South African Law Reform Commission

DISCUSSION PAPER 157

PROJECT 100B

REVIEW OF THE MAINTENANCE ACT 99 OF 1998

CLOSING DATE FOR COMMENT: 30 JUNE 2022

ISBN: 978-0-621-50365-4

Published: MAY 2022

INTRODUCTION

The South African Law Reform Commission (SALRC) was established by the South African Law Reform Commission Act, 1973 (Act 19 of 1973).

The members of the SALRC are –
Justice Narandran (Jody) Kollapen (Chairperson);
Mr Irvin Lawrence (Vice-Chairperson);
Professor Mpfariseni Budeli-Nemakonde;
Professor Karthigasen Govender;
Professor Wesahl Domingo;
Advocate Tshepo Sibeko;
Advocate Johan de Waal SC;
Advocate Hendrina Magaretha Meintjes SC; and
Advocate JB Skosana (Full-time member)

The Secretary of the SALRC is Mr Nelson Matibe. The Commissioner assigned to this project is Mr Irvin Lawrence. The project leader appointed for this investigation is Professor Madelene de Jong. The researcher assigned to this investigation is Ms Maite Modiba. The Commissions offices are at Spooral Park Building, 2007 Lenchen Avenue South, Centurion.

On 09 May 2015, Adv TM Masutha, the then Minister of Justice and Constitutional Development, appointed the following advisory committee members who assisted the SALRC to develop the discussion paper, namely:

- Prof Madelene de Jong, Research Associate, University of Limpopo and accredited mediator in private practice
- Judge Daniel Thulare, Western Cape High Court
- Ms Stephané Erasmus, National Prosecuting Authority
- Ms Likhapha Mbatha, National Movement of Rural Women
- Adv Thabo Magano, Practising Advocate of the High Court of South Africa (appointed by Minister RO Lamola on 10 October 2020)

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PREFACE

This discussion paper, which reflects information accumulated at the end of March 2022, has been prepared to elicit responses from parties and to serve as a basis for the SALRC's deliberations. Following an evaluation of the responses and any final deliberations on the matter, the SALRC may issue a report on this subject, which will be submitted to the Minister of Justice and Correctional Services for tabling in Parliament.

The views, conclusions and recommendations in this paper are not the SALRC's final views. The paper is published in full to provide persons and bodies wishing to comment or to make suggestions for the reform of this particular area of the law with sufficient background information to enable them to place focussed submissions before the SALRC.

The SALRC will assume that respondents agree to the SALRC quoting from or referring to comments and attributing comments to respondents, unless representations are marked confidential. Respondents should be aware that the SALRC may, in any event, be required to release information contained in representations under the Promotion of Access to Information Act 2 of 2000.

Respondents are requested to submit written comments and representations to the SALRC by 30 June 2022 at the address appearing on the previous page. Comment can be sent by e-mail or by post. However, comments sent by email in electronic format are preferable.

This document is available on the Internet at: http://www.justice.gov.za/salrc/

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DIRECTIVES AND RULES

CHAPTER 1: INTRODUCTION

A Origin and background of the investigation

1.1 On 1 February 2011, the South African Law Reform Commission (the SALRC or the Commission) received a request from the then Minister of Justice and Constitutional Development (the Minister) to include in its law reform programme an investigation into the Maintenance Act of 1998[1] (the Act or the Maintenance Act). The Minister requested that this investigation and review should receive priority attention.

1.2 The request by the Minister was informed by challenges that were identified with regard to implementing the Act. These were outlined in an annexure to the letter referred to above. The challenges identified by the Minister were as follows (quoted here verbatim):

(a) The Act is silent as to when an application for future maintenance can be made and whether a maintenance court has jurisdiction to deal with such an application. The Act also does not indicate who must administer the money when any annuity, gratuity or compassionate allowance or other similar benefit is attached or is subjected to execution under a warrant of execution.

(b) It is not clear who has *locus standi* in a case where a child attains majority but is still dependent on his or her parents.

(c) It is not clear who has *locus standi* in a case where a child attains majority but is still dependent on his or her parents and such child refuses to claim maintenance from the relevant parent.

(d) Section 20 of the Act provides that the maintenance court holding an enquiry may make any order as it considers just relating to the costs of the service of process. Representations have been received that this provision must be amended to extend the power of the maintenance court to make any order relating to costs as a result of the abuse of the process by persons against whom maintenance orders have been made.

(e) The Act does not provide for sufficient assistance to an applicant in making his or her choice as to the different remedies relating to civil execution, available

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[1] Act 99 of 1998.

in terms of Chapter 5 of the Act. In terms of section 26 (1) of the Act a maintenance order shall be enforced –

"(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 contemplated in section 30."

(f) There is an anomaly in the Act relating to the appointment of maintenance officers in so far as the role of the National Prosecuting Authority (the NPA) and the Department of Justice and Constitutional Development (the Department) are concerned. Section 4 (1) of the Act provides that a 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. Section 4 (2) of the Act provides that the Minister, or any officer of the Department authorised thereto in writing by the Minister, may, subject to the laws governing the public service, appoint one or more persons as maintenance officers of a maintenance court. As the NPA is regarded as a separate entity, the NPA appoints prosecutors, who are then deemed to be appointed as maintenance officers, in accordance with the salary scales fixed in respect of prosecutors. In addition, maintenance officers, who must since 2007 have a legal qualification, are appointed in terms of section 4 (2) of the Act but in accordance with different salary scales. Since maintenance matters are not *per se* regarded as criminal cases, prosecutors are not always dedicated to maintenance matters which result in the need to appoint maintenance officers under section 4 (2) of the Act. This situation also creates uncertainty regarding the persons to whom section 4 (2) appointed maintenance officers must report.

(g) Due to budgetary constraints it is not possible to appoint a maintenance investigator for every magistrate's court and it may be more appropriate in the circumstances to provide in the Act for the appointment of maintenance investigators for a cluster.

(h) The Act does not provide for the power of arrest by a maintenance investigator. In many cases a defaulter is often only traced after a lengthy period and many efforts by the maintenance investigator. The question has arisen whether in these circumstances justice would not be better served if the maintenance investigator could arrest the defaulter.

1.3 The Minister also identified specific challenges that need to be looked at, related to the following points (quoted here verbatim):

(a) The Act must provide clearly which movable property of the person who failed to pay maintenance is susceptible to attachment.

(b) Provision must be made in the Act for the holding of a financial inquiry.

(c) Three remedies are cited in section 26 of the Act to enforce maintenance orders. When interpreting section 26 (1) of the Act, it appears that the three remedies are provided as alternatives. The question has arisen whether provision should not be made for an applicant, under certain circumstances, to select more than one remedy at the same time. For example, if a person fails to pay maintenance and the applicant can prove that the amount in arrears exceeds the value of any movable property owned by the defaulter and attachable under a warrant of execution provided for in section 27 but an amount is due to the defaulter which can be attached as a debt in terms of section 30.

(d) In terms of rule 38 of the Magistrates' Courts Rules a sheriff may, if he or she is in doubt as to the validity of any attachment or contemplated attachment, require that the party suing out the process in execution, shall give security to indemnify him or her. It appears that in practice sheriffs often require applicants to provide security before executing any process from a maintenance court. It is common knowledge that many applicants are not in a position to provide the required security, the result being that the execution process is rendered useless. This aspect should be investigated.

(e) An investigation should be conducted regarding future maintenance default amounts, having regard to the protracted processes in connection with, and delays in, obtaining and executing execution process. A warrant of execution is issued for a particular amount, which amount constitutes the amount due to the applicant at that stage. It often happens that the amount in arrears increases after the issuing of warrant of execution. It is understood that an applicant has to approach the maintenance court again for the amount accrued after the issuing of the warrant of execution. The warrant of execution cannot merely be amended to include the additional amount without the intervention of the court.

(f) Many defendants try to avoid payment of maintenance through the establishment of a trust. This matter should be dealt with in the Act.

(g) Procedural issues are usually prescribed by way of rules and the procedures relating to civil execution [are best] regulated by way of rules rather than regulations[;] and therefore an enabling provision should be inserted in the Act to make provision that the Rules Board must make rules relating to the execution procedure.

1.4 After receiving this request from the Minister, the SALRC subjected the request to the SALRC's internal processes. A preliminary investigation was conducted to determine whether the requested investigation should form part of the SALRC programme. The preliminary investigation culminated in the development of a proposal paper, which made recommendations on the inclusion of an investigation in the Commission's programme and the priority rating to be accorded to the proposed investigation in line with the Minister's request.

1.5 The proposal paper was presented to the Commission for approval at its meeting convened on 22 October 2011. The Commission approved the recommendations made in the proposal paper, namely to include the investigation in the SALRC programme under Project 100.[2]

1.6 The recommendations in the proposal paper emphasise that the request from the Minister contained areas that do not require law reform and areas that do require reform. A detailed discussion on the conclusion by the SALRC is contained in the proposal paper. Areas that were identified and approved by the SALRC for law reform are as follows:

1. mediation in maintenance matters;
2. determination of maintenance awards;
3. recognition of other forms of payments;
4. future maintenance;
5. *locus standi;*
6. appointment of maintenance officers;
7. the power of arrest by maintenance investigators;
8. civil execution of maintenance orders;
9. trusts; and
10. cost orders and choice of remedy.

[2] Project 100 deals with all investigations concerning Family Law and the Law of Persons. The current investigations under Project 100 are as follows: Custody of and Access to Minor Children; Review of Aspects of Matrimonial Property Law; Hindu Marriages; and the Review of the Maintenance Act 99 of 1998.

1.7 The Commission had published an issue paper[3] to announce an investigation to the public, clarify the aim and extent of investigation, and to suggest the options available for solving existing problems pertaining to maintenance. Submissions were received from various stakeholders, and the Commission is indebted to those stakeholders who made comments as these will assist the Commission in understanding the dynamics on the ground, especially from the point of view of the people who administer the Act directly. Those submissions, together with extensive research, form the basis for this discussion paper.

