of all citizens and to free the potential of all persons by every means possible, including, amongst others, by the establishment of a fair and equitable maintenance system . . ."

³³ See n 36 below.

³⁴ Section 5 of the Act provides:

- "(1) The Minister, or any officer of the Department of Justice authorised thereto in writing by the Minister, may appoint in the prescribed manner and on the prescribed conditions one or more persons as maintenance investigators of a maintenance court to exercise or perform any power, duty or function conferred upon or assigned to maintenance investigators by or under this Act.
- (2) The Minister shall take all reasonable steps within the available resources of the Department of Justice to achieve the progressive realisation of the appointment of at least one maintenance investigator for each maintenance court."

defaulter, it is the task of the maintenance investigator or the maintenance officer to assist the complainant in facilitating this process.³⁵

[26] Despite the good intentions of this comprehensive legal framework specifically created for the recovery of maintenance, there is evidence of logistical difficulties in the maintenance courts that result in the system not functioning effectively.³⁶ The CGE placed material before the Court, demonstrating the difficulties with the operation of the Act, including problems ranging from inadequately trained staff to insufficient facilities and resources.³⁷

[27] Systemic failures to enforce maintenance orders have a negative impact on the rule of law. The courts are there to ensure that the rights of all are protected. The judiciary must endeavour to secure for vulnerable children and disempowered women their small but life-sustaining legal entitlements. If court orders are habitually evaded and defied with relative impunity, the justice system is discredited and the

³⁵ The section instituting maintenance investigators has however not yet been brought into effect due to budgetary constraints. See Wamhoff *South Africa's New Maintenance System: Problems and Suggestions* (Centre for Socio-Legal Research Report No 5, Cape Town 2001) at 6.

³⁶ A number of reports, discussion papers and articles have been published on the state of the maintenance system in South Africa. See *Report of the Lund Committee on Child and Family Support, 1996* (Chapter 5: The Private Maintenance System); *South African Law Commission: Review of the Maintenance System* (Project 100, Issue Paper 5, 1997); and Clark, "The new Maintenance Bill: some incremental reform to judicial maintenance procedure" *De Rebus* (Dec 1998) 63. These works assisted in giving rise to the enactment of the Maintenance Act 99 of 1998, however the system continues to provide a host of problems for struggling single parents. See in particular Wamhoff above n 35.

³⁷ Cornerstone Economic Research *A baseline cost study on the appointment of maintenance investigators in terms of the Maintenance Act, 1998: Report 1 (2 July 2002)* at 19-25. This study was commissioned by the Department of Justice as part of an attempt to correct some of the systemic deficiencies in the maintenance system. It sets out a list of the current problems of the system, namely inadequately trained staff; inadequate numbers of staff; poor administration; low priority given to maintenance cases; an incoherent division of labour within the system; the lack of tracing defaulters; delays in service of process; failure to serve process; lack of adequate information within the system; inadequate court facilities; and inadequate technology and resources.

constitutional promise of human dignity and equality is seriously compromised for those most dependent on the law.

[28] It is a function of the state not only to provide a good legal framework, but to put in place systems that will enable these frameworks to operate effectively. Our maintenance courts and the laws that they implement are important mechanisms to give effect to the rights of children protected by section 28 of the Constitution. Failure to ensure their effective operation amounts to a failure to protect children against those who take advantage of the weaknesses of the system.

[29] Compounding these logistical difficulties is the gendered nature of the maintenance system. The material shows that on the breakdown of a marriage or similar relationship it is almost always mothers who become the custodial parent and have to care for the children. This places an additional financial burden on them and inhibits their ability to obtain remunerative employment. Divorced or separated mothers accordingly face the double disadvantage of being overburdened in terms of responsibilities and under-resourced in terms of means. Fathers, on the other hand, remain actively employed and generally become economically enriched. Maintenance payments are therefore essential to relieve this financial burden.

[30] These disparities undermine the achievement of gender equality which is a founding value of the Constitution.³⁸ The enforcement of maintenance payments

³⁸ Section 1(a) of the Constitution.

therefore not only secures the rights of children, it also upholds the dignity of women and promotes the foundational values of achieving equality and non-sexism. Fatalistic acceptance of the insufficiencies of the maintenance system compounds the denial of rights involved. Effective mechanisms for the enforcement of maintenance obligations are thus essential for the simultaneous achievement of the rights of the child and the promotion of gender equality.

[31] The appropriate relief required by section 38 is relief that is effective in protecting threatened or infringed rights.³⁹ Where legislative remedies specifically designed to vindicate children's rights as efficiently and cost-effectively as possible fail to achieve that purpose, they do not provide effective relief. The SCA, in upholding the appeal, held that

“ . . . it has not been established that the statutory remedies have been fully and diligently pursued and have been found to be wanting.”⁴⁰

This fails to have regard to the fact that once the applicant had reported the respondent's maintenance default, the matter was then in the hands of the maintenance officer on whom there was a duty to investigate the complaint and provide the applicant with the requisite assistance to enforce the order.⁴¹ It also fails to have regard to the parlous circumstances in which the applicant found herself, and the fact that despite her efforts to secure relief through the provisions of the Act, the

³⁹ See para 19 above.

⁴⁰ *Bannatyne v Bannatyne* Case No 177/2001, as yet unreported judgment of the Supreme Court of Appeal dated 16 May 2001, at para 10.

⁴¹ See paras 5 and 25 above.

respondent had failed to pay any maintenance whatsoever to her and the children for seven months. If regard is had to all the circumstances there were indeed “good and sufficient circumstances” warranting an application to the High Court.⁴²

[32] Courts need to be alive to recalcitrant maintenance defaulters who use legal processes to side-step their obligations towards their children. The respondent was entitled to apply for a variation of the maintenance order. But whatever excuse he might have had for failing to comply with the existing order, there was no excuse for his failure to pay even the reduced amount that he contended should be substituted for it. The respondent appears to have utilised the system to stall his maintenance obligations through the machinery of the Act. It appears from the evidence of the CGE that this happens frequently in the maintenance courts. The hardships experienced by maintenance complainants need to be addressed and the proper implementation of the provisions of the Act is a matter that calls for the urgent attention of the Department of Justice.

Remedy

[33] After the applicant had launched the proceedings in the High Court, the respondent tendered through his attorneys to cede to her an amount of R34 366.06 out of the proceeds of the sale of fixed property which he had concluded. A deed of cession in such terms was signed by the respondent and enclosed with the letter. This represented the arrear maintenance at that date. The letter went on to request the

⁴² *Troskie v Troskie* above n 25 at 371D.

applicant to withdraw her application to the High Court on the basis that each party would pay its own costs. According to the letter the only alternative to this would be for the respondent to arrange for his own sequestration, in which event – as the letter said – the applicant would receive nothing at all.

[34] The applicant's response to this letter was that she would not agree to withdraw the application simply on the basis of the cession. She had no information concerning the terms of the sale, when the purchase price would be payable and whether there were preferred creditors who might have a stronger claim to such proceeds. There was further correspondence concerning a possible settlement in which the respondent consented to an order requiring him to pay the maintenance promptly and to reimburse the applicant for all medical expenses incurred by her for the children within seven days of payment.

[35] The exchange of letters was said to be with prejudice and all this information was before the High Court. The judge in the High Court did not give reasons for the order he made, and it is not possible, therefore to know what weight he attached to this correspondence. The correspondence is also not dealt with in the judgment of the SCA.

[36] The belated offer by the respondent to meet his obligation to settle the arrears and to pay the maintenance promptly was clearly prompted by the High Court application. In the light of the respondent's past conduct, and the threat to cause

himself to be sequestered, the applicant was entitled to proceed with the application. She had no assurance that the respondent would comply with his undertakings or that he would not again look for ways of avoiding them. The threat of sequestration could only have added to this concern. She was entitled to secure the protection of a court order and to ask for a sanction to be imposed if the undertaking was not complied with. The High Court agreed and sentenced the respondent to 90 days imprisonment for contempt of court, suspending the order for a period of 5 years on condition that the arrears be paid with interest within a period of three months, and ordered that the monthly maintenance be paid promptly.

[37] Although the order was fatally defective because it was made with reference to the High Court order and not the maintenance court order that had replaced it, the substance of the order as far as the arrears are concerned was correct.

[38] In the light of these considerations, I find that at the time the applicant brought the contempt proceedings in the High Court, grounds existed for the court to commit the respondent for contempt of court for failing to comply with the order of the maintenance court.

[39] We were informed by counsel that after the committal order was made in the High Court the arrear maintenance of R34 366.06 was paid out of the proceeds of the sale of the property. Since then, however, there has apparently been an ongoing

dispute about the payment of maintenance, which is the subject of a maintenance enquiry which was to take place on 9 December 2002.

[40] In the light of these changed circumstances, it is desirable that the initial contempt order of the High Court be partly set aside and that the inquiry concerning the question of past, present and future maintenance continue in the maintenance court. The maintenance court is the most appropriate forum to inquire into the changed circumstances and decide the matter. Given the long delay in this case, it seems necessary to expedite the matter and a copy of this judgment must be brought to the attention of the presiding maintenance officer.

Costs

[41] The applicant was represented by two junior counsel. She is entitled to her costs. The case is not one, however, that warrants the costs of two counsel.

Order

[42] In the result, the following order is made:

1. The application for special leave to appeal is granted.
2. The appeal is upheld.
3. The order made by the Supreme Court of Appeal is set aside.
4. In place of paragraphs 2.2 and 2.3 of the order made by Roux J the following order is made: “All matters pertaining to the payment of maintenance subsequent to February 2001 and to any arrear

maintenance that may be due and payable, and all other matters related to the dispute between the applicant and the respondent concerning payment of maintenance are referred to the maintenance court having jurisdiction for its determination.”

4. The respondent (appellant in the proceedings of the Supreme Court of Appeal) is to pay the costs of the appeals to the SCA and to this Court.
5. A copy of this judgment is to be brought to the attention of the maintenance officer dealing with the dispute between the applicant and the respondent.

Chaskalson CJ, Langa DCJ, Kriegler J, Goldstone J, Madala J, Ngcobo J, O’Regan J, Sachs J and Yacoob J concur in the judgment of Mokgoro J.

For the applicant: P. Oosthuizen and P. W. Oosthuizen instructed by M Van Den Berg Attorneys, Pretoria.

For the respondent: M. H. van Twisk instructed by Sanet De Lange Attorneys, Pretoria.

For the amicus curiae: G. M. Budlender instructed by the Legal Resources Centre, Johannesburg.

Source:

Commentary on the Childrens Act/Legislation/Acts/MAINTENANCE ACT 99 OF 1998

URL:[http://jutastat-juta-co-za.ez.sun.ac.za/nxt/gateway.dll/ctca/685/686/1331?f=templates\\$fn=default.htm](http://jutastat-juta-co-za.ez.sun.ac.za/nxt/gateway.dll/ctca/685/686/1331?f=templates$fn=default.htm)**MAINTENANCE ACT 99 OF 1998¹**

[ASSENTED TO 19 NOVEMBER 1998]

[DATE OF COMMENCEMENT: 26 NOVEMBER 1999]

(Unless otherwise indicated)

*(English text signed by the President)***published in**

GG 19513 of 27 November 1998

commencements

(see s. 47 of this Act)

| provisions | date | refer to |
|---|------------------|---|
| whole Act, excluding ss. 5 and 7 (1) (d) and (2) | 26 November 1999 | Proc R116 in GG 20627 of 15 November 1999 |
| ss. 5, 7 (1) (d), 7 (2) (a), (b) (only in so far it relates to the service of process of any maintenance court) and (c)-(f) | 1 November 2006 | Proc R46 in GG 29343 of 31 October 2006 |

as amended

| by | with effect from | refer to |
|--|-------------------------------------|---|
| Judicial Matters Amendment Act 42 of 2001 | 7 December 2001 | s. 48 of Act 42 of 2001 |
| Judicial Matters Second Amendment Act 55 of 2003 | 31 March 2005 | s. 34 of Act 55 of 2003; Proc R13 in GG 27406 of 22 March 2005 |
| Judicial Matters Amendment Act 22 of 2005 | 1 November 2006 | s. 19 (4) of Act 22 of 2005; Proc R46 in GG 29343 of 31 October 2006 |
| Jurisdiction of Regional Courts Amendment Act 31 of 2008 | 9 August 2010 | s. 11 of Act 31 of 2008; Proc R41 in GG 33448 of 6 August 2010 |
| Maintenance Amendment Act 9 of 2015 | 9 September 2015; 5 January 2018 | s. 19 of Act 9 of 2015; Proc R44 in GG 41352 of 21 December 2017 |

ACT**To restate and amend certain laws relating to maintenance.****Preamble**

WHEREAS the Constitution of the Republic of South Africa, 1996, as the supreme law of the Republic, was adopted so as to establish a society based on democratic values, social and economic justice, equality and fundamental human rights and to improve the quality of life of all citizens and to free the potential of all persons by every means possible, including, amongst others, by the establishment of a fair and equitable maintenance system;

AND WHEREAS the Republic of South Africa is committed to give high priority to the rights of children, to their survival and to their protection and development as evidenced by its signing of the World Declaration on the Survival, Protection and Development of Children, agreed to at New York on 30 September 1990, and its accession on 16 June 1995 to the Convention on the Rights of the Child, signed at New York on 20 November 1989;

AND WHEREAS Article 27 of the said Convention specifically requires States Parties to recognise the right of every child to a standard of living which is adequate for the child's physical, mental, spiritual, moral and social development and to take all appropriate measures in order to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child;

AND WHEREAS the recovery of maintenance in South Africa possibly falls short of the Republic's international obligations in terms of the said Convention;

AND WHEREAS the South African Law Commission is investigating, in addition to the recovery of maintenance for children, the reform of the entire South African maintenance system;

AND WHEREAS it is considered necessary that, pending the implementation of the said Law Commission's recommendations, certain amendments be effected in the interim to the existing laws relating to maintenance and that, as a first step in the reform of the entire South African maintenance system, certain of those laws be restated with a view to emphasising the importance of a sensitive and fair approach to the determination and recovery of maintenance;

BE IT THEREFORE ENACTED by the Parliament of the Republic of South Africa, as follows:-

ARRANGEMENT OF SECTIONS

Sections

| | |
|--|-----------|
| | CHAPTER 1 |
| 1-2 Interpretation and Application of Act | |
| | CHAPTER 2 |
| 3-5 Maintenance Courts and Court Officers | |
| | CHAPTER 3 |
| 6-14 Maintenance Enquiries | |
| | CHAPTER 4 |
| 15-25 Maintenance and Other Orders | |
| | CHAPTER 5 |
| 26-30 Civil Execution | |
| | CHAPTER 6 |
| 31-39A Offences and Penalties | |
| | CHAPTER 7 |
| 40-41 Orders relating to Prosecutions | |
| | CHAPTER 8 |
| 42-47 General and Supplementary Provisions | |

¹ This Act has been updated to include all available historical commencement details

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Source:

Commentary on the Childrens Act/Legislation/Acts/MAINTENANCE ACT 99 OF 1998/CHAPTER 1 INTERPRETATION AND APPLICATION OF ACT (ss 1-2)/1 Definitions

URL:

[http://jutastat-juta-co-za.ez.sun.ac.za/nxt/gateway.dll/ctca/685/686/1331/1332/1333?f=templates\\$fn=default.htm](http://jutastat-juta-co-za.ez.sun.ac.za/nxt/gateway.dll/ctca/685/686/1331/1332/1333?f=templates$fn=default.htm)

CHAPTER 1 INTERPRETATION AND APPLICATION OF ACT (ss 1-2)

1 Definitions

(1) In this Act, unless the context indicates otherwise-

'court in the Republic' includes a High Court;

'emoluments' includes any salary, wages, allowances or any other form of remuneration, whether expressed in money or not;

'financial institution' means any institution which carries on business as a bank or mutual bank;

'maintenance court' means a maintenance court as contemplated in section 3;

'maintenance investigator' means any person who is appointed as a maintenance investigator of a maintenance court under section 5 (1);

'maintenance officer' means any person who is deemed to have been appointed as a maintenance officer in terms of section 4 (1) (a) or who is appointed under section 4 (2), as the case may be;

'maintenance order' means 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, and includes, except for the purposes of section 31, any sentence suspended on condition that the convicted person make payments of sums of money towards the maintenance of any other person;

'Minister' means the Minister of Justice;

'prescribed' means prescribed by regulation made in terms of section 44;

'regulation' means a regulation made in terms of section 44;

'this Act' includes a regulation.

² The administration of and the powers or functions entrusted by legislation to the Minister of Justice and Constitutional Development transferred to the Minister of Justice and Correctional Services - Proc 47 in GG 37839 of 15 July 2014

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Source:

Commentary on the Childrens Act/Legislation/Acts/MAINTENANCE ACT 99 OF 1998/CHAPTER 1 INTERPRETATION AND APPLICATION OF ACT (ss 1-2)/2 Application of Act

URL:

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2 Application of Act

(1) The provisions of this Act shall apply in respect of the legal duty of any person to maintain any other person, irrespective of the nature of the relationship between those persons giving rise to that duty.

(2) This Act shall not be interpreted so as to derogate from the law relating to the liability of persons to maintain other persons.

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Source:

Commentary on the Childrens Act/Legislation/Acts/MAINTENANCE ACT 99 OF 1998/CHAPTER 2 MAINTENANCE COURTS AND COURT OFFICERS (ss 3-5)/3 Maintenance courts

URL:

[http://jutastat-juta-co-za.ez.sun.ac.za/nxt/gateway.dll/ctca/685/686/1331/1335/1336?f=templates\\$fn=default.htm](http://jutastat-juta-co-za.ez.sun.ac.za/nxt/gateway.dll/ctca/685/686/1331/1335/1336?f=templates$fn=default.htm)

CHAPTER 2 MAINTENANCE COURTS AND COURT OFFICERS (ss 3-5)

3 Maintenance courts

Every magistrate's court for a district, established in terms of section 2 (1) (e) of the Magistrates' Courts Act, 1944 (Act 32 of 1944), is within its area of jurisdiction a maintenance court for the purposes of this Act.

[S. 3 substituted by s. 10 (2) of Act 31 of 2008 (wef 9 August 2010).]

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Source:

Commentary on the Childrens Act/Legislation/Acts/MAINTENANCE ACT 99 OF 1998/CHAPTER 2 MAINTENANCE COURTS AND COURT OFFICERS (ss 3-5)/4 Maintenance officers

URL:

[http://jutastat-juta-co-za.ez.sun.ac.za/nxt/gateway.dll/ctca/685/686/1331/1335/1337?f=templates\\$fn=default.htm](http://jutastat-juta-co-za.ez.sun.ac.za/nxt/gateway.dll/ctca/685/686/1331/1335/1337?f=templates$fn=default.htm)

4 Maintenance officers

(1) (a) Any public prosecutor to whom a Director of Public Prosecutions has delegated the general power to institute and conduct prosecutions in criminal proceedings in a particular magistrate's court shall be deemed to have been appointed as a maintenance officer of the corresponding maintenance court.

(b) The National Director of Public Prosecutions shall, in consultation with the Minister, issue policy directions with a view to-

(i) establishing uniform norms and standards to be observed by public prosecutors in the performance of their functions as maintenance officers under this Act;

(ii) building a more dedicated and experienced pool of trained and specialised maintenance officers.

(c) The Minister shall cause a copy of any policy directions issued in terms of paragraph (b) to be tabled in Parliament as soon as possible after the issue thereof.

(2) Subject to the laws governing the public service, the Minister, or any officer of the Department of Justice authorised thereto in writing by the Minister, may appoint one or more persons as maintenance officers of a maintenance court-

(a) to appear in the maintenance court in proceedings under this Act; and

(b) to exercise or perform any power, duty or function conferred upon or assigned to maintenance officers by or under this Act.

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Source:

Commentary on the Childrens Act/Legislation/Acts/MAINTENANCE ACT 99 OF 1998/CHAPTER 2 MAINTENANCE COURTS AND COURT OFFICERS (ss 3-5)/5 Maintenance investigators

URL:

[http://jutastat-juta-co-za.ez.sun.ac.za/nxt/gateway.dll/ctca/685/686/1331/1335/1338?f=templates\\$fn=default.htm](http://jutastat-juta-co-za.ez.sun.ac.za/nxt/gateway.dll/ctca/685/686/1331/1335/1338?f=templates$fn=default.htm)

5 Maintenance investigators

(1) The Minister, or any officer of the Department of Justice and Constitutional Development authorised thereto in writing by the Minister, may-

(a) subject to the laws governing the public service, appoint or designate one or more officers in the Department; or

(b) appoint in the prescribed manner and on the prescribed conditions one or more persons,

as maintenance investigators of a maintenance court to exercise or perform any power, duty or function conferred upon or assigned to maintenance investigators by or under this Act.

[Sub-s. (1) substituted by s. 9 of Act 22 of 2005 (wef 1 November 2006).]

(2) The Minister shall take all reasonable steps within the available resources of the Department of Justice to achieve the progressive realisation of the appointment of at least one maintenance investigator for each maintenance court.

[Date of commencement of s. 5: 1 November 2006.]

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Source:

Commentary on the Childrens Act/Legislation/Acts/MAINTENANCE ACT 99 OF 1998/CHAPTER 3 MAINTENANCE ENQUIRIES (ss 6-14)

URL:

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CHAPTER 3 MAINTENANCE ENQUIRIES (ss 6-14)

Complaints and investigations (ss 6-8)

6 Complaints relating to maintenance

(1) Whenever a complaint to the effect-

- (a) that any person legally liable to maintain any other person fails to maintain the latter person;
- (b) that good cause exists for the substitution or discharge of a maintenance order; or
- (c) that good cause exists for the substitution or discharge of a verbal or written agreement in respect of maintenance obligations in which respect there is no existing maintenance order,

has been made and is lodged with a maintenance officer in the prescribed manner, the maintenance officer shall investigate that complaint in the prescribed manner and as provided in this Act.

(2) After investigating the complaint, the maintenance officer may institute an enquiry in the maintenance court within the area of jurisdiction in which the person to be maintained, or the person in whose care the person to be maintained is, resides, carries on business or is employed with a view to enquiring into the provision of maintenance for the person so to be maintained.

[S. 6 substituted by s. 1 of Act 9 of 2015 (wef 9 September 2015).]

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Source:

Commentary on the Childrens Act/Legislation/Acts/MAINTENANCE ACT 99 OF 1998/CHAPTER 3 MAINTENANCE ENQUIRIES (ss 6-14)/7 Investigation of complaints

URL:

[http://jutastat-juta-co-za.ez.sun.ac.za/nxt/gateway.dll/ctca/685/686/1331/1339/1340?f=templates\\$fn=default.htm](http://jutastat-juta-co-za.ez.sun.ac.za/nxt/gateway.dll/ctca/685/686/1331/1339/1340?f=templates$fn=default.htm)

7 Investigation of complaints

(1) In order to investigate any complaint relating to maintenance, a maintenance officer may-

- (a) obtain statements under oath or affirmation from persons who may be able to give relevant information concerning the subject of such complaint;
- (b) gather information concerning-
 - (i) the identification or whereabouts of any person who is legally liable to maintain the person mentioned in such complaint or who is allegedly so liable;
 - (ii) the financial position of any person affected by such liability; or
 - (iii) any other matter which may be relevant concerning the subject of such complaint;
- (c) request a maintenance officer of any other maintenance court to obtain, within the area of jurisdiction of the said maintenance officer, such information as may be relevant concerning the subject of such complaint; or
- (d) require a maintenance investigator of the maintenance court concerned to perform such other functions as may be necessary or expedient to achieve the objects of this Act.

[Date of commencement of para. (d): 1 November 2006.]

(2) A maintenance investigator shall, subject to the directions and control of a maintenance officer-

- (a) locate the whereabouts of persons-
 - (i) required to appear before a magistrate under section 8 (1);
 - (ii) who are to be subpoenaed or who have been subpoenaed to appear at a maintenance enquiry;
 - (iii) who are to be subpoenaed or who have been subpoenaed to appear at a criminal trial for the failure to comply with a maintenance order; or
 - (iv) accused of the failure to comply with a maintenance order;
- [Date of commencement of para. (a): 1 November 2006.]
- (b) serve or execute the process of any maintenance court;
- [Date of commencement of para. (b) in so far as it relates to the service of process of any maintenance court: 1 November 2006.]
- (c) serve subpoenas or summonses in respect of criminal proceedings instituted for the failure to comply with a maintenance order as if the maintenance investigator had been duly appointed as a person who is authorised to serve subpoenas or summonses in criminal proceedings;
- [Date of commencement of para. (c): 1 November 2006.]
- (d) take statements under oath or affirmation from persons who may be able to give relevant information concerning the subject of any complaint relating to maintenance;
- [Date of commencement of para. (d): 1 November 2006.]
- (e) gather information concerning-
 - (i) the identification or whereabouts of any person who is legally liable to maintain the person mentioned in such complaint or who is allegedly so liable;
 - (ii) the financial position of any person affected by such liability; or
 - (iii) any other matter which may be relevant concerning the subject of such complaint; or
- [Date of commencement of para. (e): 1 November 2006.]
- (f) gather such information as may be relevant concerning a request referred to in subsection (1) (c).
- [Date of commencement of para. (f): 1 November 2006.]

(3) (a) If a complaint is lodged with a maintenance officer in terms of section 6 and the maintenance officer, after all reasonable efforts to locate the whereabouts of the person who may be affected by an order which may be made by a maintenance court pursuant to the complaint so lodged, have failed, the maintenance officer may apply to the maintenance court, in the prescribed manner, to issue a direction as contemplated in this subsection.

(b) If a maintenance court is satisfied that all reasonable efforts to locate the whereabouts of a person have failed, as contemplated in paragraph (a), the court may issue a direction in the prescribed form, directing one or more electronic communications service providers to furnish the court, in the prescribed manner, with the contact information of the person in question if that person is in fact a customer of the service provider.

(c) If the maintenance court issues a direction in terms of paragraph (b) the maintenance court shall direct that the direction be served on the electronic communications service provider in the prescribed manner.

(d) The information referred to in paragraph (b) shall be provided to the maintenance court within the time period set out by the court in the direction.

(e) An electronic communications service provider on which a direction is served may, in the prescribed manner, apply to the maintenance court for-

- (i) an extension of the period referred to in paragraph (d) on the grounds that the information cannot be provided timeously; or
- (ii) the cancellation of the direction on the grounds that-
 - (aa) it does not provide an electronic communications service in respect of the person referred to in the direction; or

(bb) the requested information is not available in the records of the electronic communications service provider.

(f) After receipt of an application referred to in paragraph (e), the maintenance court shall consider the application, give a decision in respect thereof and inform the electronic communications service provider, in the prescribed manner, of the outcome of the application.

(g) The list of electronic communications service providers referred to in section 4 (7) of the Protection from Harassment Act, 2011 (Act 17 of 2011), may be used by maintenance courts for purposes of this subsection.

(h) The tariffs payable to electronic communications service providers for providing information as determined by the Minister in terms of section 4 (8) of the Protection from Harassment Act, 2011, apply in the case of information required in terms of this subsection.

(i) If the maintenance officer is of the opinion that the person lodging the complaint referred to in paragraph (a) is unable to pay the costs involved in the furnishing of information referred to in paragraph (b), the maintenance officer may at any time after the maintenance court issues a direction under the said paragraph (b), request the maintenance court to hold an enquiry into-

(i) the means of the complainant; and

(ii) any other circumstances which, in the opinion of the maintenance court, should be taken into consideration.

(j) At the conclusion of the enquiry referred to in paragraph (i) the maintenance court may make such order as the court may deem fit relating to the payment of the costs involved in the furnishing of information referred to in paragraph (b), including an order directing the State, subject to section 20, to pay such costs within available resources, in the prescribed manner.

(k) The maintenance court may, if it has ordered the State to pay the costs referred to in paragraph (j), upon the application of the maintenance officer, order the person affected by the order to refund the costs so paid by the State in terms of paragraph (j), in the prescribed manner.

(l) For purposes of this subsection, '**electronic communications service provider**' means an entity or a person who is licensed or exempted from being licensed in terms of Chapter 3 of the Electronic Communications Act, 2005 (Act 36 of 2005), to provide an electronic communications service.

[Sub-s. (3) added by s. 2 of Act 9 of 2015 (wef 5 January 2018).]

