

WEBINAR HANDOUT



Webinar: **HOW DOES SPOUSAL MAINTENANCE WORK?**
 Host: Eugene Opperman (Oppermans Inc. Attorneys)
 Guest speaker: Caro Opperman (Candidate Attorney at Oppermans Inc.)

During this lunch hour we will be discussing the following topics:

- 1. Post-divorce support of spouses and partners of civil unions2
- 2. Factors that the court takes into consideration in ordering spousal maintenance2
 - 2.1 Requirements for spousal maintenance2
 - 2.2 Relevant factors to determine the need and means for spousal support.....2
 - 2.3 Additional factors3
- 3. Discussion of the earning capacities of the parties3
 - 3.1 What is ‘earning capacity’ and how does it play a role in spousal maintenance?3
 - 3.2 Why is earning capacity relevant in spousal maintenance?4
 - 3.3 Factors considered in determining earning capacity of parties4
- 4. Defining the “clean-break” principle as applied by the Courts.....4
 - 4.1 Clean-break principle defined4
 - 4.2 Clean-break principle in case law5
- 5. What and why is token maintenance awarded.....5
 - 5.1 What is token maintenance?5
 - 5.2 Why apply for token maintenance?.....5
- 6. “Dum casta” clause found in many agreements.....6
 - 6.1 What is a *dum casta* clause?.....6
 - 6.2 Rationale to insert a *dum casta* clause6
- 7. Do subsequent marriages have an influence on spousal maintenance?.....6
 - 7.1 Indefinite spousal maintenance7
 - 7.2 Temporary spousal maintenance by *dum casta* clause.....7
- 8 Explaining when and how to apply for spousal maintenance.....7
 - 8.1 When you can claim for spousal maintenance7
 - 8.2 How to apply for spousal maintenance9
 - 8.3 What to expect after applying for spousal maintenance10
- References..... 11
 - Books..... 11
 - Articles.....11
 - Legislation.....11
 - Case law11
- Additional reading material11

1. Post-divorce support of spouses and partners of civil unions

An invariable consequence of marriages and civil unions are a reciprocal duty of support between a husband and wife or same sex partners. This reciprocal duty comes to an end once the marriage or civil union ends and then opens the floor to claim spousal maintenance pending or before the divorce is finalised. There is however no right to spousal maintenance, as it is not a common law duty to maintain your ex-spouse as your children. The right to spousal maintenance must therefore be proven in terms of a contractual agreement which is made an order of the Divorce Court. Section 7 of the Divorce Act regulates spousal maintenance, providing that a court may order spousal maintenance upon issuing a decree of divorce. This obligation can however be extended where there is an agreement between the two parties as such, and the agreement is made an order of the court. It is important to note that an agreement on spousal maintenance can be enforced even after the death of the spouse, but maintenance cannot be claimed after the fact if maintenance was not agreed upon during (or pending) divorce proceedings.

2. Factors that the court takes into consideration in ordering spousal maintenance

2.1 Requirements for spousal maintenance

A party is not guaranteed spousal maintenance upon divorce, as a 'need to be supported' must be proven (*EH v SH*). This need must also fall within the reasonable means of the paying spouse. Therefore, the needs and means requirement is measured against the reasonable earning capacities of the parties.

In terms of the Divorce Act, the court has discretion to award spousal maintenance if necessary, or to make no award at all. Such an award could be based upon a settlement agreement between the parties. If there is no settlement agreement however, the court will consider various factors in determining whether there is sufficient need and justification as such for the spousal maintenance. In such a case, the court has absolute discretion to consider listed factors and any factors it deems relevant. These factors are therefore not contained in a closed list, but is considered based on the merits of each case. These factors are listed below and fleshed out more under the last heading of the webinar.

2.2 Relevant factors to determine the need and means for spousal support

- 1) Existing and prospective means of the parties (including property that can be used to generate income)
- 2) Earning capacities of the parties, clean break principle & rehabilitative maintenance
- 3) Financial needs of parties
- 4) Duration of the marriage
- 5) Standard of living before divorce/ during marriage
- 6) Parties' age
- 7) Conduct (leading to breakdown of marriage)
- 8) Order for the division of assets (redistribution order) in terms of s7 of the Divorce Act
- 9) Token maintenance
- 10) Assistance in materially building the other spouse's estate (increases maintenance)

2.3 Additional factors

There is no closed list (or *numerus clausus*) of factors and the court considers various factors that have a bearing on the matter and/ or the reasons advanced for needing the spousal maintenance.

Additional factors that the court may take into account include, but is not limited to:

- 1) Best interests of the children involved.
- 2) Childcare responsibility of the dependant spouse.
- 3) Inflation rate.
- 4) Manner in which each party conveys their financial position and needs.
- 5) Anything the court deems relevant to the matter.