1.8 We have received additional issues from stakeholders who commented on the issue paper. The issues raised are as follows:

1. whether maintenance officers should have a discretion to decide to institute an enquiry or not;
2. maintenance officer's main role be altered to one of a mediator who also lead a pre-trial investigation;
3. notice should be given to third parties who may be liable to pay maintenance on behalf of a maintenance debtor;
4. duties of maintenance officer be included in the Act so that any person holding such office clearly understand his or her role;
5. section 16 (1) (a) (ii) should be gender neutral and not only permits a mother to submit a maintenance claim;
6. section 16 (2) (aa), (bb) and (cc) should permit emoluments attachment orders irrespective of whether evidence was adduced or not;
7. section 18 (5) (c) enquiry is not necessary because it establishes the same things that are established at an enquiry;
8. section 26 (3) (b) should be deleted as it bars the maintenance court from making any order to enforce a maintenance order where an order in terms of section 16 was made;
9. section 27 (3) should also allow warrant of execution to be set aside if an alternative effective way of enforcing a maintenance order is found;

[3] Issue Paper 28: Review of the Maintenance Act 99 of 1998 was published on 09 September 2014.

10. section 25 should include provisions dealing with the review of maintenance matters;
11. sections 16 and 26 should include living annuities as an asset in a person's estate;
12. section 27 be amended to insert a provision dealing with amicus curiae in maintenance matters.

B The investigative approach

1.9 Formulation of this paper has followed a qualitative methodology with elements of desktop review geared towards an understanding of maintenance. Research to date has involved examining media and public concerns over the last few years, communicating with stakeholders (especially civil society organisations), and a preliminary analysis of the policy and legislative framework to determine whether the concerns raised are covered by legislation. This has been the approach adopted by the advisory committee appointed by the SALRC during its work on this issue since 2015.

1.10 Between 2015 and 2020, it has become clear that there are some challenges encountered by maintenance complainants in accessing maintenance from maintenance debtors. This is not surprising given the common tricks played by maintenance debtors to avoid their responsibilities. It has also become clear that there are some loopholes in the Act on certain matters identified by the Commission. Because of these circumstances, the Committee has done the following:

- desktop research on maintenance matters*;*
- getting input from stakeholders through comments on matters raised in the issue paper; and
- legislative analysis to examine whether there are gaps in addressing the problem of maintenance, and how maintenance complainants and beneficiaries can be assisted.

1.11 In addition, the Deputy Minister of Justice and Constitutional Development met with the Commission on 02 April 2021 and requested the Commission to streamline the maintenance application procedure, by making provision in the Act for immediate relief. The Commission decided that it will be beneficial for the Act to provide for *ex parte* applications

which empowers the maintenance court to make interim maintenance orders if the circumstances warrant such.

CHAPTER 2: DIFFERENT APPROACH TO MAINTENANCE MATTERS – MEDIATION, DUTIES OF MAINTENANCE OFFICER, INQUISITORY ROLE OF MAGISTRATES AND THE POSSIBILITY OF INTERIM MAINTENANCE ORDERS

A Introduction

2.1 The work that is done under this section of the investigation should be seen in a broader context of the work that the SALRC has been doing around arbitration and alternative dispute resolution (ADR). Under Project 94 in the SALRC's programme the SALRC has conducted investigations focusing on International[4] and domestic[5] arbitration and ADR. ADR, the subproject of Project 94, which was added later on, was initially divided into three parts: 1) ADR and the civil law; 2) family mediation and 3) community courts. The investigation on community courts was discontinued while the investigation into family mediation now forms part of Project 100[6] under the subproject dealing with "care of and contact with minor children." ADR and the civil law is the only one remaining under Project 94.[7]

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[4] A report of the SALRC entitled "Arbitration: An international Arbitration Act for South Africa' was published and submitted to the Minister of Justice and Constitutional Development in July 1998. Although the Bill was approved by cabinet for submission to Parliament it was never introduced.

[5] A report entitled 'Domestic Arbitration' was published and submitted to the Minister of Justice and Constitutional Development for consideration in May 2001. This Bill was also never introduced in Parliament.

[6] Project 100 incorporates all projects dealing with family law, such as 'Care of and contact with Children' (Project 100D), 'Review of aspects of Matrimonial Property law' (Project 100C), Muslim marriages (which has been discontinued) and the Review of the Maintenance Act (Project 100B).

[7] The investigations on international and domestic arbitration were both finalised. The report on international arbitration was approved by the Commission in July 1998 while the report on domestic arbitration was approved by the Commission in May 2001.

2.2 ADR includes a broad range of dispute resolving mechanisms outside of litigation or adjudication through the courts. Project 94 now includes aspects of court-annexed mediation as a form of alternative dispute resolution. The focus on court-annexed mediation has its origins from a Cabinet endorsed initiative of the Department of Justice and Constitutional Development (the Department) in 2010 in terms of which it is sought to engage in a comprehensive review of the civil justice system.[8] The Department's initiative seeks to integrate alternative dispute resolving mechanisms with a mandatory referral system and this includes the establishment of a court-based mediation framework. It is envisaged that the SALRC process under Project 94 will culminate in the development of a general or generic Mediation Act that will permit the implementation of mandatory mediation in civil disputes before the civil courts.[9]

2.3 Almost all of the subprojects of Project 100, namely Care of and Contact with Children (100D), Review of Aspects of Matrimonial Property Law (100A) and the Review of the Maintenance Act (100B), will look at mediation in the specific areas investigated under each subproject. Under Project 100D, the SALRC Discussion Paper 148 of 2019 has incorporated the Family Dispute Resolution Bill, 2020, which inter alia makes provision for a mandatory information and education programme and mandatory mediation for all family law disputes. This would, of course, include maintenance matters.

2.4 The interrogation of the suitability of mediation in maintenance matters therefore does not occur in a vacuum but in line with all other developments in the mediation and ADR sphere, both in civil matters and family law. The recommendations that the SALRC will make in the respective subprojects of Project 100 should therefore not be seen in isolation but in line with the principles to be incorporated in the broad mediation and/or ADR and Family Dispute Resolution legislation that is being developed. Consideration will also be given, when making the recommendations, to the call by some legal writers who suggest that family law mediation should be regulated by a separate Act. This suggestion is premised on the

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[8] This process culminated in the publication of the Draft Mediation Rules by the Rules Board for Courts of Law (Rules Board) in 2012. These Rules will be discussed in detail below.

[9] In terms of the current mediation rules, mediation is not mandatory. This is so because of the absence of enabling legislation that sanctions the implementation of mediation in civil disputes.

special nature of family law disputes and the unique policy considerations that need to be applied in such disputes.[10]

B Mediation in family law matters

a) Historical overview

2.05 Mediation in family law matters started being used in South Africa around the 1980s and 1990s as a form of ADR.[11] This process started with the inquiries that were conducted by Justice GG Hoexter who was appointed initially to look at the Structure and Functioning of Courts[12] and later at the Rationalisation of the Provincial and Local Divisions of the Supreme Court.[13] The report issued by the Hoexter Commission in 1983 referred to issues around the use of ADR in family disputes. In fact, the Commission looked at, among other issues, the desirability of an inquisitorial system of adjudicating family law disputes.[14] One of the issues that the 1983 Hoexter Commission raised was the fact that the adversarial system was not in the best interest of the child. It concluded that there was a need to follow the inquisitorial approach in family matters, which at the time was introduced by the Mediation in Certain Divorce Matters Act.[15] The first, as well as the final, Hoexter Reports recommended various ground-breaking innovations such as the creation of the family courts that would deal with all family matters, such as children's court matters, maintenance matters, divorce actions and ancillary applications.[16] Although the first Hoexter Report recommended the institution of the family court on lower-court level, which should have a

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[10] Such as the best interests of children, equality and non-discrimination. See De Jong *Arbitration of family law issues* 2014 *PELJ* 2399 in respect of a plea for separate family law arbitration legislation.
[11] Boniface *A humanistic approach to divorce and family mediation* 2012 *African Journal on Conflict Resolution* 103-104
[12] *Commission of Inquiry into the Structure and Functioning of the Courts* (RP 78/1983). This report is referred to as the first Hoexter Report or the 1983 Hoexter Report..
[13] *Commission on Inquiry into the structure and Functioning of the Courts in South Africa* (RP200/1997). This report is referred to as the final Hoexter Report or the 1997 Hoexter Report.
[14] Final Hoexter Report Vol 1 Part 2 par 8.1.3. See also Van Zyl *Divorce mediation* 105 where reference is made to the Hoexter report released in 1983.
[15] First Hoexter Report Vol III Part 8 par 9.8.2.
[16] Van Zyl *Divorce mediation* 109.

social component where mediation services are offered,[17] the final Hoexter Report recommended the institution of a specialist family court at high-court level.[18] It further recommended the repeal of the Mediation in Certain Divorce Matters Act and the replacement thereof by the Family Advocate and Family Counselling Service Act,[19] which would give the family advocate *locus standi* to get involved in *any* family matter.[20]

2.06 Around the same period referred to above private organisations were founded to deal with divorce and family mediation.[21] The South African Association of Mediators (SAAM) was founded in 1988. Thereafter, other regional organisations were also founded, such as the Family Mediator's Association of the Cape (FAMAC), the KwaZulu-Natal Association of Family Mediator's (KAFam) and the Arbitration Foundation of Southern Africa (AFSA). These organisations offer accreditation and training to its members, who are mainly professionals from various disciplines, *inter alia* attorneys, psychologists and social workers. Such professionals provide mediation services in private practice and charge fees for their services, usually at an hourly rate.[22]

2.07 There are also non-governmental and community organisations that offer mediation services. These range from structures based within communities such as street committees, traditional leaders and advice centres, to organisations such as Family Life and the Family and Marriage Association of South Africa (FAMSA), whose services are delivered either free of charge or at a minimal cost.[23]

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[17] First Hoexter Report Vol III Part 7 par 9.1 and par 9.4.1.
[18] Final Hoexter Report Vol 1 Part 2 par 8.2.2 and par 8.8.
[19] Final Hoexter Report Vol 1 Part 2 par 8.4.4 and 9.1.
[20] Final Hoexter Report Vol 1 Part 2 par 8.8.8.
[21] Van Zyl *Divorce mediation* 151-152; Boniface 2012 *African Journal on Conflict Resolution* 103-104. See also De Jong *A pragmatic look at mediation as an alternative to divorce litigation* 2010 *TSAR* 528.
[22] Boniface 2012 *African Journal on Conflict Resolution* 103-104. See also De Jong *An acceptable, applicable and accessible family-law system – some suggestions concerning a family court and family mediation* 2005 *TSAR* 43; De Jong *International trends in family mediation-are we still on track?* 2008 *THRHR* 469-470 and De Jong 2010 *TSAR* 528.
[23] Boniface 2012 *African Journal on Conflict Resolution* 103-104. See also De Jong 2005 *TSAR* 41-43; De Jong 2008 *THRHR* 470.