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Source:

Commentary on the Childrens Act/Legislation/Acts/MAINTENANCE ACT 99 OF 1998/CHAPTER 3 MAINTENANCE ENQUIRIES (ss 6-14)/8 Examination of persons by maintenance officer

URL:

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8 Examination of persons by maintenance officer

(1) A magistrate may, prior to or during a maintenance enquiry and at the request of a maintenance officer, require the appearance before the magistrate or before any other magistrate, for examination by the maintenance officer, of any person who is likely to give relevant information concerning-

(a) the identification or the place of residence or employment of any person who is legally liable to maintain any other person or who is allegedly so liable; or

(b) the financial position of any person affected by such liability.

(2) (a) The provisions of sections 162, 163, 164 (1), 165, 179 to 181, 187, 191 and 204 of the Criminal Procedure Act, 1977 (Act 51 of 1977), shall, with the necessary changes, apply in respect of the examination of any person under this section.

(b) If the person who is required to appear before a magistrate furnishes the information in question to the satisfaction of the maintenance officer concerned in advance of the day on which he or she is required so to appear, the maintenance officer shall discharge him or her from the obligation so to appear.

(3) The examination of any person under this section may be conducted in private at a place designated by the magistrate.

The enquiry (ss 9-11)

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Source:

Commentary on the Childrens Act/Legislation/Acts/MAINTENANCE ACT 99 OF 1998/CHAPTER 3 MAINTENANCE ENQUIRIES (ss 6-14)/9 Maintenance officer may cause witnesses to be subpoenaed

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9 Maintenance officer may cause witnesses to be subpoenaed

(1) (a) A maintenance officer who has instituted an enquiry in a maintenance court may cause any person, including any person legally liable to maintain any other person or any person in whose favour a maintenance order has already been made, to be subpoenaed-

(i) to appear before the maintenance court and give evidence; or

(ii) to produce any book, document or statement.

(b) A book, document or statement referred to in paragraph (a) (ii) includes-

(i) any book, document or statement relating to the financial position of any person who is affected by the legal liability of a person to maintain any other person or in whose favour a maintenance order has been made; and

(ii) in the case where such person is in the service of an employer, a statement which gives full particulars of his or her earnings and which is signed by the employer.

[Sub-s. (1) substituted by s. 3 of Act 9 of 2015 (wef 9 September 2015).]

(2) (a) Any person to be subpoenaed as a witness shall, subject to paragraph (b), be subpoenaed in the manner in which a person may be subpoenaed to appear before a magistrate's court in a criminal trial.

(b) The form of the subpoena shall be as prescribed.

(c) The provisions of section 181 of the Criminal Procedure Act, 1977 (Act 51 of 1977), are, subject to section 11 (2), not applicable to any person against whom a maintenance order may be made under this Act.

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Source:

Commentary on the Childrens Act/Legislation/Acts/MAINTENANCE ACT 99 OF 1998/CHAPTER 3 MAINTENANCE ENQUIRIES (ss 6-14)/10 Enquiry by maintenance court

URL:

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10 Enquiry by maintenance court

(1) The maintenance court holding an enquiry may at any time during the enquiry cause any person to be subpoenaed as a witness or examine any person who is present at the enquiry, although he or she was not subpoenaed as a witness, and may recall and re-examine any person already examined.

(1A) Where circumstances permit and where a Family Advocate is available, a maintenance court may, in the circumstances as may be prescribed in the Mediation in Certain Divorce Matters Act, 1987 (Act 24 of 1987), at any time during the enquiry, cause an investigation to be carried out by a Family Advocate, contemplated in the Mediation in Certain Divorce Matters Act, 1987, in whose area of jurisdiction that maintenance court is, with regard to the welfare of any minor or dependent child affected by such enquiry, whereupon the provisions of that Act apply with the changes required by the context.

[Sub-s. (1A) inserted by s. 16 of Act 55 of 2003 (wef 31 March 2005).]

(2) The maintenance court shall administer an oath to, or accept an affirmation from, any witness appearing before the maintenance court and record the evidence of that witness.

(3) Any party to proceedings under this Act shall have the right to be represented by a legal representative.

(4) No person whose presence is not necessary shall be present at the enquiry, except with the permission of the maintenance court.

(5) Save as is otherwise provided in this Act, the law of evidence, including the law relating to the competency, compellability, examination and cross-examination of witnesses, as applicable in respect of civil proceedings in a magistrate's court, shall apply in respect of the enquiry.

(6) (a) A maintenance court shall conclude maintenance enquiries as speedily as possible and shall ensure that postponements are limited in number and in duration.

(b) A maintenance court may, where a maintenance order has not been made and a postponement of the enquiry is necessary and if the court is satisfied that-

(i) there are sufficient grounds prior to such postponement indicating that one of the parties is legally liable to maintain a person or persons; and

(ii) undue hardship may be suffered by the person or persons to be maintained as a result of the postponement,

subject to paragraph (c), make an interim maintenance order which the maintenance court may make under section 16 (1) (a).

(c) When the maintenance court subsequently makes any order under section 16, the maintenance court may-

(i) make an order confirming the interim maintenance order referred to in paragraph (b); or

(ii) set aside such interim maintenance order or substitute it with any other order which the maintenance court may consider just in the circumstances.

[Sub-s. (6) added by s. 4 of Act 9 of 2015 (wef 9 September 2015).]

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Commentary on the Childrens Act/Legislation/Acts/MAINTENANCE ACT 99 OF 1998/CHAPTER 3 MAINTENANCE ENQUIRIES (ss 6-14)/11 Rights and privileges of witnesses

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11 Rights and privileges of witnesses

(1) Any person, other than a person against whom a maintenance order may be made under this Act, attending the enquiry as a witness shall be entitled to an allowance as if he or she were attending criminal proceedings as a witness for the State.

(2) The maintenance court may direct that any person against whom a maintenance order may be made under this Act-

(a) shall be paid the prescribed allowances for subsistence and for travel to and from the court; and

(b) shall be paid such allowance as may be paid to a witness for the accused in criminal proceedings.

(3) In connection with the giving of evidence or the production of any book, document or statement at the enquiry, the law relating to privilege, as applicable to a witness giving evidence or subpoenaed to produce a book, document or statement in criminal proceedings in a magistrate's court, shall apply.

Documentary evidence (ss 12-14)**Document 13 of 50****Source:**

Commentary on the Childrens Act/Legislation/Acts/MAINTENANCE ACT 99 OF 1998/CHAPTER 3 MAINTENANCE ENQUIRIES (ss 6-14)/12 Proof of statements in writing by consent

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[http://jutastat-juta-co-za.ez.sun.ac.za/nxt/gateway.dll/ctca/685/686/1331/1339/1345?f=templates\\$fn=default.htm](http://jutastat-juta-co-za.ez.sun.ac.za/nxt/gateway.dll/ctca/685/686/1331/1339/1345?f=templates$fn=default.htm)

12 Proof of statements in writing by consent

(1) In the enquiry a statement in writing made in the prescribed manner by any person, other than a person against whom a maintenance order may be made under this Act, shall, subject to subsection (2), be admissible as evidence to the same extent as oral evidence to the same effect by the person concerned.

(2) (a) A copy of the statement, together with a copy of every document referred to in the statement as an exhibit, shall at least 14 days before the date on which the statement is to be submitted as evidence, be served on the person against whom a maintenance order may be made under this Act, and he or she may at least seven days before the commencement of the enquiry object to the statement being submitted as evidence under this section.

(b) If the person-

(i) objects in accordance with paragraph (a) to the statement being submitted as evidence, such statement shall not, subject to subparagraph (ii), be admissible as evidence under this section; or

(ii) does not object in accordance with paragraph (a) or come to an arrangement with the maintenance officer before or during the enquiry that the statement may be submitted as evidence, such statement may on its production at the enquiry be admitted as evidence in the enquiry.

(c) When the statement is served on the person, such statement shall be accompanied by the prescribed notification in writing.

(3) Any person against whom a maintenance order may be made under this Act may before or during the enquiry come to an arrangement with the maintenance officer that any statement referred to in subsection (1), notwithstanding the fact that it was not served on him or her in terms of subsection (2), be submitted as evidence, whereupon such statement may on its production at the enquiry be admitted as evidence in the enquiry.

(4) Any document referred to as an exhibit and identified in a statement in writing submitted as evidence under this section shall be treated as if it had been handed in as an exhibit and identified in the maintenance court by the person who made the statement.

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Source:

Commentary on the Childrens Act/Legislation/Acts/MAINTENANCE ACT 99 OF 1998/CHAPTER 3 MAINTENANCE ENQUIRIES (ss 6-14)/13 Evidence and findings of fact recorded in respect of existing maintenance order

URL:

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13 Evidence and findings of fact recorded in respect of existing maintenance order

(1) Subject to the provisions of subsection (2), the maintenance court holding an enquiry may take into consideration any evidence in any proceedings in respect of an existing maintenance order or accept as *prima facie* proof any finding of fact in any such proceedings.

(2) For the purposes of subsection (1)-

- (a) the record of any evidence or finding of fact in any proceedings in respect of the existing maintenance order; or
- (b) any copy or transcription thereof or extract therefrom certified as a true copy, transcription or extract by a person who purports to be the registrar or clerk of the court or other officer having the custody of the records of the court in the Republic where the order in question was issued,

shall on its production at the enquiry be admissible as evidence.

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Source:

Commentary on the Childrens Act/Legislation/Acts/MAINTENANCE ACT 99 OF 1998/CHAPTER 3 MAINTENANCE ENQUIRIES (ss 6-14)/14 Proof of entries in accounting records and documentation of banks

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14 Proof of entries in accounting records and documentation of banks

The provisions of section 236 of the Criminal Procedure Act, 1977 (Act 51 of 1977), shall, with the necessary changes, apply in respect of the enquiry.

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Source:

Commentary on the Childrens Act/Legislation/Acts/MAINTENANCE ACT 99 OF 1998/CHAPTER 4 MAINTENANCE AND OTHER ORDERS (ss 15-25)/15 Duty of parents to support their children

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[http://jutastat-juta-co-za.ez.sun.ac.za/nxt/gateway.dll/ctca/685/686/1331/1348/1349?f=templates\\$fn=default.htm](http://jutastat-juta-co-za.ez.sun.ac.za/nxt/gateway.dll/ctca/685/686/1331/1348/1349?f=templates$fn=default.htm)

CHAPTER 4 MAINTENANCE AND OTHER ORDERS (ss 15-25)

15 Duty of parents to support their children

(1) Without derogating from the law relating to the liability of persons to support children who are unable to support themselves, a maintenance order for the maintenance of a child is directed at the enforcement of the common law duty of the child's parents to support that child, as the duty in question exists at the time of the issue of the maintenance order and is expected to continue.

(2) The duty extends to such support as a child reasonably requires for his or her proper living and upbringing, and includes the provision of food, clothing, accommodation, medical care and education.

(3) (a) Without derogating from the law relating to the support of children, the maintenance court shall, in determining the amount to be paid as maintenance in respect of a child, take into consideration-

- (i) that the duty of supporting a child is an obligation which the parents have incurred jointly;
- (ii) that the parents' respective shares of such obligation are apportioned between them according to their respective means; and
- (iii) that the duty exists, irrespective of whether a child is born in or out of wedlock or is born of a first or subsequent marriage.

(b) Any amount so determined shall be such amount as the maintenance court may consider fair in all the circumstances of the case.

(4) As from the commencement of this Act, no provision of any law to the effect that any obligation incurred by a parent in respect of a child of a first marriage shall have priority over any obligation incurred by that parent in respect of any other child shall be of any force and effect.

Orders (ss 16-21)

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Source:

Commentary on the Childrens Act/Legislation/Acts/MAINTENANCE ACT 99 OF 1998/CHAPTER 4 MAINTENANCE AND OTHER ORDERS (ss 15-25)/16 Maintenance and ancillary orders

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16 Maintenance and ancillary orders

(1) After consideration of the evidence adduced at the enquiry, the maintenance court may-

(a) in the case where no maintenance order is in force-

- (i) make a maintenance order against any person proved to be legally liable to maintain any other person for the payment during such period and at such times and to such person, officer, organisation or institution, or into such account at such financial institution, and in such manner, which manner may include that an arrangement be made with any financial institution for payment by way of any stop-order or similar facility at that financial institution, as may be specified in the order, of sums of money so specified, towards the maintenance of such other person, which order may include such order as the court may think fit relating to the payment of medical expenses in respect of such other person, including an order requiring such other person, if the said other person qualifies therefor, to be registered as a dependant of such person at a medical scheme of which such person is a member;
- (ii) make an order against such person, if such other person is a child, for the payment to the mother of the child, of such sum of money, together with any interest thereon, as that mother is in the opinion of the maintenance court entitled to recover from such person in respect of expenses incurred by the mother in connection with the birth of the child and of expenditure incurred by the mother in connection with the maintenance of the child from the date of the child's birth to the date of the enquiry; or

(b) in the case where a maintenance order is in force-

- (i) make a maintenance order contemplated in paragraph (a) (i) in substitution of such maintenance order; or
- (ii) discharge such maintenance order; or

(c) make no order.

(2) (a) Any court-

- (i) that has at any time, whether before or after the commencement of this Act made a maintenance order under subsection (1) (a) (i) or (b) (i);
- (ii) that makes such a maintenance order; or
- (iii) that convicts any person of an offence referred to in section 31 (1),

shall, subject to paragraph (b) (i), make an order directing any person, including any administrator of a pension fund, who is obliged under any contract to pay any sums of money on a periodical basis to the person against whom the maintenance order in question has been or is made, to make on behalf of the latter person such periodical payments from moneys at present or in future owing or accruing to the latter person as may be required to be made in accordance with that maintenance order if that court is satisfied-

- (aa) where applicable, in the case of subparagraph (i), after hearing such evidence, either in writing or orally, as that court may consider necessary;
- (bb) where applicable, in the case of subparagraph (ii), after referring to the evidence adduced at the enquiry or the application for an order by default, as the case may be; or
- (cc) where applicable, in the case of subparagraph (iii), after referring to the evidence adduced at the trial; and
- (dd) where applicable, after hearing such evidence, either in writing or orally, of any person who is obliged under any contract to pay any sums of money on a periodical basis to the person against whom the maintenance order in question has been or is made,

that it is not impracticable in the circumstances of the case: Provided that nothing precludes the court from making an order in terms of this subsection if it is of the opinion that any further postponement of the enquiry in order to obtain the evidence of the person referred to in subparagraph (dd) will give rise to an unreasonable delay in the finalisation of the enquiry, to the detriment of the person or persons to be maintained.

[Para. (a) substituted by s. 17 of Act 55 of 2003 (wef 31 March 2005) and by s. 5 of Act 9 of 2015 (wef 9 September 2015).]

(b) A court-

- (i) contemplated in paragraph (a) (i) shall only make an order referred to in paragraph (a) on application; and
- (ii) that convicts any person of an offence referred to in section 31 (1) shall make such order whether or not any penalty is imposed in respect of that offence or any order is made under section 40 (1).

(3) (a) In order to give effect to an order referred to in subsection (2), the maintenance officer shall, within seven days after the day on which such order was made or whenever it is afterwards required, in the prescribed manner cause a notice, together with a copy of such order, to be served on any person who is obliged under any contract to pay any sums of money on a periodical basis to the person against whom the maintenance order has been made directing the former person to make the payments specified in the notice at the times and in the manner so specified.

(b) Whenever the person on whom the notice has been served, is for any reason discharged from the obligation of paying any such sums of money, he or she shall, within seven days after the day on which he or she is so discharged, give notice thereof in the prescribed manner to the maintenance officer of the court where the maintenance order in question was made.

(c) The person on whom the notice has been served shall give priority to the payments specified in that notice over any order of court requiring payments to be made from any other moneys due to the person against whom the maintenance order has been made.

(4) If any person against whom a maintenance order has been made under subsection (1) (a) (i) or (b) (i) changes his or her place of residence or employment during the currency of the maintenance order, he or she shall, within seven days after the day of such change, give notice thereof in writing to the maintenance officer of the court where the maintenance order was made, and, if payment in terms of that order is to be made to any person, officer, organisation or institution, then also to the person, officer, organisation or institution to whom payment is to be made and shall state fully and clearly where his or her new place of residence or employment is situated.

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Source:

Commentary on the Childrens Act/Legislation/Acts/MAINTENANCE ACT 99 OF 1998/CHAPTER 4 MAINTENANCE AND OTHER ORDERS (ss 15-25)/17 Orders by consent

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17 Orders by consent

(1) Any order referred to in section 16 (1) (a) or (b) may be made at the enquiry in the absence of one or both of the parties involved in the enquiry, if it is made in accordance with his or her or their consent in writing handed in by the maintenance officer at the enquiry.

(2) A copy of an order made at the enquiry in the absence of one or both of the parties as provided for in subsection (1), shall be delivered or tendered to him or her or them, as the case may be, by any maintenance officer, police officer, sheriff or maintenance investigator, and the return of any such officer, sheriff or investigator showing that such copy was delivered or tendered to the particular person or persons shall be deemed to be sufficient proof of the fact that he or she was or they were aware of the terms of the order in question.

[S. 17 substituted by s. 6 of Act 9 of 2015 (wef 9 September 2015).]

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Source:

Commentary on the Childrens Act/Legislation/Acts/MAINTENANCE ACT 99 OF 1998/CHAPTER 4 MAINTENANCE AND OTHER ORDERS (ss 15-25)/18 Orders by default

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18 Orders by default

- (1) If a maintenance court is satisfied on the grounds of sufficient proof or otherwise-
- (a) that any person against whom an order may be or has been made under section 16 (1) (a) or (b) or that any person in whose favour such an order has been made-
 - (i) has knowledge of a subpoena issued under section 9; or
 - (ii) has appeared before the court and was warned by the court to appear at a later date, time and place before the court; and
 - (b) that he or she has failed to appear before the maintenance court on the date and at the time and place-
 - (i) specified in such subpoena; or
 - (ii) in accordance with a warning referred to in paragraph (a) (ii),

the maintenance court may, on application of the maintenance officer for an order by default, call upon the person who has lodged the complaint to adduce such evidence, either in writing or orally, in support of his or her complaint as the maintenance court may consider necessary.

[Sub-s. (1) substituted by s. 7 (a) of Act 9 of 2015 (wef 9 September 2015).]

- (2) After consideration of the evidence, the maintenance court may-
- (a) make any order by default which the maintenance court could have made under section 16 (1) (a) or (b);
 - (b) make such other order as the maintenance court may consider appropriate in the circumstances of the case; or
 - (c) make no order.

(3) A copy of an order made in respect of any person not present at the enquiry shall be delivered or tendered, as soon as may be practicable in the circumstances, to him or her by any maintenance officer, police officer, sheriff or maintenance investigator, and the return of any such officer, sheriff or investigator showing that such copy was delivered or tendered to the particular person shall be deemed to be sufficient proof of the fact that he or she was aware of the terms of the order in question.

[Sub-s. (3) substituted by s. 7 (b) of Act 9 of 2015 (wef 9 September 2015).]

(4) (a) The person in respect of whom a maintenance court has made an order by default may apply to the maintenance court for the variation or setting aside of the order.

[Para. (a) substituted by s. 7 (c) of Act 9 of 2015 (wef 9 September 2015).]

(b) The application shall be made in the prescribed manner within 20 days after the day on which the person became aware of the order by default or within such further period as the maintenance court may, on good cause shown, allow.

(c) Any person who wishes to make an application under paragraph (a) shall give notice of his or her intention to make the application to the person who lodged the complaint, which notice shall be served at least 14 days before the day on which the application is to be heard.

- (d) The maintenance court may call upon-
- (i) the person who has made the application to adduce such evidence, either in writing or orally, in support of his or her application as the maintenance court may consider necessary; or
 - (ii) the person who has lodged the complaint to adduce such evidence, either in writing or orally, in rebuttal of the application as the maintenance court may consider necessary.

- (5) After consideration of the evidence, the maintenance court may-
- (a) make an order confirming the order by default referred to in subsection (2) (a);
 - (b) vary such order by default, if it appears to the maintenance court that good cause exists for such variation; or
 - (c) set aside such order by default, if it appears to the maintenance court that good cause exists for such setting aside, and convert the proceedings into a maintenance enquiry.

(6) (a) Any person in whose favour an order by default has been made may consent in writing to the variation or setting aside of the order.

(b) The consent in writing shall be handed in at the hearing of the application for the variation or setting aside of the order by default.

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Source:

Commentary on the Childrens Act/Legislation/Acts/MAINTENANCE ACT 99 OF 1998/CHAPTER 4 MAINTENANCE AND OTHER ORDERS (ss 15-25)/19 Variation or setting aside of certain orders

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19 Variation or setting aside of certain orders

A maintenance court that has made an order under section 16 (1) (a) (i) or (b) (i) may, at the request of the maintenance officer-

- (a) vary such order by designating as the person, officer, organisation, institution or account to whom, to which or into which payment is to be made, any other person, officer, organisation, institution or account at a financial institution or by determining any other manner in which payment is to be made; or
- (b) if the maintenance court has made an order referred to in section 16 (2), set aside that order,

and the maintenance officer shall, in the prescribed manner, inform the person required to pay, the person in whose favour the maintenance order has been made or the person on whom a notice referred to in section 16 (3) (a) has been served, as the case may be, of any variation or setting aside of the order in question.

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Source:

Commentary on the Childrens Act/Legislation/Acts/MAINTENANCE ACT 99 OF 1998/CHAPTER 4 MAINTENANCE AND OTHER ORDERS (ss 15-25)/20 Orders as to costs of service and directions

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20 Orders as to costs of service and directions

The maintenance court holding an enquiry may, having regard to the conduct of the persons involved in the enquiry so far as it may be relevant, make such order as the maintenance court may consider just relating to the costs of-

- (a) the service of process; and
- (b) obtaining the information contemplated in section 7 (3).

[S. 20 substituted by s. 8 of Act 9 of 2015 (wef 9 September 2015).]

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Commentary on the Childrens Act/Legislation/Acts/MAINTENANCE ACT 99 OF 1998/CHAPTER 4 MAINTENANCE AND OTHER ORDERS (ss 15-25)/21 Orders relating to scientific tests regarding paternity

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21 Orders relating to scientific tests regarding paternity

- (1) If the maintenance officer is of the opinion-
 - (a) that the paternity of any child is in dispute;
 - (b) that the mother of such child as well as the person who is allegedly the father of such child are prepared to submit themselves as well as such child, if the mother has parental authority over the said child, to the taking of blood samples in order to carry out scientific tests regarding the paternity of that child; and
 - (c) that such mother or such person or both such mother and such person are unable to pay the costs involved in the carrying out of such scientific tests,

the maintenance officer may at any time during the enquiry in question, but before the maintenance court makes any order under section 16, request the maintenance court to hold an enquiry referred to in subsection (2).

- (2) If the maintenance officer so requests, the maintenance court may in a summary manner enquire into-
 - (a) the means of the mother of the child as well as the person who is allegedly the father of the child; and
 - (b) the other circumstances which should in the opinion of the maintenance court be taken into consideration.
- (3) At the conclusion of the enquiry referred to in subsection (2), the maintenance court may-
 - (a) make such provisional order as the maintenance court may think fit relating to the payment of the costs involved in the carrying out of the scientific tests in question, including a provisional order directing the State to pay the whole or any part of such costs; or
 - (b) make no order.
- (4) When the maintenance court subsequently makes any order under section 16, the maintenance court may-
 - (a) make an order confirming the provisional order referred to in subsection (3) (a); or
 - (b) set aside such provisional order or substitute therefor any order which the maintenance court may consider just relating to the payment of the costs involved in the carrying out of the scientific tests in question.

Administrative provisions (ss 22-23)**Document 23 of 50****Source:**

Commentary on the Childrens Act/Legislation/Acts/MAINTENANCE ACT 99 OF 1998/CHAPTER 4 MAINTENANCE AND OTHER ORDERS (ss 15-25)/22 Notice of substitution or discharge of maintenance orders

URL:

[http://jutastat-juta-co-za.ez.sun.ac.za/nxt/gateway.dll/ctca/685/686/1331/1348/1356?f=templates\\$fn=default.htm](http://jutastat-juta-co-za.ez.sun.ac.za/nxt/gateway.dll/ctca/685/686/1331/1348/1356?f=templates$fn=default.htm)

22 Notice of substitution or discharge of maintenance orders

Whenever a maintenance court-

- (a) makes an order under section 16 (1) (b) in substitution of a maintenance order; or
- (b) discharges a maintenance order under section 16 (1) (b),

the maintenance order shall cease to be of force and effect only insofar as the court expressly, or by necessary implication, replaced that order or part thereof, and the maintenance officer shall forthwith give notice of the decision to the registrar or clerk of the court in the Republic where the maintenance order was issued or where the sentence concerned was imposed, as the case may be, who shall deal with the relevant records or registers in the prescribed manner.

[S. 22 substituted by s. 9 of Act 9 of 2015 (wef 9 September 2015).]

Document 24 of 50**Source:**

Commentary on the Childrens Act/Legislation/Acts/MAINTENANCE ACT 99 OF 1998/CHAPTER 4 MAINTENANCE AND OTHER ORDERS (ss 15-25)/23 Transfer of maintenance orders

URL:

[http://jutastat-juta-co-za.ez.sun.ac.za/nxt/gateway.dll/ctca/685/686/1331/1348/1357?f=templates\\$fn=default.htm](http://jutastat-juta-co-za.ez.sun.ac.za/nxt/gateway.dll/ctca/685/686/1331/1348/1357?f=templates$fn=default.htm)

23 Transfer of maintenance orders

(1) Subject to the directions prescribed in connection with the transfer of maintenance orders, the maintenance officer shall, in writing, direct the clerk of the court where a maintenance order was made to transmit the maintenance order, together with the prescribed records, to the clerk of the maintenance court within the area of jurisdiction of which the person in whose favour the maintenance order was made, or the person in whose care that person is, resides, carries on business or is employed.

[Sub-s. (1) substituted by s. 10 of Act 9 of 2015 (wef 9 September 2015).]

(2) On receipt of the maintenance order, the clerk of the maintenance court shall register such maintenance order in the prescribed manner.

(3) Any maintenance order registered in terms of subsection (2) shall for the purposes of this Act be deemed to be a maintenance order made under section 16 by the maintenance court where the order has been so registered.

Effect of orders, and appeals (ss 24-25)

Document 25 of 50

Source:

Commentary on the Childrens Act/Legislation/Acts/MAINTENANCE ACT 99 OF 1998/CHAPTER 4 MAINTENANCE AND OTHER ORDERS (ss 15-25)/24 Effect of orders of maintenance court

URL:

[http://jutastat-juta-co-za.ez.sun.ac.za/nxt/gateway.dll/ctca/685/686/1331/1348/1358?f=templates\\$fn=default.htm](http://jutastat-juta-co-za.ez.sun.ac.za/nxt/gateway.dll/ctca/685/686/1331/1348/1358?f=templates$fn=default.htm)

24 Effect of orders of maintenance court

(1) Save as is otherwise provided in this Act, any order or direction made by a maintenance court under this Act shall have the effect of an order or direction of the said court made in a civil action.

(2) Any order made under section 16 (1) (a) (ii), 20 or 21 (4) shall have the effect of a civil judgment of the maintenance court concerned and shall be executed as provided in Chapter 5.

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Source:

Commentary on the Childrens Act/Legislation/Acts/MAINTENANCE ACT 99 OF 1998/CHAPTER 4 MAINTENANCE AND OTHER ORDERS (ss 15-25)/25 Appeals against orders

URL:

[http://jutastat-juta-co-za.ez.sun.ac.za/nxt/gateway.dll/ctca/685/686/1331/1348/1359?f=templates\\$fn=default.htm](http://jutastat-juta-co-za.ez.sun.ac.za/nxt/gateway.dll/ctca/685/686/1331/1348/1359?f=templates$fn=default.htm)

25 Appeals against orders

(1) Any person aggrieved by any order made by a maintenance court under this Act may, within such period and in such manner as may be prescribed, appeal against such order to the High Court having jurisdiction.

(2) On appeal, the High Court or the Supreme Court of Appeal, as the case may be, may make such order in the matter as it may think fit.

(3) Notwithstanding anything to the contrary contained in any law, an appeal under this section shall not suspend the payment of maintenance in accordance with the maintenance order in question, unless the appeal is noted against a finding that the appellant is legally liable to maintain the person in whose favour the order was made.

(4) For the purposes of subsection (1) 'order'-

- (a) does not include any order by consent referred to in section 17 (1), any provisional order referred to in section 21 (3) (a) or any order by default referred to in section 18 (2) (a);
- (b) includes any discharge of such order as well as any confirmation, setting aside, substitution or variation of such provisional order or such order by default;
- (c) includes any refusal to make such order as well as any refusal-
 - (i) to make such provisional order;
 - (ii) to make such order by default; or
 - (iii) to make any provisional maintenance order under section 16 by virtue of the provisions of any other law.

