

WEBINAR HANDOUT



Webinar: **FUTURE MAINTENANCE**
Host: Eugene Opperman (Oppermans Inc. Attorneys)
Speaker: Adv Deon Ruiters (Senior Prosecutor at the NPA)

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1. Introduction to future maintenance

Future maintenance or *anti-dissipation interdicts* refers to maintenance payable in the future. For example, in the context of parties who receive maintenance from another party who decides to retire before their maintenance obligation has ceased. Applicants may then approach the court with an application setting out the calculation of the actual maintenance needs of the party or the children. In the case of children, it will be until they become majors. The money is then frozen where it is being held (either at the Pension Fund Administrators or relevant bank) and the parties will be granted an opportunity to show the court their reasoning behind the application.¹

Maintenance paying parents can therefore not escape their maintenance obligation to provide for the child's reasonable needs by retiring whilst their children are still young. Applications for such anti-dissipation interdicts are brought frequently as many parents do indeed retire prior to their children being self-supporting.²

Elaboration on the notion of anti-dissipation interdicts is however of utmost importance, as terminology may be difficult for the layperson to understand without legal background. A discussion as such therefore follows.

2. What is future maintenance/ anti-dissipation interdicts?

The granting of future maintenance by way of an anti-dissipation interdict is usually how future maintenance obligations are enforced. The term *dissipation* comes from the word "dissipate" which means "to waste or fritter away or use up (usually money or resources). When it comes to assets, this is when one parent uses or gets rid of an asset for their benefit with the intention of evading his maintenance obligations or hiding the assets from the custodial parent who might want to attach it where there are defaults in maintenance payments. *Interdict* is used to stop a financial institution from paying out funds to a defaulter whom are rightfully entitle to claim the financial benefit.

Future maintenance has been awarded in maintenance courts since 1996. In *Knox D'Arcy Ltd and Others v Jamieson and Others* (283/95) [1996] ZASCA 58; 1996 (4) SA 348 (SCA); [1996] 3 All SA 669 (A); (29 May 1996), courts recognized the need for a mechanism to stop defaulting respondents from using up or wasting resources that could be kept for their children.

¹<https://www.aeinc.co.za/maintenance#:~:text=Future%20maintenance%20refers%20to%20maintenance,mai ntenance%20duty%20having%20fallen%20away.>

²<https://www.aeinc.co.za/maintenance#:~:text=Future%20maintenance%20refers%20to%20maintenance,mai ntenance%20duty%20having%20fallen%20away.>

Sentinel Retirement Fund v Mtambo (2015) has also provided relevant precedent as to the form that future maintenance payments may take place, as discussed subsequently. Therefore, future maintenance or anti-dissipation interdicts are usually sought where an applicant foresees that a respondent might squander funds to the detriment of the minor children or his maintenance obligation in spousal maintenance matters.

Future maintenance is not specifically dealt with in the Maintenance Act, but **section 26(4)** of the Act allows for pensions, gratuities and annuities to be attached to satisfy a maintenance order. This section is usually relied on when the respondent is about to stop working (either because of retirement, resignation or dismissal) and the complainant wants to attach part of the respondent's pension benefits for future maintenance. In most cases regarding future maintenance, the respondent has a pension from which future maintenance is claimed.³

The complainant must be sure that the respondent is about to stop working and that there is an existing maintenance order. It is advisable for the complainant to approach a legal practitioner who will prepare the necessary court papers. The complainant would need to know where the respondent is employed and if the respondent is contributing to a pension or provident fund.⁴

Once the order is granted, the pension fund will be notified and ordered to pay to the Guardian's Fund the amount mentioned in the order. The complainant will not receive the full amount in a lump sum, but instead it will go to the Guardian's Fund which will continue paying the complainant the amount of maintenance that he/she was receiving from the respondent, usually until the minor child reaches the age of majority (18) or becomes independent.⁵

³ <https://grocotts.ru.ac.za/2019/07/10/child-maintenance-enforcing-maintenance-orders/>.

⁴ <https://grocotts.ru.ac.za/2019/07/10/child-maintenance-enforcing-maintenance-orders/>.

⁵ <https://grocotts.ru.ac.za/2019/07/10/child-maintenance-enforcing-maintenance-orders/>.

