

# WEBINAR HANDOUT



Webinar: **SECTION 10 FORMAL MAINTENANCE ENQUIRIES**  
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In this Lunch and Learn we will discuss:

- What is a section 10 enquiry?
- What is the procedure and when a maintenance enquiry is referred to Maintenance Court?
- Discussion of the discretion and wording of the Act when it comes to referrals to Court
- The process of a formal section 10 enquiry done in Court
- Duties of the maintenance officer when referring the matter to court
- Recommendation of the maintenance officer
- Creating a court bundle of documented evidence for submission to Court
- Discussion of the section 9 summons to formally appear in court and what happens if the respondent does not appear

## **Introduction:**

When the maintenance officer conducts an investigation, if the parties are unable to agree on the amount of child support to be paid, the matter will need to be formally investigated by the maintenance magistrate. The mother's means, the father's means, and the minor child's requirements must all be properly taken into account by the court in this case. A maintenance reward should then be given. The maintenance officer and magistrate have a legal duty to look into the matter carefully. Therefore, a judicial officer should not approach a maintenance inquiry with a passive attitude before passing judgment. If all goes according to plan, a maintenance award would be granted after the investigation.

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 of enquiring into the provision of maintenance for the person so to be maintained.

### **Statutory provisions:**

#### 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.*

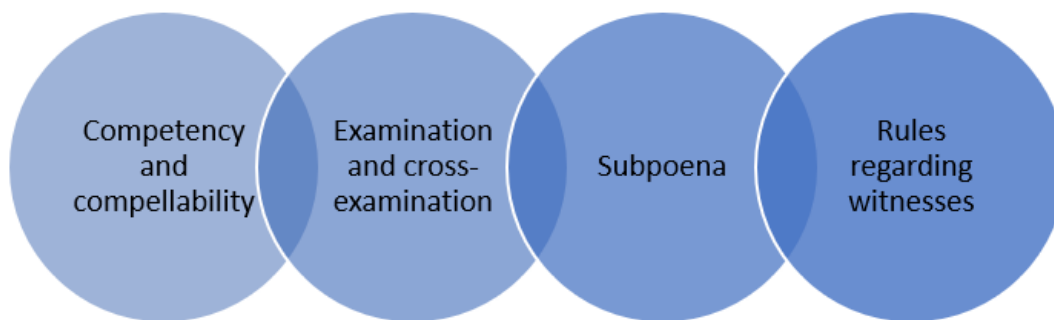
*(2) The maintenance court shall administer an oath to, or accept an affirmation from, any witness appearing before the maintenance court and record the evidence of that witness.*

*(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.*

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



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

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.

Important things to note about a section 10 enquiry:

- Section 6 enquiries are INFORMAL in the office of the maintenance officer. Section 10 enquiries are FORMAL in Court.
- Section 10: Proceedings in an enquiry are akin to those in ordinary civil cases. Reinforced by §10(5): provides that the law of evidence applicable to civil proceedings in a magistrate's court applies.
- The proceedings are inquisitorial in character for questions relating to the duty to support.

- No party is dominus litis and it is not left to only the parties to produce evidence; they share this responsibility with the officials involved in the case. Irrespective of whether the parties have legal representation, both the maintenance officer and the presiding officer are obliged to play an active role in the proceedings.
- During a maintenance enquiry, there should be full disclosure of the financial position of the parties.
- Once legal liability to pay maintenance is established, a person can be compelled to give evidence on her or his means so that the amount of maintenance can be established.
- Both parties can and should be questioned about their assets, earnings and expenses and, when relevant, about their needs and those of their children and can be compelled to lay documentary proof of these matters before the court.

**Difference between a section 6 and a section 10 enquiry:**



**Now let's turn to the practical implementation of a section 10 inquiry:**

To start off with the section 10 inquiry could only be used after a section 6 investigation has been fully completed and the maintenance officer has made his or her recommendation to court.