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Source:

Commentary on the Childrens Act/Legislation/Acts/MAINTENANCE ACT 99 OF 1998/CHAPTER 5 CIVIL EXECUTION (ss 26-30)/26 Enforcement of maintenance or other orders

URL:

[http://jutastat-juta-co-za.ez.sun.ac.za/nxt/gateway.dll/ctca/685/686/1331/1360/1361?f=templates\\$fn=default.htm](http://jutastat-juta-co-za.ez.sun.ac.za/nxt/gateway.dll/ctca/685/686/1331/1360/1361?f=templates$fn=default.htm)

CHAPTER 5 CIVIL EXECUTION (ss 26-30)

26 Enforcement of maintenance or other orders

(1) Whenever any person-

- (a) against whom any maintenance order has been made has failed to make any particular payment in accordance with that maintenance order; or

[Para. (a) substituted by s. 18 (a) of Act 55 of 2003 (wef 31 March 2005).]

- (b) against whom any order for the payment of a specified sum of money has been made under section 16 (1) (a) (ii), 20 or 21 (4) has failed to make such a payment,

such order shall be enforceable in respect of any amount which that person has so failed to pay, together with any interest thereon-

- (i) by execution against property as contemplated in section 27;
- (ii) by the attachment of emoluments as contemplated in section 28; or
- (iii) by the attachment of any debt as contemplated in section 30.

(2) (a) If any maintenance order or any order made under section 16 (1) (a) (ii), 20 or 21 (4) has remained unsatisfied for a period of ten days from the day on which the relevant amount became payable or any such order was made, as the case may be, the person in whose favour any such order was made may apply to the maintenance court where that person is resident-

- (i) for the authorisation of the issue of a warrant of execution referred to in section 27 (1);
- (ii) for an order for the attachment of emoluments referred to in section 28 (1); or
- (iii) for an order for the attachment of any debt referred to in section 30 (1).

[Para. (a) substituted by s. 18 of Act 42 of 2001 (wef 7 December 2001) and by s. 18 (b) of Act 55 of 2003 (wef 31 March 2005).]

- (b) The application shall be made in the prescribed manner and shall be accompanied by-

- (i) a copy of the maintenance or other order in question; and

- (ii) a statement under oath or affirmation setting forth the amount which the person against whom such order was made has failed to pay.

(2A) On the granting of an application contemplated in subsection (2) by a maintenance court, the maintenance officer or clerk of the court at the request of the maintenance officer, shall, notwithstanding anything to the contrary contained in any law, in the prescribed manner, furnish the particulars of the person against whom a maintenance order has been made and a certified copy of the order of the court contemplated in subsection (2) (a) (i), (ii) or (iii), to any business which has as its object the granting of credit or is involved in the credit rating of persons.

[Sub-s. (2A) inserted by s. 11 of Act 9 of 2015 (wef 5 January 2018).]

(3) A maintenance court shall not authorise the issue of a warrant of execution or make any order for the attachment of emoluments or any debt in order to satisfy a maintenance order-

- (a) if the payment of maintenance in accordance with that maintenance order has been suspended by an appeal against the order under section 25; or
(b) if that maintenance court has made an order referred to in section 16 (2).

(4) Notwithstanding anything to the contrary contained in any law, any pension, annuity, gratuity or compassionate allowance or other similar benefit shall be liable to be attached or subjected to execution under any warrant of execution or any order issued or made under this Chapter in order to satisfy a maintenance order.

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Source:

Commentary on the Childrens Act/Legislation/Acts/MAINTENANCE ACT 99 OF 1998/CHAPTER 5 CIVIL EXECUTION (ss 26-30)/27 Warrants of execution

URL:

[http://jutastat-juta-co-za.ez.sun.ac.za/nxt/gateway.dll/ctca/685/686/1331/1360/1362?f=templates\\$fn=default.htm](http://jutastat-juta-co-za.ez.sun.ac.za/nxt/gateway.dll/ctca/685/686/1331/1360/1362?f=templates$fn=default.htm)

27 Warrants of execution

(1) The maintenance court may, on the application of a person referred to in section 26 (2) (a), authorise the issue of a warrant of execution against the movable property of the person against whom the maintenance or other order in question was made and, if the movable property is insufficient to satisfy such order, then against the immovable property of the latter person to the amount necessary to cover the amount which the latter person has failed to pay, together with any interest thereon, as well as the costs of the execution.

- (2) (a) A warrant of execution authorised under this section shall be-
- (i) prepared in the prescribed manner by the person in whose favour the maintenance or other order in question was made;
(ii) issued in the prescribed manner by the clerk of the maintenance court; and
(iii) executed in the prescribed manner by the sheriff or maintenance investigator.

(b) The person in whose favour the maintenance or other order in question was made shall be assisted by the maintenance investigator or, in the absence of a maintenance investigator, by the maintenance officer in taking the prescribed steps to facilitate the execution of the warrant.

(3) A maintenance court may, on application in the prescribed manner by a person against whom a warrant of execution has been issued under this section, set aside the warrant of execution if the maintenance court is satisfied that he or she has complied with the maintenance or other order in question.

(4) A maintenance court may, on application in the prescribed manner by a person against whom a warrant of execution has been issued under this section-

- (a) in summary manner enquire into the circumstances mentioned in subsection (5); and
(b) if the maintenance court so decides, suspend the warrant of execution and make an order-
- (i) for the attachment of emoluments referred to in section 28 (1); or
(ii) for the attachment of any debt referred to in section 30 (1).

(5) At the enquiry the maintenance court shall take into consideration-

- (a) the existing and prospective means of the person against whom the warrant of execution has been issued;
(b) the financial needs and obligations of, or in respect of, the person maintained by the person against whom the warrant of execution has been issued;
(c) the conduct of the person against whom the warrant of execution has been issued in so far as it may be relevant concerning his or her failure to satisfy the maintenance or other order in question; and
(d) the other circumstances which should, in the opinion of the court, be taken into consideration.

(6) (a) Any person who wishes to make an application under subsection (3) or (4) shall give notice in the prescribed manner of his or her intention to make the application to the person in whose favour the maintenance or other order in question was made, which notice shall be served at least 14 days before the day on which the application is to be heard.

(b) The maintenance court may call upon-

- (i) the person who has made the application to adduce such evidence, either in writing or orally, in support of his or her application as the maintenance court may consider necessary; or
(ii) the person in whose favour the maintenance or other order in question was made to adduce such evidence, either in writing or orally, in rebuttal of the application as the maintenance court may consider necessary.

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Source:

Commentary on the Childrens Act/Legislation/Acts/MAINTENANCE ACT 99 OF 1998/CHAPTER 5 CIVIL EXECUTION (ss 26-30)/28 Attachment of emoluments

URL:

[http://jutastat-juta-co-za.ez.sun.ac.za/nxt/gateway.dll/ctca/685/686/1331/1360/1363?f=templates\\$fn=default.htm](http://jutastat-juta-co-za.ez.sun.ac.za/nxt/gateway.dll/ctca/685/686/1331/1360/1363?f=templates$fn=default.htm)

28 Attachment of emoluments

(1) A maintenance court may-

- (a) on the application of a person referred to in section 26 (2) (a);
(b) when such court suspends the warrant of execution under section 27 (4) (b);
(c) when such court suspends the order for the attachment of debt under section 30 (1); and
(d) where applicable, after hearing the evidence, either in writing or orally, of the employer of the person in question,

make an order for the attachment of any emoluments at present or in future owing or accruing to the person against whom the maintenance or other order in question was made to the amount necessary to cover the amount which the latter person has failed to pay, together with any interest thereon, as well as the costs of the attachment or execution, which order shall authorise any employer of the latter person to make on behalf of the latter person such payments as may be specified in the order from the emoluments of the latter person until such amount, interest and costs have been paid in full: Provided that nothing precludes the court from making an order in terms of this subsection if it is of the opinion that any further postponement of the enquiry in order to obtain the evidence of the person referred to in paragraph (d) will give rise to an unreasonable delay in the finalisation of the enquiry, to the detriment of the person or persons to be maintained.

[Sub-s. (1) substituted by s. 12 of Act 9 of 2015 (wef 9 September 2015).]

(2) (a) An order under this section may at any time, on good cause shown, be suspended, amended or rescinded by the maintenance court.

(b) Any person who wishes to make an application for the suspension, amendment or rescission of an order under this section shall give notice in the prescribed manner of his or her intention to make the application to the person in whose favour that order was made, which notice shall be served at least 14 days before the day on which the application is to be heard.

(c) The maintenance court may call upon-

(i) the person who has made the application to adduce such evidence, either in writing or orally, in support of his or her application as the maintenance court may consider necessary; or

(ii) the person in whose favour an order under this section was made to adduce such evidence, either in writing or orally, in rebuttal of the application as the maintenance court may consider necessary.

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Source:

Commentary on the Childrens Act/Legislation/Acts/MAINTENANCE ACT 99 OF 1998/CHAPTER 5 CIVIL EXECUTION (ss 26-30)/29 Notice relating to attachment of emoluments

URL:

[http://jutastat-juta-co-za.ez.sun.ac.za/nxt/gateway.dll/ctca/685/686/1331/1360/1364?f=templates\\$fn=default.htm](http://jutastat-juta-co-za.ez.sun.ac.za/nxt/gateway.dll/ctca/685/686/1331/1360/1364?f=templates$fn=default.htm)

29 Notice relating to attachment of emoluments

(1) In order to give effect to an order for the attachment of emoluments referred to in section 28 (1), the maintenance officer shall, within seven days after the day on which such order was made by the maintenance court or whenever it is afterwards required, in the prescribed manner cause a notice, together with a copy of such order, to be served on the employer concerned directing that employer to make the payments specified in the notice at the times and in the manner so specified.

(2) Whenever any person to whom the notice relates leaves the service of the employer, that employer shall, within seven days after the day on which he or she so leaves the service, give notice thereof in the prescribed manner to the maintenance officer of the court where the order in question was made.

(3) Any employer on whom a notice has been served for the purposes of satisfying a maintenance order shall give priority to the payments specified in that notice over any order of court requiring payments to be made from the emoluments due to the person against whom that maintenance order was made.

(4) If any employer on whom a notice has been served for the purposes of satisfying a maintenance order has failed to make any particular payment in accordance with that notice, that maintenance order may be enforced against that employer in respect of any amount which that employer has so failed to pay, and the provisions of this Chapter shall, with the necessary changes, apply in respect of that employer, subject to that employer's right or the right of the person against whom that maintenance order was made to dispute the validity of the order for the attachment of emoluments referred to in section 28 (1).

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Source:

Commentary on the Childrens Act/Legislation/Acts/MAINTENANCE ACT 99 OF 1998/CHAPTER 5 CIVIL EXECUTION (ss 26-30)/30 Attachment of debts

URL:

[http://jutastat-juta-co-za.ez.sun.ac.za/nxt/gateway.dll/ctca/685/686/1331/1360/1365?f=templates\\$fn=default.htm](http://jutastat-juta-co-za.ez.sun.ac.za/nxt/gateway.dll/ctca/685/686/1331/1360/1365?f=templates$fn=default.htm)

30 Attachment of debts

(1) A maintenance court may-

(a) on the application of a person referred to in section 26 (2) (a); or

(b) when such court suspends the warrant of execution under section 27 (4) (b),

make an order for the attachment of any debt at present or in future owing or accruing to the person against whom the maintenance or other order in question was made to the amount necessary to cover the amount which the latter person has failed to pay, together with any interest thereon, as well as the costs of the attachment or execution, which order shall direct the person who has incurred the obligation to pay the debt to make such payment as may be specified in that order within the time and in the manner so specified.

(2) (a) An order under this section may at any time, on good cause shown, be suspended, amended or rescinded by the maintenance court.

(b) Any person who wishes to make an application for the suspension, amendment or rescission of an order under this section shall give notice of his or her intention to make the application to the person in whose favour that order was made, which notice shall be served at least 14 days before the day on which the application is to be heard.

(c) The maintenance court may call upon-

(i) the person who has made the application to adduce such evidence, either in writing or orally, in support of his or her application as the maintenance court may consider necessary; or

(ii) the person in whose favour an order under this section was made to adduce such evidence, either in writing or orally, in rebuttal of the application as the maintenance court may consider necessary.

(3) An order made under subsection (1) may be enforced as if it were a civil judgment of the court.

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Source:

Commentary on the Childrens Act/Legislation/Acts/MAINTENANCE ACT 99 OF 1998/CHAPTER 6 OFFENCES AND PENALTIES (ss 31-39A)/31 Offences relating to maintenance orders

URL:

[http://jutastat-juta-co-za.ez.sun.ac.za/nxt/gateway.dll/ctca/685/686/1331/1366/1367?f=templates\\$fn=default.htm](http://jutastat-juta-co-za.ez.sun.ac.za/nxt/gateway.dll/ctca/685/686/1331/1366/1367?f=templates$fn=default.htm)

CHAPTER 6 OFFENCES AND PENALTIES (ss 31-39A)

31 Offences relating to maintenance orders

(1) Subject to the provisions of subsection (2), any person who fails to make any particular payment in accordance with a maintenance order shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding three years or to such imprisonment without the option of a fine.

[Sub-s. (1) substituted by s. 13 (a) of Act 9 of 2015 (wef 9 September 2015).]

(2) If the defence is raised in any prosecution for an offence under this section that any failure to pay maintenance in accordance with a maintenance order was due to lack of means on the part of the person charged, he or she shall not merely on the grounds of such defence be entitled to an acquittal if it is proved that the failure was due to his or her unwillingness to work or misconduct.

(3) If the name of a person stated in a maintenance order as the person against whom the maintenance order has been made corresponds substantially to the name of the particular person prosecuted for an offence under this section, any copy of the maintenance order certified as a true copy by a person who purports to be the registrar or clerk of the court or other officer having the custody of the records of the court in the Republic where the maintenance order was made, shall on its production be *prima facie* proof of the fact that the maintenance order was made against the person so prosecuted.

(4) If a person has been convicted of an offence under this section, the maintenance officer shall, notwithstanding anything to the contrary contained in any law, in the prescribed manner, furnish that person's personal particulars to any business which has its object the granting of credit or is involved in the credit rating of persons.

[Sub-s. (4) substituted by s. 13 (b) of Act 9 of 2015 (wef 5 January 2018).]

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Source:

Commentary on the Childrens Act/Legislation/Acts/MAINTENANCE ACT 99 OF 1998/CHAPTER 6 OFFENCES AND PENALTIES (ss 31-39A)/32 Offences relating to examination of persons by maintenance officer

URL:

[http://jutastat-juta-co-za.ez.sun.ac.za/nxt/gateway.dll/ctca/685/686/1331/1366/1368?f=templates\\$fn=default.htm](http://jutastat-juta-co-za.ez.sun.ac.za/nxt/gateway.dll/ctca/685/686/1331/1366/1368?f=templates$fn=default.htm)

32 Offences relating to examination of persons by maintenance officer

(1) The provisions of sections 164 (2), 188 and 189 of the Criminal Procedure Act, 1977 (Act 51 of 1977), shall, with the necessary changes, apply in respect of a person required to appear before a magistrate under section 8, and the magistrate may, subject to subsection (2), exercise in respect of that person all the powers conferred by section 170 (2) of the said Act and the said section 189 on the court referred to in those sections.

(2) A person who is required to appear before a magistrate and who refuses or fails to furnish the information in question shall not be sentenced to imprisonment as contemplated in section 189 of the Criminal Procedure Act, 1977, unless the magistrate is also of the opinion that the furnishing of such information is necessary for the administration of justice.

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Source:

Commentary on the Childrens Act/Legislation/Acts/MAINTENANCE ACT 99 OF 1998/CHAPTER 6 OFFENCES AND PENALTIES (ss 31-39A)/33 Offences relating to witnesses

URL:

[http://jutastat-juta-co-za.ez.sun.ac.za/nxt/gateway.dll/ctca/685/686/1331/1366/1369?f=templates\\$fn=default.htm](http://jutastat-juta-co-za.ez.sun.ac.za/nxt/gateway.dll/ctca/685/686/1331/1366/1369?f=templates$fn=default.htm)

33 Offences relating to witnesses

(1) The provisions of sections 188 and 189 of the Criminal Procedure Act, 1977 (Act 51 of 1977) shall, with the necessary changes, apply in respect of a person subpoenaed under section 9 or 10 (1) to appear before a maintenance court or who is present at a maintenance enquiry, and the maintenance court holding the enquiry may exercise in respect of that person all the powers conferred by section 170 (2) of the said Act and the said section 189 on the court referred to in those sections.

(2) Any person who, after having been sworn or having affirmed as a witness, wilfully gives false evidence before the maintenance court, knowing the evidence to be false or not knowing or believing it to be true, shall be guilty of an offence and liable on conviction to the penalties which may in law be imposed for perjury.

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Source:

Commentary on the Childrens Act/Legislation/Acts/MAINTENANCE ACT 99 OF 1998/CHAPTER 6 OFFENCES AND PENALTIES (ss 31-39A)/34 Offences relating to false information

URL:

[http://jutastat-juta-co-za.ez.sun.ac.za/nxt/gateway.dll/ctca/685/686/1331/1366/1370?f=templates\\$fn=default.htm](http://jutastat-juta-co-za.ez.sun.ac.za/nxt/gateway.dll/ctca/685/686/1331/1366/1370?f=templates$fn=default.htm)

34 Offences relating to false information

(1) Any person who makes a statement which is admitted as evidence under section 12 and who in such statement wilfully and falsely states anything which, if sworn, would have constituted perjury, shall be guilty of an offence and liable on conviction to the penalties which may in law be imposed for perjury.

(2) Any person who is requested by a maintenance investigator or a maintenance officer to furnish information in the performance of the maintenance investigator's or maintenance officer's functions under this Act, and who wilfully furnishes information which he or she knows to be false or does not know or believe to be true, shall be guilty of an offence and liable on conviction to the penalties which may in law be imposed for perjury.

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Source:

Commentary on the Childrens Act/Legislation/Acts/MAINTENANCE ACT 99 OF 1998/CHAPTER 6 OFFENCES AND PENALTIES (ss 31-39A)/35 Offences relating to maintenance enquiries

URL:

[http://jutastat-juta-co-za.ez.sun.ac.za/nxt/gateway.dll/ctca/685/686/1331/1366/1371?f=templates\\$fn=default.htm](http://jutastat-juta-co-za.ez.sun.ac.za/nxt/gateway.dll/ctca/685/686/1331/1366/1371?f=templates$fn=default.htm)

35 Offences relating to maintenance enquiries

Any person who wilfully interrupts the proceedings at a maintenance enquiry or who wilfully hinders or obstructs the maintenance court in the performance of the maintenance court's functions at the enquiry shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding one year or to both a fine and such imprisonment.

[S. 35 substituted by s. 14 of Act 9 of 2015 (wef 9 September 2015).]

Document 37 of 50**Source:**

Commentary on the Childrens Act/Legislation/Acts/MAINTENANCE ACT 99 OF 1998/CHAPTER 6 OFFENCES AND PENALTIES (ss 31-39A)/36 Offences relating to publication of information in respect of children

URL:

[http://jutastat-juta-co-za.ez.sun.ac.za/nxt/gateway.dll/ctca/685/686/1331/1366/1372?f=templates\\$fn=default.htm](http://jutastat-juta-co-za.ez.sun.ac.za/nxt/gateway.dll/ctca/685/686/1331/1366/1372?f=templates$fn=default.htm)

36 Offences relating to publication of information in respect of children

(1) Save as is otherwise provided in subsection (3), no person shall publish in any manner whatsoever the name or address of any person under the age of 18 years who is or was involved in any proceedings at a maintenance enquiry or the name of his or her school or any other information likely to reveal the identity of that person.

(2) Any person who contravenes a provision of subsection (1) shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment.

(3) If the Minister or the officer presiding at the maintenance enquiry is of the opinion that the publication of information in respect of a particular person under the age of 18 years would be just and in his or her interest, the Minister or such officer may in writing dispense with the prohibition contained in subsection (1) to the extent so specified.

Document 38 of 50**Source:**

Commentary on the Childrens Act/Legislation/Acts/MAINTENANCE ACT 99 OF 1998/CHAPTER 6 OFFENCES AND PENALTIES (ss 31-39A)/37 Offences relating to disclosure

URL:

[http://jutastat-juta-co-za.ez.sun.ac.za/nxt/gateway.dll/ctca/685/686/1331/1366/1373?f=templates\\$fn=default.htm](http://jutastat-juta-co-za.ez.sun.ac.za/nxt/gateway.dll/ctca/685/686/1331/1366/1373?f=templates$fn=default.htm)

37 Offences relating to disclosure

Any person who, except for the purposes of performing his or her functions under this Act or when required to do so by any court or under any law, discloses to any other person any information acquired by that person in the performance of that person's functions under this Act shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding twelve months or to both such fine and such imprisonment.

Document 39 of 50**Source:**

Commentary on the Childrens Act/Legislation/Acts/MAINTENANCE ACT 99 OF 1998/CHAPTER 6 OFFENCES AND PENALTIES (ss 31-39A)/38 Offences relating to certain notices

URL:

[http://jutastat-juta-co-za.ez.sun.ac.za/nxt/gateway.dll/ctca/685/686/1331/1366/1374?f=templates\\$fn=default.htm](http://jutastat-juta-co-za.ez.sun.ac.za/nxt/gateway.dll/ctca/685/686/1331/1366/1374?f=templates$fn=default.htm)

38 Offences relating to certain notices

Any person who-

- (a) without sufficient cause, refuses or fails to make any payment in accordance with a notice under section 16 (3) (a), 29 (1) or 30 (1); or
- (b) refuses or fails to give notice to a maintenance officer as required by section 16 (3) (b) or 29 (2),

shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding two years.

[S. 38 substituted by s. 15 of Act 9 of 2015 (wef 9 September 2015).]

Document 40 of 50**Source:**

Commentary on the Childrens Act/Legislation/Acts/MAINTENANCE ACT 99 OF 1998/CHAPTER 6 OFFENCES AND PENALTIES (ss 31-39A)/39 Offences relating to notice of change of address

URL:

[http://jutastat-juta-co-za.ez.sun.ac.za/nxt/gateway.dll/ctca/685/686/1331/1366/1375?f=templates\\$fn=default.htm](http://jutastat-juta-co-za.ez.sun.ac.za/nxt/gateway.dll/ctca/685/686/1331/1366/1375?f=templates$fn=default.htm)

39 Offences relating to notice of change of address

Any person who refuses or fails to give notice of any change of his or her place of residence or employment as required by section 16 (4) shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding one year.

[S. 39 substituted by s. 16 of Act 9 of 2015 (wef 9 September 2015).]

Document 41 of 50**Source:**

Commentary on the Childrens Act/Legislation/Acts/MAINTENANCE ACT 99 OF 1998/CHAPTER 6 OFFENCES AND PENALTIES (ss 31-39A)/39A Offences relating to maintenance investigators

URL:

39A Offences relating to maintenance investigators

(1) Any person who wilfully hinders or obstructs a maintenance investigator in the exercise of his or her powers or the performance of his or her duties shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding one year.

(2) Any person, other than a clerk of the court who is requested to assist a maintenance investigator in the performance of his or her functions, who has not been appointed as a maintenance investigator in terms of this Act and who-

- (a) performs any function entrusted to a maintenance investigator under any law; or
- (b) pretends to be or makes use of any name, title or addition or description creating the impression that he or she is a maintenance investigator or is recognised by law as such,

shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding two years.

[S. 39A added by s. 17 of Act 9 of 2015 (wef 9 September 2015).]

Document 42 of 50

Source:

Commentary on the Childrens Act/Legislation/Acts/MAINTENANCE ACT 99 OF 1998/CHAPTER 7 ORDERS RELATING TO PROSECUTIONS (ss 40-41)/40 Recovery of arrear maintenance

URL:

[http://jutastat-juta-co-za.ez.sun.ac.za/nxt/gateway.dll/ctca/685/686/1331/1377/1378?f=templates\\$fn=default.htm](http://jutastat-juta-co-za.ez.sun.ac.za/nxt/gateway.dll/ctca/685/686/1331/1377/1378?f=templates$fn=default.htm)

CHAPTER 7 ORDERS RELATING TO PROSECUTIONS (ss 40-41)

40 Recovery of arrear maintenance

(1) A court with civil jurisdiction convicting any person of an offence under section 31 (1) may, on the application of the public prosecutor and in addition to or in lieu of any penalty which the court may impose in respect of that offence, grant an order for the recovery from the convicted person of any amount he or she has failed to pay in accordance with the maintenance order, together with any interest thereon, whereupon the order so granted shall have the effect of a civil judgment of the court and shall, subject to subsection (2), be executed in the prescribed manner.

(2) A court granting an order against a convicted person may-

- (a) in a summary manner enquire into the circumstances mentioned in subsection (3); and
- (b) if the court so decides, authorise the issue of a warrant of execution against the movable or immovable property of the convicted person in order to satisfy such order.

(3) At the enquiry, the court shall take into consideration-

- (a) the existing and prospective means of the convicted person;
- (b) the financial needs and obligations of, or in respect of, the person maintained by the convicted person;
- (c) the conduct of the convicted person in so far as it may be relevant concerning his or her failure to pay in accordance with the maintenance order; and
- (d) the other circumstances which should, in the opinion of the court, be taken into consideration.

(4) Notwithstanding anything to the contrary contained in any law, any pension, annuity, gratuity or compassionate allowance or other similar benefit shall be liable to be attached or subjected to execution under an order granted under this section.

Document 43 of 50

Source:

Commentary on the Childrens Act/Legislation/Acts/MAINTENANCE ACT 99 OF 1998/CHAPTER 7 ORDERS RELATING TO PROSECUTIONS (ss 40-41)/41 Conversion of criminal proceedings into maintenance enquiry

URL:

[http://jutastat-juta-co-za.ez.sun.ac.za/nxt/gateway.dll/ctca/685/686/1331/1377/1379?f=templates\\$fn=default.htm](http://jutastat-juta-co-za.ez.sun.ac.za/nxt/gateway.dll/ctca/685/686/1331/1377/1379?f=templates$fn=default.htm)

41 Conversion of criminal proceedings into maintenance enquiry

If during the course of any proceedings in a magistrate's court in respect of-

- (a) an offence referred to in section 31 (1); or
- (b) the enforcement of any sentence suspended on condition that the convicted person make periodical payments of sums of money towards the maintenance of any other person,

it appears on good cause shown that it is desirable that a maintenance enquiry be held, the court may, of its own accord or at the request of the public prosecutor, convert the proceedings into such enquiry.

[S. 41 substituted by s. 18 of Act 9 of 2015 (wef 9 September 2015).]

Document 44 of 50

Source:

Commentary on the Childrens Act/Legislation/Acts/MAINTENANCE ACT 99 OF 1998/CHAPTER 8 GENERAL AND SUPPLEMENTARY PROVISIONS (ss 42-47)/42 Record of proceedings at maintenance enquiries

URL:

[http://jutastat-juta-co-za.ez.sun.ac.za/nxt/gateway.dll/ctca/685/686/1331/1380/1381?f=templates\\$fn=default.htm](http://jutastat-juta-co-za.ez.sun.ac.za/nxt/gateway.dll/ctca/685/686/1331/1380/1381?f=templates$fn=default.htm)

CHAPTER 8 GENERAL AND SUPPLEMENTARY PROVISIONS (ss 42-47)

42 Record of proceedings at maintenance enquiries

(1) The prescribed record of the proceedings at a maintenance enquiry shall be kept and shall be accessible to such persons on such conditions as to payment of fees or otherwise as may be prescribed.

(2) All fees shall be prescribed in consultation with the Minister of Finance.

Document 45 of 50**Source:**

Commentary on the Childrens Act/Legislation/Acts/MAINTENANCE ACT 99 OF 1998/CHAPTER 8 GENERAL AND SUPPLEMENTARY PROVISIONS (ss 42-47)/43
Photographs of persons subject to maintenance orders

URL:

[http://jutastat-juta-co-za.ez.sun.ac.za/nxt/gateway.dll/ctca/685/686/1331/1380/1382?f=templates\\$fn=default.htm](http://jutastat-juta-co-za.ez.sun.ac.za/nxt/gateway.dll/ctca/685/686/1331/1380/1382?f=templates$fn=default.htm)

43 Photographs of persons subject to maintenance orders

(1) A maintenance court may, at the request of the maintenance officer, direct that two photographs be taken of the person against whom the maintenance court has made a maintenance order.

