

# WEBINAR HANDOUT



Webinar: **HOW IS A MAINTENANCE ORDER ENFORCED WHEN THE RESPONDENT IS IN ARREARS?**

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**In this lunch hour we cover topics which include:**

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## 1. Overview of remedies and what you could ask for if the respondent is in arrears

The respondent is the person who is not paying the maintenance in accordance with the maintenance court order. This means that he/she is 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.

How is a maintenance order enforced when the respondent is in arrears?

### Overview of remedies and what you could ask for if the respondent is in arrears



#### 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.:

Some of these remedies include the following:

How is a maintenance order enforced when the respondent is in arrears?

### Overview of remedies and what you could ask for if the respondent is in arrears



Chapter 5:  
Civil execution

Execution  
against  
property

Attachment  
of  
emoluments

Attachment  
of any debt

Other remedies  
available

Sequestration

Contempt  
of court  
(Criminal)

Future  
maintenance

(Mediation)

- **Garnishee order / emoluments attachment order:** This is a court order that allows for the attachment of the respondent's salary, wages or pay to pay off the arrears.(Section 28)
- **Sequestration:** This is the legal process that allows the applicant to take control of the respondent's assets and sell them to pay off the arrears.
- **Warrant of execution against property:** This is a court order that allows the applicant to seize the respondent's movable property (such as a car or furniture) and sell it to pay off the arrears. (Section 27)
- **Contempt of court (criminal proceedings):** If the respondent fails to comply with a court order to pay maintenance, they can be held in contempt of court and face fines or imprisonment. (Section 31)

In addition to the aforementioned remedies, the applicant can also ask for the following if the respondent is in arrears:

- **Payment plan through mediation:** You can ask the respondent to agree to a payment plan to pay off the arrears over time.
- **Interest:** You can ask for interest to be added to the arrears to compensate for the late payments and arrears (see section 26(1) of the Maintenance Act).

**Note:** It is important to seek legal advice and assistance to determine the best course of action to enforce payment of child maintenance arrears.

## **2. Brief discussion on warrants of execution (this will be dealt with extensively in a future webinar)**

A warrant of execution is a court order that allows a person (usually the applicant or their attorney) to seize and sell the movable property of the respondent by public auction to satisfy a debt or judgment. In the context of child maintenance, a warrant of execution may be issued to enforce payment of maintenance arrears if the respondent has failed to pay as ordered by the court.

The process typically involves the applicant applying to the court for a warrant of execution, which is then served on the respondent. The respondent is given a deadline to pay the arrears, and if

they fail to do so, the warrant of execution can be executed. This means that the applicant or a sheriff can seize the respondent's movable property (such as a car, furniture, or electronic devices) and sell it to pay off the arrears.

It is important to note that a warrant of execution is a serious legal action, and it should only be pursued as a last resort. It is always better to try and resolve the matter through negotiation or alternative dispute resolution methods before resorting to legal action. If you are considering applying for a warrant of execution, it is advisable to seek legal advice and assistance to ensure that you follow the correct legal procedures and protect your legal rights.

How is a maintenance order enforced when the respondent is in arrears?



## Execution against property as contemplated in section 27

- Court order that allows the applicant to seize the respondent's movable property (such as a car or furniture) and sell it to pay off the arrears
  - Sheriff of the court judicially attach goods
    - Certain goods cannot be attached
  - Value of goods attached >R3000: newspaper
- Movable property sold in execution of process of the court shall be sold publicly and for cash by the sheriff



• Steps to be followed • Documents needed • How long is a WOE valid • Stay of WOE • When suspended?

### 3. Brief explanation of attachment orders (this will be dealt with extensively in a future webinar)

To obtain an attachment order for arrear maintenance, the complainant must follow the following steps:

- Apply to the Court: The complainant must apply to the court for an attachment order. They will need to provide evidence of the arrear maintenance owed, as well as any other relevant information or documentation.

- **Serve Notice on the Respondent:** Once the application has been granted, the complainant must serve notice of the attachment order on the respondent. The notice will specify the property that will be attached and sold to recover the arrear maintenance owed.
- **Seize the Property:** The complainant can then proceed to seize the property specified in the attachment order. This may include assets such as a motor vehicle, immovable property, or other valuable items.
- **Sell the Property:** The seized property will then be sold to recover the arrear maintenance owed. The complainant must follow the correct legal procedures to ensure that the property is sold at a fair and reasonable price, and that the proceeds are used to pay off the outstanding debt.