3. Relevant legislation

3.1 Maintenance Act

In terms of **section 15(1)** of the Maintenance Act 99 of 1998, 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 and this duty exists at the time of the issue of the maintenance order and as the Act provides, "it is expected to continue". In light of this, if the Respondent left his employment, the duty of support shall not terminate as same is expected to continue, hence future maintenance applications are the appropriate mechanisms to ensure that the best interests of the children are protected.⁶

3.2 Other legislation and international law

The following provisions of our South African Statutes are applicable to future maintenance cases⁷:

- **Section 26(4)** of the Maintenance Act 99 of 1998 – makes provision for the attachment of any pension, annuity, gratuity, compassionate allowance or similar benefits;
- **Section 37A(1)** of the Pension Funds Act 24 of 1956 – makes provisions for the attachment of benefits in the rules of a registered fund, annuities and contributions to the extent permitted by amongst others, the Maintenance Act, and it protects the dependents of a member; and lastly
- **Section 28(2)** of the Constitution as well as section 9 of the Children's Act 38 of 2005 - makes provision for the protection of the best interests of the child.

Article 3 of the United Nations Convention on the Rights of the Child 1989, of which South Africa is a signatory, also protects the best interests of the child in relevant maintenance matters.

⁶ http://www.justiceforum.co.za/JET/JET-LTN/e-Mantshi_issue_98.pdf.

⁷ http://www.justiceforum.co.za/JET/JET-LTN/e-Mantshi_issue_98.pdf.

4. When can future maintenance be claimed?

There must exist a maintenance obligation, before such obligation can be enforced via the awarding of a future maintenance claim. An *anti-dissipation interdict* can be applied for when the applicant can show a particular state of mind on the part of the respondent with the intention of defeating the claim of the child for maintenance, or a set of circumstances that may threaten future maintenance claims⁸. Future maintenance can be granted by the court in instances where the respondent has left employment either as a form of retrenchment, retirement or resignation and is going to receive or has received his package benefits such as pension funds, provident funds, annuities or any other lump sum benefits.⁹

In practice, applicants claim future maintenance usually when:

- The person legally liable to maintain failed to do so¹⁰ OR
- When the court can draw the inference that person legally liable to maintain will not be able to meet future maintenance payments¹¹ (state of mind not *bona fide*, but is *mala fide*) OR
- 'Where the future maintenance claims of a minor child are threatened...whether or not the recalcitrant parent is in arrears'¹²

An order for Future Maintenance can still be applied for even in the absence of a Maintenance Order – for example where there is a written or verbal agreement to maintain, or in case of a history of the respondent not maintaining the child. The supporting affidavit need to clearly set out the circumstances under which the order for future maintenance is sought. In most instances pension money is attached to secure future maintenance payments, but any available funds may form the object of attachment, for example proceeds from the sale of a house.¹³

In the above instances, it is in the best interests of the child to be awarded future maintenance as in many cases, most respondents are not employable after retirement and some misuse the retirement or pension benefits to the prejudice of their children who at the time, are still in need of support or will still need same in future. In circumstances of this nature, it was held in *Magewu vs Zozo* 2004 (4) SA 578 (C) that the attachment of pension fund benefits in respect

⁸ NPA Maintenance Training: Future Maintenance (2019).

⁹ http://www.justiceforum.co.za/JET/JET-LTN/e-Mantshi_issue_98.pdf.

¹⁰ *Mngadi v Beacon Sweets* 2004 (5) SA 388 (D).

¹¹ *Magewu v Zozo* 2004 (4) SA 578 (C) and *Soller v Magistrate Wynberg* 2006 (2) SA 66 (C).

¹² *Gerber v Gerber* (CPD) Case nr. 12166/07.

¹³ *Gerber supra*.

of future maintenance claims was a direct and effective means of ensuring that the rights of the child are upheld.¹⁴

5. Jurisdiction and recent developments

The issue of jurisdiction often poses a delay to applications and awards for future maintenance. This debate had been guided by principles that seek to ensure constitutional rights and statutory duties are fulfilled in respect of the child at stake.

Generally, the Maintenance Act does not authorise attachment of a maintenance debtor's assets in respect of future maintenance payments. Execution and attachment kicks in only when the maintenance debtor is in arrears.¹⁵ There are however guiding principles which drastically alters the relevant approach, as discussed below.

4.1 Guiding principles

Section 28(2) of the Constitution of the Republic of South Africa, 1996 ("Constitution") provides that the child's best interest is of child paramount importance in matters concerning children.