(2) The photographs shall be dealt with by the maintenance officer in the prescribed manner.

Document 46 of 50**Source:**

Commentary on the Childrens Act/Legislation/Acts/MAINTENANCE ACT 99 OF 1998/CHAPTER 8 GENERAL AND SUPPLEMENTARY PROVISIONS (ss 42-47)/44
Regulations

URL:

[http://jutastat-juta-co-za.ez.sun.ac.za/nxt/gateway.dll/ctca/685/686/1331/1380/1383?f=templates\\$fn=default.htm](http://jutastat-juta-co-za.ez.sun.ac.za/nxt/gateway.dll/ctca/685/686/1331/1380/1383?f=templates$fn=default.htm)

44 Regulations

(1) The Minister may make regulations-

- (a) as to the powers, duties and functions of a maintenance officer, the clerk of the maintenance court or a maintenance investigator;
- (b) prescribing the procedure to be followed at or in connection with a maintenance enquiry;
- (c) prescribing guidelines for, or prescribing the factors to be taken into account by, a maintenance court when making a maintenance order;
- (d) as to the execution of maintenance or other orders of maintenance courts;
- (e) as to any matter required or permitted to be prescribed by regulation under this Act;
- (f) in general, as to any matter which the Minister may consider necessary or expedient to prescribe in order that the objects of this Act may be achieved.

(2) The Minister shall cause a copy of regulations made under this section to be tabled in Parliament as soon as possible after the publication thereof.

(3) Regulations made under this section may prescribe penalties for any contravention thereof or failure to comply therewith not exceeding imprisonment for a period of three years.

(4) Any regulation made under this section which may result in financial expenditure for the State shall be made in consultation with the Minister of Finance.

Document 47 of 50**Source:**

Commentary on the Childrens Act/Legislation/Acts/MAINTENANCE ACT 99 OF 1998/CHAPTER 8 GENERAL AND SUPPLEMENTARY PROVISIONS (ss 42-47)/45
Repeal or amendment of laws, and savings

URL:

[http://jutastat-juta-co-za.ez.sun.ac.za/nxt/gateway.dll/ctca/685/686/1331/1380/1384?f=templates\\$fn=default.htm](http://jutastat-juta-co-za.ez.sun.ac.za/nxt/gateway.dll/ctca/685/686/1331/1380/1384?f=templates$fn=default.htm)

45 Repeal or amendment of laws, and savings

(1) The laws mentioned in the Schedule are hereby repealed or amended to the extent indicated in the third column thereof.

(2) Notwithstanding the repeal of any law by subsection (1), anything done under any such law and which could be done under a provision of this Act, shall be deemed to have been done under such provision.

(3) Notwithstanding the repeal of the Maintenance Act, 1963 (Act 23 of 1963), by subsection (1)-

- (a) section 5 (6) of the said Act shall continue to apply in respect of maintenance enquiries as if such repeal had not been effected; and
 - (b) the rules which were made under the said Act and were in force immediately before the commencement of this Act and which are not inconsistent with this Act shall continue in force until they are repealed, withdrawn or amended by regulations made under section 44.
-

Document 48 of 50**Source:**

Commentary on the Childrens Act/Legislation/Acts/MAINTENANCE ACT 99 OF 1998/CHAPTER 8 GENERAL AND SUPPLEMENTARY PROVISIONS (ss 42-47)/46
Transitional arrangements in respect of execution of maintenance or other orders

URL:

[http://jutastat-juta-co-za.ez.sun.ac.za/nxt/gateway.dll/ctca/685/686/1331/1380/1385?f=templates\\$fn=default.htm](http://jutastat-juta-co-za.ez.sun.ac.za/nxt/gateway.dll/ctca/685/686/1331/1380/1385?f=templates$fn=default.htm)

46 Transitional arrangements in respect of execution of maintenance or other orders

Until such time as regulations relating to the execution of maintenance or other orders of maintenance courts made under section 44 (1) (d) or (e) come into operation, the provisions-

- (a) of the Magistrates' Courts Act, 1944 (Act 32 of 1944), relating to the execution of any judgment or order of a magistrate's court; or
- (b) of the rules made under section 6 of the Rules Board for Courts of Law Act, 1985 (Act 107 of 1985), in respect thereof,

shall, in so far as those provisions are not inconsistent with this Act or are not otherwise clearly inappropriate, apply in respect of the execution of maintenance or other orders of maintenance courts as if those provisions had been made under the said section 44 (1) (d) or (e), and any execution of any maintenance or other order of a maintenance court commenced under those provisions immediately before the coming into

Document 49 of 50

Source:

Commentary on the Childrens Act/Legislation/Acts/MAINTENANCE ACT 99 OF 1998/CHAPTER 8 GENERAL AND SUPPLEMENTARY PROVISIONS (ss 42-47)/47
Short title and commencement

URL:

[http://jutastat-juta-co-za.ez.sun.ac.za/nxt/gateway.dll/ctca/685/686/1331/1380/1386?f=templates\\$fn=default.htm](http://jutastat-juta-co-za.ez.sun.ac.za/nxt/gateway.dll/ctca/685/686/1331/1380/1386?f=templates$fn=default.htm)

47 Short title and commencement

- (1) This Act shall be called the Maintenance Act, 1998, and shall come into operation on a date fixed by the President by proclamation in the *Gazette*.
- (2) Different dates may be so fixed in respect of different provisions of this Act.

Document 50 of 50

Source:

Commentary on the Childrens Act/Legislation/Acts/MAINTENANCE ACT 99 OF 1998/CHAPTER 8 GENERAL AND SUPPLEMENTARY PROVISIONS (ss 42-47)/Schedule LAWS REPEALED OR AMENDED

URL:

[http://jutastat-juta-co-za.ez.sun.ac.za/nxt/gateway.dll/ctca/685/686/1331/1380/1387?f=templates\\$fn=default.htm](http://jutastat-juta-co-za.ez.sun.ac.za/nxt/gateway.dll/ctca/685/686/1331/1380/1387?f=templates$fn=default.htm)

**Schedule
LAWS REPEALED OR AMENDED**

(Section 45)

| No. and year of law | Short title | Extent of repeal or amendment |
|---------------------|--|---|
| Act 24 of 1956 | Pension Funds Act, 1956 | Amends section 37A (1) by substituting the words preceding the proviso. |
| Act 23 of 1963 | Maintenance Act, 1963 | Repeals the whole. |
| Act 80 of 1963 | Reciprocal Enforcement of Maintenance Orders Act, 1963 | <p>1 Amends section 1, as follows: paragraph (a) substitutes the definition of 'maintenance court'; and paragraph (b) substitutes the definition of 'maintenance order'.</p> <p>2 Amends section 4 by substituting subsection (5).</p> <p>3 Substitutes section 6.</p> <p>4 Amends section 8, as follows: paragraph (a) substitutes subsection (1); and paragraph (b) substitutes subsection (4).</p> |
| Act 19 of 1967 | Maintenance Amendment Act, 1967 | Repeals the whole. |
| Act 39 of 1970 | Maintenance Amendment Act, 1970 | Repeals the whole. |
| Act 79 of 1974 | Members of the Coloured Persons Representative Council Pensions Act, 1974 | Amends section 14 by substituting subsection (1). |
| Act 86 of 1974 | Members of the South African Indian Council Pensions Act, 1974 | Amends section 14 by substituting subsection (1). |
| Act 51 of 1977 | Criminal Procedure Act, 1977 | Amends section 195 (1) by substituting paragraph (c). |
| Act 29 of 1979 | General Pensions Act, 1979 | Amends section 2 by substituting subsection (1). |
| Act 34 of 1986 | Special Courts Blacks Abolition Act, 1986 | Repeals so much of the Schedule as relates to the Maintenance Act, 1963. |
| Act 6 of 1989 | Reciprocal Enforcement of Maintenance Orders (Countries in Africa) Act, 1989 | <p>1 Amends section 1, as follows: paragraph (a) substitutes the definition of 'maintenance court'; and paragraph (b) substitutes the definition of 'maintenance order'.</p> <p>2 Amends section 5 by substituting subsection (1).</p> <p>3 Amends section 6 by substituting subsection (6).</p> <p>4 Substitutes section 7.</p> |

| | | |
|-----------------|--|---|
| | | 5 Substitutes section 8. |
| | | 6 Amends section 9 by substituting subsection (3). |
| | | 7 Amends section 11 by substituting subsection (1). |
| Act 2 of 1991 | Maintenance Amendment Act, 1991 | Repeals the whole. |
| Act 204 of 1993 | General Law Sixth Amendment Act, 1993 | Repeals sections 3 and 4. |
| Act 18 of 1996 | Justice Laws Rationalisation Act, 1996 | 1 Amends section 10, as follows: paragraph (a) substitutes subsection (1); and paragraph (b) substitutes subsection (2). |
| Proc 21 of 1996 | Government Employees Pension Law, 1996 | Amends section 21 by substituting subsection (1). |
| Act 104 of 1996 | Judicial Matters Amendment Act, 1996 | Repeals section 9. |



REPUBLIC OF SOUTH AFRICA

FORM 2

[Regulation 4]

APPLICATION FOR PROTECTION ORDER**SECTION 4(1) OF THE DOMESTIC VIOLENCE ACT, 1998 (ACT NO. 116 OF 1998)****PART A : APPLICATION (To be completed by applicant)****1. PARTICULARS OF COMPLAINANT (Victim of domestic violence)**

| | |
|--|--|
| Surname : | |
| Full names : | |
| Id.No / Date of birth | |
| Home or temporary address : | |
| Home/contact telephone number : | |
| Work address : | |
| Work telephone number : | |
| Nature of domestic relationship with person who committed the act of domestic violence (Respondent): | |
| Occupation : | |

2. PARTICULARS OF PERSON MAKING THE APPLICATION ON BEHALF OF THE COMPLAINANT (if applicable)

| | |
|---------------------------------|--|
| Surname : | |
| Full names : | |
| Id.No / Date of birth | |
| Home address : | |
| Home/contact telephone number : | |

| | |
|--|---|
| Work address : | |
| Work telephone number : | |
| Occupation : | |
| Capacity in which application is made : | |
| Nature of relationship with the complainant : | |
| State reason(s) why application is made on behalf of the complainant: | |
| Indicate whether written consent of complainant has been obtained : <i>(Delete whichever is not applicable)</i> | <p>Written consent *has been obtained and is attached/is not necessary since the complainant is-</p> <ul style="list-style-type: none"> a minor (under the age of 21 years); mentally retarded; unconscious; unable to provide consent because <p>.....</p> <p>.....</p> <p>.....</p> <p>.....</p> <p>.....</p> |

3. PARTICULARS OF PERSON WHO COMMITTED ACT OF DOMESTIC VIOLENCE (hereafter called the Respondent) - in so far as such particulars are available

| | |
|-----------------------|--|
| Surname : | |
| Full names : | |
| Id.No / Date of birth | |
| Home address : | |

| | |
|---------------------------------|--|
| Home/contact telephone number : | |
| Work address : | |
| Work telephone number : | |
| Occupation : | |

4. PERSONS AFFECTED BY DOMESTIC VIOLENCE

4.1 Particulars of children and adults sharing the residence :

| Name : | Age : | Relationship to complainant |
|---------------|--------------|------------------------------------|
| | | |
| | | |
| | | |
| | | |
| | | |

4.2 How are these persons affected ?

| |
|--|
| |
|--|

4.3 Do any of these persons suffer disabilities? If so give details :

| |
|--|
| |
|--|

5. INFORMATION REGARDING ACTS OF DOMESTIC VIOLENCE

Give full details regarding all incidents of domestic violence and also indicate whether firearms or other dangerous weapons were used, what injuries have been sustained and whether medical treatment was obtained :

6. INFORMATION REGARDING URGENCY OF APPLICATION

Submit the reasons why the Court has to consider the application as a matter of urgency and why undue hardship may be suffered if the application is not dealt with immediately

7. TERMS OF PROTECTION ORDER

It is requested that the Respondent must be ordered (Mark appropriate box and

complete where necessary) :

| | | |
|-----|--|--|
| (a) | Not to commit any act of domestic violence | |
| (b) | Not to get the help of another person to commit any act of domestic violence | |
| (c) | Not to enter the shared residence, situated at | |
| (d) | Not to enter a specified part of the shared residence, namely | |
| (e) | Not to enter the Complainant's residence, situated at | |
| (f) | Not to enter the Complainant's place of employment, namely | |
| (g) | Not to prevent the Complainant or any child who ordinarily live(s) or lived in the shared residence from entering or remaining in the shared residence or any part thereof, to wit | |
| (h) | Not to commit any other act, namely | |

8.ADDITIONAL CONDITIONS

It is also requested that the Court must order that (mark appropriate box and complete where necessary) :

| | | |
|-----|---|--|
| (a) | A peace officer, namely, is to accompany the Complainant to assist with arrangements regarding the collection of the Complainant's personal property set out in paragraph 9, below. | |
| (b) | A member of the South African Police Service is to seize the following arm(s) or dangerous weapon(s) in the possession of the Respondent: | |
| (c) | The Respondent is to pay the following rent or mortgage payments: | |

| | | |
|-----|---|--|
| (d) | The Respondent is to pay the following emergency monetary relief: | |
| (e) | The Respondent is refused any contact with the following child or children: | |
| (f) | The Respondent is granted the following contact with the above-mentioned child or children: | |
| (g) | The physical address of the Complainant's residence not be disclosed to the Respondent | |
| (i) | Other conditions requested : | |

9.PERSONAL PROPERTY

| <i>Property description:</i> | <i>Grounds on which property is considered to be personal property :</i> | <i>Address where property is kept:</i> |
|-------------------------------------|---|---|
| | | |
| | | |
| | | |
| | | |
| | | |

10. I am likely to report a breach of the Protection Order at the _____ Police Station.

DEPONENT
(Person who applies for order)

DATE

PART B : CERTIFICATION (for official use)

11. I hereby certify that before administering the *oath / taking the affirmation I asked the Deponent the following questions and noted *her/his answers in *her/his presence as indicated below:-
- (a) Do you know and understand the contents of the above declaration?
Answer _____.
 - (b) Do you have any objection to taking the prescribed oath?
Answer _____.
 - (c) Do you consider the prescribed oath to be binding on your conscience?
Answer _____.

I hereby certify that the Deponent has acknowledged that *she/he knows and understands the contents of this declaration which was *sworn to / affirmed before me, and the Deponent's *signature / thumb print / mark was placed thereon in my presence.

Dated at _____ this ____ day of _____ year ____.

Justice of the Peace / Commissioner of Oaths
 Full Names _____
 Designation _____
 Area for which appointed _____
 Business Address _____

SS v VV-S
2018 (6) BCLR 671 (CC)

Division: Constitutional Court of South Africa
Date: 01/03/2018
Case No: **CCT 247/16**
Before: RMM Zondo Acting Chief Justice, E Cameron, J Froneman, CN Jafta, M Madlanga, NZ Mhlantla, F Kathree-Setiloane, J Kollapen and DH Zondi Acting Justices

Children - rights of - right of children to parental care in terms of [section 28](#) of the Constitution - post-divorce maintenance for children - courts have a special obligation to ensure that maintenance orders are complied with - execution against former husband's immovable property for satisfaction of debt arising from maintenance arrears - application for execution opposed on basis of the non-joinder of the bondholder and a contention that a proper case not made out in terms of rule 46(1) as creditor former wife allegedly failing to set out all material and relevant considerations that a court was obliged to consider in deciding whether to declare a residential property specially executable - by time of hearing before Constitutional Court former husband remaining in arrears with maintenance obligations - interests of justice would not be served by allowing him to ventilate argument in respect of the merits of the appeal - Constitutional Court accordingly refusing leave to appeal.

Courts - powers of - power to enforce compliance with court orders - all court orders must be complied with diligently, both in form and spirit, to honour the judicial authority of courts - courts have obligation to ensure that court orders are complied with - a further and heightened obligation in the case of court orders that touch on the protection of the rights of children - execution against former husband's immovable property for satisfaction of debt arising from maintenance arrears - application for execution opposed on basis of the non-joinder of the bondholder and a contention that a proper case not made out in terms of rule 46(1) as creditor former wife allegedly failing to set out all material and relevant considerations that a court was obliged to consider in deciding whether to declare a residential property specially executable - by time of hearing before Constitutional Court former husband remaining in arrears with maintenance obligations - interests of justice would not be served by allowing him to ventilate argument in respect of the merits of the appeal - Constitutional Court accordingly refusing leave to appeal.

Husband and wife - divorce - maintenance - children - enforcement of obligation - execution against former husband's immovable property - application for execution opposed on basis of the non-joinder of the bondholder and a contention that a proper case not made out in terms of rule 46(1) as creditor former wife allegedly failing to set out all material and relevant considerations that a court was obliged to consider in deciding whether to declare a residential property specially executable - by time of hearing before Constitutional Court former husband remaining in arrears with maintenance obligations - interests

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of justice would not be served by allowing him to ventilate argument in respect of the merits of the appeal - Constitutional Court refusing leave to appeal.

Maintenance - for children - enforcement of obligation - execution against former husband's immovable property - application for execution opposed on basis of the non-joinder of the bondholder and a contention that a proper case not made out in terms of rule 46(1) as creditor former wife allegedly failing to set out all material and relevant considerations that a court was obliged to consider in deciding whether to declare a residential property specially executable - by time of hearing before Constitutional Court former husband remaining in arrears with maintenance obligations - interests of justice would not be served by allowing him to ventilate argument in respect of the merits of the appeal - Constitutional Court refusing leave to appeal.

Editor's Summary

Applicant ("Mr S") approached the Constitutional Court seeking leave to appeal against the judgment and order of a High Court authorising the issuance of a warrant of execution to attach and sell Mr S's immovable property to satisfy a debt that he owed Ms V-S in respect of maintenance for their only child. The exact amount owing was in dispute.

The parties were divorced on 29 October 2010. The divorce order incorporated the terms of a settlement agreement reached by them. That agreement governed the amount Mr S would pay, on a monthly basis, for the basic maintenance of the child born of their marriage. It also contained separate provisions relating to Mr S's contributions toward school fees, medical expenses, the cost of textbooks and other special costs.

In May 2010 Ms V-S relocated to the United States of America, where she remained for approximately four years. During this time, Ms V-S claimed to have paid various amounts in respect of school fees, medical bills, and extra-mural activities for the child. Mr S paid maintenance for the child from October 2010 until close to the end of 2012, at which point he ceased making payments. Upon her return to the RSA, Ms V-S applied successfully to the High Court for the issuance of a writ of execution in the amount of R306 550,18. She alleged that Mr S owed that amount for basic maintenance and the contribution to the child's medical bills, school fees, and fees for extra-mural activities.

The Sheriff found that Mr S had insufficient movable assets to satisfy the debt. Ms V-S then applied to the High Court in terms of rule 46(1)(a)(ii) of the Uniform Rules of Court to have Mr S's residential property declared specially executable. Mr S opposed the application. He did so on the basis that the bondholder had not been joined and a contention that Ms V-S had not made out a proper case in terms of rule 46(1) as she had allegedly failed to set out all material and relevant considerations that a court is obliged to consider in deciding whether to declare a

residential property specially executable. In August 2015 the High Court ordered execution against Mr S's immovable property. Mr S applied to have the warrant of execution set aside. This application was dismissed. Mr S made an application for leave to appeal to the Supreme Court of Appeal. That application was also dismissed.

The matter was first set down to be heard before the Constitutional Court on 29 August 2017. At the hearing it became clear that Mr S remained in substantial arrears with his basic maintenance obligations. He had not paid maintenance in the period between early 2014 and August 2017. The Court postponed the proceedings to 8 November 2017 to provide Mr S with time to remedy his default with regard to basic maintenance payments. He was ordered to pay: (i) Ms V-S's costs occasioned by the

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postponement, (ii) an amount of at least R150 000 on or before 30 September 2017 in respect of the arrear maintenance, and (iii) monthly amounts in respect of his maintenance obligations and other expenses in accordance with the settlement agreement. When the matter resumed on 8 November 2017, it emerged during the hearing that Mr S had not fully complied with the Court order made on 29 August 2017. In particular, he had failed to make monthly payments in respect of the basic maintenance obligations and other expenses of the child.

The Court acknowledged that the matter raised a constitutional issue, but held that it would not be in the interests of justice to grant Mr S leave to appeal. The Court ordered Mr S to pay Ms V-S's costs. Given his conduct compromising the child's best interests and the Court's integrity, his continued application could be viewed as being "so unreasonable or out of line that it constitute[d] an abuse of process". The Court held that a punitive order of costs would be justified because Mr S's conduct was the kind of "extraordinary" conduct worthy of the Court's rebuke. Mr S was ordered to pay Ms V-S's costs relating to the proceedings of 8 November 2017 on an attorney and client scale.

Judgment

Kollapen AJ:

Introduction

[1] This is an application for leave to appeal against the judgment and order of the High Court of South Africa, Gauteng Division, Pretoria, ("High Court") *per* Magardie AJ. The High Court granted an order authorising the issue of a warrant of execution against the applicant's immovable property. The warrant issued was in respect of maintenance obligations due by the applicant to the respondent in respect of the minor child born of the erstwhile marriage between the parties.

Parties

[2] The applicant is the former husband of the respondent.

Background facts

[3] The applicant and respondent were married in 2007 and a child, K, was born during that marriage in September 2008. The marriage was of limited duration as divorce proceedings were initiated in March 2008. On 29 October 2010, an order of divorce was granted by the High Court which incorporated the terms of a settlement agreement between the applicant and respondent ("Order"). That agreement deals substantially with the interests of the minor child including matters relating to guardianship, care and contact, and maintenance. The terms of the Order in so far as maintenance is concerned, provide that:

"The [applicant] shall pay the [respondent] the sum of R2500 (two thousand five hundred rand) per month for the maintenance of [K] (the basic maintenance payment):

(a) The above amount will be paid monthly in advance of the last day of each month. The basic maintenance payment will be deposited into the [respondent's] bank account;

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(b) The basic maintenance payments shall increase by the consumer price index on the anniversary of the signing of this agreement and on all subsequent anniversaries thereafter;

(c) In addition to the basic maintenance payments, the [applicant] shall be liable for half (50%) of [K's] crèche/school fees and the [respondent] shall be liable for the remaining half (50%);

(d) Each party will be liable for half (50%) of all costs of [K's] text books, school uniforms, reasonably required extra lessons, extra mural activities and uniforms, equipment, school outings and tours and other necessarily related educational expenses and the like;

(e) The [applicant] will be liable for 50% of [K's] medical, dental, pharmaceutical, ophthalmic, specialist and other related medical expenses reasonably incurred that are not covered by the [applicant's] medical aid scheme."

[4] The agreement clearly distinguishes between what it describes as the basic maintenance amount and then what may be described as the additional amounts, the latter relating to the educational and medical expenses in respect of the minor child. The dispute which arose relates to the applicant's alleged failure to honour his maintenance obligations under the Order's terms. The precise extent of his default was unclear from the record but some clarity, though not sufficient, emerged during the course of this Court's first hearing of the matter.

- [5] The respondent and K moved temporarily to the United States of America ("United States") and resided there from May 2010 to January 2014. On 18 February 2014, and upon her return from the United States, the respondent caused a warrant of execution to be issued out of the High Court against the applicant in the sum of R306 550,18. The warrant issued was in respect of the movable goods of the applicant.
- [6] The issue of the warrant was supported by an affidavit filed with the Registrar by the respondent in which she purported to particularise the applicant's default in the sum of R306 550,18 under the different heads of maintenance. The respondent detailed that maintenance owing was the "increase [in] the maintenance by [6%] in October 2011" and subsequently "the maintenance again increased by 5.6% in October 2012 [and] . . . [t]he [applicant] has failed, since November 2005 to February 2014, to pay any maintenance whatsoever". She annexed various lists to the affidavit which provided a monthly breakdown of what she alleged was in arrears and detailed the non-payment of maintenance, school fees, medical expenses, and extra mural activities. The respondent provided no corroborative evidence for the school fees, medical expenses, and extramural activities in the form of receipts, vouchers, invoices, tax returns or bank statements.
- [7] The Sheriff of the High Court, Pretoria East ("Sheriff"), attempted to execute the warrant issued by the Registrar and on 22 February 2014 issued a *nulla bona* (no goods) return, thereby confirming that the applicant had no movable assets to satisfy the amount set out in the warrant.
- [8] The applicant disputes the correctness of the *nulla bona* return and offers a different account of what transpired during the attempt by the Sheriff to

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execute upon the warrant, but nothing turns on that dispute and no more need be said about it.

Litigation history

- [9] The applicant brought an application before the High Court to set aside the warrant of execution issued during February 2014. That application was dismissed with costs on 11 November 2014.
- [10] In January 2015, the respondent proceeded with an application in terms of rule 46(1)(a)(ii) of the Uniform Rules of Court,¹ seeking to execute against the applicant's immovable property.
- [11] The application was opposed by the applicant who raised two preliminary points, the first being the non-joinder of the bondholder in respect of the property against which execution was sought and the second that a proper case had not been made out in terms of rule 46(1). In particular, the applicant contended that the respondent had not set out all the material and relevant considerations that the Court was obliged to consider in the granting of the relief sought.²
- [12] On the key question of the maintenance arrears which was central to the respondent's case, the stance of the applicant was somewhat ambivalent. In paragraph 2.3 of the applicant's answering affidavit, he conceded that:
- "The application is aimed at recovering maintenance arrears which I currently owe to the [respondent]. I have fully acknowledged my indebtedness to the [respondent] in this regard."
- However, when one considers the tenor of his stance taken throughout the dispute then it may be fair to say that, while the applicant does not dispute his legal obligation to pay both the basic and additional maintenance, his view was that the additional maintenance amounts were not properly quantified by reference to vouchers and proof of payment. The latter approach is more in accord with what I would describe as the applicant's general basis of opposition and his admission in paragraph 2.3 of his answering affidavit must be considered in this broader context. Fairness and justice would certainly support such an approach.
- [13] On 19 August 2015, the High Court ordered execution against the applicant's immovable property and, in doing so, made reference to what she

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regarded as the "revolting attitude towards the [respondent] and the minor child as well as his elaborate efforts aimed at frustrating compliance with his maintenance obligations".

- [14] An application for leave to appeal was dismissed with costs on 2 March 2016 and a similar fate befell the application for leave to appeal to the Supreme Court of Appeal.

In this Court

- [15] The applicant applied for leave to appeal, which was opposed by the respondent. This Court requested written submissions and, following receipt of these from the parties, this Court issued further directions on 10 May 2017 in the following terms:
- "1. The application for leave to appeal is set down for hearing on Tuesday, 29 August 2017 at 10h00 in regard to the following issues:
- (a) Leave to appeal.
 - (b) Appeal:
 - (i) whether the amount of R306 550.18 was a judgment debt and whether, therefore, the applicant and the respondent had a judgment debtor-judgment creditor relationship in respect of that amount; and
 - (ii) whether the High Court used the Rule 46(1)(a)(ii) execution process as a measure of last resort."

- [16] The matter proceeded to hearing on 29 August 2017. During the course of the hearing it emerged that the applicant, even though he disputed the quantification of the additional maintenance amounts, was in substantial arrears with his basic maintenance obligations. In particular, he did not pay maintenance for the period since the respondent returned to South Africa from the United States in early 2014, right up to and including August 2017 when the matter was first before this Court - a period of almost four years.
- [17] This concession inevitably led to a discussion as to whether the applicant's conduct in failing to pay the undisputed maintenance obligation warranted this Court to proceed with the hearing of the matter.³ There was a live and open question whether it would undermine this Court's integrity to hear the dispute while the applicant remained in default with his admitted maintenance obligations.
- [18] While it is so that the proceedings in this Court on 29 August 2017 were not contempt proceedings, the concession of non-payment of the basic maintenance obligations, which was never in dispute, cannot simply pass without consequence. The judicial authority vested in all courts,⁴ obliges courts to ensure that there is compliance with court orders to safeguard

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and enhance their integrity, efficiency, and effective functioning. To this extent, the views expressed by our courts on compliance with court orders remain relevant in these proceedings.

- [19] In *Matjhabeng*, this Court expressed itself on the matter in the following terms:

"Section 165 of the Constitution, indeed, vouchsafes judicial authority. This section must be read with the supremacy clause of the Constitution. It provides that courts are vested with judicial authority, and that no person or organ of state may interfere with the functioning of the courts. The Constitution enjoins organs of state to assist and protect the courts to ensure, among other things, their dignity and effectiveness.