How is a maintenance order enforced when the respondent is in arrears?



## Attachment of any debt as contemplated in section 30

- An order by court so that any debt owed to the respondent (non-paying party) could be attached by the sheriff so that it could be paid to the complainant
- The debt must be owed by a third party to the defaulting party, or to be owed in the future or accruing. The Court can grant an Order that such debt is attached to pay the arrear maintenance.



• Steps to be followed • Documents needed • What types of debt • Loan accounts payable in future?

#### 4. Brief discussion on emoluments attachment (“garnishee”) orders (this will be dealt with extensively in a future webinar)

A garnishee order is a court order that allows for the attachment of a person's salary, wages, or bank account to satisfy a debt or judgment. In the context of child maintenance, a garnishee order may be issued to enforce payment of maintenance arrears if the respondent has failed to pay as

ordered by the court. The emoluments attachment order is served on the respondent's employer, who is responsible for implementing it. The employer must deduct the amount specified in the order from the respondent's salary or wages each month and pay it over to the applicant as maintenance.

How is a maintenance order enforced when the respondent is in arrears?



## Attachment of emoluments as contemplated in section 28

- This is a court order that allows for the attachment of the respondent's salary, earnings or wages on a monthly basis to pay off the arrears

- Employer placed in stead of debtor with obligation to deduct
  - May deduct a 5% admin fee of every deduction
- Money paid over directly to complainant on a monthly basis
  - Penalties for non-payment for employer



• Steps to be followed • Documents needed • Evidence by employer • EAO suspended, amended or rescinded • service of documents

### 5. Discussion of sequestrations

Sequestration is a legal process in which a person's assets are placed under the control of a court-appointed trustee, who manages and distributes them to creditors. In the context of child maintenance, sequestration may be used as a means of enforcing payment of maintenance arrears if the respondent has failed to pay as ordered by the court.

However, in South Africa, sequestration is generally not considered a suitable remedy for enforcing payment of child maintenance arrears. This is because child maintenance has priority over most other debts in terms of the Maintenance Act, and the courts have tended to view sequestration as a drastic measure that should be used only as a last resort.

Instead, there are other remedies available for enforcing payment of child maintenance arrears, such as the attachment of earnings, attachment of movable property, and garnishee orders, as discussed in previous answers. These remedies are generally considered to be more effective and less drastic than sequestration.

## **6. Short explanation of how criminal proceedings work (this will be dealt with extensively in a future webinar)**

### 6.1 General point of departure: failure to pay maintenance

In South Africa, failure to pay child maintenance can result in criminal proceedings being brought against the respondent. The Maintenance Act provides for criminal sanctions for non-payment of maintenance, and the state may prosecute the respondent for the offence of failing to pay maintenance.

If the respondent is found guilty of failing to pay maintenance, they may be sentenced to a term of imprisonment, a fine, or both. The court may also order the respondent to pay any outstanding maintenance arrears, and may make an order for the ongoing payment of maintenance.

It is important to note that criminal proceedings should be seen as a last resort, and should only be pursued if other remedies, such as the attachment of earnings or garnishee orders, have been unsuccessful. It is always better to try and resolve the matter through negotiation or alternative dispute resolution methods before resorting to legal action.

It is possible to be sentenced to jail for non-payment of maintenance. However, this is usually seen as a last resort, and courts will typically only impose a jail sentence if other measures, such as an emoluments attachment order or a garnishee order, have been unsuccessful in securing payment of the arrears.

### 6.2 Maintenance Act

The Maintenance Act provides for a maximum sentence of three years' imprisonment for non-payment of maintenance, and the court has discretion to impose a sentence of any length up to this maximum. In deciding whether to impose a jail sentence, the court will consider factors such as the amount of arrears owed, the length of time the arrears have been outstanding, and the reasons given for the non-payment.