2.08 Furthermore, public mediation service in family matters is offered by the Office of the Family Advocate and by maintenance court officials in the maintenance court environment. There are limitations in the mediation provided by the Office of the Family Advocate in terms of the Mediation of Certain Divorce Matters Act[24] as its interventions are limited to issues around the care of, guardianship over and contact with children.[25] Similarly, the mediation provided by maintenance court officials is limited to maintenance matters only.

2.09 The Children's Act[26] makes provision for mediation in various ways – as will be seen below it is mandatory in certain instances, discretionary in the opinion of the court in other instances and implied in yet more instances. There are, however, also some limitations in the mediation provided for or prescribed in the Children's Act, as will be elaborated upon below when dealing with mediation in legislation affecting family law below.

2.10 The private mediation sector has a regulator established on 23 March 2010, which sets out standards for accredited mediators and provides accreditation for courses offered in mediation.[27] The regulator is called the National Accreditation Board for Family Mediators (NABFAM) to which regional mediation organisations such as SAAM, FAMAC and KAFam subscribe. Although accreditation is not compulsory, it is advisable for those providing mediation services to become members of NABFAM membership organisations, such as SAAM, KAFam and FAMAC, and observe its standards.[28] This is a useful stopgap measure until such time that South Africa has legislation that regulates mediation, including training and accreditation of mediators.

2.11 The provision in the current Mediation Rules for court-annexed mediation[29] for accreditation of mediators further illustrates the importance of having mediators who are

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[24] Act 24 of 1987.
[25] De Jong 2008 *THRHR* 468.
[26] Act 30 of 2005.
[27] Boniface 2012 *African Journal on Conflict Resolution* 103-104; De Jong 2008 *THRHR* 4689 and De Jong 2010 *TSAR* 528.
[28] Boniface 2012 *African Journal on Conflict Resolution* 103-104. See also De Jong in Heaton J *The Law of Divorce* 588.
[29] Chapter 2 of the Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa as introduced by GN R183 in *GG* 37448 of 18 March 2014.

accredited. Pursuant to rule 86,[30] qualification standards were subsequently published[31] which *inter alia* provides that court-annexed mediators must be accredited by and be affiliated to an institution, which offers mediation training.[32] However, one should bear in mind that having accredited mediators may have budget challenges for them to service all areas.

2.12 Similarly, the Family Dispute Resolution Bill, 2020, under Project 100D, which provides for mandatory mediation for all family law disputes, makes provision for certified mediators in clause 17(2) to conduct the mandatory mediation in terms of the Bill. The Discussion Paper 48 of 2019 published under Project 100D further makes mention that the accreditation and training of mediators will be covered by the generic Mediation Act, which is currently being developed as part of the Commission's Project 94 investigation into alternative dispute resolution.[33] Clause 16 of the Family Dispute Resolution Bill also specifically makes provision that the provisions of such generic Mediation Act will apply to any mediation conducted in terms of the Bill.

2.13 From the historical overview of family mediation it is clear that mediation has become a preferred method of resolving family disputes, especially children's issues, which once again, include maintenance matters.

2.14 As family mediation, including mandatory family mediation, is analysed and investigated in full in Discussion Paper 148 of 2019 under Project 100D, it will not be analysed and investigated again in this discussion paper. However, all legislation and draft legislation making provision for mediation in family matters will be examined to ascertain if the provisions are broad enough to ensure mediation in maintenance matters.

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[30] Which provides for the determination by the Minister of the qualification, standards and levels of mediators who will conduct mediation under the rules.
[31] In the Schedule to GN 598 of 2014 GG No 37883 of 1 August 2014.
[32] Item 1(2). Item 1(1) sets out the course content and contact training which the mediation training must include.
[33] Para 4.2.2 of Discussion Paper 48 of 2019 under Project 100D (*Alternative dispute resolution in family matters*).

b) Mediation in legislation affecting family law

2.15 Besides the recognition and incorporation of mediation in other areas of the law referred to above, family law has followed suit, specifically in the law of divorce and children's issues. In 1987, the legislature passed the Mediation in Certain Divorce Matters Act,[34] which introduced the concept of mediation in divorce matters. The late 1990s and early 2000s saw an introduction of mediation processes in other pieces of legislation regulating family law such as the Recognition of Customary Marriages Act,[35] the Children's Act,[36] and the Child Justice Act.[37] In 2019, the draft Family Dispute Resolution Bill[38] was published in Discussion Paper 148 of 2019 to outright make provision for mandatory mediation in all family law disputes.

2.16 The Mediation in Certain Divorce Matters Act created the Office of the Family Advocate and introduced mediation in a very limited and small-scale manner in children's issues upon or after divorce. In terms of this Act, read with section 6 (1) (b) of the Divorce Act,[39] parties can be forced to submit to an enquiry by the family advocate before a divorce decree is granted.[40] An enquiry is regulated by section 4 (1) and (2) of the Act and the focus is only directed at matters relating to the care or guardianship of and contact with children.[41] Section 4 (1) of this Act provides that:

> The family Advocate shall-
>
> (a) After the institution of a divorce action, or
>
> (b) after an application has been lodged for the variation, rescission or suspension of an order with regard to the custody or guardianship of, or access to, a child, made in terms of the Divorce Act, 1979 (Act No. 70 of 1979);
>
> if so requested by any party to such proceedings or the court concerned, institute an enquiry to enable him to furnish the court at the trial of such action or the hearing of such application with a report and recommendations on any matter concerning the

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[34] Footnote 32.
[35] Act 120 of 1998.
[36] Footnote 34.
[37] Act 75 of 2008.
[38] 2020.
[39] Act 70 of 1979 as amended.
[40] De Jong 2008 THRHR 470. See also De Jong in Heaton *The Law of Divorce* 607-608.
[41] De Jong 2010 *TSAR* 527.

welfare of each minor or dependent child of the marriage concerned or regarding such matter as is referred to him by the court.

While section 4 (2) provides that

A family Advocate may-

(a) after the institution of a divorce action;

(b) after an application has been lodged for the variation ,rescission or suspension of an order with regard to the custody or guardianship of , or access to, a child, made in terms of the Divorce Act, 1979 (Act No. 70 of 1979);

if he deems it in the best interest of any minor or dependent child of a marriage concerned, apply to the court concerned for an order authorising him to institute an inquiry contemplated in subsection (1).

2.17 The above provision of the Mediation in Certain Divorce Matters Act should be read with section 6 (1) (b) of the Divorce Act,[42] which states that the decree of divorce will not be granted until the court "if an enquiry is instituted by the Family Advocate in terms of section 4 (1) (a) or (2) (a) of the Mediation in Certain Divorce Matters Act, 1987, had considered the report and recommendation referred to in the said section 4 (1)".

2.18 Although the provisions of sections 4 (1) (a) and 4 (2) (a) of the Mediation in Certain Divorce Matters Act mentioned above do not directly provide for mediation, it appears that the family advocate's role at an enquiry is threefold in practice, namely to monitor, to mediate, and to evaluate. Although the monitoring and evaluation functions are dominant, limited mediation does take place when the family advocate and the family counsellor endeavour, when meeting with both parents, to mediate an agreement between divorcing or divorced parents concerning the care or guardianship of or contact with a child.[43] In a limited sense, the Mediation in Certain Divorce Matters Act therefore makes provision for mandatory mediation by the office of the family advocate.

[42] 70 of 1979 as amended.
[43] De Jong in Heaton *The Law of Divorce* 607.

2.19 Maintenance matters, however, do not fall within the scope of the Mediation in the Certain Divorce Matters Act as it only makes provision for the involvement of the office of the family advocate in guardianship, care and contact matters. In addition, due to budgetary constraints, it becomes difficult for family advocates to provide the services to all. For example, in KwaZulu-Natal there are three offices of the family advocate in Durban, Pietermaritzburg and Newcastle, whereas there are 72 maintenance courts at the Magistrates' Courts in the province. Therefore, only courts surrounding those three cities/towns are serviced and the vast majority not. Members of the public do not have resources to travel to those offices. In addition, the office of the family advocate is under pressure from its current workload because of the limited budget available to create more posts.

2.20 Mediation also applies to the dissolution of marriages entered into in terms of the Recognition of Customary Marriages Act through divorce.[44] Section 8 of the Recognition of Customary Marriages Act deals with dissolution of customary marriages and subsection (3) thereof provides that "The Mediation in Certain Divorce Matters Act … and section 6 of the Divorce Act … apply to the dissolution of a customary marriage." This therefore means that mediation in the dissolution of customary marriages is conducted in the same way described in paragraphs **2.15 to 2.17** above. Maintenance matters, however, will be excluded, once again.

2.21 In addition, section 8 (5) of the Recognition of Customary Marriages Act provides that nothing in section 8 may be construed as limiting the role recognised in customary law of any person, including any traditional leader, in mediation in accordance with customary law of any dispute or matter arising prior to the dissolution of a customary marriage by a court. Maintenance matters, which may be included in customary practices, such as the return of the bride money or lobola, might therefore fall within the scope of this section.

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[44] De Jong in Heaton *The Law of Divorce* 608.

2.22 Furthermore, there are various sections in the Children's Act that prescribe mediation in certain matters affecting children.[45] For example, if there are issues as to whether the father meets the requirements for obtaining full parental responsibilities and rights in cases where parents are unmarried, there is a requirement in section 21 (3) (a) that such matters must be referred for mediation by a qualified person such as a family advocate, social worker or a suitably qualified person.[46] Again, there is a requirement for mediation in section 33 (2) read with section 33 (5) in instances where there is a need to agree on a parenting plan between parents who experience difficulties in exercising their parental responsibilities and rights.[47] As parenting plans may include the responsibility and right of parents to contribute to the maintenance of a child, maintenance matters are included in the scope of section 33 (2) read with section 33 (5). As sections 21 (3) and 33 (2) and (5) prescribe that mediation should be sought first before an approach can be made to a court to resolve disputes referred to in those sections,[48] it is clear that mediation might be mandatory for these children's issues.