The maintenance officer may refer the matter to the maintenance court for a formal inquiry, but is not obliged to do so. With other words, it's not necessary in all circumstances to refer

the matter to court especially where the expenses of the minor children and the income of both parties are not in dispute.

In the event that the maintenance officer has made a submission to court the magistrate can confirm the maintenance officers recommendation and afterwards complete a J168 Court order.

The section 10 enquiry should only be used where there is a legal dispute or issue that need to be addressed by court or when the expenses claimed by the applicant is disputed or in the event that the parties are not in agreement with the apportionment of their different pro rata contributions towards maintenance.

Possible dates of when section 10 enquiries are dealt with are usually obtained from the magistrate that would preside over the matter. Some courts have fixed dates for section 10 enquiries in which event the matter is just placed on the roll for trial.

In terms of the Act, it is the duty of the maintenance officer to summons the parties in terms of section 9(2) to attend the section 10 formal enquiry. In practice what normally transpire is that the parties are informally warned to appear on a section 10 court date for the matter to be heard. A practical problem arises when one of the parties do not show up on the court date – a warrant of arrest for failure to appear on such court date would not be granted as a formal summons to appear in terms of section 9(2) has not been served upon the parties.

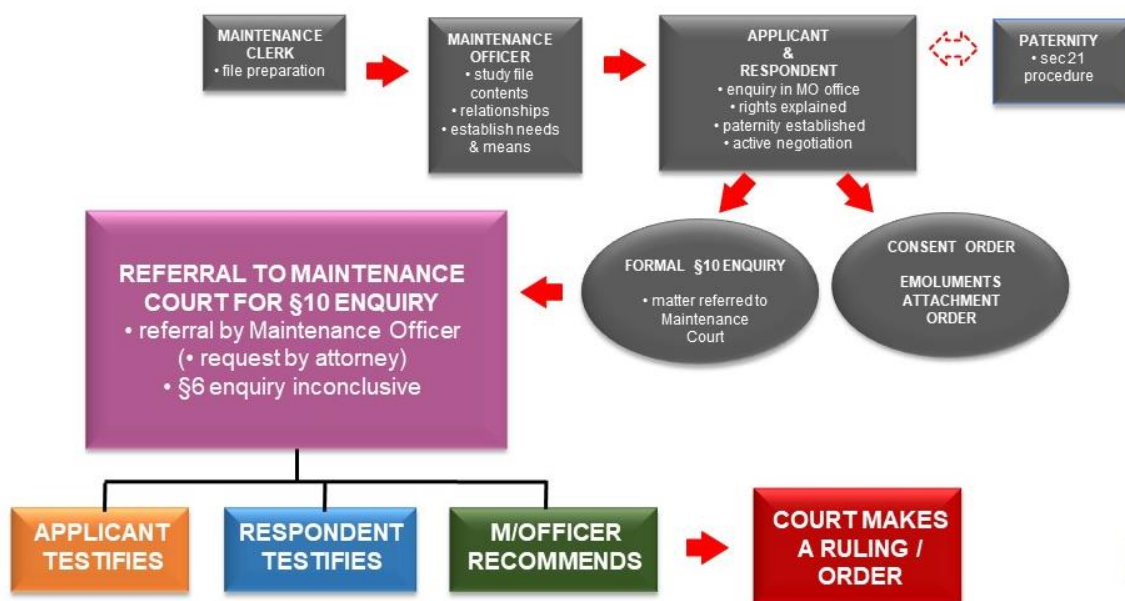
It is therefore good practice to issue a summons to appear on both parties before the section 10 enquiry even though the parties may be legally represented.

It is the task of the maintenance clerk to complete the summons and hand it to the maintenance officer for signature before it is handed to the maintenance investigator to serve on both parties.

The DOJ Code 26 and NPA directives state that the maintenance officer should compile 4 sets of copies of all documents before the court date to be handed to all parties during the trial.