To ensure that courts' authority is effective, section 165(5) makes orders of court binding on 'all persons to whom and organs of state to which it applies'. The purpose of a finding of contempt is to protect the fount of justice by preventing unlawful disdain for judicial authority. Discernibly, continual non-compliance with court orders imperils judicial authority."⁵ (Footnotes omitted.)

- [20] Further in *Fakie*, the Supreme Court of Appeal, *per* Cameron JA, held:

"It is a crime unlawfully and intentionally to disobey a court order. This type of contempt of court is part of a broader offence, which can take many forms, but the essence of which lies in violating the dignity, repute or authority of the court. The offence has, in general terms, received a constitutional 'stamp of approval', since the rule of law - a founding value of the Constitution - 'requires that the dignity and authority of the courts, as well as their capacity to carry out their functions, should always be maintained'."⁶ (Footnotes omitted.)

- [21] The applicant does not face the consequences of either a finding of civil or criminal contempt but his conduct, if left unaddressed by this Court, would undermine judicial integrity. Analogous considerations to formal contempt proceedings arise. In this regard, Counsel for the applicant was certainly amenable to the matter being postponed to enable the applicant to remedy the consequences of his failure to pay. It was a stance which was wisely and correctly taken given the significant and ongoing nature of the failure by the applicant to comply with his maintenance obligation towards his minor child. A court's role is more than that of a mere umpire of technical rules, it is "an administrator of justice . . . [it] has not only to direct and control the proceedings according to recognised rules of procedure but to see that justice is done".⁷
- [22] A further factor which fortifies the conclusion that this Court was not only entitled but obliged to have raised and dealt with the non-compliance

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with the Order by the applicant, lies in the nature of the obligations that the Order and the settlement agreement which accompanied it evidenced.

- [23] All court orders must be complied with diligently, both in form and spirit, to honour the judicial authority of courts. There is a further and heightened obligation where court orders touch interests lying much closer to the heart of the kind of society we seek to establish and may activate greater diligence on the part of all. Those interests include the protection of the rights of children and the collective ability of our nation to "free the potential of each person"⁸ including its children, which ring quite powerfully true in this context.
- [24] Thus, when courts act as the upper guardian of each child they do so not only to comply with the form that the Constitution enjoins us to be loyal to,⁹ but with the very spirit that is encapsulated in the provisions of section 28(2) of the Constitution that "a child's best interests are of paramount importance in every matter concerning the child".
- [25] This is precisely such a matter. The Order was about ensuring the best means of protecting and enhancing the interests of the minor child, and the scope and the breadth of the provisions of the settlement agreement appear to compellingly underscore that objective. The High Court, when it granted the decree of divorce, must then have been satisfied that the interests of the minor child were well catered for.
- [26] When those interests are imperilled or when the obligation undertaken by either parent to the child is not diligently complied with, then courts are enjoined to interfere in a manner that best protects those interests. In *Bannatyne*, this Court dealt with the significance of maintenance obligations and the duty of courts to ensure compliance therewith. The Court articulated itself on the matter in the following terms:

"Systemic failures to enforce maintenance orders have a negative impact on the rule of law. The courts are there to ensure that the rights of all are protected. The judiciary must endeavour to secure for vulnerable children and disempowered women their small but life-sustaining legal entitlements. If court orders are habitually evaded and

defied with relative impunity, the justice system is discredited and the constitutional promise of human dignity and equality is seriously compromised for those most dependent on the law.

It is a function of the state not only to provide a good legal framework, but to put in place systems that will enable these frameworks to operate effectively. Our maintenance courts and the laws that they implement are important mechanisms to give effect to the rights of children protected by [section 28](#) of

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the Constitution. Failure to ensure their effective operation amounts to a failure to protect children against those who take advantage of the weaknesses of the system."¹⁰

[27] Reverting to the proceedings of 29 August 2017, this Court, presented with the common cause evidence of the non-compliance with the basic maintenance obligations that the applicant had undertaken to pay, made the following order:

1. The matter is postponed to Wednesday 8 November 2017 at 10h00.
2. The applicant must pay the respondent's costs of postponement.
3. The applicant must pay to the respondent's attorneys, for the benefit of the minor child, an amount of at least R150 000 on or before 30 September 2017.
4. In addition to this payment, the applicant must make monthly payments in respect of the maintenance obligations and other expenses of the minor child in accordance with the order of the High Court."

[28] This 29 August 2017 order ("August Order") responded to the pressing need both to respect K's best interests and safeguard against potential damage to this Court's integrity. This Court's integrity would be jeopardised if it failed to uphold its solemn constitutional obligation under [section 28](#), to protect the best interests of children.

The proceedings in this Court of 8 November 2017

[29] When the hearing of the matter resumed on 8 November 2017, a necessary and anterior issue to be determined was whether the applicant had complied with the August Order. It was particularly important that this Court was satisfied that he had, especially given that the matter had previously not proceeded on account of the failure by the applicant to pay his basic maintenance obligations. The paramount question was whether the applicant had remedied his default and allayed this Court's earlier concerns that continuing to resolve this dispute while the basic maintenance remained unpaid, would undermine judicial integrity by ignoring K's best interests.

[30] The question raised was important in the context of determining what sanction, if any, this Court would consider in the event of failure by the applicant to establish that he had remedied his conduct.

[31] In *Burchell*, the High Court, upon finding that a party was in contempt of an order of court, ordered as part of the relief it granted that, unless the offending party purged his contempt, he faced the risk of being precluded from continuing with any litigation in the High Court.¹¹ Such a sanction, which may at first sight appear to run counter to the right of access to

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courts enshrined in [section 34](#) of the Constitution,¹² is in my view wholly appropriate in circumstances when one is dealing with conduct that may be described as contemptuous of the authority of the order issued by a court. It can only be described as unconscionable when a party seeks to invoke the authority and protection of this Court to assert and protect a right it has, but in the same breath is contemptuous of that very same authority in the manner in which it fails and refuses to honour and comply with the obligations issued in terms of a court order. The High Court, in *Di Bona*, supports the view that a court may refuse to hear a party until they have purged themselves of the contempt by coming to the following conclusion:

"The consequences of the rule are that anyone who disobeys an order of [c]ourt is in contempt of [c]ourt and may be punished by arrest of his person and by committal to prison and, secondly, that no application to the [c]ourt by a person in contempt will be entertained until he or she has purged the contempt."¹³

[32] In his response to the question whether he had complied with the August Order, the applicant offered, through his Counsel, an explanation from the Bar of the steps he had taken in furtherance of the order. No affidavit was filed by the applicant setting out the manner of compliance with the August Order and in any event the explanation offered from the Bar was the subject of contestation from the side of the respondent. The applicant's Counsel submitted that the applicant paid R150 000, the minimum amount prescribed in the August Order. Counsel conceded that the applicant failed to honour the term that he "must make monthly payments in respect of the maintenance obligations and other expenses of the minor child in accordance with the order of the High Court". The applicant's Counsel sought to postpone the hearing a second time to allow the applicant to depose to an affidavit explaining the non-compliance. The reason for non-compliance offered, advanced from Counsel, was that the R150 000 was more than the calculated amount of basic maintenance owing, and that the respondent had agreed to allow a portion of the R150 000 as a set off for the monthly payments owing since the August Order. Respondent's Counsel disagreed that any agreement had been concluded.

[33] Notwithstanding the existence or otherwise of any agreement, this was not an adequate and proper reason for non-compliance with the August Order. Given the serious nature of the conduct that was conceded, it is hardly acceptable or appropriate for this Court to engage in speculation or an oral contestation from Counsel in respect of such a significant issue. Further, considering the relief that the applicant was seeking, he should

have proceeded with greater care in ensuring that he was in compliance with the August Order. As mentioned earlier, this matter does not deal

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with formal contempt proceedings and the requirement of purging related contempt. However, the principle need to preserve the integrity of justice is present here, and there is an undoubted need to assess whether conduct that could compromise that integrity is remedied.

- [34] Under the circumstances and for the reasons given, I conclude that on what is before us, there is no evidence that the applicant had remedied his conduct. This conclusion then leads to the question as to whether the interests of justice are served by allowing the applicant to ventilate his argument in respect of the merits of the appeal.
- [35] Those interests will not be best served and will be undermined if the applicant is allowed to proceed and deal with the merits of the appeal in the absence of him remedying his conduct by complying with the August Order. It will dilute the potency of the judicial authority and it will send a chilling message to litigants that orders of court may well be ignored with no consequence. At the same time, it will signal to those who are the beneficiaries of such orders that their interests may be secondary and that the value and certainty that a court order brings counts for little. For all these reasons, and in particular that the subject matter of this litigation involves the best interests of the child, the interests of justice strongly militate against the applicant's pursuing his application. Proceeding with the hearing of this matter, where adequate compliance with the August Order, which sought to ensure payment of the basic maintenance for K, is in doubt, would create "[c]ontinued uncertainty . . . [which] cannot be in the interests of the child"¹⁴ and does not further the interests of justice.
- [36] This Court enjoys wide jurisdiction to hear matters involving a constitutional issue or where an issue is connected with a decision on a constitutional matter.¹⁵ Notwithstanding the significance or otherwise nature of the constitutional issue raised, an overriding consideration must always remain whether the interests of justice dictate that a matter be heard.¹⁶ Those interests are not confined to those of the applicant but extend and include all the parties before this Court as well as those of the public at large. Those interests, properly contextualised and considered, also stand against leave to appeal being granted.¹⁷ This Court granting leave to appeal in this matter would clearly run counter to the interests of justice, given the cumulative effect of the applicant's failure to respect K's best interests by paying the basic maintenance and his continued failure to respect this Court's integrity by flouting the August Order.

Costs

- [37] While it was submitted on behalf of the applicant that the Court should not make any order as to costs in the event of the application being

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dismissed, the principle in *Biowatch* should not apply.¹⁸ This is precisely the kind of case that should invoke the exception to *Biowatch* for litigation that is "frivolous or vexatious, or in any other way manifestly inappropriate".¹⁹ In light of the totality of circumstances at the two hearings before this Court, and the applicant's wanton conduct, my view is that the litigation was "manifestly inappropriate". Given the applicant's conduct compromising K's best interests and this Court's integrity, his continued application can be viewed as "so unreasonable or out of line that it constitutes an abuse of process".²⁰ As this Court aptly stated in *Limpopo Legal Solutions*, "although *Biowatch* changed the costs landscape for constitutional litigants, it gives no free pass to cost-free, ill-considered, irresponsible litigation" and applicants "seeking to vindicate constitutional rights must respect court processes".²¹ Accordingly, the applicant is directed to pay the respondent's costs in this Court for the application.

- [38] What remains to be determined is the scale of such costs. Counsel for the respondent urged the Court to impose a punitive cost order as a measure and indication of its displeasure at the manner in which the applicant has conducted this litigation.
- [39] In *Nel*, the High Court held the following in relation to punitive cost orders:

"A costs order on an attorney and client scale is an extraordinary one which should not be easily resorted to, and only when by reason of special considerations, arising either from the circumstances which gave rise to the action or from the conduct of a party, should a court in a particular case deem it just, to ensure that the other party is not out of pocket in respect of the expense caused to it by the litigation.

As such, the order should not be granted lightly, as courts look upon such orders with disfavour and are loath to penalise a person who has exercised a right to obtain a judicial decision on any complaint such party may have."²² (References omitted.)

- [40] The Labour Appeal Court, in *PCASA*, emphasised the view that punitive cost orders are "extraordinary" in nature and they will not be easily granted:

"The scale of attorney and client is an extraordinary one which should be reserved for cases where it can be found that a litigant conducted itself in a clear and indubitably vexatious and reprehensible conduct. Such an award is

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exceptional and is intended to be very punitive and indicative of extreme opprobrium."²³

[41] This is the kind of matter where a punitive order of costs would be justified. Neglecting to respect K's best interests and the failure to honour the August Order, that sought to ensure those interests are protected and preserve this Court's core integrity, is precisely the kind of "extraordinary" conduct worthy of a court's rebuke with punitive sanctions. Adding to those transgressions, the manner in which the applicant failed to apprise this Court of any efforts to remedy his conduct and sought to improperly admit oral evidence on these efforts from Counsel, disregarding the appeal process and transforming the hearing into a factual inquiry - absent appropriate leave - is a further basis warranting punitive costs in this matter. The applicant must accordingly pay the costs of the respondent in this Court on an attorney and client scale. However, this cost order is applicable only to the proceedings that took place on 8 November 2017, the earlier cost order in respect of the August Order still stands.

A concluding observation

[42] This case involves, in the narrowest sense, a dispute about the payment of a maintenance obligation. There is little doubt that the payment of maintenance is an important factor in the ability of a custodian parent to provide for the needs and interests of a minor child. Those needs and interests are, however, best served when a child is able to enjoy the recognition of its parents and the love and care that is almost symptomatic of being a parent. When that is missing, one can only speculate about the manner in which it redounds on the wellbeing of a young child. It was, accordingly, with some dismay that this Court noted a request in October 2017 by the applicant to have the child undergo a paternity test. This coming some seven years after the divorce was finalised and following two paternity tests conducted by independent pathologists, which showed with 99,999994% certainty that the applicant is K's father, raises in the sharpest and most concerning of terms the attitude of the applicant towards the minor child rooted, as it appears to be, in a belief that the child is not his.

[43] Impressive as its powers are, no court can direct a parent to love and recognise a child, critical as that may be to the full development of a child. What we can do and are enjoined to do, is to point out that every child is deserving of the love and care that is necessary for their development and that the duty to provide that rests primarily on the parents of the child. We can only hope that in the young life of the minor child whose interest is the subject of this litigation, that that transpires in the fullness of time.

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Order

[44] The following order is made:

1. The application for leave to appeal is dismissed.
2. The applicant is to pay the respondent's costs in this Court on an attorney and client scale, excluding costs relating to the 29 August 2017 postponement.

(Zondo ACJ, Cameron, Froneman, Jafta, Madlanga, Mhlantla JJ, Kathree-Setiloane and Zondi AJJ concurred in the judgment of Kollapen AJ.)

For the applicant:

DZ Kela instructed by *Ndumiso Voyi Incorporated*

For the respondent:

GT Avvakoumdies and *T Mogale* instructed by *Snyman De Jager Inc Attorneys*

The following cases were referred to in the above judgment:

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| Bannatyne v Bannatyne 2003 (2) BCLR 111 ([2002] ZACC 31; 2003 (2) SA 363) (CC) - Dicta at paras [27]-[28] reaffirmed | 679 |
| Barkhuizen v Napier 2007 (7) BCLR 691 ([2007] ZACC 5; 2007 (5) SA 323) (CC) - Referred to | 682 |
| Biowatch Trust v Registrar Genetic Resources 2009 (10) BCLR 1014 ([2009] ZACC 14; 2009 (6) SA 232) (CC) - Referred to | 682 |
| Burchell v Burchell [2005] ZAECHC 35 - Approved | 679 |
| Campus Law Clinic (University of KwaZulu-Natal Durban) v Standard Bank of South Africa Ltd 2006 (6) BCLR 669 ([2006] ZACC 5; 2006 (6) SA 103) (CC) - Referred to | 682 |
| Di Bona v Di Bona [1993] 3 All SA 624 (1993 (2) SA 682) (C) - Approved | 680 |
| Fakie NO v CCII Systems (Pty) Ltd [2006] JOL 17080 ([2006] ZASCA 52; 2006 (4) SA 326) (SCA) - Dictum at para [6] approved | 677 |
| Fraser v Naude 1998 (11) BCLR 1357 ([1998] ZACC 13; 1999 (1) SA 1) (CC) - Referred to | 681 |
| Gundwana v Steko Development CC 2011 (8) BCLR 792 ([2011] ZACC 14; 2011 (3) SA 608) (CC) - Referred to | 675 |
| H v Fetal Assessment Centre 2015 (2) BCLR 127 ([2014] ZACC 34; 2015 (2) SA 193) (CC) - Dictum at para [64] reaffirmed and applied | 678 |

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|---|---------------------|
| Jaftha v Schoeman, Van Rooyen v Stoltz 2005 (1) BCLR 78 ([2004] ZACC 25; 2005 (2) SA 140) (CC) - Referred to | 675 |
| Lawyers for Human Rights v Minister in the Presidency 2017 (4) BCLR 445 ([2016] ZACC 45; 2017 (1) SA 645) (CC) - Dictum at para [20] reaffirmed and applied | 682 |
| Limpopo Legal Solutions v Eskom Holdings SOC Limited 2017 (12) BCLR 1497 ([2017] ZACC 34) (CC) - Dictum at para [41] reaffirmed and applied | 682 |
| Matjhabeng Local Municipality v Eskom Holdings Limited; Mkhonto v Compensation Solutions (Pty) Limited 2017 (11) BCLR 1408 ([2017] ZACC 35) (CC) - Dicta at paras [47]-[48] reaffirmed | 677 |
| Nel v Davis SC NO [2017] JOL 37849 (GP) - Dicta at paras [25]-[26] approved | 682 |
| Paulsen v Slip Knot Investments 777 (Pty) Limited 2015 (5) BCLR 509 ([2015] ZACC 5; 2015 (3) SA 479) (CC) - Referred to | 681 |
| Plastic Converters Association of South Africa (PCASA) obo Members v National Union of Metalworkers Union of South Africa [2016] JOL 36301 (LAC) - Dictum at para [46] approved | 683 |
| R v Hepworth 1928 AD 265 - Referred to | 677 |
| S v Boesak 2001 (1) BCLR 36 ([2000] ZACC 25; 2001 (1) SA 912) (CC) - Referred to | 681 |
| Take & Save Trading CC v The Standard Bank of SA Ltd [2004] 1 All SA 597 ([2004] ZASCA 1; 2004 (4) SA 1) (SCA) - Dictum at para [3] approved | 677 |

Footnotes

- Rule 46 reads:
 - (1) (a) No writ of execution against the immovable property of any judgment debtor shall issue until -.
 - such immovable property shall have been declared to be specially executable by the court or, in the case of a judgment granted in terms of rule 31(5), by the registrar: Provided that, where the property sought to be attached is the primary residence of the judgment debtor, no writ shall issue unless the court, having considered all the relevant circumstances, orders execution against such property."
- The material and relevant points being those articulated in *Jaftha v Schoeman, Van Rooyen v Stoltz* [2004] ZACC 25; [2005 \(2\) SA 140](#) (CC); [2005 \(1\) BCLR 78](#) (CC) at paras [59]-[60] and *Gundwana v Steko Development CC* [2011] ZACC 14; [2011 \(3\) SA 608](#) (CC); [2011 \(8\) BCLR 792](#) (CC) at para [54].
- [S 173](#) of the Constitution affords this Court, the Supreme Court of Appeal, and the High Court of South Africa the "inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice".
- [S 165](#) of the Constitution provides that "[t]he judicial authority of the Republic is vested in the courts".
- Matjhabeng Local Municipality v Eskom Holdings Limited; Mkhonto v Compensation Solutions (Pty) Limited* [2017] ZACC 35; [2017 \(11\) BCLR 1408](#) (CC) (*Matjhabeng*) at paras [47]-[48].
- Fakie NO v CCII Systems (Pty) Ltd* [2006] ZASCA 52; [2006 \(4\) SA 326](#) (SCA) (*Fakie*) at para [6] [also reported at [\[2006\] JOL 17080](#) (SCA) - Ed].
- Take & Save Trading CC v The Standard Bank of SA Ltd* [2004] ZASCA 1; [2004 \(4\) SA 1](#) (SCA) at para [3] [also reported at [\[2004\] 1 All SA 597](#) (SCA) - Ed], referencing *R v Hepworth* 1928 AD 265.
- See Preamble of the Constitution.
- H v Fetal Assessment Centre* [2014] ZACC 34; [2015 \(2\) SA 193](#) (CC); [2015 \(2\) BCLR 127](#) (CC) at para [64] states that: "In South Africa, in addition to [section 28\(2\)](#) of the Constitution, the common law principle that the High Court is the upper guardian of children obliges courts to act in the best interests of the child in all matters involving the child. As upper guardian of all dependent and minor children, courts have a duty and authority to establish what is in the best interests of children."

The Children's Act [38 of 2005](#) at [s 45\(4\)](#) further states that "[n]othing in this Act shall be construed as limiting the inherent jurisdiction of the High Court as upper guardian of all children".
- Bannatyne v Bannatyne* [2002] ZACC 31; [2003 \(2\) SA 363](#) (CC); [2003 \(2\) BCLR 111](#) (CC) at paras [27]-[28].
- Burchell v Burchell* [2005] ZAEHC 35 at para [35].
- [S 34](#) of the Constitution provides that "[e]veryone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum".
- Di Bona v Di Bona* [1993 \(2\) SA 682](#) (C) at 688F-G [also reported at [\[1993\] 3 All SA 624](#) (C) - Ed].
- Fraser v Naude* [1998] ZACC 13; [1999 \(1\) SA 1](#) (CC); [1998 \(11\) BCLR 1357](#) (CC) at para [9].
- [S 167\(3\)\(c\)](#) of the Constitution.
- Paulsen v Slip Knot Investments 777 (Pty) Limited* [2015] ZACC 5; [2015 \(3\) SA 479](#) (CC); [2015 \(5\) BCLR 509](#) (CC) at paras [29]-[30].
- S v Boesak* [2000] ZACC 25; [2001 \(1\) SA 912](#) (CC); [2001 \(1\) BCLR 36](#) (CC) at para [12].
- Biowatch Trust v Registrar Genetic Resources* [2009] ZACC 14; [2009 \(6\) SA 232](#) (CC); [2009 \(10\) BCLR 1014](#) (CC) (*Biowatch*) at paras [26]-[27] referencing *Barkhuizen v Napier* [2007] ZACC 5; [2007 \(5\) SA 323](#) (CC); [2007 \(7\) BCLR 691](#) (CC) and *Campus Law Clinic (University of KwaZulu-Natal Durban) v Standard Bank of South Africa Ltd* [2006] ZACC

- 5; [2006 \(6\) SA 103](#) (CC), [2006 \(6\) BCLR 669](#) (CC).
- 19 *Biowatch id* at para [24].
- 20 *Lawyers for Human Rights v Minister in the Presidency* [2016] ZACC 45; [2017 \(1\) SA 645](#) (CC); [2017 \(4\) BCLR 445](#) (CC) at para [20].
- 21 *Limpopo Legal Solutions v Eskom Holdings SOC Limited* [2017] ZACC 34 at para [41] [reported at [2017 \(12\) BCLR 1497](#) (CC) - Ed].
- 22 *Nel v Davis SC NO* [\[2017\] JOL 37849](#) (GP) at paras [25]-[26].
- 23 *Plastic Converters Association of South Africa (PCASA) obo Members v National Union of Metalworkers Union of South Africa* [\[2016\] JOL 36301](#) (LAC) (PCASA) at para [46].



REPUBLIC OF SOUTH AFRICA

**APPLICATION FOR MAINTENANCE ORDER
COMPLAINT IN TERMS OF SECTION 6(1) (a) OF THE MAINTENANCE ACT, 1998 (ACT No. 99 OF 1998)**

* Delete whichever is not applicable.

Reference No.

[This information should, as far as possible, be given in order to investigate the complaint. If space is insufficient information should be supplied on an attached annexure.]

I, (full name), (called "the complainant")

born on

| | | | | | |
|---|---|---|---|---|---|
| d | d | m | m | y | y |
|---|---|---|---|---|---|

 age

| |
|--|
| |
|--|

 ID number

| | | | | | | | | | | | | | | | | | | | |
|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|
| | | | | | | | | | | | | | | | | | | | |
|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|

living at working at
.....
.....
.....

tel. no (.....) tel. no (.....)

nearest police station.....

hereby *declare under oath/truly affirm as follows:

1. (Full name), (called "the defendant ")

born on

| | | | | | |
|---|---|---|---|---|---|
| d | d | m | m | y | y |
|---|---|---|---|---|---|

 age

| |
|--|
| |
|--|

 ID number

| | | | | | | | | | | | | | | | | | | | |
|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|
| | | | | | | | | | | | | | | | | | | | |
|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|

living at working at
.....
.....
.....

tel. no (.....) tel. no (.....)

nearest police station.....

is legally liable to maintain *me and/or the following child(ren) mentioned in 4. below, who is/are under my care.

2. *The defendant is legally liable to maintain me because:

.....

.....

*The child(ren) mentioned in 4. below is/are under my care because

.....

.....

3. The defendant has not supported *myself/the said child(ren) since (date) and has made *no contribution towards maintenance/the following contribution towards maintenance:

.....

.....

4. I request that the Defendant be ordered to make the following contribution(s) towards maintenance: A *weekly/monthly contribution of –

R..... in respect of myself (complainant), and / or

| Amount | | Name of Child | Born | | | | | | | |
|--------|---------------|---------------|------|---|---|---|---|---|---|---|
| R | in respect of | | d | d | m | m | y | y | y | y |
| R | in respect of | | d | d | m | m | y | y | y | y |
| R | in respect of | | d | d | m | m | y | y | y | y |
| R | in respect of | | d | d | m | m | y | y | y | y |
| R | in respect of | | d | d | m | m | y | y | y | y |
| R | in respect of | | d | d | m | m | y | y | y | y |

The first payment should be made on and after that on or before the day of each succeeding *week/month. All payments should be made toin favour of

and/or

other contributions [for example medical and dental costs, school fees, fees to tertiary institutions, school wear, expenses for sport and/or cultural activities, birth expenses and maintenance for child(ren) from birth]:

.....

.....

5. Particulars of my assets and *monthly/weekly income and expenditures (supported by documentary proof, where possible) are as follows:

| ASSETS | | INCOME | | |
|----------------|---|---|-------------|--------|
| Fixed property | R | Gross salary | | R |
| Investments | R | Minus: Deductions | Tax | R |
| | | | Medical Aid | R |
| Savings | R | | Pension | R |
| | | | Other: | R |
| Shares | R | | | R |
| | | | R | |
| Motor vehicles | R | Total nett salary | | R 0.00 |
| Other: | R | Other income (state source of income) | | R |
| | R | | | R |
| | R | | | R |
| | | Total income | | R 0.00 |

| Expenditure | | Self | Child(ren) | Total | |
|-------------|---|--|--------------------------|-------|------|
| 1 | Lodging (bond repayment/levy /rent/ board) | | | 0.00 | |
| 2 | Groceries/food/personal care (including hair care/cosmetics etc.) | | | 0.00 | |
| 3 | Household expenditure | Water and electricity / gas / paraffin | | 0.00 | |
| | | Rates and taxes | | 0.00 | |
| | | Laundry/Dry-cleaning | | 0.00 | |
| | | Lunches | | 0.00 | |
| | | Telephone | | 0.00 | |
| | | Domestic worker | | 0.00 | |
| | | Garden services | | 0.00 | |
| | | Insurance (short term) | | 0.00 | |
| 4 | Clothing | Clothes and shoes | | 0.00 | |
| | | School uniforms | | 0.00 | |
| | | Sports clothes | | 0.00 | |
| 5 | Transport | Bus / taxi / lift club | | 0.00 | |
| | | Car | Installments & Insurance | | 0.00 |
| | | | Maintenance | | 0.00 |
| | | | Fuel | | 0.00 |
| | | | Licences | | 0.00 |
| | | | Parking | | 0.00 |

| Expenditure | | Self | Child(ren) | Total |
|-------------|---|---------------------------------------|------------|-------|
| 6 | Educational expenditure | School fees | | 0.00 |
| | | Crèche / day care / after school care | | 0.00 |
| | | Insurance (study policy) | | 0.00 |
| | | Books / Stationery | | 0.00 |
| | | Outings / Extramural | | 0.00 |
| | | Sports | | 0.00 |
| | | Other school expenditure | | 0.00 |
| 7 | Medical expenditure | Doctor/dentist/etc. | | 0.00 |
| | | Medication | | 0.00 |
| | | Hospital | | 0.00 |
| | | Other medical expenditure | | 0.00 |
| 8 | Insurance | Life | | 0.00 |
| | | Annuity | | 0.00 |
| | | House owners/House holders | | 0.00 |
| 9 | Pocket money/ Allowances | | | 0.00 |
| 10 | Holidays, entertainment & recreation (incl M-Net) | | | 0.00 |
| 11 | Maintenance, replacement and repairs of items | House | | 0.00 |
| | | Household appliances | | 0.00 |
| | | Kitchenware | | 0.00 |
| | | Linen, towels, etc. | | 0.00 |
| | | *Bicycles/bikes/scooters | | 0.00 |
| | | Other items | | 0.00 |
| 12 | Personal loans | | | 0.00 |
| 13 | Security alarm system | | | 0.00 |
| 14 | Membership fees | | | 0.00 |
| 15 | Religious contributions/ Charities | | | 0.00 |
| 16 | Gifts | | | 0.00 |
| 17 | TV licence | | | 0.00 |
| 18 | Reading material | Books / Newspapers / Periodicals | | 0.00 |
| 19 | Lease / credit agreement payments | Furniture | | 0.00 |
| | | Appliances | | 0.00 |
| | | Other | | 0.00 |
| 20 | Pets | Food | | 0.00 |
| | | Veterinary surgeon ("vet") | | 0.00 |
| | | Licence | | 0.00 |

| Expenditure | | Self | Child(ren) | Total |
|--------------------------|-----------------------------|-------------|-------------|-------------|
| 21 | Other (not specified above) | | | 0.00 |
| | | | | 0.00 |
| | | | | 0.00 |
| | | | | 0.00 |
| | | | | 0.00 |
| Total expenditure | | 0.00 | 0.00 | 0.00 |

Dated at this day of year

.....
Signature of Complainant

* Delete whichever is not applicable

FOR OFFICIAL USE ONLY

Oath/Affirmation

1. I certify that before administering the *oath/affirmation I asked the complainant the following questions and wrote down *his/her answers in *his/her presence:

(a) Do you know and understand the contents of the declaration? Answer

(b) Do you have any objection to taking the prescribed oath? Answer

(c) Do you consider the prescribed oath binding on your conscience? Answer

2. I certify that the complainant acknowledged that *he/she knows and understands the contents of this declaration. The complainant uttered the following words *"I swear that the contents of this declaration are true, so help me God"/"I truly affirm that the contents of the declaration are true". The *signature/mark of the complainant was affixed to the declaration in my presence.