The Constitutional Court's decision in *Bannatyne v Bannatyne* has become authority on enforcement of maintenance. Referring to difficulties in the Maintenance Courts, Mokgoro J held that "the judiciary must endeavour to secure for vulnerable children and disempowered women their small but life-sustaining legal entitlements". Therefore, effective mechanisms for the enforcement of maintenance obligations are crucial for the protection of the child's rights.¹⁶ Such mechanisms may fall outside the ambit of the Maintenance Act.

The Preamble of the Maintenance Act 99 of 1998 also provides that strong measures are needed to ensure that maintenance is paid, thereby giving effect to the child's best interest principle by securing and maintaining a reasonable standard of living that is in line with the basic necessities to survive.

¹⁴ http://www.justiceforum.co.za/JET/JET-LTN/e-Mantshi_issue_98.pdf.

¹⁵ <https://www.studocu.com/en-za/document/university-of-south-africa/family-law/assignment-1-grade-a/6923260>.

¹⁶ <https://www.studocu.com/en-za/document/university-of-south-africa/family-law/assignment-1-grade-a/6923260>.

4.2 Context and statutory jurisdiction

Below is loosely what was held in *Soller v Magistrate* 2006 (2) SA 66 (C), but there will follow a discussion on the facts and outcome of that case in respect of the precedent it created regarding future maintenance jurisdiction.

Section 3 Of the Maintenance Act provides that every Magistrates Court within its area of jurisdiction functions as a Maintenance Court with wide ranging powers. This provision is inter alia making orders for payment and orders for attachment of arrears. Therefore, every Magistrate's Court may be approached for orders as to (future) maintenance.

It is clear that the legislature did not intend to restrict the applicant to the remedies in the Maintenance Act and that it is the duty of the Maintenance Court to develop mechanisms of granting the applicant with a means to obtain maintenance money.¹⁷

The Maintenance Court therefore is *sui generis* (of its own, unique nature) when exercising powers in terms of the Maintenance Act and has the jurisdiction to make orders relating to the periodic payment of future maintenance, including orders in the form of prohibitory-interdicts or exceeding monetary jurisdiction of the magistrates court.¹⁸

4.3 *Soller v Magistrate, Wynberg* 2006 (2) SA 66 (C)

The general issue that the Maintenance Act does not warrant the attachment of assets to satisfy future maintenance, was addresses in the *Soller* case, in line with the guiding principles as previously mentioned. The court *in casu* stated that 'The Maintenance Act clearly does not provide for all the remedies maintenance courts may be called upon to grant, in which event innovative remedies should be considered.'¹⁹ This tacitly refers to the remedial effect of awarding future maintenance.

In *Soller*, the High Court granted the Maintenance Courts jurisdiction to authorise attachment of a maintenance debtor's assets in respect of future maintenance payments. In particular, Van Zyl J held that even a Maintenance Court could make an order similar to the one the High Court made in this case. He argued that section 28(2) of the Constitution overrides any real or ostensible limitation relating to the jurisdiction of magistrates' courts.²⁰

¹⁷ *Mngadi v Beacon Sweets* 2004 (5) SA 388 (D).

¹⁸ NPA Maintenance Training: Future Maintenance (2019).

¹⁹ Para 29.

²⁰ <https://www.studocu.com/en-za/document/university-of-south-africa/family-law/assignment-1-grade-a/6923260>.

Soller further provided that a maintenance debtor's continued defaulting on his maintenance payments justified an order that a retirement annuity fund be prohibited from making payments to the maintenance debtor unless the Maintenance Court or the maintenance debtor's former wife, taking care of the couple's minor child consented to such payment. The fund was further ordered to make annual maintenance payments from the annuity to the child's mother until the child became self-supporting.²¹

Emphasising the jurisdictional dilemma, Van Zyl J held that: "...it would be absurd, and a costly time-wasting exercise, if an applicant for relief in a maintenance court should be compelled to approach the High Court for such relief because of jurisdictional limitations adhering to the magistrate's court. This could never have been the intention of the Legislature in enacting the Maintenance Act with the professed aim of rendering the procedure for determining and recovering maintenance "sensitive and fair".²²

5. How to claim future maintenance

5.1 Ex parte application

The applicant will approach the nearest Magistrate's Court (which is also a maintenance court) in the district where they, or the respondent, resides or carries on employment. An *ex parte* (uncontested, with no respondent) application must be brought to the court by applicant by means of a notice of motion with a supporting affidavit. The person obliged to pay maintenance, the pension fund administrator (or other third party) (being the custodian of the money at this stage) and/or the Master of the High Court (being the institution to receive the lump sum, place it in the Guardians Fund and make maintenance payments from those funds) must be cited as respondents.²³

5.2 Rule nisi

Upon such *ex parte* application, the court will issue a rule *nisi*-order or a decree *nisi*. A rule *nisi* is a court order that will come into force at a future date unless a particular condition is met. Therefore, unless the condition is met, the ruling becomes a decree absolute and is binding as such. This is a provisional order which provides a return date on which the order will be made final if certain requirements are met.