3. Discussion of the earning capacities of the parties

3.1 What is 'earning capacity' and how does it play a role in spousal maintenance?

Earning capacity will most often be the deciding factor in awarding spousal maintenance or not. This is because spousal maintenance is largely based on the lack of earning capacity from the spouse who needs maintenance, either because they have never worked or have little skills to enter the workforce and maintain themselves as such. While the court does indeed take the above-mentioned factors into account, there are principles which guard against the uneconomical awarding of spousal maintenance. Where a party's earning capacity is low, they may be more likely to succeed in claiming spousal maintenance from their spouse who has a higher earning capacity. The concept of 'earning capacity' is therefore central to a spousal maintenance claim and is very important to the outcome of such application.

3.2 Why is earning capacity relevant in spousal maintenance?

The emerging view has become that post-divorce, parties should become financially independent from each other as soon as possible. Our courts favour the idea of a clean-break principle, where parties attempt to terminate inter-financial dependence on each other completely. Therefore, where a spouse earns enough to support themselves and maintain a reasonable standard of living, the court will be reluctant to award maintenance in such spouse's favour. *Rehabilitative maintenance* is however a possible remedial claim, to support the spouse in training and building their skills to be able to enter the workforce and increase their earning capacity as such. This indicates why courts tend to focus on earning capacity of the parties, as spousal maintenance directly related to a diminished earning capacity of one spouse compared to the other.

3.3 Factors considered in determining earning capacity of parties

The *age, qualifications, employment status and number of dependent children* of the spouse claiming maintenance will also be taken into consideration. A person will be regarded as having a lower earning capacity if they are older, with little qualifications, no employment and more than 1 dependent children. Conversely, a person has a higher earning capacity if they are younger, with qualifications, have a job and have one or no dependent children to maintain. In *K v K* it was rightfully held that the division of roles in a family influences not only the past earning capacity of a party, but also their future earning capacity. The division of household roles may therefore also be a relevant factor as it can have a bearing on a spouse's earning capacity.

The above-mentioned scenario (relating to the factors mentioned) must be distinguished from instances where both spouses have jobs. In scenarios where both spouses are economically active their respective incomes must be taken into account to determine whether or not each spouse will be able to meet his/her maintenance needs. If a spouse can work but chooses not to, the court will act stricter towards this spouse in terms of the granting of spousal maintenance.

4. Defining the “clean-break” principle as applied by the Courts

4.1 Clean-break principle defined

The clean-break principle has grown in the face of marriage being seen as between two economically independent individuals, as mentioned above. This has translated into the clean-

break principle that parties should, after divorce, become as economically independent from each other as soon as possible. This notion is a guiding principle for courts not to award unnecessary maintenance and to ultimately consider the earning capacities of the parties before hastily granting spousal maintenance. This principle also highlights why rehabilitative maintenance is remedial, but usually only awarded for a limited period of time while the spouse obtains skills and/ or training to enter the workforce.

4.2 Clean-break principle in case law

This principle has been applied and further fleshed out by courts. For example, in *Beaumont v Beaumont*, it was noted that the principle purports to guide courts in attempting to terminate financial dependence of one party on the other. The court in this case also highlighted that a redistribution order under the Divorce Act is a relevant consideration when awarding spousal maintenance.

In *Kooverjee v Kooverjee*, the court held that the clean-break principle is to be considered on a casuistic or case-by-case basis as it demands due consideration of the circumstances of each case and/ or party. The court in that case however criticised the attachment of an arbitrary time period when awarding rehabilitative maintenance as it does not address the ultimate goal of becoming self-sufficient. It also noted that consideration must be given to whether the standard of living can be maintained.

5. What and why is token maintenance awarded

5.1 What is token maintenance?

Token maintenance is a form of nominal maintenance, where a little amount is granted as spousal maintenance not for the purposes of maintaining the spouse, but to allow a future increase in the amount if needed. The rationale is to keep the door open to adjust such token maintenance, as spousal maintenance cannot be awarded after a divorce has been finalised.

5.2 Why apply for token maintenance?

A R1 token maintenance order, for example, granted before the finalisation of the divorce, allows the beneficiary spouse of such maintenance to approach court for an increase of the number if a larger amount of maintenance is needed in the future. Whereas if no nominal maintenance amount was awarded before the divorce, a spouse would not be able to approach a maintenance court at a later stage after the divorce has been finalised to obtain an increase in the amount as they need it.

Token maintenance is therefore a useful tool to guard against increased cost of living and/ or unexpected injuries or illness as it keeps the door to future anticipated maintenance open. It also allows a maintenance court to entertain the matter if it was not settled in the divorce court and such divorce court referred the matter to a maintenance officer as such. Sufficient reasons must however be presented to court before token maintenance will be granted.