.....
Justice of the Peace/Commissioner of Oaths

Full name and surname (block letters)

Designation (rank) Ex Officio Republic of South Africa

Business address (street address must be stated)

Dated at this day of year

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG, PRETORIA)

Case number: 61876/2012

| | |
|-------|-------------------------------------|
| (1) | REPORTABLE: YES / NO |
| (2) | OF INTEREST TO OTHER JUDGES: YES/NO |
| (3) | REVISED. |
| | 19 May 2014 |
| | |
| DATE | SIGNATURE |

In the matter between:

ANNAH OUMA MTHIMUNYE

PLAINTIFF

and

**MINISTER OF JUSTICE AND
AND CONSTITUTIONAL DEVELOPMENT**

FIRST DEFENDANT

NATIONAL PROSECUTING AUTHORITY

SECOND DEFENDANT

MICHAEL MATLALA

THIRD DEFENDANT

D. LESESE

FOURTH DEFENDANT

T.A. MOHLABA

FIFTH DEFENDANT

S. MALUNGANE

SIXTH DEFENDANT

N. NTHULI

SEVENTH DEFENDANT

J U D G M E N T

HIEMSTRA AJ

[1] The plaintiff, Ms Annah Ouma Mthimunye, was married to the third defendant, Michael Matlala (Matlala). Two minor children were born from the marriage. The marriage ended in divorce and the primary residence of the minor children is with the plaintiff. On 6 December 1990 Matlala consented in writing to pay maintenance in respect of the children. This consent was made an order of court at the Mdujiana Magistrates' Court at Siyabuswa in Mpumalanga, sitting as a Maintenance Court in terms of s 3 of the Maintenance Act, 99 of 1998 (the Act).

[2] The first defendant is the Minister of Justice and Constitutional Development. He is sued in his capacity as the political head responsible for the Department of Justice. The second defendant is the National Prosecuting Authority of South Africa, which is sued in its capacity as the employer of the fourth, fifth, sixth and seventh defendants.

[3] The fourth to seventh defendants are prosecutors employed by the second defendant at the Mdujiana Magistrates' Court. In terms of s 4(1)(a) of the Act, prosecutors are by virtue of the powers delegated to them by the Director of Public Prosecutions deemed to be maintenance officers of the corresponding Maintenance Court. I shall refer to them as "the maintenance officers".

[4] The plaintiff claims damages from the defendants jointly and severally. Her cause of action against the first and second defendants and the maintenance officers is

delictual. Her claim against Matlala, the third defendant, is for payment of arrear maintenance. She alleges that the maintenance officers, acting within the course and scope of their employment with the second defendant, had negligently and unlawfully omitted to take appropriate steps in terms of the Act to enforce the payment of arrear maintenance by Matlala. As a result of their omissions the arrears in maintenance accumulated over a period of three years to R24 500. On 28 October 2009 a magistrate purported to "write off" the arrear maintenance.

[5] Matlala had from the outset been delinquent in paying his maintenance. He was employed as a teacher at the Masana Primary School at Mbibane, Mpumalanga. Because of his irregular payments, the plaintiff had obtained garnishee orders against his emoluments, which ensured regular payments from then on. However, he resigned from his employment with effect from 1 January 2006 and promptly ceased paying maintenance. However, a pension payout was due to him.

[6] The failure of the maintenance officers to attach this pension payout in order to secure the recovery of arrear maintenance is the issue in this case.

[7] After Matlala had stopped paying maintenance, the plaintiff reported the arrears to Mr Jimmy Mahlangu, a maintenance inspector at the Maintenance Court. Mr Mahlangu duly made enquiries at the Masana Primary School and the principal confirmed in writing on 14 February 2006 that the third respondent had resigned from his position with effect from January 2006. The plaintiff testified that she had called at the accounts hall at the Magistrates'/Maintenance Court to collect her maintenance each month. Invariably Matlala had made no payments and the staff referred her to the

maintenance clerks to report the non-payment, which she duly did. She dealt with various officers, including the senior magistrate, Mr Gama. She told Mr Gama that a pension payout was due to Matlala and asked him to instruct Mr Mahlangu to hurry up because she feared that Matlala would squander the money. Mr Gama told her that the Maintenance Court had no authority to attach Matlala's pension benefits while he is retired. As shown below, this advice was clearly wrong.

[8] A maintenance enquiry in terms of s 10 of the Act was nevertheless duly initiated. It was first enrolled for 21 February 2006. It was thereafter postponed or struck from the roll on 8 March and 15 March 2006 for reasons that cannot be discerned from the docket.

[9] On 31 May 2006 the plaintiff filled in a form entitled "*Complaint of failure to comply with Maintenance Order*". The maintenance enquiry was apparently thereupon aborted criminal proceedings initiated. On the same day a criminal summons was issued against Matlala. The criminal case was enrolled for 6 June 2006 but was postponed because Matlala said that he wanted to apply for legal aid. It was again postponed to 2 August 2006. On 2 August 2006 the matter was once again postponed to 6 September 2006. On 6 September the magistrate recorded the following:

"State submit (sic) that accused failed to pay as per the maintenance order because he was still waiting for his pension moneys, but at this stage arrears have been paid in full.

Withdrawn by the State."

(It appears from the records of the Maintenance Court that not all the arrears had at that stage been paid and that the sum of R900 was still in arrears.)

[10] The plaintiff testified that she had repeatedly reminded Mr Mahlangu of the awaited pension payout and asked him to take steps to have it attached. Mr Mahlangu said in his testimony that he could not remember the plaintiff mentioning the pension payout but admitted that he had been aware of it. He said he had been in constant communication with the Treasury about it. During August 2006 he obtained a statement of Matlala's bank account. It reflected that the sum of R237 248.42 had been deposited in Matlala's bank account on 1 August 2006.

[11] The fourth defendant, Mr D. Lesese, testified on his own behalf and on behalf of the other defendants. He appeared as maintenance officer in the aborted maintenance enquiry and in the criminal proceedings. He conceded that the maintenance officers had been aware of the expected pension payout, but said that they had left it to Matlala to use this money to bring his arrear maintenance up to date. When asked under cross-examination why he had chosen to institute criminal proceedings instead of the extensive civil proceedings for the enforcement of maintenance orders provided for in the Act, he responded that he had been a relief prosecutor and that it was the decision of the resident maintenance officers. He further conceded that he had not familiarised himself fully with the contents of the file but said that other maintenance officers had also neglected to apply their minds to the file. He also conceded that he was not familiar with the whole of the Act, and had only read parts of it.

[12] When Matlala received his pension moneys, he made a substantial payment towards the arrears. However, there remained an amount of R900, being one month's maintenance, in arrears after this payment. Thereafter he made sporadic payments,

but soon fell into arrears again. It appears from a bank statement dated 9 March 2007 that Matlala had been in credit to the tune of R60 104.11 on 11 January 2007. However, by 3 March 2007 his account was in overdraft to the amount of R199.30. Between those dates he made 24 withdrawals of R2 000 each and others of R8 000, R5 000, R3 500 and R7 000. All these withdrawals were made at an automatic teller machine (ATM) at the Carousel Sun casino.

[13] Ms Thakor, who appeared for the plaintiff, provided the court with a full analysis of the amounts of outstanding maintenance from time to time. This has not been refuted by the defendants. Suffice it so say that Matlala had at all relevant times been in arrears.

[14] There are ample provisions in the Act for the effective enforcement of maintenance orders. They are the following:

Section 26(1) and (2) of the Act provide as follows:

****26 Enforcement of maintenance or other orders***

- (1) *Whenever any person-*
- (a) *Against whom any maintenance order has been made has failed to make any particular payment in accordance with that maintenance order; or*
 - (b) *against whom any order for the payment of a specified sum of money has been made under section 16(1)(a)(ii), or 20 or 21(4) has failed to make such payment,*
- such order shall be enforceable in respect of any amount which that person has failed to pay, together with any interest thereon-*
- (i) *by execution against property as contemplated in section 27;*
 - (ii) *by the attachment of emoluments referred to in section 28; or*
 - (iii) *by the attachment of any debt as contemplated in section 30.*
- (2) (a) *If any maintenance order or any order made under section 16(1)(a)(ii), 20 or 21(4) has remained unsatisfied for a period of ten days from the day on which the relevant amount became payable or any such order was made, as the case may be, the person in whose favour any such order was made may apply to the maintenance court where that person is resident-*

- (i) for authorisation of the issue of a warrant of execution referred to in section 27(1);
- (ii) for an order for the attachment of emoluments referred to in section 30(1);
- (iii) for an order for the attachment of any debt referred to in section 30(1).

[15] S 26(4) provides

"(4) Notwithstanding anything to the contrary contained in any law, any pension, annuity, gratuity or compassionate allowance or other similar benefit shall be liable to be attached or subjected to execution under any warrant of execution or any order issued or made under this Chapter in order to satisfy a maintenance order."

[16] S 30 provides in respect of a debt referred to in s 26(2)(a)(ii):

30 Attachment of debts

- (1) A maintenance court may-
- (a) on the application of a person referred to in section 26(2)(a), or
 - (b) when such court suspends the warrant of execution under section 27(4)(b),
- make an order for the attachment of any debt at present owing or accruing to the person against whom the maintenance or other order in question was made to the amount necessary to cover the amount which the latter person has failed to pay, together with any interests thereon, as well as the costs of the attachment or execution, which order shall direct the person who has incurred the obligation to pay the debt to make payment as may be specified in that order within the time and the manner so specified.

[The emphases in the sections quoted above are mine]

[17] As appears from the underlined words in S 26(1)(a) and (b), quoted above, the provisions provide for the recovery of maintenance where a person has failed to make "any particular payment in accordance with that maintenance order" or failed to make "the payment of a specified sum of money". The question has arisen whether the law allows for the attachment of pension fund benefits to secure future maintenance obligations of a person. On a literal reading of the section, it appears as if the Act only provides for the recovery of arrear maintenance not future maintenance.

Our courts have, however, made short shrift of this question. Nicolson J said in *Mngadi v Beacon Sweets & Chocolate Provident Fund*¹:

"The law has never shrunk from interdicting a debtor from dissipating funds to thwart the rights of creditors and it was no great leap for the courts to extend such relief to cover or safeguarding a payout in the hands of a fund such as the first respondent. The provisions of the Pension Fund Act applied to the payment of future maintenance, more especially s 37A(1) and the provision thereto which protects dependants.

Ms Tharok also referred me to the headnote in *Magewu v Zono and Others*², which reads as follows:

"It is clear that upon a reading of the Act and the relevant sections of the Pension Funds Act that the two Acts together work in a manner to provide relief to an applicant who has a maintenance order that has not been abided by the judgment debtor. That although the respondent was not in arrears, this on its own did not frustrate the applicant's case. Acknowledging the child's right to maintenance, and the best interests of the child being paramount in matters dealing with children, the court pointed out that the first respondent had been in arrears on several occasions. The child therefore had no security that his future maintenance claims would be met. It was also unfair to expect the applicant to constantly take legal action to enforce the child's claims.

An application for the attachment of a pension benefit was accordingly granted.

[18] Despite the withdrawal of the criminal proceedings on 2 August 2007 after Matlala paid a portion of the arrear maintenance, criminal proceedings were again instituted. Matlala was convicted on 28 October 2009 of contravention of s 31(1) of the Act in that he had failed to pay maintenance during the period December 2006 to June 2009. At that stage the arrear maintenance amounted to R24 500. He was sentenced to a fine of R2 000 or two years' imprisonment. The sentence was wholly suspended for five years on condition that he was not found guilty of contravention of s 31 of the Act during the period of suspension. The court further ruled that the arrears of R24 500 be "written off". The magistrate gave no reasons for this order.

¹ 2004 (5) SA 388 (D) at 398E-J

² [2004 JOL 12662 (C)]

There is no provision for such an order in the Act. No steps were taken to appeal against this ruling or to have it reviewed or set aside. However, it cannot be expected of the plaintiff to have taken steps in this regard. The State was *dominus litis* in the proceedings. It was the duty of the State, not the plaintiff to prosecute such proceedings.

[19] There are in any event other effective processes that the maintenance court should have followed upon conviction. They are contained in ss 40 and 41 of the Act:

40 Recovery of arrear maintenance

- (1) *A court with civil jurisdiction convicting any person of an offence under section 31 (1) may, on the application of the public prosecutor and in addition to or in lieu of any penalty which the court may impose in respect of that offence, grant an order for the recovery from the convicted person of any amount he or she has failed to pay in accordance with the maintenance order, together with any interest thereon, whereupon the order so granted shall have the effect of a civil judgment of the court and shall, subject to subsection (2), be executed in the prescribed manner.*
- (2) *A court granting an order against a convicted person may-*
 - (a) *in a summary manner enquire into the circumstances mentioned in subsection (3); and*
 - (b) *if the court so decides, authorise the issue of a warrant of execution against the movable or immovable property of the convicted person in order to satisfy such order.*
- (3) *At the enquiry, the court shall take into consideration-*
 - (a) *the existing and prospective means of the convicted person;*
 - (b) *the financial needs and obligations of, or in respect of, the person maintained by the convicted person;*
 - (c) *the conduct of the convicted person in so far as it may be relevant concerning his or her failure to pay in accordance with the maintenance order; and*
 - (d) *the other circumstances which should, in the opinion of the court, be taken into consideration.*
- (4) *Notwithstanding anything to the contrary contained in any law, any pension, annuity, gratuity or compassionate allowance or other similar benefit shall be liable to be attached or subjected to execution under an order granted under this section. [My emphasis]*

41 Conversion of criminal proceedings into maintenance enquiry

If during the course of any proceedings in a magistrate's court in respect of-

- (a) *an offence referred to in section 31 (1); or*
 (b) *the enforcement of any sentence suspended on condition that the convicted person make periodical payments of sums of money towards the maintenance of any other person,*
it appears to the court that it is desirable that a maintenance enquiry be held, or when the public prosecutor so requests, the court shall convert the proceedings into such enquiry.

[20] These remedies have simply been disregarded. It was held in *De Wit v De Wit*³ that it's the maintenance officer, not the complainant, who must decide whether or not to take such steps. The failure to take effective and available steps speaks of gross incompetence and dereliction of duties.

[21] As a result the plaintiff cannot recover the arrear maintenance, and is left with only a dubious *spes* of future maintenance payments.

[22] The plaintiff's claim is for pure economic loss suffered as a result of the maintenance officers' failure to take the necessary steps to secure her claim. The Act placed a statutory duty upon them to take such steps. Their failure to do so is therefore unlawful. They have patently been grossly negligent. These facts satisfy the requirements for an action for pure economic loss suffered as a result of an omission.

[23] The loss that the plaintiff suffered is the amount of arrear maintenance that the maintenance officers could and should have secured through an attachment of Matlala's pension benefit. This amount was irretrievably lost when the magistrate ordered on 28 October 2009 that the arrears be written off.

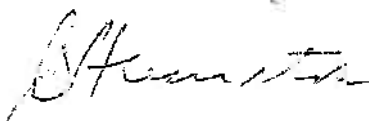
³ 1995 (3) SA 700 (T) at 709

[24] The plaintiff sued the individual maintenance officers personally, jointly and severally with the first and second defendants. The individual roles of the different maintenance officers do not appear from the evidence. As a team of maintenance officers they neglected to take the steps provided for in the Act. Their employer, the second defendant is vicariously liable for their unlawful and negligent omissions. I shall therefore make no orders against the maintenance officers individually.

[25] The amount of the claim falls within the jurisdiction of the magistrates' court. However, this action is akin to a review of proceedings of a magistrates' court sitting as a maintenance court. The magistrates' court has no jurisdiction to review its own proceedings. It was therefore appropriate for the plaintiff to bring her action in this court

In the result I make the following order:

1. The first, second and third defendants are ordered to pay to the plaintiff the sum of R24 500 jointly and severally, the one paying the others to be absolved;
2. Interest on the said sum at the rate of 15,5% per annum from the date of summons.



J. HIEMSTRA
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

HOW TO COMPLETE THE J101 APPLICATION FOR MAINTENANCE FORM



J101 E



REPUBLIC OF SOUTH AFRICA

APPLICATION FOR MAINTENANCE ORDER COMPLAINT IN TERMS OF SECTION 6(1) (a) OF THE MAINTENANCE ACT, 1998 (ACT No. 99 OF 1998)

* Delete whichever is not applicable.

Reference No. _____

LEAVE THIS EMPTY

[This information should, as far as possible, be given in order to investigate the complaint. If space is insufficient information should be supplied on an attached annexure.]

I, (full name) **SEE COMMENT 1** (called "the complainant")

born on **SEE COMMENT 2** age ID number **SEE COMMENT 3**

living at _____

SEE COMMENT 4

working at _____

SEE COMMENT 5

tel. no. (.....) **SEE COMMENT 6**

tel. no. (.....) **SEE COMMENT 7**

1. **FULL NAME:**
STATE YOUR FULL NAME AS DISPLAYED IN YOUR IDENTITY DOCUMENT.
2. **BORN ON:**
STATE THE DATE YOU WERE BORN STARTING WITH TWO DIGITS FOR THE DAY, THEN TWO DIGITS FOR THE MONTH AND THEN TWO DIGITS FOR THE LAST TWO DIGITS OF THE CURRENT YEAR.
3. **ID NUMBER:**
STATE YOUR FULL 13-DIGIT SOUTH AFRICAN IDENTITY NUMBER.
4. **LIVING AT:**
STATE YOUR FULL ADDRESS, WHICH INCLUDES HOUSE, APARTMENT OR PLOT NUMBER, NAME OF FLAT OR COMPLEX, STREET NAME, SUBURB AND TOWN WITH POSTAL CODE.
5. **WORKING AT:**
STATE NAME OF COMPANY OR EMPLOYER, STATE REGISTERED ADDRESS OF COMPANY OR EMPLOYER WHICH INCLUDES THE BUILDING NAME AND/OR STREET ADDRESS OF THE COMPANY, NEIGHBOURHOOD, TOWN AND POSTAL CODE. IF UNEMPLOYED, LEAVE THIS OUT.
6. **TELEPHONE NUMBER:**
PROVIDE YOUR LANDLINE OR CELLPHONE NUMBER WHERE YOU ARE MOST LIKELY TO BE REACHED.
7. **TELEPHONE NUMBER: (IF YOU ARE EMPLOYED ONLY)**
PROVIDE YOUR WORK PHONE NUMBER OR CELL NUMBER WHERE YOU COULD BE REACHED DURING OFFICE HOURS.

2. *The defendant is legally liable to maintain me because:

SEE COMMENT 1

*The child(ren) mentioned in 4. below is/are under my care because

SEE COMMENT 2

3. The defendant has not supported *myself/the said child(ren) since (date) and has made *no contribution towards maintenance/the following contribution towards maintenance:

SEE COMMENT 3

SEE COMMENT 4

1. **REASON WHY PERSON MUST MAINTAIN YOU:**

STATE REASON WHY YOU ARE CLAIMING MAINTENANCE, E.G THE CHILDREN'S FATHER STOPPED PAYING MAINTENANCE AFTER YOUR DIVORCE OR THE FATHER NEVER CONTRIBUTED TO DATE TO HIS CHILD.

2. **CARE:**

STATE THE REASON WHY THE CHILDREN FOR WHOM YOU CLAIM MAINTENANCE IS IN YOUR CARE, E.G. YOU ARE THE PRIMARY CAREGIVER OR THE FATHER IS WITHOUT A FIXED ADDRESS.

3. **DATE:**

PROVIDE THE ACTUAL DATE THE DEFENDANT/PERSON YOU INTEND TO CLAIM MAINTENANCE FROM LAST PAID MAINTENANCE OR STOPPED PAYING MAINTENANCE.

4. **CONTRIBUTION OF MAINTENANCE:**

STATE IN WHAT WHY THE DEFENDANT DO NOT CONTRIBUTE TO MAINTENANCE. STATE WHAT EXPENSES NEEDS TO BE COVERED IN TERMS OF MAINTENANCE CONTRIBUTIONS, E.G. CLOTHING AND MEDICAL EXPENSES.

LEAVE THIS SECTION EMPTY FOR NOW - WE WILL COME BACK TO THIS SECTION TO COMPLETE AT THE END AFTER WE HAVE COMPLETED THE WHOLE APPLICATION.

4. I request that the Defendant be ordered to make the following contribution(s) towards maintenance: A *weekly/monthly contribution of –

R..... in respect of myself (complainant), and / or

| Amount | | Name of Child | Born | | | | | | | |
|--------|---------------|---------------|------|---|---|---|---|---|---|---|
| R | in respect of | | d | d | m | m | y | y | y | y |
| R | in respect of | | d | d | m | m | y | y | y | y |
| R | in respect of | | d | d | m | m | y | y | y | y |
| R | in respect of | | d | d | m | m | y | y | y | y |
| R | in respect of | | d | d | m | m | y | y | y | y |
| R | in respect of | | d | d | m | m | y | y | y | y |

LEAVE THIS SECTION EMPTY FOR NOW - WE WILL COME BACK TO THIS SECTION TO COMPLETE AT THE END AFTER WE HAVE COMPLETED THE WHOLE APPLICATION.

The first payment should be made on and after that on or before the day of each succeeding *week/month. All payments should be made to in favour of

and/or

other contributions [for example medical and dental costs, school fees, fees to tertiary institutions, school wear, expenses for sport and/or cultural activities, birth expenses and maintenance for child(ren) from birth]:

.....

| ASSETS | | |
|----------------|---------------|-----------------|
| Fixed property | | R SEE COMMENT 1 |
| Investments | | R SEE COMMENT 2 |
| | | |
| Savings | | R SEE COMMENT 3 |
| | | |
| Shares | | R SEE COMMENT 4 |
| | | |
| Motor vehicles | | R SEE COMMENT 5 |
| Other: | SEE COMMENT 6 | R |
| | | R |
| | | R |

1. **FIXED PROPERTY:**
STATE THE VALUE OF YOUR HOUSE / FLAT / ERF OR OTHER BUILDINGS. ONLY FILL THIS IN IF YOU OWN YOUR HOUSE, NOT IF YOU ARE ONLY RENTING THE HOUSE.
2. **INVESTMENTS:**
STATE THE VALUE OF ALL YOUR INVESTMENTS AT REGISTERED FINANCIAL INSTITUTIONS. THIS COULD BE INVESTMENT POLICIES AT OLD MUTUAL, SANLAM ETC.
3. **SAVINGS:**
STATE THE VALUE OF YOUR SAVINGS ACCOUNTS AT ANY OF THE BANKS. GIVE AN INDICATION IF YOU HAVE SAVED UP SOME MONEY IN A BANK ACCOUNT AND HOW MUCH YOU SAVED.
4. **SHARES:**
STATE THE VALUE OF YOUR SHARES AT REGISTERED FINANCIAL INSTITUTIONS (IF ANY)
5. **MOTOR VEHICLES:**
STATE THE TOTAL MARKET VALUE OF ALL MOTOR VEHICLES, MOTORBIKES, TRAILERS OR ANY OTHER ROADWORTHY VESSEL IN YOUR OWNERSHIP.
6. **OTHER:**
STATE THE VALUE OF ANY OTHER VALUABLE ASSETS IN YOUR OWNERSHIP, E.G. JEWELLERY.

| INCOME | | | |
|--|---------------|---|--------------------|
| Gross salary | | R | SEE COMMENT 1 |
| Minus: Deductions | Tax | R | SEE COMMENT 2 |
| | Medical Aid | R | SEE COMMENT 3 |
| | Pension | R | SEE COMMENT 4 |
| | Other: | R | SEE COMMENT 5 |
| | SEE COMMENT 5 | R | |
| | | R | |
| Total nett salary | | R | 0.00 SEE COMMENT 6 |
| Other income (state source of income) | SEE COMMENT 7 | R | SEE COMMENT 7 |
| | | R | |
| | | R | |
| Total income | | R | 0.00 SEE COMMENT 8 |

1. **GROSS SALARY: (ONLY FILL THIS IN IF YOU ARE EMPLOYED)**
STATE YOUR SALARY BEFORE DEDUCTIONS. IF YOU ARE UNEMPLOYED, DO NOT FILL THIS IN.
2. **TAX: (ONLY FILL THIS IN IF YOU ARE EMPLOYED)**
STATE THE TOTAL AMOUNT OF TAX DEDUCTED MONTHLY FROM YOUR SALARY OR WHICH YOU PAY OVER PER MONTH. ONLY FILL THIS IN IF THEY DEDUCT TAX FROM YOUR SALARY OR WAGES.
3. **MEDICAL AID: (ONLY FILL THIS IN IF YOU ARE EMPLOYED)**
STATE THE TOTAL MONTHLY CONTRIBUTION TO YOUR MEDICAL AID FOR WHICH YOU ARE RESPONSIBLE. ONLY FILL THIS IN IF YOU HAVE A MEDICAL AID.
4. **PENSION: (ONLY FILL THIS IN IF YOU ARE EMPLOYED)**
STATE YOUR MONTHLY PENSION, PROVIDENT FUND OR ANY OTHER RETIREMENT FUND CONTRIBUTION. ONLY FILL THIS IN IF YOU HAVE A PENSION FUND.
5. **OTHER: (ONLY FILL THIS IN IF YOU ARE EMPLOYED)**
STATE ANY MAJOR/IMPORTANT MONTHLY DEDUCTIONS FROM YOUR SALARY, E.G. BARGAINING COUNCIL OR GROUP LIFE INSURANCE OR GARNISHEE ORDERS.
6. **TOTAL NETT SALARY: (ONLY FILL THIS IN IF YOU ARE EMPLOYED)**
STATE THE ACTUAL AMOUNT THAT GETS PAID OVER TO YOUR MONTHLY/WEEKLY AFTER DEDUCTIONS WERE MADE FROM YOUR SALARY. YOU SHOULD HAVE A COPY OF YOUR PAYSリップ READY (IF YOU ARE EMPLOYED) AS PROOF OF THIS.
7. **OTHER INCOME:**
STATE THE VALUE OF ADDITIONAL INCOME, E.G. RENT, DIVIDENDS, INTEREST, GRANT, SASSA ETC.
8. **TOTAL INCOME:**
THIS IS YOUR NETT SALARY AND OTHER INCOME COMBINED.

NOTE: IF YOU ARE UNEMPLOYED AND ONLY GET GRANT OR SASSA, ONLY FILL IN YOUR SASSA AMOUNT AT COMMENT 7

THIS IS USUALLY THE MOST IMPORTANT SECTION OF YOUR APPLICATION AND MANY PEOPLE HAVE DIFFICULTY IN COMPLETING THIS SECTION. IN ORDER TO PREPARE YOU FOR COURT, IT IS SUGGESTED THAT YOU MAKE COPIES OF ALL RELEVANT DOCUMENTS IN SUPPORT OF THE MONEY THAT YOU CLAIM, FOR EXAMPLE, IF YOU CLAIM FOR RATES AND TAXES, HAVE A COPY OF YOUR MUNICIPAL ACCOUNT READY.



Because so many have difficulties with completing this section (how to split between the “self” and “childrens” portion, our next webinar will deal with this calculation in detail.