2.23 Other relevant sections are sections 49, 70 and 71, which require the children's court to refer certain matters to a lay-forum in an attempt to settle the matters before that court can decide on those matters, and section 69 (1), which allows the children's court to make an order for a pre-trial conference in contested matters before it for purposes of mediating such disputes.[49] In these instances, mediation is therefore mandatory in the discretion of the

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[45] De Jong in Heaton *The Law of Divorce* 608-609.

[46] The section provides that:
If there is a dispute between the biological father referred to in subsection (1) and the biological mother of a child with regard to the fulfilment by the biological father of the conditions set out in subsection (1) (a) or (b), the matter *must* be referred for mediation to a family advocate, social worker, social service professional of other suitably qualified person.[Emphasis added]

[47] The relevant subsections of section 33 provide as follows:
(2) If the co-holders of parental responsibilities and rights in respect of a child are experiencing difficulties in exercising their responsibilities and rights, those persons, *before seeking the intervention of a court*, must first seek to agree on a parenting plan determining the exercise of their respective responsibilities and rights in respect of the child. [Emphasis added]
(5) In preparing a parental plan as contemplated in subsection (2) the parties *must* seek-
(a) The assistance of a family advocate, social worker or psychologist; or
(b) Mediation through a social worker or other suitably qualified person. [Emphasis added]

[48] De Jong 2010 *TSAR* 527. See also de Jong 2008 *THRHR* 632.

[49] The relevant section 69 (1) (a) and it provides that:
(1) If a matter brought to or referred to a children's court is contested, the court may order that a pre-hearing conference be held with the parties involved in the matter in order to-
(a) Mediate between the parties. See also De Jong 2008 *THRHR* 633-635; 2010 *TSAR* 527.

court. What can be deduced from these referrals to lay forums and pre-trial conferences is that the intention is that most matters affecting children should be mediated before being decided by the courts.[50] It is foreseen that maintenance matters contained in parenting plans that are dealt with in the children's courts may therefore fall within the scope of these four sections of the Children's Act.

2.24 Section 21 (3) and section 33 (5), that provide for mandatory mediation, and the other sections, such as sections 49 (1) (a), 70 (2) (a) and 71 (1), that deal with mediation that is at the discretion of the court, prescribe that mediation in the circumstances provided for in those sections should be conducted by a family advocate, social worker, social service professional or other suitably qualified person.[51] Although a suitably qualified person is not defined, it is submitted such a person would probably be someone who has a degree, diploma or other qualification from a university, college of advanced education or other tertiary institution and has undergone specific training in mediation and who is not in any of the specified categories.[52]

2.25 The Child Justice Act[53] does not specifically provide for mediation but provides for a child centred approach in dealing with child offenders. This Act provides for specific ways to deal with children in conflict with the law. Section 9 of the Act provides for procedures to deal with children under the age of 10 years. Subsection 1 provides that when a child who is suspected to be under the age of 10 years has committed an offense, a police official may not arrest that child. Instead, the child must be handed over to his or her parents or where there are no parents to an appropriate adult. Subsection (3) provides for a process to be followed after a probation officer has assessed the child. In terms of these procedures a probation officer may refer the child to the children's court; for counselling or therapy; an accredited centre offering an age appropriate programme and a range of support services. Subsection (3) (a) (v) provides for the convening of a meeting where the parents of the child

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[50] De Jong 2010 *TSAR* 527.
[51] De Jong 2008 *THRHR* 637-638.
[52] De Jong 2008 *THRHR* 638.
[53] 75 of 2008.

must be present. The purpose of the meeting is to determine the circumstances of the child and for the formulation of an appropriate plan to be made for the child.[54]

2.26 Another relevant provision is one found in section 43, which provides for a preliminary inquiry in a matter involving a child. Section 44 provides for people who should be present at the inquiry and they are the inquiry magistrate, the prosecutor, the child, the child's parents and the probation officer. The purpose of the inquiry is to determine the circumstances of the child to make an appropriate decision on how the offense should be dealt with. The preliminary inquiry process is preferred as opposed to the child appearing in court for the offense he or she is suspected to have committed.

2.27 Clause 17(1) of the draft Family Dispute Resolution Bill, 2020 to Discussion Paper 148 of 2019 (Project 100D) provides as follows:

> **Commencement of mediation before litigation**
> **17**(1) In order to attempt the resolution of a family law dispute, the parties to a dispute must, once they have complied with section 13, submit to mediation in terms of this Act before any other proceedings (including the issuing of summons, or a notice of motion) may commence.

2.28 What this clause implies is that it is mandatory for any family dispute, including a maintenance matter, to be subject to mediation first before any other court proceedings can take place.

2.29 In addition, clause 17(2) provides that

> 17(2) The mediation must be performed by a certified mediator agreed on by the parties or, if the parties are unable to agree, by a certified mediator appointed by a mediation service provider, as prescribed, or by the Court.

2.30 It appears that the requirements for certification of a mediator for purposes of this subsection will be dealt with in the general or generic Mediation Act to be developed under Project 94. Clause 16 of the Family Dispute Resolution Bill specifically makes provision for application of the generic Mediation Act. In Discussion Paper 148 of 2019, it is stated that

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[54] Section 9 (4).

the generic Mediation Act will deal with matters such as the accreditation and training of mediators, funding and fees, interruption of prescription, confidentiality of the mediation process, the right to legal representation, termination of the mediation process, certification of participation and the enforcement of a mediated outcome.[55]

2.31 Clause 17(4) of the draft Family Dispute Resolution Bill of 2020, however, makes provision for instances where mediation is not mandatory and where the parties to a family law dispute may approach the relevant court directly. It provides that parties are not compelled to submit to mediation if—

> *(a)* they intend to file a consent order and both parties consent to the order that is being requested;
> *(b)* they have previously attempted to mediate the dispute concerned but that mediation was unsuccessful;
> *(c)* a mediator, after assessing, as prescribed, whether family violence may be present, is of the opinion that family violence is present and that the family violence may adversely affect the safety of the party or a family member of that party or the ability of the party to negotiate a fair agreement;
> *(d)* a court is satisfied that there are reasonable grounds to believe that abuse of a child by one of the parties has occurred or there would be a risk of abuse of the child if there were to be a delay in applying for protection of the child; or
> *(e)* they have signed a collaborative dispute resolution participation agreement; or
> *(f)* a court determines that participation is not in the best interests of the parties or the child, including urgency or potential hardship.

2.32 It is contemplated that most maintenance matters will in terms of the exceptions set out in clause 17(4)(b), (c), (d) and (f) be exempted from mandatory mediation. Most parties in the maintenance court will therefore miss out on the many advantages of mediation as set out in Discussion Paper 148 of 2019.

2.33 Furthermore, in terms of clause 22 the parties are required to share the costs of the mediator, unless one party offers to pay the fees of the mediator in full or the mediation services are provided free of charge.

2.34 Once the Family Dispute Resolution Bill becomes an Act mandatory mediation will be fully incorporated in family law, and maintenance matters will be included in the scope of

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[55] Paras 4.2.1 to 4.2.3.

the Act. However, it is foreseen that maintenance complainants will almost invariably be allowed to approach the maintenance court directly due to economic abuse of family members, urgency, potential hardship and/or the best interests of the child. Although strides have been made in incorporating mediation in family law, the question needs to be considered whether the Maintenance Act should also make provision for additional mediation as part of the maintenance court process.

C Mediation in maintenance matters

a) Background

2.35 People using the maintenance system are usually the marginalised and impoverished in our communities. They consist mostly of women and children who are unable to care for themselves. Women, who in most cases become the care-givers of the children upon family breakdown, often lose out on employment opportunities because of their responsibility to care for their children. It therefore follows that the women who use the maintenance system are in most cases unemployed and depend on maintenance for their survival and that of their children.[56] Therefore, although the legal rules underlying post-divorce maintenance apply equally to men and women, it is generally women who are not on an equal footing with men upon marriage breakdown.[57] It is clear that the non-payment of maintenance has *inter alia* become a sex and gender issue.[58] This is despite section 9 of the Constitution of the Republic of South Africa, 1996, which guarantees sex and gender equality. It is also clear that the difficulties and hardship that these women have to endure to obtain their and their children's maintenance entitlements undermine their dignity, which is protected by section 10 of the Constitution.[59]

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[56] De Jong & Sephai "New measures to better secure maintenance payments for disempowered women and vulnerable children" 2014 *THRHR* 196-197.

[57] De Jong "New trends regarding the maintenance of spouses upon divorce" 1999 *THRHR* 80-81; Carnelley and Hoctor "Maintenance defaulters: Aiding the process and process-in-aid" 2003 *Obiter* 511.

[58] Carnelley "A review of the criminal prosecution and sentencing of maintenance defaulters in South Africa, with commentary on sentencing strategies" 2012 *SACJ* 344, 355.

[59] De Jong and Sephai 2014 *THRHR* 197.

2.36 Furthermore, in this regard, section 28 of the Constitution is instructive on how matters affecting children should be dealt with. At the centre of the rights to be afforded to children is the fact that with matters affecting children the best interest of the child should be paramount. This constitutional imperative therefore instructs the SALRC to deal with this investigation in a meticulous and humane way to ensure that the best interest of children affected by maintenance are promoted and protected. This reality also emphasises the need to make sure that the duty to support children is evenly distributed among those who have a responsibility to maintain children.

2.37 Maintenance disputes often occur when relationships have broken down and families find themselves in a situation where they cannot negotiate matters affecting their separation. It is a time when emotions are high and often the respective parties' parental responsibilities and rights become a contested terrain. Maintenance disputes are therefore usually very acrimonious, and parties often feel that the other party is neglecting his or her duty to support the child or children whom he or she is responsible to maintain.[60]

2.38 Although proceedings in the maintenance court are more inquisitorial in nature than in the High Courts or magistrates' courts, it is nonetheless clear that many elements of the adversarial system of litigation still apply in the maintenance court. There is a strong adherence to the rules of evidence and procedure, facts are found through the testing of evidence in open court and there is reliance upon legal representation and oral evidence.[61] It has, however, been established that the adversarial system of litigation is not suitable to resolve intimate and emotional disputes between family members, which includes maintenance disputes. The increased tension and conflict between the disputing parties further leads to dire consequences for the children involved in maintenance matters.[62] The children's relationship with the maintenance debtor is often seriously damaged and they may

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[60] De Jong 2009 THRHR 275.