²¹ <https://www.studocu.com/en-za/document/university-of-south-africa/family-law/assignment-1-grade-a/6923260>.

²² <https://www.studocu.com/en-za/document/university-of-south-africa/family-law/assignment-1-grade-a/6923260>.

²³ NPA Maintenance Training: Future Maintenance (2019).

The Rule nisi-order should include a clause for the fund to retain the pension benefit and make monthly maintenance payments according to the court order – in terms of *Mngadi supra*.

- Should the Fund not be in a position to administer the monthly maintenance payments, the Fund should be ordered to pay the lump sum to the Master, and the Master to make monthly maintenance payments according to the court order in terms of *GEPF v Bezuidenhout*.
- In case of the Fund being GEPF, Alexander Forbes, Motor Vehicle Industries Provident Fund, Mineworkers Provident Fund and Metal Workers Industries Provident Fund, the Fund must be ordered to pay the lump sum to the Master and the Master to make monthly maintenance payments.²⁴

The rule nisi-order serves to interdict the pension fund/bank, or other third party, to pay money to respondent pending the return date stated in the rule nisi-order and should be served on all the respondents cited.²⁵

5.3 Return date and final order

On the return date (or further date in case of a postponement) the court will make a final order by:²⁶

- Confirming the provisions of the rule nisi-order *in toto* (as a whole)
- Amending the provisions of the rule nisi-order
- Setting aside the rule nisi-order *in toto* (as a whole)

In many cases a Section 26 application to recover arrear maintenance will accompany an application for future maintenance. Money attached for arrear maintenance should be paid to the applicant directly, but a lump sum for future maintenance should never be paid to the applicant directly, because it is not due and payable to the complainant as yet.²⁷

The issue of the manner of payment was also *Sentinel Retirement Fund v Mtambo* (2015), where the High Court had to consider whether a fund could pay future maintenance as a lump sum. The court ultimately held that the payment of future maintenance as a lump sum was contrary to sections 37A and 37D of the Pension Funds Act (unless there was mala fides on the part of the debtor). This translates into present that future maintenance awards must be

²⁴ NPA Maintenance Training: Future Maintenance (2019).

²⁵ NPA Maintenance Training: Future Maintenance (2019).

²⁶ NPA Maintenance Training: Future Maintenance (2019).

²⁷ NPA Maintenance Training: Future Maintenance (2019).

deducted and paid to the maintenance creditor as and when it becomes due and payable, instead of awarding a lump sum as such.

6. Steps to claim future maintenance

7.1 Documents required

Applicants must take the following documentation with them to the nearest Magistrate's Court in the district where they, or the respondent, resides or carries on employment:

- a) An identity book (green book with your photo) or passport or drivers licence and/or immigration permit;
- b) Certified copies of the child/children's birth certificates;
- c) Three months bank statement (LATEST);
- d) Three months proof of income (payslip) or the signed letter from the employer confirming your income;
- e) Physical/work address of the person responsible for paying the maintenance money;
- f) List of your income and expenditure e.g. water and lights bill, till slips for groceries, school expenses; medical and travel receipts, clothing accounts, etc;
- g) Full name of parent/person responsible for paying the maintenance money;
- h) Copy of Decree of Divorce (in the case of divorce).

7.2 Form to be completed

These documents are needed to complete an Application for Maintenance Form (Form A or the **J101E**). Previous webinars have discussed how to fill out this form and can be found at www.lunchandlearn.org.za or www.childmaintenance.org.za.

A practical guide on how to complete this J101 Form can also be electronically found and watched on: <https://www.youtube.com/watch?v=T2TZCLtkzvK>.