FIRST THINGS FIRST: GET THE TOTAL AMOUNTS OF YOUR MONTHLY EXPENSES

WHAT IS FILLED IN AS “SELF”

WHAT IS FILLED IN AS “CHILDREN”

| Expenditure | | Self | Child(ren) | Total |
|-------------|---|--|------------|-------|
| 1 | Lodging (bond repayment/levy /rent/ board) | | | 0.00 |
| 2 | Groceries/food/personal care (including hair care/cosmetics etc.) | | | 0.00 |
| 3 | Household expenditure | Water and electricity / gas / paraffin | | 0.00 |
| | | Rates and taxes | | 0.00 |
| | | Laundry/Dry-cleaning | | 0.00 |
| | | Lunches | | 0.00 |
| | | Telephone | | 0.00 |
| | | Domestic worker | | 0.00 |
| | | Garden services | | 0.00 |
| | Insurance (short term) | | 0.00 | |
| 4 | Clothing | Clothes and shoes | | 0.00 |
| | | School uniforms | | 0.00 |
| | | Sports clothes | | 0.00 |



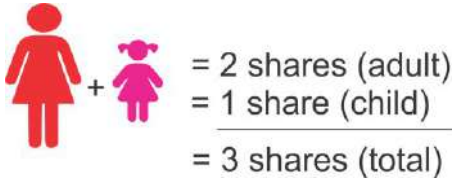
There is no fixed formula as the South Africa is in favour of discretionary amounts (up to the court to decide what is fair). However, we use the principles of case law in Accutt v Accutt and Santam v Fourie for guidance - this will be discussed in detail in the next webinar



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EXPENDITURE:

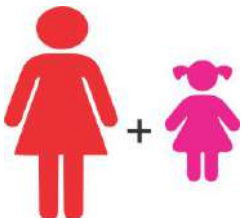
FIRSTLY YOU HAVE TO ESTABLISH HOW MANY PEOPLE ARE THERE IN YOUR HOUSE. COUNT THE NUMBER OF ADULTS (THIS ALSO INCLUDES CHILDREN OVER THE AGE OF 18) AND CHILDREN YOUNGER THAN 18 YEARS. EACH ADULT IN THE HOUSE IS ALLOCATED 2 (TWO) SHARES AND 1 (ONE) SHARE IS ALLOCATED FOR EACH MINOR CHILD.



If it is only the applicant and the minor child :
 To work out the child's expenses, all expenses must be divided by 3
 (thus each child portion is 1/3) and your expenses are 2/3

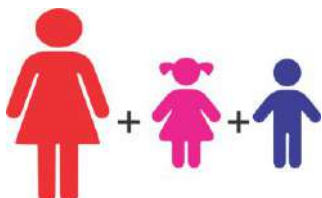
| Expenditure | | Self | Child(ren) | Total |
|-------------|---|--|------------|-------|
| 1 | Lodging (bond repayment/levy /rent/ board) | | | 0.00 |
| 2 | Groceries/food/personal care (including hair care/cosmetics etc.) | | | 0.00 |
| 3 | Household expenditure | Water and electricity / gas / paraffin | | 0.00 |
| | | Rates and taxes | | 0.00 |
| | | Laundry/Dry-cleaning | | 0.00 |
| | | Lunches | | 0.00 |
| | | Telephone | | 0.00 |
| | | Domestic worker | | 0.00 |
| | | Garden services | | 0.00 |
| 4 | Clothing | Insurance (short term) | | 0.00 |
| | | Clothes and shoes | | 0.00 |
| | | School uniforms | | 0.00 |
| | | Sports clothes | | 0.00 |

More examples:

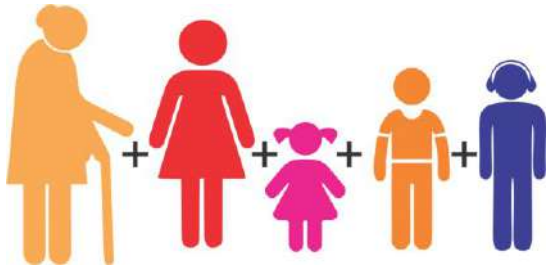


If the bond / rent is R5000,00 per month then the child's expense will be $R5000 / 3 = R1666.66$

The mother's contribution will then be 2/3 of the rent which amounts to R3333.34.

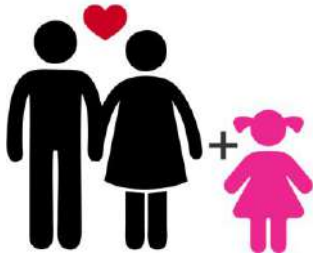


A mother with two children and the electricity amount to R2000 per month means the children's share will be 2 / 4 . One adult is 2 shares and each child is one share meaning 2 plus 1 plus 1 equal four which means the mother will contribute 2 / 4 of R2000 electricity that is R1000.00. If the father is only the biological father of one child the child's share will be R500.00 for his child.



Mother is living with her grandmother and two brothers (aged 15 and 19) with her child and the food/grocery bill is R4000.00 per month then the child's share will be 1/8 since the mother is two shares, the grandmother is two shares and her 19 year old adult brother is two shares (3 adults is 3x2=6) plus the 15 year old brother plus the minor child in question.

The minor child's expense on the grocery item will be 4000 divided by 8 =R500.00



A mother and her new boyfriend living in a flat with the minor will mean all joint expenses will be divided by 5 (2 adults = 4) plus 1 = 5
A child is one share that accounts to 1 point.

| Expenditure | | Self | Child(ren) | Total |
|-------------|---|--|---------------|-------|
| 1 | Lodging (bond repayment/levy /rent/ board) | SEE COMMENT 1 | | 0.00 |
| 2 | Groceries/food/personal care (including hair care/cosmetics etc.) | SEE COMMENT 2 | | 0.00 |
| 3 | Household expenditure | Water and electricity / gas / paraffin | SEE COMMENT 3 | 0.00 |
| | | Rates and taxes | | 0.00 |
| | | Laundry/Dry-cleaning | | 0.00 |
| | | Lunches | | 0.00 |
| | | Telephone | | 0.00 |
| | | Domestic worker | | 0.00 |
| | | Garden services | | 0.00 |
| | | Insurance (short term) | | 0.00 |
| 4 | Clothing | Clothes and shoes | SEE COMMENT 4 | 0.00 |
| | | School uniforms | SEE COMMENT 4 | 0.00 |
| | | Sports clothes | SEE COMMENT 4 | 0.00 |

- LODGING:**
THIS IS THE TOTAL AMOUNT YOU PAY FOR ACCOMMODATION ON A MONTHLY BASIS, WHETHER IS A BOND REPAYMENT OR RENT. STATE YOUR PORTION AND YOUR CHILDREN'S PORTION SEPARATELY AND UNDER TOTAL THE WHOLE AMOUNT FOR ACCOMMODATION.
- GROCERIES/FOOD/PERSONAL CARE:**
STATE THE TOTAL AMOUNT YOU PAY FOR FOOD AND TOILETRIES. STATE YOUR PORTION AND YOUR CHILDREN'S PORTION SEPARATELY, THEN ADD IT UNDER TOTAL AMOUNT.
- HOUSEHOLD EXPENDITURE:**
STATE YOUR MONTHLY EXPENSES DIRECTLY LINKED TO YOUR RESIDENCE. THIS INCLUDES EXPENSES SUCH AS ELECTRICITY, RATES AND TAXES, ARMED RESPONSE, INTERNET AND YOUR LAUNDRY. REMEMBER TO SPLIT THE EXPENSES BETWEEN YOUR PORTION AND THE CHILDREN'S PORTION AND THEN AD IT IN THE TOTAL COLUMN.
- CLOTHING:**
THIS INCLUDES ALL CLOTHING, UNDERWEAR, SCHOOL CLOTHING AND SPORT CLOTHING. SPLIT THE EXPENSES BETWEEN YOUR SHARE OF CLOTHING AND YOUR CHILDREN'S SHARE OF CLOTHING. ADD THE TWO AMOUNTS IN THE TOTAL COLUMN.

| | | | | | | |
|---|-----------|------------------------|--------------------------|---------------|--|------|
| 5 | Transport | Bus / taxi / lift club | | SEE COMMENT 5 | | 0.00 |
| | | Car | Installments & Insurance | SEE COMMENT 5 | | 0.00 |
| | | | Maintenance | SEE COMMENT 5 | | 0.00 |
| | | | Fuel | SEE COMMENT 5 | | 0.00 |
| | | | Licences | SEE COMMENT 5 | | 0.00 |
| | | | Parking | SEE COMMENT 5 | | 0.00 |

5. **TRANSPORT:**

IF YOU MAKE USE OF PUBLIC TRANSPORT OR A LIFT CLUB PROVIDE YOUR MONTHLY TRANSPORTATION FEES AND SPLIT IT BETWEEN YOUR SHARE AND YOUR CHILDREN'S SHARE. IF YOU OWN YOUR OWN VEHICLE, PROVIDE YOUR MAINTENANCE, FUEL, LICENCING, INSURANCE AND OTHER EXPENSES RELATED TO YOUR VEHICLE AND DIVIDE IT INTO YOUR SHARE AND YOUR CHILDREN'S SHARE, SEEING AS THEY ARE ALSO BENEFITING FROM YOUR VEHICLE. ADD YOUR SHARE AND YOUR CHILDREN'S SHARE IN THE TOTAL COLUMN.

| Expenditure | | Self | Child(ren) | Total | |
|-------------|-------------------------|---------------------------------------|---------------|-------|------|
| 6 | Educational expenditure | School fees | SEE COMMENT 1 | | 0.00 |
| | | Crèche / day care / after school care | | | 0.00 |
| | | Insurance (study policy) | | | 0.00 |
| | | Books / Stationery | | | 0.00 |
| | | Outings / Extramural | | | 0.00 |
| | | Sports | | | 0.00 |
| | | Other school expenditure | | | 0.00 |
| 7 | Medical expenditure | Doctor/dentist/etc. | SEE COMMENT 2 | | 0.00 |
| | | Medication | SEE COMMENT 2 | | 0.00 |
| | | Hospital | SEE COMMENT 2 | | 0.00 |
| | | Other medical expenditure | SEE COMMENT 2 | | 0.00 |
| 8 | Insurance | Life | SEE COMMENT 3 | | 0.00 |
| | | Annuity | SEE COMMENT 3 | | 0.00 |
| | | House owners/House holders | SEE COMMENT 3 | | 0.00 |

1. **EDUCATIONAL EXPENDITURE:**

STATE YOUR CHILDREN'S SCHOOL FEES, CRÈCHE FEES, AFTER CARE FEES, SCHOOL BOOKS AND STATIONARY EXPENSES, SPORT ACTIVITY EXPENSES AND ANY OTHER PROVISION ARE MAKING IN TERMS OF YOUR CHILDREN'S EDUCATION. IN THIS CATEGORY YOU DON'T NEED TO SPLIT THE EXPENSE BETWEEN YOURSELF AND YOUR CHILDREN AS THIS EXPENSE IS STRICTLY FOR YOUR CHILDREN. ASK THE SCHOOL FOR A LETTER REFLECTING THE SCHOOL FEES AND HAND IT IN TOGETHER WITH YOUR APPLICATION.

2. **MEDICAL EXPENDITURE:**

STATE MEDICAL AID CONTRIBUTIONS, CO-PAYMENTS AS A RESULT OF MEDICAL AID SHORT PAYMENTS, DOCTOR CONSULTATIONS, HOSPITAL STAYS AND ANY MEDICATION YOU HAD TO BUY. SPLIT THIS EXPENSE BETWEEN YOURSELF AND YOUR CHILDREN AND PROVIDE THE TOTAL IN THE RELEVANT COLUMN.

3. **INSURANCE: (ONLY IF APPLICABLE SHOULD THIS BE FILLED IN)**

STATE ALL YOUR INSURANCE PREMIUMS TO WHICH YOUR CHILDREN BENEFIT FROM. THIS INCLUDES LIFE INSURANCE, SHORT-TERM INSURANCE AND ANY ANNUITY YOU TOOK OUT. SPLIT THIS EXPENSE BETWEEN YOURSELF AND YOUR CHILDREN AND PROVIDE THE TOTAL THEREOF IN THE NECESSARY COLUMN.

| | | | | |
|----|---|--------------------------|-----------------|------|
| 9 | Pocket money/ Allowances | | SEE COMMENT 1 | 0.00 |
| 10 | Holidays, entertainment & recreation (incl M-Net) | SEE COMMENT 2 | | 0.00 |
| 11 | Maintenance, replacement and repairs of items | House | } SEE COMMENT 3 | 0.00 |
| | | Household appliances | | 0.00 |
| | | Kitchenware | | 0.00 |
| | | Linen, towels, etc. | | 0.00 |
| | | *Bicycles/bikes/scooters | | 0.00 |
| | | Other items | | 0.00 |
| 12 | Personal loans | SEE COMMENT 4 | | 0.00 |
| 13 | Security alarm system | SEE COMMENT 5 | | 0.00 |
| 14 | Membership fees | SEE COMMENT 6 | | 0.00 |
| 15 | Religious contributions/ Charities | SEE COMMENT 7 | | 0.00 |
| 16 | Gifts | SEE COMMENT 8 | | 0.00 |

1. **POCKET MONEY/ALLOWANCES:**
IF YOU PAY ANY ALLOWANCE TO YOUR CHILDREN STATE THIS AMOUNT. THERE IS NO NEED TO SPLIT THIS EXPENSE BETWEEN YOURSELF AND YOUR CHILDREN AS ONLY YOUR CHILDREN BENEFIT FROM IT.
2. **HOLIDAYS, ENTERTAINMENT & RECREATION:**
STATE YOUR EXPENDITURE ON HOLIDAY OUTINGS, ENTERTAINMENT SUCH AS MOVIES AND ANY FUN ACTIVITIES. SPLIT THIS EXPENSE BETWEEN YOURSELF AND YOUR CHILDREN AND STATE THE TOTAL AMOUNT IN THE RELEVANT COLUMN.
3. **MAINTENANCE, REPLACEMENT AND REPAIRS OF ITEMS:**
THIS REFERS TO ALL YOUR HOUSEHOLD EXPENDITURE IN ORDER TO KEEP THE CONTENTS UPDATED AND IN GOOD ORDER. STATE EXPENSES SUCH AS THE REPLACEMENT OF LINEN/TOWELS, BROKEN APPLIANCES THAT NEEDS TO BE REPLACED, PAINTING OF YOUR HOUSE, ETC. MAKE SURE TO SPLIT THE EXPENSE BETWEEN YOUR PORTION AND YOUR CHILDREN'S PORTION AND PROVIDE THE TOTAL IN THE RELEVANT COLUMN.
4. **PERSONAL LOANS:**
IF YOU HAVE A LOAN WITH ANY RECOGNISED FINANCIAL INSTITUTION IN SOUTH AFRICA LIST IT HERE AND STATE THE AMOUNT OWNING. THIS WILL BE FOR YOUR ACCOUNT ONLY, THEREFORE NO NEED TO SPLIT IT WITH THE CHILDREN'S EXPENSES.
5. **SECURITY ALARM SYSTEMS:**
IF YOU HAVE ANY SECURITY SYSTEM OR ARMED RESPONSE FOR WHICH YOU PAY A MONTHLY SUBSCRIPTION, YOU NEED TO INDICATE THIS EXPENSE. SPLIT THE EXPENSE BETWEEN YOURSELF AND YOUR CHILDREN AND PROVIDE THE TOTAL IN THE RELEVANT COLUMN.
6. **MEMBERSHIP FEES:**
IF YOU AND YOUR KIDS BELONG TO ANY ORGANISATIONS OR GROUPS THAT REQUIRE A MEMBERSHIP FEE, STATE THE MONTHLY FEE HERE. SPLIT THE FEE BETWEEN YOUR PORTION AND YOUR CHILDREN'S PORTION. SUCH FEES CAN INCLUDE ANY EXTRAMURAL ACTIVITIES SUCH AS SPORTS OR CULTURAL ACTIVITIES.
7. **RELIGIOUS CONTRIBUTIONS/CHARITIES:**
STATE YOUR MONTHLY CONTRIBUTIONS TO CHARITIES OR YOUR PLACE OF WORSHIP WHICH YOU SUPPORT. SPLIT THIS EXPENSE BETWEEN YOUR PORTION AND YOUR CHILDREN'S PORTION. PROVIDE THE TOTAL IN THE RELEVANT COLUMN.
8. **GIFTS:**
THIS INCLUDES BIRTHDAY GIFTS AND GIFTS FOR SPECIAL OCCASIONS. SPLIT THE EXPENSE BETWEEN YOUR PORTION AND YOUR CHILDREN'S PORTION. PROVIDE THE TOTAL IN THE RELEVANT COLUMN.

| | | | | | |
|----|-----------------------------------|----------------------------------|-----------------|--|------|
| 17 | TV licence | | SEE COMMENT 1 | | 0.00 |
| 18 | Reading material | Books / Newspapers / Periodicals | SEE COMMENT 2 | | 0.00 |
| 19 | Lease / credit agreement payments | Furniture | } SEE COMMENT 3 | | 0.00 |
| | | Appliances | | | 0.00 |
| | | Other | | | 0.00 |
| 20 | Pets | Food | SEE COMMENT 4 | | 0.00 |
| | | Veterinary surgeon ("vet") | SEE COMMENT 4 | | 0.00 |
| | | Licence | SEE COMMENT 4 | | 0.00 |

- TV LICENCE:**
SPLIT YOUR MONTHLY CONTRIBUTION TO YOUR TV LICENCE BETWEEN YOUR CHILDREN AND YOURSELF. PROVIDE THE TOTAL IN THE RELEVANT COLUMN.
- READING MATERIAL:**
STATE YOUR EXPENSES FOR PURCHASING BOOKS, NEWSPAPERS, LIBRARY SUBSCRIPTIONS, ETC. SPLIT THIS EXPENSE BETWEEN YOURSELF AND YOUR CHILDREN. PROVIDE THE TOTAL IN THE RELEVANT COLUMN.
- LEASE / CREDIT AGREEMENT:**
IF YOU HAVE ANY CREDIT AGREEMENTS STATE THE AMOUNT THEREOF HERE. THIS CAN BE CREDIT AGREEMENTS FOR FURNITURE OR A VEHICLE. THE WHOLE AMOUNT THAT YOU SHOULD PAY MONTHLY SHOULD BE STATED HERE. SPLIT THE EXPENSE BETWEEN YOUR PORTION AND YOUR CHILDREN'S PORTION. PROVIDE THE TOTAL IN THE RELEVANT COLUMN.
- PETS:**
STATE YOUR EXPENSES WITH REGARDS TO YOUR FAMILY PETS. INCLUDE FOOD AND VETERINARY VISITS. SPLIT THE EXPENSE BETWEEN YOUR PORTION AND YOUR CHILDREN'S PORTION. PROVIDE THE TOTAL IN THE RELEVANT COLUMN.

| Expenditure | | Self | Child(ren) | Total |
|--------------------------|-----------------------------|---------------|-------------|-------------|
| 21 | Other (not specified above) | SEE COMMENT 5 | | 0.00 |
| | | SEE COMMENT 5 | | 0.00 |
| | | SEE COMMENT 5 | | 0.00 |
| | | SEE COMMENT 5 | | 0.00 |
| | | SEE COMMENT 5 | | 0.00 |
| Total expenditure | | 0.00 | 0.00 | 0.00 |

Dated at **SEE COMMENT 6** this day of year

YOU HAVE TO SIGN THE DOCUMENT IN FRONT OF A COMMISSIONER OF OATHS (SUCH AS THE POLICE) SO, DON'T SIGN IT YET

Signature of Complainant

- OTHER:**
STATE ANY ADDITIONAL EXPENSES WHICH YOU FEEL IS RELEVANT TO THE BENEFIT OF YOUR CHILDREN. SPLIT THIS EXPENSE BETWEEN YOUR PORTION AND YOUR CHILDREN'S PORTION. PROVIDE THE TOTAL IN THE RELEVANT COLUMN.
- DATED AT:** STATE THE PLACE TOWN/SUBURB WHERE YOU SIGN THIS DOCUMENT. THIS DAY: STATE THE DAY OF THE MONTH MONTH: STATE THE MONTH IN WHICH YOU SIGN THIS DOCUMENT. YEAR: STATE THE YEAR IN WHICH YOU SIGN THIS DOCUMENT.

**THIS PORTION YOU LEAVE OUT BECAUSE THIS SECTION NEEDS TO BE FILLED IN
WHEN YOU HAVE THIS APPLICATION COMMISSIONED IN FRONT OF A COMMISSIONER
OF OATHS (SUCH AS A POLICE STATION OR AT COURT)**

FOR OFFICIAL USE ONLY

Oath/Affirmation

1. I certify that before administering the *oath/affirmation I asked the complainant the following questions and wrote down *his/her answers in *his/her presence:

(a) Do you know and understand the contents of the declaration? Answer

(b) Do you have any objection to taking the prescribed oath? Answer

(c) Do you consider the prescribed oath binding on your conscience? Answer

2. I certify that the complainant acknowledged that *he/she knows and understands the contents of this declaration. The complainant uttered the following words *"I swear that the contents of this declaration are true, so help me God"/"I truly affirm that the contents of the declaration are true". The *signature/mark of the complainant was affixed to the declaration in my presence.

.....
Justice of the Peace/Commissioner of Oaths

Full name and surname (block letters)


Designation (rank) Ex Officio Republic of South Africa

Business address (street address must be stated)

Dated at this day of year

NOW, GO BACK TO THIS PORTION AT THE BEGINNING THAT STILL NEEDS TO BE COMPLETED.

WHAT YOU HAVE TO DO NOW, IS TO CALCULATE ALL THE AMOUNTS THAT YOU HAVE INDICATED IN THE "CHILD(REN) COLUMN. MAKE DOUBLE SURE THAT YOU HAVE ADDED ALL THE AMOUNTS CORRECTLY. NOW YOU HAVE THE TOTAL AMOUNT WHAT IS NEEDED FOR MAINTENANCE OF ALL YOUR CHILDREN (FOR EXAMPLE A TOTAL AMOUNT OF R2000 THAT IS NEEDED MONTHLY). YOU ARE READY TO COMPLETE THIS SECTION NOW, BUT FIRST WORK OUT HOW MUCH MONEY EACH CHILD SHOULD GET. TAKE THE TOTAL AMOUNT THAT YOU HAVE JUST ADDED (EG. R2000) AND DIVIDE THAT BY THE AMOUNT OF CHILDREN (EG. 4). THEN EACH CHILD SHOULD GET AN AMOUNT OF (R2000 / 4 = R500).



Because so many have difficulties with completing this section (how to calculate the parent's contribution portion, our following webinar will deal with this calculation in detail.

4. I request that the Defendant be ordered to make the following contribution(s) towards maintenance: A *weekly/monthly contribution of – **SEE COMMENT 1**

R. in respect of myself (complainant), and / or

| Amount | | Name of Child | Born | | | | | |
|--|---------------|--|------|---|--|---|---|--|
| R SEE COMMENT 2 | in respect of | SEE COMMENT 3 | d | d | SEE COMMENT 4 | y | y | |
| R SEE COMMENT 2 | in respect of | SEE COMMENT 3 | d | d | SEE COMMENT 4 | y | y | |
| R SEE COMMENT 2 | in respect of | SEE COMMENT 3 | d | d | SEE COMMENT 4 | y | y | |
| R SEE COMMENT 2 | in respect of | SEE COMMENT 3 | d | d | SEE COMMENT 4 | y | y | |
| R SEE COMMENT 2 | in respect of | SEE COMMENT 3 | d | d | SEE COMMENT 4 | y | y | |
| R SEE COMMENT 2 | in respect of | SEE COMMENT 3 | d | d | SEE COMMENT 4 | y | y | |

The first payment should be made on SEE COMMENT 5 and after that on or before the SEE COMMENT 6 day of each succeeding *week/month. All payments should be made to SEE COMMENT 7 in favour of SEE COMMENT 8;

and/or

other contributions [for example medical and dental costs, school fees, fees to tertiary institutions, school wear, expenses for sport and/or cultural activities, birth expenses and maintenance for child(ren) from birth]: SEE COMMENT 9

1. **WEEKLY/MONTHLY:**
CHOOSE THE FREQUENCY HOW OFTEN THE MAINTENANCE NEEDS TO BE PAID INTO YOUR ACCOUNT. (USUALLY MONTHLY)

2. **AMOUNT:**
STATE THE INDIVIDUAL AMOUNT YOU CLAIM FOR EACH OF YOUR CHILDREN HERE. NOTE: NOT THE COMBINED AMOUNT, BUT THE AMOUNT YOU REQUIRE PER CHILD.
3. **NAME OF CHILD:**
STATE THE FULL NAME OF EACH OF YOUR CHILDREN. THIS INCLUDES FIRST NAME, SECOND NAME AND SURNAME OF EACH RESPECTIVE CHILD.
4. **BORN DATE:**
STATE THE DATE OF BIRTH OF EACH OF YOUR CHILDREN. THE FIRST TWO BLOCKS IS FOR THE DAY OF THE MONTH, THE SECOND TWO BLOCKS FOR THE ACTUAL MONTH OF THE YEAR AND THE LAST TWO BLOCKS FOR THE LAST TWO DIGITS OF THE YEAR.
5. **DATE:**
STATE THE ACTUAL DATE ON WHEN THE FIRST MAINTENANCE PAYMENT NEEDS TO BE MADE.
6. **SUBSEQUENT DATE:**
STATE THE DATE ON WHICH THE RECURING MAINTENANCE PAYMENTS NEEDS TO BE MADE AFTER THE INITIAL MAINTENANCE PAYMENT.
7. **NAME OF PERSON TO RECEIVE MAINTENANCE:**
STATE THE FULL NAME OF THE PERSON WHO NEEDS TO RECEIVE THE MAINTENANCE PAYMENTS.
8. **NAME OF PERSON IN WHOSE FAVOUR MAINTENANCE IS PAYABLE:**
STATE THE FULL NAME OR NAMES OF CHILDREN IN WHOSE FAVOUR THE SAID MAINTENANCE IS PAYABLE.
9. **ADDITIONAL CONTRIBUTIONS:**
STATE ANY ADDITIONAL CONTRIBUTIONS THE MAINTENANCE PAYER NEEDS TO MAKE, ABOVE THE MAINTENANCE PAYMENT, E.G.SCHOOL CLOTHING, DENTAL CARE, WINTER CLOTHES ETC.



REPUBLIC OF SOUTH AFRICA

**MAINTENANCE ORDER IN TERMS OF SECTION 16 OF THE
MAINTENANCE ACT, 1998 (ACT No. 99 OF 1998)**

Reference No.

[Form G (J214E) must be used in the event of an order by consent and Form H (J252E) must be used in the event of an order by default.]

In the maintenance matter between:

.....
(person who applies for maintenance order)

and

.....
(person against whom order is made)

1. In terms of the provisions of section 16(1)(a) and/or (b) of the Maintenance Act, 1998 (Act No. 99 of 1998), it is ordered that -

.....
(full name of person against whom order is made)

ID number

| | | | | | | | | | | | | | |
|--|--|--|--|--|--|--|--|--|--|--|--|--|--|
| | | | | | | | | | | | | | |
|--|--|--|--|--|--|--|--|--|--|--|--|--|--|

living at

and working at

*(a) shall pay on a *weekly/monthly basis with effect from..... towards the maintenance of *the complainant and/or the following child(ren) the sum of -

R in respect of the complainant

| Amount | | Name of Child |
|--------|---------------|---------------|
| R | in respect of | |
| R | in respect of | |
| R | in respect of | |
| R | in respect of | |
| R | in respect of | |
| R | in respect of | |

the first payment is to be made on and after that on/or before the
..... day of each succeeding *week/month to

in favour of

and/or

*(b)
.....
.....
.....

(other contributions, for example medical and dental costs, school fees, fees to tertiary institutions, school wear, expenses for sport and/or cultural activities, birth expenses and maintenance for child(ren) from birth).

*2. It is further ordered that the maintenance order, dated made by the
....., is hereby substituted
by the above-mentioned maintenance order.

*3. In terms of the provisions of section 16(2) of the Maintenance Act, 1998 (Act No. 99 of 1998), it is ordered that –
.....
(person(s) who is/are obliged by any contract to pay money on a periodical basis to person against whom maintenance order was
made)

of
..... (address(es))

make on behalf of the person against whom the order in paragraph (1) above was made the following payments:
.....
.....
.....