[61] See section 10 (5) which provides that :
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.
See also De Jong 2009 *THRHR* 277-278.

[62] De Jong 2009 *THRHR* 275 and 287.

well end up with less than their fair share of the family's income and necessary creature comforts.[63].

2.39 There are suggestions that mediation is often a better alternative because in this process parties are able to negotiate solutions that are suited to their own circumstances and assist them in recognising their responsibilities towards their children.[64] Mediation has always been accredited as a tool that can be used to avoid litigation and the costs associated with it. This is so where mediation is offered by properly trained personnel.[65] Mediation is also a preferred method as it also acknowledges the emotional and psychological status that the parties find themselves in, as opposed to the strictly legalistic approach of the adversarial system to these issues.[66]

2.40 Various other attempts have been made at considering mediation as a viable alternative to resolving maintenance disputes as opposed to the court process. Non-governmental community organisations that work with maintenance issues in some communities have used mediation to assist women seeking maintenance from their partners.[67] In those instances where mediation was used benefits were realised as those disputes were speedily resolved.[68] What could be attributed to the successes of mediation conducted by community organisations are a number of factors, such as, the environment within which the maintenance discussion takes place, the role of the third party assisting with resolving the issues and the fact that the issues that are central to the dispute are explained in a manner understandable to those involved. The other relevant factor is that

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[63] Ibid.

[64] De Jong 2009 THRHR 275; Mothiba in Budlender and Moyo *What about the Children? Silent Voices in Maintenance* 107; Jeffery "Hurdles remain, but our child support system has improved" (2015) available at: https://mg.co.za/article/2015-06-11-hurdles-remain-but-our-child-support-system-has-improved/ (accessed on 23 March 2016)

[65] Wamhoff and Burman 'Parental maintenance for children: How the private maintenance system might be improved' 2002 *Social Dynamics* Taylor & Francis 161-162.

[66] De Jong 2009 THRHR 278.

[67] The non-governmental organisations that started using mediation in maintenance matters are the Centre for Criminal Justice (CCJ) and Justice for Women (JAW) and both are based in Pietermaritzburg. The work that these organisations did around maintenance is detailed in Mamashela "The Implementation of the Maintenance Act 99 of 1998: Two NGOs throw down the gauntlet - A model for the country?" 2005 *SAJHR 493-498.*

[68] Mamashela 2005 *SAJHR* 494-495.

parties are assisted in finding solutions that are tailor made for their circumstances, instead of a one-size-fit-all solution, something that the courts often enforce on parties.[69]

b) Maintenance Act and mediation

2.41 The Act under review does not provide for mediation in the process of resolving a maintenance dispute. Sections 6,[70] 7 (1)[71] and 8 (1)[72] of the Act read with regulation 3,[73]

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[69] Ibid.

[70] Section 6 currently provides as follows:

(1) Whenever a complaint to the effect-

(a) that any person legally liable to maintain another person fails to maintain the latter person; or

(b) that good cause exists for the substitution or discharge of a maintenance order,

has been made and is lodged with the maintenance officer in a 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 with a view to inquiring into the provision of maintenance of the person so to be maintained.

[71] Section 7 (1) provides that:

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 a complaint or who is legally 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 maybe necessary or expedient to achieve the objects of the Act.

[72] Section 8 (1) provides that

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 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.

[73] Regulation 3 provides as follows:

(1) A maintenance officer may, in investigating a complaint and with due consideration to expediting the investigation of that complaint, direct the complainant and the person against whom a maintenance order may be or was to be made to-

(a) appear on a specific time and date before him or her; and

(b) produce to him or her on the date of appearance information relating to the complaint and documentary proof of the information, if applicable.

contained in the Regulations published in terms of the Act, prescribe the process for investigating maintenance complaints. The process calls for a three-staged process, namely, the lodging of a complaint, the investigation thereof and the formal inquiry before a magistrate.[74] Within the three stages of the process, a number of officials are involved. The details of the process and involvement of the various maintenance court officials are discussed below.

2.42 With the first stage of lodging a complaint, the Act requires that the complaint must be lodged in writing in the court that has jurisdiction to hear the case.[75] The complaint identifies the person against whom the claim is made and sets out reasons why the person against whom the claim is made is liable to maintain the person in respect of whom the claim is made. The complaint must set out the basis upon which the duty to maintain arises.[76] The clerk of the court usually assists the complainant with this stage of the enquiry by issuing a directive for the parties to appear before the maintenance officer to submit proof of income.[77]

2.43 The second stage, which encompasses the investigation process, is provided for in section 7 (1)[78] of the Act and is triggered by the use of regulation 3, which empowers the maintenance officer to direct the parties to the dispute to appear at court (before the maintenance officer) to provide information regarding their financial position. The maintenance investigator may play a role at this stage of the process by assisting the maintenance officer with issues around the location of the person/s that is/are required to appear before a magistrate, serving and executing processes of the court, taking statements

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(2) (a) A direction contemplated in subregulation (1) may be given in the manner the maintenance officer deems fit.
(b) The maintenance officer shall keep record of the manner in which the direction was given.
(3)Any person who fails to comply with the direction contemplated in subregulation (1) shall be guilty of an offence and liable on conviction to imprisonment for a period not exceeding six months.

[74] Pretorius L. *Step-by-step. Maintenance applications in the maintenance court*, De Rebus, January/February 2004, 36-39.
[75] Section 6 of the Act read with Regulation 1, which prescribes that the complaint must be set out in Form A, an annexure to the Regulations.
[76] Pretorius L, De Rebus, 2004 at 36.
[77] Regulation 3(1) (a).
[78] Footnote 97.

under oath from any affected persons and gathering all the requisite information.[79] When the parties appear before the maintenance officer information is shared regarding, amongst other things, the needs of the person for whom maintenance is claimed and the financial position of the parties. This is the stage at which the maintenance officer or maintenance investigator[80] usually first attempts to mediate the dispute by establishing crucial factors such as the income and expenses of the parties and how much the party liable to pay maintenance is able to provide as maintenance.[81] It is therefore crucial that all relevant information and documentary proof of income and the expenditure of the applicant and the respondent are before the maintenance officer at this stage. If the parties reach an agreement, then a consent order is recorded and confirmed by a magistrate who issues an order in terms of section 16 (1) of the Act. Where the parties fail to resolve the dispute during the investigation stage the maintenance officer may refer the dispute to court for a formal inquiry before a magistrate, which is the third stage of the process.[82] The parties are subpoenaed to appear in court.

2.44 On the date set down for a hearing, before a case goes before a magistrate, there is often another informal meeting between the maintenance officer and the parties to determine if there is not a possibility that the matter can be settled. In practice, maintenance officers often mediate at this informal meeting just before the hearing.[83] If the parties have come to an agreement in the office of the maintenance officer, they are then taken to the magistrate for him or her for an order to be made. The magistrate must still enquire in a summary manner into the income and expenditure of both parties to convince him or herself of the fact that the order he or she is about to make is indeed in the best interest of the child and just in the circumstances. If the parties, however, do not settle the case is formally

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[79] Section 7 (2) of the Act.

[80] In terms of section 7 (2) the maintenance investigation also plays a role in facilitating the resolution of the maintenance dispute. The role of the investigator is collation of information relevant for the resolution of the dispute. During the investigation by the maintenance investigator, it is alleged that some form of mediation also takes place**.**

[81] De Jong 2009 *THRHR* 277. See also Esterhuise L "Maintenance and child support" available at: https://www.divorceattorney.co.za/child-maintenance-and-spousal-support.html (accessed on 23 March 2016).

[82] It should be noted that the issue of the discretion that the maintenance officer has to refer a maintenance dispute to court for a formal enquiry is a subject of this investigation and is discussed below in the next paragraph.

[83] De Jong 2009 *THRHR* 277.

presented before a magistrate in court. As indicated above, despite being more inquisitorial in nature, proceedings at the formal maintenance enquiry in court are akin to the procedure in ordinary civil cases.[84] The formal enquiry therefore takes the form of a hearing where all evidence is presented and sometimes parties are called to give evidence.[85] At the end of the hearing the magistrate may then make an order.

2.45 As noted in various parts of this discussion paper, it should again be emphasised that the hearing of a maintenance dispute by a court is not the best approach to resolving the dispute as the court environment can be intimidating to the parties because they usually do not have a proper understanding of the court processes. It is therefore important to formally make provision for the mediation of maintenance disputes in an endeavour to diverge these disputes from the formal enquiry in court.

2.46 Whilst there is no provision for mediation in the Act, it appears that some form of mediation does indeed take place firstly at the stage when information and documentary proof is gathered by a maintenance officer, and secondly at the informal meeting with the maintenance officer just before the formal enquiry in court. Available literature referred to in this discussion paper suggests that a high number of maintenance complaints are resolved at the investigation stage.[86] There are suggestions that the mediation that takes place at this stage, usually leads to many disputes being resolved.[87] Presiding officers often get to make a summary enquiry to confirm the agreement made by the parties before a maintenance officer as a court order.