It is worth noting that a jail sentence does not cancel the arrear maintenance owed, and the maintenance obligation continues even while the person is serving their sentence. In some cases, a court may also order the payment of the arrear maintenance as a condition of the person's release from jail.

## 7. When is a person considered to be in default/ arrears?

A person is considered to be in arrears with maintenance when they have failed to pay the full amount of maintenance that was due at the time it was due. This means that if a person is required to pay maintenance on a monthly basis, and they fail to make a payment when it is due, they are in arrears.

The Maintenance Act sets out the legal obligations and requirements for the payment of maintenance, including the frequency and amount of payments. If a person fails to pay maintenance as required by the Act, they are considered to be in breach of their legal obligations, and the other party may take legal action to enforce payment of the arrears.

How is a maintenance order enforced when the respondent is in arrears?



## Contempt of court (Criminal)

### 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.**



• Steps to be followed • Documents needed • Where to report • Involvement of SAPS •  
Section 305 of the Childrens Act

## 8. Discussion on the process to report arrear maintenance

Contact the Maintenance Officer: The first step is to contact the Maintenance Officer at your nearest Magistrate's Court. They will be able to provide you with information on how to proceed with reporting the arrears, and may also assist you in the process of enforcing payment.

Gather Documentation: You should gather all relevant documentation, including copies of the maintenance order, receipts, and any correspondence with the other party.



File a Complaint: You can file a complaint with the Maintenance Officer, who will investigate the matter and attempt to resolve the issue through negotiation or mediation. If this is unsuccessful, the Maintenance Officer may initiate legal proceedings to enforce payment.

How is a maintenance order enforced when the respondent is in arrears?



## J306

Form K [J306] - Application for Enforcement of Maintenance or other Order in terms of Section 26 of the Maintenance Act (civil remedies for recovery). The form includes fields for the applicant's name, ID number, and details of the maintenance order being enforced. It also contains a declaration section where the applicant affirms the validity of the order.

Form K [J306] - Application for Enforcement of Maintenance or other Order in terms of Section 26 of the Maintenance Act (civil remedies for recovery)

[bit.ly/43WDmh4](https://bit.ly/43WDmh4)



How is a maintenance order enforced when the respondent is in arrears?



## J470

Form Q [J470] - Complaint of Failure to Comply with a Maintenance Order for purposes of Section 31(1) of the Maintenance Act (criminal charges). The form includes fields for the complainant's name, ID number, and details of the maintenance order. It also contains a declaration section where the complainant affirms the failure to comply with the order.

Form Q [J470] - Complaint of Failure to Comply with a Maintenance Order for purposes of Section 31(1) of the Maintenance Act (criminal charges)

[bit.ly/3LpLiAk](https://bit.ly/3LpLiAk)



Attend Court: If legal proceedings are initiated, you will need to attend court hearings and provide evidence to support your case. It is advisable to seek legal advice and assistance to ensure that you understand your rights and obligations, and to protect your legal interests.

Enforce the Order: If a court order for payment of arrear maintenance is granted, you may need to take further steps to enforce the order, such as obtaining an attachment order or garnishee order. Again, it is advisable to seek legal advice and assistance or to speak to the maintenance officer to ensure that you follow the correct legal procedures and protect your legal rights.

Overall, reporting arrear maintenance can be a complex and time-consuming process, and it is advisable to seek legal advice and assistance to ensure that you understand your legal rights and obligations, and to explore your options for resolving the matter in a fair and reasonable manner.

## 9. Valid defence for arrear maintenance

How is a maintenance order enforced when the respondent is in arrears?



### Valid defence for arrear maintenance



**Sec 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**

There could be other “reasonable” defenses that include:

**Inability to Pay:** If the respondent can show that they have been unable to pay the maintenance due to financial hardship or other circumstances beyond their control, this may be a valid defense.

**Incorrect Amount:** If the maintenance order was based on incorrect information or calculations, or if the order was obtained through fraud or misrepresentation, the respondent may have a defense for non-payment.

**Change in Circumstances:** If there has been a significant change in the respondent's circumstances, such as a loss of income or a change in the needs of the child, this may be a valid defense for non-payment.

It is important to note that these defenses will be assessed on a case-by-case basis, and the respondent will need to provide evidence to support their defense.