6. “Dum casta” clause found in many agreements

6.1 What is a *dum casta* clause?

A maintenance agreement may include a *dum casta* clause, which provides that the recipient spouse will forfeit their maintenance if they fail to lead a life of chastity or enter into a further relationship as such. However, a court will not lightly read such clause into a maintenance agreement as it can in some instances be against public policy and unenforceable as such. The wording of such a clause must therefore be clear enough to guard against potential alleged contractual unfairness.

6.2 Rationale to insert a *dum casta* clause

The rationale and justification for insertion of such a clause is that the recipient receives support from another source if they cohabit or live together in a relationship similar to marriage with another person. Cohabitation as such can therefore also justify the variation or suspension of the maintenance order, and many parties terminate spousal maintenance upon such circumstances. The parties can therefore include a *dum casta* clause to such effect, or apply to court to have the maintenance obligation terminated/ suspended based on the assumption that such duty of support ceases upon remarriage, etc. Inclusion of such a clause will however save time and costs as court processes and disputes are avoided by prior agreement between the parties. This is illustrated below.

7. Do subsequent marriages have an influence on spousal maintenance?

Remarriage of a spouse receiving spousal maintenance may lead to suspension or termination of the maintenance agreement. There are multiple reasons for this consequence, but overarchingly, spousal maintenance should not be awarded when such recipient is being maintained from another source. This is to guard against double-compensation or being benefitted twice, as a spousal maintenance obligation cannot be split between two liable parties.

When a new marital duty to support arises, the previous obligation to maintain (whether it be indefinitely or temporarily) stops and the payer can apply to have the order suspended or varied according to agreement. These different possibilities are illustrated below.

7.1 Indefinite spousal maintenance

If the agreement does not stipulate duration, it may be assumed that the obligation of spousal maintenance ceases upon remarriage. The rationale is that a new reciprocal duty of support was created upon the remarriage of the parties. This presumption is useful to suspend or terminate a maintenance obligation where there is no *dum casta* clause in the agreement.

7.2 Temporary spousal maintenance by *dum casta* clause

The maintenance will automatically stop upon remarriage when an agreement contains a *dum casta* clause, which states that the maintenance obligation will stop once the recipient remarries. When the recipient is receiving support from another source, the maintenance payer is allowed to apply for variation or suspension of the maintenance award, even if the agreement does not include a *dum casta* clause.

8. Explaining when and how to apply for spousal maintenance

8.1 When you can claim for spousal maintenance

Ultimately, you must apply for spousal maintenance before the divorce order is granted. As maintenance is generally only a valid claim once the respective need and means of the parties have been proven, these requirements will have to be shown. An application for spousal maintenance can also only be entertained *before* the divorce proceedings are finalised, which makes it crucial to approach court for maintenance before such time. You cannot apply for spousal maintenance after the decree of divorce order is granted if you did not obtain spousal maintenance as part of the divorce.

You can claim and enforce spousal maintenance if you have proven sufficient reason as such and there is an agreement or court order to such effect. In *Van der Vyver v Du Toit*, the court accepted that an agreement to pay your spouse may amount to a maintenance agreement, even if the term 'maintenance' was not used. This case illustrates that a tacit spousal maintenance agreement may be assumed where the context of the contract indicates as such, thereby affording the same mechanisms to enforce the contract as if it was court-ordered.

A further discussion on relevant factors and how it impacts a spousal maintenance claim is discussed below. This will be done on the basis of highlighting the factors that either support or undermine a party's case.

8.1.1 Indicators of likely success

You may stand the chance to succeed in a spousal maintenance claim if you can prove that you need financial support in light of various reasons, as will be discussed below in terms of the factors listed previously. Financial means, or the ability to pay, must also be proven on the side of the higher earning spouse.

You may establish the need to be maintained if, for example, you have built little or no estate during the subsistence of the marriage, thereby decreasing your earning capacity and ability to maintain yourself after the marriage. This is also relevant if the marriage and marital support had endured for a long period of time, which meant that you did not have the need to build a secure financial estate until the divorce. This is also relevant if you are an elder and have not had the opportunity to grow an estate before the divorce. Assistance given in support of growing the financially secure spouse's estate will also count in your favour, if proven.

8.1.2 Factors that lessen the prospects of success

The standard of living before the divorce will also be a consideration, which means that spousal maintenance must be reasonable in light of the standard of living of the parties during the marriage. A court will not grant an order for spousal maintenance which exceeds the needs, or the standard of living, that the parties have had during their marriage.

Questionable conduct, leading to the breakdown of the marriage, may justify decreased spousal maintenance. However since we have moved away from fault-based divorces, conduct by the parties is arguably an immaterial consideration and cannot justify the refusal of maintenance. Spousal maintenance is also no longer seen as a penalty for such misconduct.