2.47 On the question of whether the maintenance officer is the right official to conduct mediation, consideration has to be had on the functions that they currently fulfil. The

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[84] Section 10 (5) of the Act.
[85] Section 10 (1) of the Act.
[86] Jeffery "Hurdles remain, but our child support system has improved" (2015) available at https://mg.co.za/article/2015-06-11-hurdles-remain-but-our-child-support-system-has-improved/ (accessed on 23 March 2016.
[87] Pretorius L, De Rebus, 2004 at 37. It was also reported by Advisory Committee member, Mrs Stephanie Erasmus, that during February 2019, only 3 out of 103 matters were referred by the maintenance officers for formal enquiry in the Durban maintenance court. It further needs to be noted that parties sometimes arrive at court and ask for the matter to be removed from the roll without any intervention by maintenance officers.

maintenance officer, assisted by the maintenance investigator, does all the preliminary work required to assist in determining the validity of a maintenance claim.[88] The job of a maintenance officer is, however, very difficult as there are some courts that do not have the services of a maintenance officer on a daily basis as prosecution services are understaffed due to a shortage of budget and a moratorium on appointments the past couple of years. As a result, it can be argued that with the current workload of maintenance officers it might be cumbersome for them to officially provide mediation as well.[89]

2.48 In the context of maintenance investigations the Act does provide for mediation although such mediation is only directed at matters regulated by the Mediation in Certain Divorce Matters Act, which relate to guardianship and care of and contact with children. In this regard section 10 (1A) of the Act[90] provides as follows:

> 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. [Emphasis added]

2.49 Section 10 (1A) therefore makes provision for a maintenance court to instruct a Family Advocate to carry out an investigation in terms of the Mediation in Certain Divorce Matters Act in maintenance proceedings. In practice, the maintenance officer will ask the maintenance court to refer the matter to the Office of the Family Advocate in circumstances where there is a dispute regarding in which parent's care a child should be placed, so that the family advocate should investigate and make a recommendation. However, due to the practical shortage of family advocates, maintenance officers on many occasions will have to rely on a report of a social worker from the local Department of Social Development.

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[88] Mamashela 2005 *SAJHR* 494.
[89] Mamashela 2005 *SAJHR* 498-499
[90] Section was inserted by section 16 of Act 55 of 2003.

2.50 A perusal of the Namibian Maintenance Act[91] might provide some form of guidance on how other jurisdictions deal with mediation within their maintenance system. The Namibian Maintenance Act is similar in many respects to the Act under review and it also does not specifically provide for mediation. However, there is an indication that in that system mediation is catered for at the informal enquiry stage of the maintenance investigation.[92] This is the stage where the parties to a maintenance dispute attend court for an informal meeting to discuss and provide information relating to their income, assets and financial responsibilities.[93] This meeting or mediation is conducted by the maintenance officer (or sometimes the maintenance clerk[94]) and he or she assists the parties to come to an agreement regarding the dispute. It is indicated that many maintenance cases are resolved through mediation even though the process is not sanctioned by the Act.[95]

c) Department of Justice and Constitutional Development Turnaround Strategy on maintenance

2.51 Due to the concerns that have been raised since the promulgation of the Act, such as issues around the failure of the law to assist users of the system with access to maintenance support, the Department elevated maintenance issues and developed mechanisms to monitor the implementation of the Act. One such mechanism is the development by the Chief Directorate: Promotion of Vulnerable Groups, of a Turnaround Strategy,[96] which is aimed at improving among other things, "service delivery at various service points in the current maintenance system."[97] The Department's Turnaround Strategy also identifies mediation as one of the areas that needs to be looked at as it has been championed as a method that promotes a speedy resolution of disputes.[98]

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[91] Act 9 of 2003.
[92] Legal Assistance Centre *Summary of the Maintenance Act 2005* 45.
[93] Ibid.
[94] The mediation is often conducted by the clerk of the court instead of by the maintenance officer, because there is a shortage of maintenance officers.
[95] Legal Assistance Centre Summary of the Maintenance Act 2005 47.
[96] Department of Justice and Constitutional Development "The Project Kha ri Unde: Maintenance Turnaround Strategy for the Speedy and Effective Implementation of the Maintenance Act, 1998." Unpublished Report. The project is referred to in this paper as the Department Turnaround Strategy.
[97] Department Turnaround Strategy 9.
[98] Department Turnaround Strategy 20.

2.52 In terms of the Maintenance Project that the Department developed under the auspices of the Turnaround Strategy, the Department looked at the suitability of mediation in the maintenance management chain. The motivation for considering mediation as an option by the Department is based on the growing support that has been accorded to the process because of the benefits that it provides.[99] The Department also acknowledges the fact that other pieces of legislation, such as the Mediation in Certain Divorce Matters Act, the Children's Act and the Child Justice Act, regard mediation as an option for resolving family disputes as opposed to subjecting them to the adversarial judicial process as a first resort.[100] Benefits such as saving the courts time and the reduction of the court's case load are identified as some of the reason for adopting mediation as a strategy for resolving maintenance disputes.

2.53 Before the development of the Department Turnaround Strategy, during the 2007/2008 financial year, the department piloted the use of mediation in maintenance disputes in two courts, namely the Johannesburg Family Court and the Pretoria Magistrate's court, to test the success that it can achieve in the resolution of maintenance disputes. As a first step, the Department sent all maintenance court officials attached to these two courts to attend a three-day mediation training programme.[101] What is important to note is that the Project stipulates that mediation should be provided at any time in the maintenance operational chain and identifies the officials that should provide mediation to the parties seeking the assistance of the maintenance courts.[102] Among other officials identified for assistance with the provision of mediation, maintenance officers, who are the ones who deal with parties the most, are identified as mediators. What is also noteworthy is the fact that the Department envisages provision of mediation by trained personnel who must be accredited by suitably accredited mediation institutions to provide mediation.[103] The Department Turnaround Strategy notes that the piloting of mediation was a success and supports the use of mediation in maintenance disputes.[104]

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[99] Department Turnaround Strategy 19.
[100] Ibid.
[101] De Jong 2009 THRHR 275.
[102] Department Turnaround Strategy 20-21.
[103] Department Turnaround Strategy 24-26.
[104] Department Turnaround Strategy 20 and 33.

2.54 After the implementation of the Project on Mediation and the training of officials at various courts the Department commissioned an evaluation or impact assessment of the project.[105] The rationale for the assessment was that the Department wanted to expand the mediation training to all other maintenance courts throughout the country. Before the roll out could be done the Department was eager to assess the impact that the training had in the functioning of the courts where mediation services were implemented.

2.55 For purposes of determining the impact of the introduction of mediation training in the maintenance court environment, court officials that were trained and the users of the maintenance system at the identified courts (the parties) were interviewed and their responses were compared to those of court officials and parties where no mediation training was introduced.[106] The findings of the study were positive both from the perspective of the officials trained and the users of the system at the courts where mediation was implemented. The officials highlighted the benefits of the training and its usefulness in their work environment.[107] The officials made numerous suggestions such as the provision of mediation to all officials in the court, not only those dealing with maintenance as it often happens that officials are rotated to sections that are not necessarily their workstations.[108] It would therefore be very unwise to restrict any future mediation training to maintenance officers. The officials further suggested that they be provided with advanced training on an on-going basis. The users of the maintenance system also had positive stories to tell about the implementation of mediation at the court. Some of the benefits identified by the users relate to the fact that mediation helped to improve relations between the parties.[109] They also observed that a number of agreements were reached at the mediation stage and parties were satisfied with such agreements. It appears that significantly more agreements were reached between parties in maintenance court proceedings in the experimental group (where court officials underwent mediation training and tried to mediate maintenance

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[105] The impact assessment was conducted by Professor de Jong, a research associate at the University of Limpopo and a project leader for this investigation.
[106] De Jong 2009 *THRHR* 280.
[107] De Jong 2009 *THRHR* 292.
[108] Ibid.
[109] De Jong 2009 *THRHR* 294.

disputes whenever they could) than in the control group (where no mediation training was offered to court officials). Furthermore, a significantly higher percentage of cases in the experimental court than in the control courts were resolved in just one to two months. The parties also indicated that the mediation had positive effects on the children of the parties to the dispute. Results indicate that maintenance officers in the experimental courts where mediation was introduced helped parties to gain a better understanding of the rand costs associated with raising their children. Furthermore, children affected by cases processed in the experimental courts had a more meaningful relationship with the maintenance debtor, mostly the father, than children affected by cases processed in the control courts. The chance that children will become the innocent victims of the maintenance dispute between their parents will therefore be lowered or diminished.[110]

2.56 In the final analysis the conclusion of the impact assessment was the following:

- that the pilot mediation training programme offered to maintenance court in Pretoria and Johannesburg has indeed been instrumental in more effectively resolving maintenance disputes than the traditional procedures; and
- that the mediation training programme should definitely be rolled out country-wide as soon as possible for the benefit of the judicial system, parties involved in maintenance disputes and their children.[111]

2.56 The Department's implementation of mediation without any legal prescript must be commended, especially because of the benefits associated with it. It is hoped that the Department will in future be amenable to the incorporation of mediation in the Act under review should the Commission recommend as such at the conclusion of the current investigation. The positive messages about the rollout of mediation at various courts will only enhance benefits already derived from the implementation of mediation for maintenance disputes.[112]

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[110] Ibid.
[111] De Jong 2009 *THRHR* 295.
[112] Jeffery J "Hurdles remain, but our child support system has improved" (2015) available at: https://mg.co.za/article/2015-06-11-hurdles-remain-but-our-child-support-system-has-improved/ (accessed on 23 March 2016)

d) Current investigation on mediation

(i) Background

2.57 The issue paper indicates the need to incorporate mediation in maintenance matters as there is evidence that it leads to a speedy resolution of many maintenance disputes. It posed a number of questions relating to the need to incorporate mediation in maintenance disputes. The thrust of the questions asked in the issue paper is whether, as a matter of principle, mediation should be incorporated in maintenance matters and whether it should be voluntary or mandatory.

2.58 When the Minister of the Justice and Constitutional Development referred the request for investigation on the review of the Maintenance Act, mediation was not part of the scope of the request. The SALRC, on its own accord, identified mediation as an area that should be investigated, especially with regard to whether the Maintenance Act should prescribe mediation as one of the mechanisms that the courts must implement to secure a speedy resolution of maintenance disputes in addition to the provisions for mediation in other pieces of legislation or draft legislation.[113]

(ii) Court-connected mediation in the Magistrates' Court and compulsory consideration of mediation in High Court Matters in terms of Uniform Rule 41A

2.59 When one deals with the issue of mediation of maintenance disputes this has to be done in the context of and with an appreciation of the role that the newly introduced court-connected mediation Rules in the Magistrates' Courts will play in dispute resolution. This is because it is now clear that government has taken a stand regarding the introduction of mediation in civil dispute before the courts.

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[113] Issue Paper 28, September 2014, pages 12 to 28 contains a section titled 'General challenges in the maintenance system', and this is the section where mediation is discussed. This section contains those matters that are not identified by the Minister of the Justice and Constitutional Development in its referral to the SALRC but were identified by the SALRC as matters that still require attention to make the maintenance system more comprehensive to ensure that it benefits those that rely on the system.