Some courts or magistrates insist to have all court documents bundled and indexed which is quite time consuming.

Now lets look at an overview of where the section 10 enquiry fits in:



The blocks marked in grey signifies the section 6 enquiry and investigation that was concluded without a maintenance order being made due to certain disputes whereafter it is then referred to the maintenance court for a formal financial enquiry in terms of section 10.

The parties involved at court are the applicant, the respondent (or either of their attorneys) and the maintenance officer (which also might be a prosecutor) and the magistrate as a presiding officer.

During the court proceedings which are akin to civil court proceedings the maintenance officer will address the court and might briefly explain why a section 10 enquiry is to be held based on the fact that the section 6 informal enquiry was inconclusive. However – this differs

from court to court and some courts request that the applicant leads and present their case which is contrary to current case law which will be dealt with later.

Both parties will offer testimony under oath and the maintenance officer will either submit or give oral evidence as to his or her recommendation. After considering all the evidence the court will make a ruling or a maintenance order.

### **So what does a typical session 10 enquiry look like in court:**

The applicant will give testimony under oath about the following:

- The relationship between the parties
- The expenses of the children and herself
- An the need for a certain amount of maintenance

The court, respondent or his attorney and the maintenance officer will be allowed to cross examine and ask questions about the expenses claimed and the needs of the children.

Next the respondent will have the opportunity to testify about his income and his expenses and again the court, applicant or his attorney and the maintenance officer will be allowed to cross examine and ask questions about the expenses claimed and the income of the respondent

Lastly the maintenance officer will submit his recommendation (either in writing or orally) to court whereafter the court will make a finding.

### **Important provisions of section 10:**

§10(1)           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



- §10(1A) During any stage of the enquiry, the court may refer the matter to a Family Advocate for investigation
- §10(4) No person whose presence is not necessary shall be present at the enquiry
- §10(5) 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
- §10(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.
- §10(6)(b) If a postponement is necessary, the court may make an order for interim maintenance pending finalization of the enquiry

**Important case law dealing with section 10 enquiries:**

- Onus of proof: Buch v Buch [1967] 3 All SA 194 (T) , 967 (3) SA 83 (T) 87 ; Vedovato v Vedovato [1980] 3 All SA 63 (T), 1980 (1) SA 772 (T).
- Presiding officer and maintenance officers not passive role S 7; Buch v Buch [1967] 3 All SA 194 (T), 1967 (3) SA 83 (T).)
- Full disclosure of all material circumstances concerning their financial position. The court will take into account failure to do so and particularly any suspicion of an attempt to mislead the court in determining whether sufficient reason has been established. Whiteley v Whiteley [1959] 2 All SA 295 (E), 1959 (2) SA 148 (E).
- Inquisitorial nature – no party dominus litis Buch v Buch [1967] 3 All SA 194 (T), 1967 (3) SA 83 (T); Van Zyl v Steyn [1976] 2 All SA 179 (O), 1976 (2) SA 108 (O); Beukes v Beukes [1995] 1 All SA 605 (O), 1995 (4) SA 429 (O).
- Irrespective of whether the parties have legal representation, both the maintenance officer and the presiding officer are obliged to play an active role in the proceedings. (Pieterse v Pieterse [1965] 4 All SA 316 ( T ) , 1965 (4) SA 344 ( T ) ; Kruger v Ferreira [1979] 3 All SA 3 (NC), 1979 (1) SA 915 (NC); Johnson v Tiger [1979] 3 All SA 380 (NC), 1979 (1) SA 920 (NC) 921.

- The presiding officer should not adopt the normal passive attitude of a judicial officer presiding at a trial. *Pieterse v Pieterse* [1965] 4 All SA 316 (T), 1965 (4) SA 344 (T). )
- The maintenance officer is not only entitled but also dutybound to lay before the court all the relevant evidence obtainable. *S v Ward* [1992] 3 All SA 299 (B), 1992 (1) SA 271 (BGD) 272.