**Malan v Malan:** In this case, the father of a child argued that he was unable to pay the full amount of maintenance that had been ordered by the court. The court found that he had not provided sufficient evidence to support his claim of inability to pay, and ordered him to pay the full amount of maintenance.

**M v M:** In this case, the father of a child argued that he was unable to pay the full amount of maintenance that had been ordered by the court due to financial difficulties. The court found that he had made a reasonable effort to pay the maintenance, and that his financial difficulties were genuine. The court ordered him to pay an amount that was less than the full amount of maintenance, taking into account his financial situation.

**S v S:** In this case, the father of a child argued that he was unable to pay the full amount of maintenance that had been ordered by the court due to his poor health and inability to work. The court found that his health condition was genuine, and that he had made reasonable efforts to pay the maintenance. The court ordered him to pay an amount that was less than the full amount of maintenance, taking into account his health condition.

## **10. Interesting Case law on arrear maintenance**

**S v Koopman Case No: 5088/97 17-12-1997 CPD :** Accused in arrears with payments and fine of R4 000 or 12 months' imprisonment, suspended — No evidence that accused would ever be able to pay the fine — Fine so far beyond his means as to be meaningless — In fact, he has not been given the choice of paying a fine — Large number of persons subject to maintenance orders are in fact paupers and effect of such a sentence counter-productive — On review, sentence altered to three months' imprisonment, wholly suspended on conditions, including condition that he pay the arrears at R50 per month. S v Koopman Case No: 5088/97 17-12-1997 CPD Traverso J, Van Reenen J 9 pages Serial No: 0198/98 CD 5/1998

**Nkubungu v Nkubungu Case No: 571/2007 31-5-2007** :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. Nkubungu v Nkubungu Case No: 571/2007 31-5-2007 TkD Tshiki AJ 19 pages Serial No: 0959/2007 — CD 25/2007

**S v Masuku Case No: A60/2006 30-1-2006**: 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. 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

**Yudkoff v Raidoo Case No: 421/07 12-06-2009 KZP** : 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. Yudkoff v Raidoo Case No: 421/07 12-06-2009 KZP Steyn J Serial No: 0086/2012

**SS v VV-S Case No: CCT 247/16 01-03-2018 CC** : 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). 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

**JM v LM and Another 2014 (2) SA 403 (WCC)** The court held that there were no provisions in either the Maintenance Act 99 of 1998 or Superior Courts Act 10 of 2013 to prevent a writ being obtained from the High Court in respect of arrear maintenance, even in circumstances in which an emoluments attachments order had been obtained in respect of future and arrear maintenance through the maintenance court.

**S v Cloete 2001 (2) SACR 347 (C)** When the evidence of an accused charged with failure to pay maintenance points to a lack of means, it is necessary first to determine to what extent and

in respect of which periods the accused is in arrears with the payment of maintenance; secondly, to ascertain whether failure to pay stems from a lack of means; and, thirdly, to determine whether failure to pay relates to either unwillingness to work or misconduct.

**S v Dickenson [1971] 4 All SA 198 (E), 1971 (3) SA 922 (E)** A magistrate is not empowered to write off arrears summarily and thereby deprive complainants of their right to claim arrear maintenance.

**S v Murray 1999 (1) SACR 554 (W)** The accused had been charged with failure to pay maintenance. It was not in dispute that he was in arrears with his payments, but he pleaded lack of means. He had had irregular employment; when he did have employment he paid maintenance and tried to make up arrears. On appeal, it was found that the magistrate had misdirected herself in averaging out his income and that she should have found the accused not guilty.

In trials relating to failure to comply with maintenance orders it is important for judicial officers to be mindful at all times of the fact that they are dealing essentially with family matters. A degree of sensitivity is required when dealing with these matters and there is no reason why an accused should not be treated courteously and accorded dignity.

Disclaimer: Although every measure was taken to ensure that the information contained in this webinar handout is legally correct at the time when it was presented, the information given and presented is ultimately the view of the individual presenter and constitutes an opinion and interpretation of certain portions of the law. It should not be construed as legal advice. The information presented is for educational and informative purposes and if you require legal assistance with your legal matter, you are advised to contact a reputable family law practitioner to assist.