7. Relevant case law

Nancy Soller v The Maintenance Presiding Officer Wynberg and Others 2006 (2) SA 66 (C): (previously discussed) An interdict was sought by the applicant preventing Sanlam Personal Portfolios (Pty) Ltd from making any payment from the annuity to the respondent until such time as the child became self-supporting. This application was dismissed in the

Maintenance court which held that the Maintenance court did not have the power to grant a prohibitory interdict of this nature. In the High Court, it was held that the legislature accepts the need to introduce strong measures to ensure that maintenance required for children is paid by those persons obliged to do so and that the maintenance courts are fully empowered to make orders relating to the periodic payment of future maintenance from pension funds, annuities and the like. An interdict was therefore granted against Sanlam prohibiting it from making any payments to the respondent until such time that the child becomes self-supporting.²⁸

Government Pension Fund v Bezuidenhout (TPD) Appeal no. 2113/04: The court held that the Pension Fund should 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 nisi calling upon the fund to give reasons why an order should not be made. That will afford the fund the opportunity to explain its position before a final order is made.²⁹

Burger v Burger and Another [2007] 1 BPLR 50 (D): Pension benefit may also be attached to secure a future maintenance claim of the creditor, where there is a reasonable fear that the debtor may default on his or her future payments.³⁰

Gerber v Gerber (CPD) Case no. 12166/07: This case dealt with an application for the attachment and retention of the proceeds from a sale of immovable property for the payment of a future maintenance claim. It was held that it has been firmly established by the courts that where the future maintenance claim of a minor child are threatened, courts do not hesitate to issue orders attaching lump sum pension fund benefits, and that this is the position whether or not the recalcitrant parent is in arrears or not. Consequently, a final order was granted for the attachment and retention of the said proceeds to satisfy the future maintenance claim of the child.³¹

Mngadi v Beacon Sweets & Chocolate Provident Fund and Others 2003 (2) All SA 279 (D); 2004 (5) SA 388 (D): The judge held that the applicant needs to show a particular state of mind on the part of the respondent, that he for instance, is getting rid of funds or is likely to do so with the intention of defeating the claims of creditors. On interdicts, it was held that the effect of same is to prevent the respondent from freely dealing with his own property to which the applicant lays claim and that justice may require this restriction in cases where the respondent is shown to be acting mala fide with the intent of preventing execution in respect

²⁸ http://www.justiceforum.co.za/JET/JET-LTN/e-Mantshi_issue_98.pdf.

²⁹ http://www.justiceforum.co.za/JET/JET-LTN/e-Mantshi_issue_98.pdf.

³⁰ "A warning to all maintenance court officials." De Rebus (September 2014) 170.

³¹ http://www.justiceforum.co.za/JET/JET-LTN/e-Mantshi_issue_98.pdf.

of the applicant's claim. The respondent's pension fund was therefore found to be obliged to retain such amount of the withdrawal benefits payable to him for the future maintenance of the children.³²

Magewu v Zozo 2004 (4) SA 578 (C): It was held that the attachment of pension fund benefits in respect of future maintenance claims is a direct and effective means of ensuring that the rights of the child and the dignity of women are upheld. Further since the Respondent has been in arrears on several occasions before, he has not conducted himself in a manner that would create the impression that the provision of the child's maintenance is of paramount importance to him. The Pension Fund was therefore ordered to withhold his withdrawal benefit in order to secure the future maintenance claims of the minor child.³³

Mbhele v Mbhele & others [2010] JOL 25651 (KZP): Held that the solution to the impasse lay in the common law, rendering it unnecessary and inappropriate to decide whether the Guardian's Fund was the appropriate, or permissible, receptacle for the receipt of monies to provide for the needs of a major, who is in need of maintenance. A major child who is incapable of supporting himself, is entitled to support from a parent who is able to do so. If such a major is incapable of managing his affairs, a curator bonis can be appointed to administer such affairs and provide the necessary maintenance from funds made available to the curator. The applicant was advised to launch an application in the appropriate forum for the appointment of herself, or a suitable person, as a curator bonis to the child if the evidence revealed that he was unable to administer his own affairs.³⁴

8. Conclusion

Future maintenance operates as a mechanism to ensure that those liable to pay maintenance, do not escape their obligation to do so by retiring. The development of this remedy has seen piecemeal recognition in case law and has crystallised into a self-standing method to secure future maintenance payments in light of volatile circumstances.

³² http://www.justiceforum.co.za/JET/JET-LTN/e-Mantshi_issue_98.pdf.

³³ http://www.justiceforum.co.za/JET/JET-LTN/e-Mantshi_issue_98.pdf.

³⁴ G Nel's *Family Law Case Index* (2015) 36.