2.60 In 2012, the Department introduced draft Mediation Rules to regulate mandatory mediation in civil litigation. The final Rules were published in March 2014[114] and they provide for voluntary mediation.[115] The Rules are currently piloted at a selected number of districts and in some regional courts throughout the country. In terms of rule 70, the Rules are intended to give effect to section 34[116] of the Constitution and a resolution of the Access to Justice Conference held in July 2011.[117]

2.61 In the foreword by the then Minister of Justice and Constitutional Development, Honourable Mr Radebe, he states that mediation as provided for in the Rules will be voluntary because mandatory mediation can only be authorised by enabling legislation. This therefore suggests that once legislation is promulgated, mediation in civil litigation will become mandatory. The Minister explained that mediation has been selected as an option to resolve civil disputes because it facilitates early resolution of disputes and could reduce the high costs associated with litigation.[118]

2.62 The Mediation Rules came about as a result of the insertion of Chapter 2 into the Rules Regulating Conduct of Proceedings in the Magistrates' Court of South Africa.[119] In terms of the Rules, voluntary mediation applies to disputes prior to litigation or disputes in which litigation proceedings have commenced but before judgment.[120] The referral of a

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[114] GN R 183 in *GG* 37448 of 18 March 2014.

[115] The Rules are voluntary at this stage because there is no enabling legislation that permits and regulate mediation. It is hoped that once the SALRC's investigation on Project 94 is finalised it will make recommendation for a legal instrument that will permit mediation in all civil disputes before the civil courts. Once legislation is promulgation then mediation can be mandatory.

[116] Section 34 provides that 'Everyone 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.'

[117] This Conference was convened by the Chief Justice and was aimed at ensuring delivery of quality justice for all. The Conference also authorised the introduction of court-annexed mediation.

[118] Department of Justice and Constitutional Development *Court –Annexed Mediation* 2. This is a booklet published by the DOJCD for the launch of the Mediation Rules in March 2014.

[119] Department of Justice and Constitutional Development *Court –Annexed Mediation.* 4.

[120] Rules 74, 75, 77, 78 and 79.

dispute to mediation can be done by litigants[121] or it can be requested by the court.[122] What is worth noting is that the mediation conducted in terms of the Mediation Rules is conducted by an independent third party[123] and at the cost of the parties involved.[124] In 2014, the recommended fees for court-annexed mediation were as follows: R225 to R300 per half hour session – to a maximum of R4500 to R6000 per day per mediation session; R400 to R600 per hour spent on compiling a report, to a maximum of R1350 to R1800 per report; and charges per document perused during mediation : R22 per page.

2.63 At the time when the draft Mediation Rules were published in 2012 a lot of concern was raised, especially by legal practitioners. The concerns were raised because the mediation proposed in the draft Mediation Rules was compulsory. Legal practitioners were cautious about the effect that mediation will have in the practice of law. This is because for all civil matters, mediation will have to, in some way, precede litigation. And in cases where practitioners do not inform their clients of an option to mediate, a cost order could be imposed.[125] Even at the time the draft Mediation Rules were published there were nonetheless some legal practitioners who acknowledged the benefits associated with mediation. They agreed that mediation is suited for most disputes and that some disputes get resolved quickly, especially where mediation is introduced in the early stages of the

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[121] Rule 75(1) and Rule 78(1)(a) deal with the referral by a litigant. Rule 75(1) provides that:
Parties may refer a dispute to mediation-
(a) prior to the commencement of litigation; or
(b) after commencement of litigation but prior to judgement;
Provided that where the trial has commenced the parties must obtain the authorisation of the court.
Rule 78(1)(a) provides that:
Any party may at any stage after litigation has commenced, but before trial, request the clerk or registrar of the court, in writing, to refer the dispute to mediation.

[122] Rule 75(2) and Rule 79(1) provide for mediation that is ordered by the court. Rule 75(2) prides that:
A judicial officer may at any time after the commencement of the litigation, but before judgment, enquire into the possibility of mediation of a dispute and accord the parties an opportunity to refer the dispute to mediation.
Rule 79(1) provides that:
A court may, prior to or during a trial but before judgement, enquire into the possibility of mediation and accord the parties an opportunity to refer the dispute to the clerk or registrar of the court to facilitate mediation.

[123] Rule 86. The provisions of rule 86 indicate that the private mediator would have to be trained and comply with certain accreditation requirements.

[124] Rule 84.

[125] Jordaan B *The potential of court-based mediation,* De Rebus, 18-21.

dispute.[126] Since the current Mediation Rules are voluntary, the noise has died down and there has not been any objection from those who previously objected to mandatory mediation.

2.64 Academic writers who support mediation see the step by the Department, with the introduction of the Mediation Rules, as a step in the right direction. Their view is that the use of mediation as proposed in the Rules will assist in exposing mediation and encourage more people to use it in many disputes.[127]

2.65 The publication of Court-annexed Mediation Rules of the Magistrates' Courts, which reflects the desire to regulate mediation in the civil courts, is indicative of the direction the country wants to take in introducing the use of mediation as a dispute resolving mechanism. On 9 March 2020 the Rules Board also introduced a new rule, 41A, to the Uniform Rules of Court, entitled "Mediation as a dispute resolution mechanism". Unlike the Chapter 2 mediation rules of the Magistrates' Courts, Uniform rule 41A does not make provision for court-annexed mediation. It merely facilitates access to private mediation contemplated by the parties or recommended by the court and provides for a procedure for referral to mediation in terms of rule 37(6)(*d*), which makes provision for mediation as part of the pre-trial conference, and rule 37A, which makes provision for voluntary mediation in the judicial case management process. This new rule confirms that there is currently an appreciation that not all disputes should or can be resolved in court.

2.66 In terms of Rule 41A it is compulsory that in every new action or application proceeding in the High Court, the plaintiff or applicant is required to serve, along with the summons or notice of motion, a notice indicating whether the plaintiff or applicant agrees to or opposes referral of the dispute to mediation. The defendant or respondent in turn is required to serve a notice indicating whether they agree or oppose referral of the dispute to mediation. These notices must state the reasons for each party's belief that the dispute is or is not capable of being mediated. The parties may, in any event,

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[126] Jordaan B. De Rebus, 2012 at 18.
[127] De Jong in Heaton *The Law of Divorce* 612.

at any stage before judgment is granted refer the matter to mediation, provided that where a trial or opposed application has commenced, the leave of the court is required.

2.67 It is further important to note that the Rules Board is currently engaged in harmonising the court-annexed mediation rules in Chapter 2 of the Magistrates' Courts Rules with rule 41A of the Uniform Rules of the High Court. This is being done in an attempt to encourage more mediation in the magistrates' courts as nothing has really come of the current court-annexed mediation rules. The Commission is of the opinion that such endeavour would be a step in the right direction because it will bring uniformity between the Magistrates' Court Rules and the High Court Rules pertaining to mediation.

D Responses to the issue paper

2.68 Only a few respondents responded to the call by the Commission in Issue Paper 28 to assist it with the issues that pertain to the current investigation.[128] The respondents who have made submissions to the issue paper argue in favour of the formal inclusion of mediation in maintenance court proceedings by legislation.[129] They acknowledge the benefits of mediation and that it can lead to a speedy resolution of maintenance disputes. Some caution that mediation should not be used to delay the maintenance process unreasonably.[130]

2.69 Van Niekerk suggests that mediation should not be made a requirement that precede the court process as is the case with the Children's Act.[131] His view is that such an approach would delay the process and encourage recalcitrant maintenance payers to delay the maintenance process even further. Van Niekerk suggests that since the investigation

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[128] Inputs were received from Mr J van Niekerk, a Magistrate at the Tembisa magistrates' Court on 26 November 2014; Mr L Greyvenstein, an ADR Consultant, Trainer, Mediator & Facilitator on 1 December 2014; Department of Justice and Constitutional Development, from an NPA Prosecutor, Mr MA Raletjena, an NPA prosecutor on 2 December 2014 and the Ministry of Social Development, Western Cape on 8 December 2014.

[129] Van Niekerk J. submission 2. See also submissions made by Greyvenstein L 1 and the Western Cape Ministry of Social Development submission 1.

[130] Van Niekerk J. submission 2

[131] Van Niekerk submission 2.

process is currently compulsory and that is where mediation currently takes place, that it should be incorporated in that process.[132] He cautions against a disruption of the current process where the investigation is interlinked with mediation. This therefore means that mediation should be incorporated in the investigation process currently provided for in section 6 (a) and (b) of the Act read with regulation 3.[133]

2.70 On the question of who should conduct the mediation, it is pointed out that maintenance officers do conduct mediation even though they are not suitably qualified to do so.[134] Van Niekerk is nevertheless amenable to have maintenance officers conduct mediation and have their roles altered to being mediators who lead the pre-investigation.[135] In this regard, another argument by Greyvenstein is that mediation should be conducted by suitably qualified mediators with specialised knowledge in mediation.[136] Mediation should therefore, in his opinion, be sourced out to private mediators and not be conducted by court officials within the maintenance court environment.

2.71 With regard to the question whether mediation should be voluntary or compulsory, the view by van Niekerk is that it should not be compulsory. He is of the opinion that the maintenance officers should use their discretion in deciding whether mediation should take place or not. The Western Cape Department of Social Development is of the view that mediation should be voluntary as forced mediation may escalate the animosity between the parties.[137] It seems that Greyvenstein is in favour of mandatory mediation in that he comments that "parties should be given the opportunity to resolve their maintenance problems through mediation *first*" (emphasis added).

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[132] Van Niekerk submission 3.
[133] van Niekerk submission 3.
[134] Van Niekerk submission at 3 and 19.
[135] Van Niekerk 19.
[136] Greyvenstein 1.
[137] Western Cape Ministry of Social Development 2.

E Evaluation and recommendation

2.72 From the discussion above, it is incumbent on the SALRC to explore a number of issues during this investigation, such as, firstly, whether mediation should also be formally incorporated in maintenance court procedure, secondly, whether the mediation service should be compulsory or voluntary, thirdly, who should conduct mediation in the maintenance court procedure, fourthly, who should be liable for the costs associated with mediation and lastly, at what stage of the maintenance process should mediation take place.

a) Should mediation also be formally incorporated in maintenance proceedings in legislation?