Dated at this day of year

.....
Magistrate

*Delete whichever is not applicable



REPUBLIC OF SOUTH AFRICA

CONSENT AND MAINTENANCE ORDER
IN TERMS OF SECTION 17 READ WITH SECTION 16 OF THE MAINTENANCE ACT, 1998 (ACT No. 99 OF 1998)

Reference No.

In the maintenance matter between:
 (person who applies for maintenance order)
 and

 (person against whom order may be made)

* Delete whichever is not applicable

A. Written consent in terms of section 17(1)

I,, (full name of person against whom order may be/was made)
 born on

| | | | | | |
|---|---|---|---|---|---|
| d | d | m | m | y | y |
|---|---|---|---|---|---|

 age

| |
|--|
| |
|--|

 ID number

| | | | | | | | | | | | | | | | | | | | |
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 living at working at

consent to the following:

That a maintenance order be issued against me -

*(a) to pay with effect from on a *weekly/monthly basis towards the maintenance of *the complainant and/or the following children the sum of –

R..... in respect of the complainant, and / or

| Amount | | Name of Child | Date of Birth |
|--------|---------------|---------------|---------------|
| R | in respect of | | |
| R | in respect of | | |
| R | in respect of | | |
| R | in respect of | | |

that the first payment be made on and after that on or before the day of each succeeding *week/month to ;
 in favour of ;
 and/or

*(b) to *make the following contribution/*pay.....

Dated at this day of year

Accept (Signature of Applicant)

Signature of person against whom order may be/was made

B. Maintenance order in terms of section 17(1)

- 1. A maintenance order in accordance with the above-mentioned written consent by the person against whom an order may be made/was made is hereby made an order of court.
- *2. The maintenance order dated, made by the, is hereby substituted.
- *3. In terms of the provisions of section 16(2) of the Maintenance Act, 1998 (Act No. 99 of 1998), it is ordered that -
 [person(s) who is/are obliged by any contract to pay money on a periodical basis to person against whom maintenance order was made]
 of [address(es)]

 make on behalf of the person against whom the order in part A above was made the following payments:

Dated at this day of year

.....
Magistrate

C. Return in terms of section 17(2)

I,, hereby certify that I have tendered/delivered a copy of this order to at (place) at*a.m./p.m. on this day of year , and informed *him/her of the nature and urgency thereof.

Dated at this day of year

.....
***Maintenance Officer / Maintenance Investigator
/ Sheriff / Police Officer**

*Delete whichever is not applicable



REPUBLIC OF SOUTH AFRICA

ORDER BY DEFAULT AND NOTICE IN TERMS OF SECTION 18 READ WITH SECTION 16 OF THE MAINTENANCE ACT, 1998 (ACT No. 99 OF 1998)

Reference No.

In the maintenance matter between:
 (person who applies for maintenance order)

and

.....
 (person against whom order may be made)

* Delete whichever is not applicable

A. Order by default

1. In terms of the provisions of section 18 read with section 16 of the Maintenance Act, 1998 (Act No. 99 of 1998), it is ordered that –

(full name of person against whom order may be/was made)

born on

| | | | | | |
|---|---|---|---|---|---|
| d | d | m | m | y | y |
|---|---|---|---|---|---|

 age

| |
|--|
| |
|--|

 ID number

| | | | | | | | | | | | | | | | | | | | |
|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|
| | | | | | | | | | | | | | | | | | | | |
|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|

living at working at

.....

.....

.....

*(a) shall pay on a *weekly/monthly basis with effect from towards the maintenance of *the complainant and/or the following child(ren) the sum of -

R..... in respect of the complainant, and / or

| Amount | | Name of Child |
|--------|---------------|---------------|
| R | in respect of | |
| R | in respect of | |
| R | in respect of | |
| R | in respect of | |
| R | in respect of | |
| R | in respect of | |

The first payment is to be made on and after that on or before the day of each succeeding *week/month to in favour of

and/or

*(b) (other contribution)
.....
.....
.....
.....

*2. It is further ordered that the maintenance order, datedmade by the is hereby substituted by the above-mentioned maintenance order.

*3. In terms of the provisions of section 16(2) of the Maintenance Act, 1998 (Act No. 99 of 1998), it is ordered that - (person(s) who is/are obliged by any contract to pay money on a periodical basis to person against whom maintenance order was made) of (address(es))

make on behalf of the person against whom the order in part A above was made the following payments:
.....
.....
.....

Dated at this day of year

.....
Magistrate

B. Notification of order by default to the person against whom the abovementioned order was made.

1. You are hereby informed of the above-mentioned order by default made against you in terms of which you are directed to make payments as specified in the order.
2. Should you wish to apply for the variation or setting aside of the attached order your application must be made to the maintenance officer of the court who issued the order within 20 days after receipt of this notice.
3. Please take note that you must also give notice of your application to the person in whose favour the order was made and the notice is to be served at least 14 days before the day the application is to be heard.
4. Your application (see paragraph 2) and the notice (see paragraph 3) must be on the prescribed form available at any magistrate's office.

Dated at this day of year

.....
Maintenance Officer/ Clerk of the Maintenance Court

C. Return in terms of section 18(3)

I,, hereby certify that I have tendered/delivered a copy of the order to at (place) at.....a.m./p.m. on this day of year , and informed him/her of the nature and urgency thereof.

Dated at this day of year

.....
*Maintenance Officer / Maintenance Investigator / Sheriff / Police Officer

*Delete whichever is not applicable



REPUBLIC OF SOUTH AFRICA

**INTERIM MAINTENANCE ORDER IN TERMS OF THE
MAINTENANCE ACT, 1998 (ACT No. 99 OF 1998)**

Reference No.

[Form G (J214E) must be used in the event of an order by consent and Form H (J252E) must be used in the event of an order by default.]

In the maintenance matter between:

.....
(person who applies for maintenance order)

and

.....
(person against whom order is made)

1. In terms of the provisions of section 16(1)(a) and/or (b) of the Maintenance Act, 1998 (Act No. 99 of 1998), it is ordered that -

.....
(full name of person against whom order is made)

ID number

| | | | | | | | | | | | | | |
|--|--|--|--|--|--|--|--|--|--|--|--|--|--|
| | | | | | | | | | | | | | |
|--|--|--|--|--|--|--|--|--|--|--|--|--|--|

living at

.....

and working at

.....

*(a) shall pay on a *weekly/monthly basis with effect from..... towards the maintenance of *the complainant and/or the following child(ren) the sum of -

R in respect of the complainant

| Amount | | Name of Child |
|--------|---------------|---------------|
| R | in respect of | |
| R | in respect of | |
| R | in respect of | |
| R | in respect of | |
| R | in respect of | |
| R | in respect of | |

the first payment is to be made on and after that on/or before the
..... day of each succeeding *week/month to

in favour of

and/or

*(b)
.....
.....

(other contributions, for example medical and dental costs, school fees, fees to tertiary institutions, school wear, expenses for sport and/or cultural activities, birth expenses and maintenance for child(ren) from birth).

*2. It is further ordered that the maintenance order, dated made by the
....., is hereby substituted
by the above-mentioned maintenance order.

*3. In terms of the provisions of section 16(2) of the Maintenance Act, 1998 (Act No. 99 of 1998), it is ordered that –
.....
(person(s) who is/are obliged by any contract to pay money on a periodical basis to person against whom maintenance order was
made)

of
..... (address(es))

make on behalf of the person against whom the order in paragraph (1) above was made the following payments:
.....
.....
.....

4. This interim order shall remain of force and effect until a competent court pronounces otherwise in whole or in part, of its terms.

Dated at this day of year

.....
Magistrate

*Delete whichever is not applicable



REPUBLIC OF SOUTH AFRICA

**SUBSTITUTION OR DISCHARGE OF EXISTING MAINTENANCE ORDER
COMPLAINT IN TERMS OF SECTION 6(1)(b) OF THE MAINTENANCE ACT, 1998 (ACT No. 99 OF 1998)**

* Delete whichever is not applicable.

Reference No.

[This information should, as far as possible, be given in order to investigate the complaint. If space is insufficient information should be supplied on an attached annexure.]

I, (full name), (called "the deponent")

born on

| | | | | | |
|---|---|---|---|---|---|
| d | d | m | m | y | y |
|---|---|---|---|---|---|

 age

| |
|--|
| |
|--|

 ID number

| | | | | | | | | | | | | | | | | | | | |
|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|
| | | | | | | | | | | | | | | | | | | | |
|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|

living at working at
.....
.....
.....

tel. no (.....) tel. no (.....)

nearest police station.....

hereby *declare under oath/truly affirm as follows:

1.
(Full name of person against whom maintenance order was made)

born on

| | | | | | |
|---|---|---|---|---|---|
| d | d | m | m | y | y |
|---|---|---|---|---|---|

 age

| |
|--|
| |
|--|

 ID number

| | | | | | | | | | | | | | | | | | | | |
|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|
| | | | | | | | | | | | | | | | | | | | |
|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|

living at working at
.....
.....
.....

tel. no (.....) tel. no (.....)

nearest police station.....

was ordered by (Court) on the day of year

to pay – (a) on a *weekly/monthly basis with effect from towards the maintenance of

..... /the following child(ren) the sum of -

R..... in respect of the complainant, and / or

| Amount | | Name of Child | Born | | | | | | | |
|--------|---------------|---------------|------|---|---|---|---|---|---|---|
| R | in respect of | | d | d | m | m | y | y | y | y |
| R | in respect of | | d | d | m | m | y | y | y | y |
| R | in respect of | | d | d | m | m | y | y | y | y |
| R | in respect of | | d | d | m | m | y | y | y | y |
| R | in respect of | | d | d | m | m | y | y | y | y |
| R | in respect of | | d | d | m | m | y | y | y | y |

All payments should have been made to
in favour of

and/or

other contributions [for example, medical and dental costs, school fees, fees to tertiary institutions, school wear, expenses for sport and/or cultural activities, birth expenses and maintenance for child(ren) from birth]

.....

.....

.....

A copy of the order is attached.

2. *Good cause/reason exists for the **substitution** of the said maintenance order as follows:

(a) A *weekly/monthly payment with effect from in the amount of –
 R..... in respect of the complainant

| Amount | | Name of Child | Born | | | | | | | |
|--------|---------------|---------------|------|---|---|---|---|---|---|---|
| R | in respect of | | d | d | m | m | y | y | y | y |
| R | in respect of | | d | d | m | m | y | y | y | y |
| R | in respect of | | d | d | m | m | y | y | y | y |
| R | in respect of | | d | d | m | m | y | y | y | y |
| R | in respect of | | d | d | m | m | y | y | y | y |
| R | in respect of | | d | d | m | m | y | y | y | y |

The first payment must be made on..... and after that on or before the day of each succeeding *week/month. All payments must be made to..... in favour of

and/or

other contributions [for example, medical and dental costs, school fees, fees to tertiary institutions, school wear, expenses for sport and/or cultural activities, birth expenses and maintenance for child(ren) from birth]

.....

.....

.....

OR

*good cause/ reason exists for the **discharge** of the said maintenance order.

3. The cause/reason for the *substitution/discharge of the maintenance order is

.....

.....

.....

.....

4. Particulars of my assets and *monthly/weekly income and expenditures (supported by documentary proof, where possible) are as follows:

| ASSETS | | INCOME | | |
|----------------|---|---|-------------|--------|
| Fixed property | R | Gross salary | | R |
| Investments | R | Minus: Deductions | Tax | R |
| | | | Medical Aid | R |
| Savings | R | | Pension | R |
| | | | Other: | R |
| Shares | R | | | R |
| | | | R | |
| Motor vehicles | R | Total nett salary | | R 0.00 |
| Other: | R | Other income (state source of income) | | R |
| | R | | | R |
| | R | | | R |
| | | Total income | | R 0.00 |

| Expenditure | | Self | Child(ren) | Total | |
|-------------|---|--|--------------------------|-------|------|
| 1 | Lodging (bond repayment/levy /rent/ board) | | | 0.00 | |
| 2 | Groceries/food/personal care (including hair care/cosmetics etc.) | | | 0.00 | |
| 3 | Household expenditure | Water and electricity / gas / paraffin | | 0.00 | |
| | | Rates and taxes | | 0.00 | |
| | | Laundry/Dry-cleaning | | 0.00 | |
| | | Lunches | | 0.00 | |
| | | Telephone | | 0.00 | |
| | | Domestic worker | | 0.00 | |
| | | Garden services | | 0.00 | |
| | | Insurance (short term) | | 0.00 | |
| 4 | Clothing | Clothes and shoes | | 0.00 | |
| | | School uniforms | | 0.00 | |
| | | Sports clothes | | 0.00 | |
| 5 | Transport | Bus / taxi / lift club | | 0.00 | |
| | | Car | Installments & Insurance | | 0.00 |
| | | | Maintenance | | 0.00 |
| | | | Fuel | | 0.00 |
| | | | Licences | | 0.00 |
| | | | Parking | | 0.00 |

| Expenditure | | Self | Child(ren) | Total |
|-------------|---|---------------------------------------|------------|-------|
| 6 | Educational expenditure | School fees | | 0.00 |
| | | Crèche / day care / after school care | | 0.00 |
| | | Insurance (study policy) | | 0.00 |
| | | Books / Stationery | | 0.00 |
| | | Outings / Extramural | | 0.00 |
| | | Sports | | 0.00 |
| | | Other school expenditure | | 0.00 |
| 7 | Medical expenditure | Doctor/dentist/etc. | | 0.00 |
| | | Medication | | 0.00 |
| | | Hospital | | 0.00 |
| | | Other medical expenditure | | 0.00 |
| 8 | Insurance | Life | | 0.00 |
| | | Annuity | | 0.00 |
| | | House owners/House holders | | 0.00 |
| 9 | Pocket money/ Allowances | | | 0.00 |
| 10 | Holidays, entertainment & recreation (incl M-Net) | | | 0.00 |
| 11 | Maintenance, replacement and repairs of items | House | | 0.00 |
| | | Household appliances | | 0.00 |
| | | Kitchenware | | 0.00 |
| | | Linen, towels, etc. | | 0.00 |
| | | *Bicycles/bikes/scooters | | 0.00 |
| | | Other items | | 0.00 |
| 12 | Personal loans | | | 0.00 |
| 13 | Security alarm system | | | 0.00 |
| 14 | Membership fees | | | 0.00 |
| 15 | Religious contributions/ Charities | | | 0.00 |
| 16 | Gifts | | | 0.00 |
| 17 | TV licence | | | 0.00 |
| 18 | Reading material | Books / Newspapers / Periodicals | | 0.00 |
| 19 | Lease / credit agreement payments | Furniture | | 0.00 |
| | | Appliances | | 0.00 |
| | | Other | | 0.00 |
| 20 | Pets | Food | | 0.00 |
| | | Veterinary surgeon ("vet") | | 0.00 |
| | | Licence | | 0.00 |

| Expenditure | | Self | Child(ren) | Total |
|--------------------------|-----------------------------|-------------|-------------|-------------|
| 21 | Other (not specified above) | | | 0.00 |
| | | | | 0.00 |
| | | | | 0.00 |
| | | | | 0.00 |
| | | | | 0.00 |
| Total expenditure | | 0.00 | 0.00 | 0.00 |

Dated at this day of year

.....
Signature of Deponent

* Delete whichever is not applicable

| FOR OFFICIAL USE ONLY | |
|---|--------------|
| Oath/Affirmation | |
| 1. I certify that before administering the *oath/affirmation I asked the deponent the following questions and wrote down *his/her answers in *his/her presence: | |
| (a) Do you know and understand the contents of the declaration? | Answer |
| (b) Do you have any objection to taking the prescribed oath? | Answer |
| (c) Do you consider the prescribed oath binding on your conscience? | Answer |
| 2. I certify that the deponent acknowledged that *he/she knows and understands the contents of this declaration. The deponent uttered the following words: *"I swear that the contents of this declaration are true, so help me God"/"I truly affirm that the contents of the declaration are true". The *signature/mark of the deponent was affixed to the declaration in my presence. | |
| Justice of the Peace/Commissioner of Oaths | |
| Full name and surname (block letters) | |
| Designation (rank) Ex Officio Republic of South Africa | |
| Business address (street address must be stated) | |
| | |
| Dated at this day of year | |



REPUBLIC OF SOUTH AFRICA

**WARRANT OF EXECUTION AGAINST PROPERTY
SECTION 27 OF THE MAINTENANCE ACT, 1998 (ACT No. 99 OF 1998)**

Part A must be completed by the person in whose favour the order was made.

Part B must be completed by the clerk of the maintenance court.

Parts C and D must be completed by the person authorised to execute this warrant.

In the maintenance matter between:

Reference No.....

.....
(person in whose favour order was made, hereinafter referred to as the "execution creditor")
 and

.....
(person against whom order was made, hereinafter referred to as the "execution debtor")

A. To the Clerk of the Maintenance Court,

1. Amounts to be levied:

| | | |
|-----|-----------------------------|---------|
| (a) | Outstanding amount of order | R |
| (b) | Interest on amount in (a) | R |
| | Total due | R |

2. Address of the execution debtor:

Dated at this day of year

.....
Person in whose favour order was made

*** Delete whichever is not applicable**

B. To the person authorised to execute this warrant:

1. The above-mentioned maintenance court authorised on the day of year in favour of the execution creditor, the issuing of a warrant of execution in terms of section 27 of the Maintenance Act, 1998 (Act No. 99 of 1998), against the *movable / immovable property of the execution debtor for the abovementioned amounts, amounting in all to the sum of R..... .

- 2. You are therefore authorised and required to raise on the property of the execution debtor the sum of R....., together with your costs of this execution, and pay to the said execution creditor the sum of R..... and report to this Court what you have done by virtue hereof.

Dated at this day of year

Date stamp of issuing office

.....
Clerk of the Maintenance Court

Note to person authorised to execute this warrant:

- 1. If the execution debtor pays the above-mentioned amount and the costs of this execution within half an hour of your entry he or she will not be required to pay any further costs of execution. The amount of any payment made by the execution debtor and the date thereof shall forthwith be endorsed on the original and copy hereof, which endorsement shall be signed by the person authorised to execute this warrant and countersigned by the execution debtor or his or her representative.
- 2. This execution may be paid out of sale, subject to the payment of the execution costs, which may be required to be taxed.
- 3. The only immovable property upon which this warrant may be executed is -
(set out its situation and nature sufficiently to enable it to be identified)
- 4. Any alterations made herein shall be initialled by the clerk of the maintenance court before the warrant is issued or reissued by him or her.

C. Return of service

I, , certify that I have -
.....
.....
.....
.....

D. Endorsement

The execution debtor paid the amount of R within half an hour of my entry.

.....
Signature of Sheriff/ Maintenance Investigator

.....
Signature of Execution Debtor/ Representative



REPUBLIC OF SOUTH AFRICA

NOTICES TO AND BY EMPLOYER
IN TERMS OF SECTION 29 OF THE MAINTENANCE ACT, 1998 (ACT No. 99 OF 1998)

Reference No.

In the maintenance matter between:

.....
(person in whose favour order for attachment of emoluments was made)
and

.....
(person against whom order for attachment of emoluments was made)

A. Application in terms of section 29(1)

[This notice shall be served on the person concerned within seven days on which the order was made.]

To:
(the employer of the person against whom order for the attachment of emoluments was made)

of (address)
.....

1. You are hereby informed of the attached order of court in terms of which you are directed to make the payments as specified. Please note that these payments must be given priority over any other order of court requiring payments to be made from the emoluments due to the person against whom the maintenance order was made.

2. If the person against whom the order for attachment of emoluments was made leaves your service, you shall within seven days after the day on which he or she left your service, give notice thereof on Part C of this form to the maintenance officer of the court where the attached order was made. This notice may be submitted to the maintenance officer in any manner convenient to you, but you must keep record of the manner in which the notice was submitted.

3. Warning:
If you -
(a) fail to make the payments specified in the attached order you may be held liable for the payment; and
(b) without good reason cause, refuse or fail to
(i) make the payments specified in the attached order; or
(ii) furnish the maintenance officer with the notice provided for in Part C of this form,
you shall be guilty of an offence and may be sentenced to a fine or to imprisonment for a period not exceeding six months.

Dated at this day of year

.....
Signature of the Maintenance Officer/Clerk of the Maintenance Court

***Delete whichever is not applicable**

| B. Return of service |
|--|
| <p>I,, certify that I have –</p> <p>*(a) delivered a copy of the notice to personally [regulation 26(1)(a)(i)]; <div style="text-align: center;">or</div> *(b) offered a copy of the notice for delivery to personally [regulation 26(1)(a)(i)]; <div style="text-align: center;">or</div> *(c) delivered a copy of the notice to, a person apparently not younger than the age of 16 years and apparently residing or employed at the *residence/ place of employment/place of business of, since he/she could not conveniently be found [regulation 26(1)(a)(ii) or (iii)]; <div style="text-align: center;">or</div> *(d) *affixed/placed a copy of the notice to/in the *outer/principal door/security gate/post box of the *residence/place of employment/place of business of, since he/she prevented the service by keeping his/her *residence/place of employment/place of business closed [regulation 26(1)(c)]; <div style="text-align: center;">or</div> *(e) delivered a copy of the notice to..... a *director/responsible employee of at the latter's *registered office/main place of business [regulation 26(1)(a)(iv)].</p> <p>Dated at this day of year</p> <div style="text-align: right; margin-top: 20px;"> *Maintenance Investigator/Sheriff/Police Officer </div> |

| C: Notification in terms of section 29(2) |
|--|
| <p>To: The Maintenance Officer/Clerk of the Maintenance Court of the Magistrate's Office, </p> <p>I,, hereby give notice that, who was in my employment, left my service on (date)</p> <p>Dated at this day of year</p> <div style="text-align: right; margin-top: 20px;"> Signature </div> |

(c) the amount of R..... is still outstanding. The amount has been calculated as follows:

.....

Dated at this day of year

.....
 Signature of Deponent

* Delete whichever is not applicable

FOR OFFICIAL USE ONLY

Oath/Affirmation

1. I certify that before administering the *oath/affirmation I asked the deponent the following questions and wrote down *his/her answers in *his/her presence:

- (a) Do you know and understand the contents of the declaration? Answer
- (b) Do you have any objection to taking the prescribed oath? Answer
- (c) Do you consider the prescribed oath binding on your conscience? Answer

2. I certify that the deponent acknowledged that *he/she knows and understands the contents of this declaration. The deponent uttered the following words *"I swear that the contents of this declaration are true, so help me God."/"I truly affirm that the contents of the declaration are true. "The *signature/mark of the deponent was affixed to the declaration in my presence.

.....
Justice of the Peace/Commissioner of Oaths

Full name and surname (block letters)

Designation (rank) Ex Officio Republic of South Africa

Business address (street address must be stated)

.....

Dated at this day of year

* Delete whichever is not applicable

FOR OFFICIAL USE ONLY

Oath/Affirmation

1. I certify that before administering the *oath/affirmation I asked the deponent the following questions and wrote down *his/her answers in *his/her presence:

(a) Do you know and understand the contents of the declaration? Answer

(b) Do you have any objection to taking the prescribed oath? Answer

(c) Do you consider the prescribed oath binding on your conscience? Answer

2. I certify that the deponent acknowledged that *he/she knows and understands the contents of this declaration. The deponent uttered the following words *"I swear that the contents of this declaration are true, so help me God."/"/"I truly affirm that the contents of the declaration are true. "The *signature/mark of the deponent was affixed to the declaration in my presence.

.....
Justice of the Peace/Commissioner of Oaths

Full name and surname (block letters)

Designation (rank) Ex Officio Republic of South Africa

Business address (street address must be stated)

Dated at this day of year

B. Notification in terms of section 28(2)(b)

[Submit this notice, at least 14 days before your application is heard, to the person in whose favour the order for attachment of emoluments was made in any manner convenient to you but keep record of the manner in which the notice was submitted.]

To:
 (person in whose favour order for attachment of emoluments was made)

1. Take note that the above-mentioned application will be heard on the day of year
 at (time) at the Maintenance Court,

2. Attached hereto, if applicable, are copies of affidavits in support of the application.

Dated at this day of year

.....
 Person against whom order for attachment of emoluments was made

IN THE MAGISTRATE'S COURT FOR THE DISTRICT OF _____
HELD AT _____

CASE NUMBERS: _____

IN THE CRIMINAL MATTER BETWEEN:

NAME AND SURNAME OF APPLICANT

COMPLAINANT

And

NAME AND SURNAME OF RESPONDENT

SUSPECT /

ACCUSED

**FOUNDING AFFIDAVIT IN TERMS OF SECTION 305(3) AND 305(4) OF THE
CHILDREN'S ACT 38 OF 2005 (as amended)**

I, the undersigned, **NAME AND SURNAME OF APPLICANT**, do hereby make an oath and state that:

The facts deposed to herein be within my own personal knowledge, unless the context indicates otherwise, and are to the best of my belief true and correct.

1. I am an adult female, residing at _____, and employed at _____. My cellnumber is _____ and contact details are _____ and email applicant@gmail.com A copy of my identity document is annexed hereto marked **APP1**.
2. I was never married to the respondent **NAME AND SURNAME OF RESPONDENT**. The respondent address is _____. His last contact cellnumber is _____ and his identity number is _____.
3. Out of our relationship the following children were born:
_____. Annexed hereto are birth certificates marked _____ respectively. The biological Father is Respondent **FATHER NAME AND SURNAME** residing at _____ and contact details _____ and email address respondent@gmail.com.

4. The suspect Respondent father name and surname abandoned the children in the following ways: _____
-
5. I am aware that the abandonment of a child is a criminal offence in terms of section 305 (3) (b) of the Children's Act 38 of 2005 and wish this matter to be further investigated by the SA Police services.
6. I was also advised that where a parent do not provide **adequate food, clothing, lodging and medical assistance** is a criminal offence in terms of section 305 (3) (b) of the Children's Act 38 of 2005 and wish this matter to be further investigated by the SA Police services.
7. I have a duty in terms of section 110 of the Children's Act 38 of 2005 to report any abuse committed against a child to the South African Police and therefore report this matter for investigation. Abuse is defined in section 1 of Act 38 of 2005 as : "**abuse**", in relation to a child, means any form of harm or ill-treatment deliberately inflicted on a child, and includes—
- (a) assaulting a child or inflicting any other form of deliberate injury to a child;
 - (b) sexually abusing a child or allowing a child to be sexually abused;
 - (c) bullying by another child;
 - (d) a labour practice that exploits a child; or
 - (e) exposing or subjecting a child to behaviour that may harm the child psychologically or emotionally;
8. I believe by abandoning our child(ren) is a form of abuse and can cause psychological and emotional issues of abandonment and harm to my children.

PRAYER

9. I wish that the SAPS FCS unit investigate the said matter of CHILD ABANDONEMENT in terms of 305 (3) of the Children's Act 38 of 2005 .
10. I further wish that the SAPS FCS unit investigate the said matter of the respondent father not fulfilling his parental duties in terms of 305 (4) of the Children's Act 38 of 2005 .
11. I request that the South African Police service apply for a J50 warrant of arrest at the local magistrates courts.
12. I request that the National Prosecuting Authority issue a J50 warrant of arrest to be circulated at all ports of entry in South Africa's airports and harbours by the SAPS.
13. I further request that the National Prosecuting Authority request mutual legal assistance in terms of the Extradition Act, 67 of 1962 and the International Co-operation in Criminal Matters Act, 75 of 1996 (ICCMA) and Part 44 of the National Prosecuting Authority policy document and

I know and understand the contents of this declaration. I have objections to taking the prescribed oath and affirm the contents of the affidavit.

I hereby certify that the deponent has acknowledged that he knows and understands the contents of this declaration. This declaration was confirmed to before me and the deponent's signature has been placed hereon in my presence in _____ on _____.

Dated at _____ on this the _____ day of _____

Signature of Deponent

Oath/Affirmation

I certify that before administering the *oath/affirmation I asked the deponent the following questions and wrote down *his/her answers in *his/her presence:

a. Do you know and understand the contents of the declaration?

Answer: YES

b. Do you have any objection to taking the prescribed oath?

Answer: YES

c. Do you consider the prescribed oath binding on your conscious?

Answer: YES

2. I certify that the deponent acknowledged that *he/she knows and understands the contents of this declaration. The deponent uttered the following words ~~"*I swear that the contents of this declaration are true, so help me God."/~~ ~~"*I truly affirm that the contents of the declaration are true."~~ The *signature/mark of the deponent was affixed to the declaration in my presence.

Signature of the Peace/Commissioner of Oaths

Full Name: _____
(block letters)

Designation (Rank: _____ Ex Officio Republic South Africa

Business Address: _____
(street address must be stated)

Dated at _____ this _____ day of _____