In *LM v GJM*¹ an applicant failed to prove that their circumstances justify the awarding of spousal maintenance. This case is crucial for future potential applicants to understand, especially in the context of misleading contextual evidence that disallowed the spousal maintenance award. It dealt with a wife (appellant) who purported to claim spousal maintenance upon their divorce to the respondent (husband), but who was barred from doing

¹ WCC unreported case no. A11210 22-2-2011.

so as she did not sustain sufficient cause in terms of the relevant factors to warrant such order. The applicant's contentions as to her inadequate financial means was dissected and uncovered to be flawed. The applicant was found to have been indeed financially maintained by her independent missionary work and her pastor-status. The applicant's expert evidence was also found to be flawed, uninformed and misleading as it found the applicant to be a housewife with no earning capacity, all while the applicant had indeed earned income from her missions. The applicant's lack of insight into the respondent's financial circumstances and the fact that the respondent's lack of means was not sufficiently proven, led the applicant's claim for spousal maintenance to be uneconomical. The court therefore dismissed the applicant's appeal *in casu*.

Therefore, applicants must take care when applying for spousal maintenance and ensure that they are indeed in a financially vulnerable position which warrants such application. If a spouse's financial position is not clearly inadequate and proof of their income is sustained, it is unlikely that a court will entertain a spousal maintenance claim such applicant indeed has some earning capacity. The above-mentioned case also illustrates the risk of leading dishonest or exaggerated evidence, and how such evidence is likely to lessen the prospects of success of an application for spousal maintenance.

8.2 How to apply for spousal maintenance

Spousal maintenance can be claimed in four instances: during the marriage; pending divorce; upon divorce; and after the death of a deceased spouse (claimed against the deceased estate). The focus of this webinar will however be on a spousal maintenance claim against a living estate. The maintenance of surviving spouses will be discussed in later courses.

8.2.1 *Interim maintenance pending divorce*

A vulnerable spouse can claim interim financial support pending the divorce until such time as the divorce is finalised. This may be done where the divorce takes a long time to finalise and, for example, a spouse is a homemaker without any income and legitimately needs financial support as soon as possible. This application for interim spousal maintenance is possible in both the High Court and the Magistrates' Court. In most such cases, separated spouses will approach the Court with a Rule 43 Application in the High Court or a Rule 58 Application in the Regional Court, pending the divorce.

You will be required to complete a J101E, or an Application for Maintenance form (exactly the same as for child maintenance). You can find a step-by-step guide on how to complete the

J101 form by following this educational video and relevant link:
<https://www.youtube.com/watch?v=qCz69nj8P2E>.

8.2.2 Spousal maintenance **upon divorce**

The court granting the decree of divorce may make an order as to spousal maintenance based on an agreement between the parties (if there is any) or make an order it deems just if there are no agreements between the parties. Divorce proceedings usually take place in the High Court and the spousal maintenance was such be applied for in the High Court. Where a High Court fails to decide on what it would regard as just spousal maintenance, the matter should *not* be sent back to the maintenance court *unless* token maintenance has been granted, which allows a maintenance court to hear the maintenance matter *after* finalisation of the divorce. If token maintenance was not granted in such an instance, a maintenance court will not have jurisdiction to entertain the matter after the divorce order is finalised.

8.3 What to expect after applying for spousal maintenance

Similar to child maintenance matters, an application for spousal maintenance will first be heard in an informal enquiry, where the parties and maintenance officer aim to reach a settlement. If the parties can reach an agreement, such consent order will be made an order of court. If the parties cannot reach an agreement, the matter will be heard in court by a Magistrate.

The previous webinars, and webinars to follow, will set out this process in much more detail as it related to both child and spousal maintenance.

References

Books

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

Articles

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

N Khumalo's *Marriage, Reciprocal Support and Spousal Maintenance* (2019).

D Card's *Your rights as a cohabiting partner* (2021).

Legislation

Divorce Act 90 of 1979: Sections 7, 8.

Maintenance Act 99 of 1998.

Maintenance Amendment Act 9 of 2015.

Case law

EH v SH 2012 (4) SA 164 (SCA).

K v K 2006 (6) SA 127 (C).

Beaumont v Beaumont [1985] 4 All SA 284 (W); 1985 (4) SA 171 (W).

Kooverjee v Kooverjee [2006] 4 All SA 369 (C).

Van der Vyver v Du Toit 2004 (4) SA 420 (T).

LM v GJM WCC unreported case no. A11210 22-2-2011.

Additional reading material

GH Fick's *Divorce Without Fault: Towards Change in South Africa* (1978).

L Ackerman's *Divorce in South Africa: An Overview* (2014).

N Morei's *Should Spousal Maintenance be Left Solely to Judge's Discretion?* (2014).

E Bonthuys' *ST v CT: Two views on public policy and post-divorce spousal maintenance* (2019).