2.73 Evidence has been presented in the impact study conducted for the Department that a significantly high number of disputes are resolved in instances where mediation is offered, especially at the courts where the pilot project was conducted.[138] This is not the case where parties are left to their own devices to resolve their dispute or where the courts decide on their dispute. The conclusion that can be made is that a resolution of a dispute is possible where a trained mediator assists the parties to the dispute to resolve their differences. The positive spinoff is that the parties to the dispute reach a solution that is appropriate for their circumstances and is for the benefit of the children who are beneficiaries of the maintenance support that is usually sought.

2.74 The Commission is satisfied with the evidence presented in some of the literature reviewed for the investigation and the results of the pilot project that there are benefits associated with mediation and specifically that mediation can be of assistance in fast-tracking the settlement of maintenance disputes and further in furthering the best interests of children. Therefore, to ensure that all parties, including children, benefit from the advantages of mediation in cases where maintenance complainants are allowed direct access to the maintenance court, mediation should formally be built into the maintenance court process through legislation.

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[138] See para 2.65 above.

b) Should mediation be mandatory or voluntary?

2.75 Comments received from stakeholders regarding the desirability of mediation in maintenance matters have been very instructive. There is support for both voluntary and mandatory mediation. Van Niekerk and the Western Cape Ministry of Social Development's opinion is that mediation should not be mandatory in maintenance court proceedings, while Greyvenstein argues for mandatory mediation.

2.76 As stated in the sections of this paper that deal with pieces of legislation that regulate mediation in family law, it can be seen that there is an increasing tendency to make mediation mandatory. For example, there are certain important instances where mediation is made mandatory in terms of the Children's Act.[139] Furthermore, the Mediation in Certain Divorce Matters Act also makes provision for a kind of mandatory mediation in the sense that parties can be forced to submit to an enquiry by the Office of the Family Advocate, where mediation is indeed one of the functions of the family advocate at an enquiry. The recently published South African Law Reform Commission Discussion Paper 148 of 2019: Alternative Dispute Resolution in Family Matters (Project 100D) makes provision for mandatory mediation in all family disputes before parties may approach the court. The arguments for and against mandatory mediation have been broached in that discussion paper in detail.[140] The question whether mandatory family mediation may be unconstitutional has also been investigated in detail in Discussion Paper 148 of 2019.[141] It is concluded in that discussion paper that although mandatory mediation may be regarded as an infringement of the right of access to court, this right may justifiably be limited to protect the best interests of children, the right to privacy and the right to dignity. There should therefore be no objection to making mediation a compulsory part of the maintenance court process. Nonetheless, the Commission has decided to only encourage mediation in the early stages of maintenance court process after all relevant information and documentation have been supplied by the parties.

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[139] See paragraphs 2.29-2.30.
[140] Paragraphs 4.2.4 – 4.2.33.
[141] Chapter 5.

c) Who should provide mediation services?

2.77 Various pieces of legislation referred to in this discussion paper identify who should provide mediation in the different circumstances when mediation is prescribed. The Mediation in Certain Divorce Matters Act provide for the institution of an inquiry by a family advocate in matters affecting children.[142] The Children's Act, on the other hand, provides that for matters regulated by section 21,[143]mediation should be referred to a family advocate, social worker, social service professional or other suitably qualified person, and for matters falling under section 33[144] assistance should be sought from a family advocate, social worker or psychologist or mediation should be provided by a social worker or other suitably qualified person.[145] Discretionary mediation provided for in the Children's Act, such as in sections 49 (1) (a), 70 (2) (a) and 71 (1) requires that mediation is conducted by a family advocate, social worker, social service professional or other suitably qualified person including a family group conference or a lay-forum hearing which, on its turn may include a traditional authority.[146] Section 10 (1A) of the Act under review also provides for the provision of mediation in the specified instances by the family advocate.[147] In terms of the Court-annexed Mediation Rules, mediation is conducted by an independent third party[148] and at the cost of the parties involved.[149]

2.78 Besides the prescription for mediation in the legislation regulating family law and the Court-annexed Mediation Rules referred to above, other suggestions have also been made about who should provide mediation in maintenance matters. Firstly, the Department impact study illustrates the use of maintenance court officials for mediation at the informal enquiry of the maintenance investigation and suggests that mediation provided by maintenance officers was successful as they were trained in mediation.[150] Secondly, in the literature reviewed there are suggestions that mediation can be provided by community-based

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[142] Section 4 (1) and (2). See also paragraphs 2.23 to 2.25.
[143] Section 21 (3) (a).
[144] Section 33 (5).
[145] Paragraphs 2.28 to 2.30.
[146] Ibid.
[147] See paragraph 2.50.
[148] Footnote 167.
[149] Footnote 168.
[150] See paragraph 2.57.

organisations.[151] Thirdly, Greyvenstein suggests that mediation should be provided by properly trained private mediators.[152] Furthermore, in terms of clause 17(2) of the Family Dispute Resolution Bill of 2020, family mediation must be provided by a "certified" mediator agreed on by the parties or by a "certified" mediator appointed by a mediation service provider or the Court.

2.79 As illustrated there are a wide variety of officials, individuals and institutions who/which can deliver mediation services. As stated throughout this discussion paper maintenance is a unique area of the law that assists the most vulnerable in our society. While it might be justifiable to consider various options relating to who should provide mediation in maintenance matters the reality is that the users of the system require special attention, as they are mostly not in a position to fund the services of mediation should there be a cost involved. Furthermore, the reality is that maintenance court officials, specifically maintenance officers, are currently offering mediation in maintenance matters, albeit on an *ad hoc* basis. Successes already achieved by court officials conducting mediation cannot be ignored.

2.80 Therefore, it is submitted that the mediation process, which is already in place, should be formalised, encouraged and improved to ensure future successes. It would therefore be best if mediation in the maintenance court-environment is offered by maintenance court officials, more specifically maintenance officers. Such a recommendation would also be the cheapest option for both the parties and the state as there will be no additional costs involved. Some of these officials have already been trained and there are therefore available resources that could be utilised to extend mediation to maintenance clients.

d) Should parties pay for mediation services?

2.81 Mediation in maintenance matters should be seen within its proper context, that is, it is a service provided to the vulnerable members of our community, women and children who in most cases are not able to care for themselves. The people who seek maintenance for

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[151] Mamashela 2005 *SAJHR* 493-498.
[152] See paragraph 2.64.

their children frequently do not have any other source of income and rely on maintenance for their sustenance.

2.82 In some settings where mediation is used, parties to a dispute are required to pay for such mediation. This would be the case in terms of the court-annexed mediation rules in the Magistrates' Courts, in terms of Rule 41A of the Uniform Rules of Court in the High Courts, and also in terms of the Children's Act where mediation is conducted by a social-services professional or a suitably qualified person. In terms of clause 22 of the draft Family Dispute Resolution, the parties participating in the mediation process must pay the fees of the mediator in full, except when the services of the mediator are provided free of charge or when a sliding scale, as prescribed, applies owing to the indigence of a party or the parties. It further provides that liability for the fees of the mediator must be borne equally between the opposing parties participating in the mediation process: Provided that any party may offer or undertake to pay the fees of the mediator in full.

2.83 There are, however, other settings where mediation is provided to the parties free of charge. This would be the case in terms of the Mediation in the Certain Divorce Matter Act and in terms Children's Act where mediation is provided by the family advocate.

2.84 In the context of maintenance matters, there are currently two opposing arguments as regards the question whether parties should pay for mediation. Firstly, there is the argument that with maintenance matters one needs to depart from the rule in private and some public mediation models wherein parties bear the cost of mediation because the users of the maintenance system are predominantly the most vulnerable in our community, namely women and children, and they will almost invariably not be able to afford to pay for mediation. Secondly, there is the argument that for parties to take mediation seriously, they need to make a financial investment, even if it is only for a very small amount, in the process. As a result of these arguments the Commission will be guided by the outcome of the consultations it will hold with stakeholders and inputs it will receive, after the publication of this discussion paper, on what needs to be done on this aspect. The unique circumstances of the users of the maintenance system should, however, probably tip the scales in favour of the first argument. The suggestion is therefore that the maintenance officer needs to provide mediation services for parties at the investigation stage after all relevant information and documentation have been supplied by the parties. However, parties who wish to opt for

private mediation services are given the choice to do so at their own cost. Similarly, where parties qualify to go for community mediation, they are also given the choice to do so.

e) At what stage in the maintenance dispute resolution chain should mediation be offered?

2.85 The literature reviewed suggests that the mediation that is currently taking place, takes place at the investigation stage and that it has indeed produced some positive results in practice.[153] It further appears that mediation is sometimes also conducted by the maintenance officer on the day that a matter is scheduled for the formal maintenance enquiry in court.[154]

2.86 The Department Turnaround strategy indicates that mediation should be offered at any stage of the dispute resolution process.[155] This suggests that mediation can be offered at any stage before the dispute goes before a presiding officer at the formal enquiry stage. This is similar to the approach taken in the court-annexed mediation rules where mediation is offered at any stage before judgment is handed down. Clause 17 of the draft Family Dispute Resolution Bill provides that parties to a dispute must submit to mediation before any other proceedings (including the issuing of summons, or a notice of motion). Due to hardship and urgency mandatory mediation in terms of the Family Dispute Resolution Bill will probably not apply to most maintenance disputes, and will fall within the exemptions provided in clause 17(4). To ensure that parties do go through mediation in the maintenance court process, there should be a provision for mediation at the informal maintenance enquiry stage.

2.87 There is support for suggestions that mediation should take place at the stage of the maintenance investigation because this is where many disputes are resolved. Van Niekerk is of the opinion that since the investigation stage is compulsory mediation should be incorporated into that stage.

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[153] Paragraphs 2.45 to 2.46.
[154] Paragraph 2.46.
[155] Paragraph 2.57.

2.88 The Commission is of the view that the mediation should mainly take place at the investigation stage after all the necessary information has been disclosed by the parties. That is, this option should be made available to the parties at the investigation stage in terms of section 6 (4) (a) and (b) read with regulation 3. This is so because the opportune time is when the maintenance officer has before him or her all relevant information regarding the parties' finances and other personal details, before the matter is referred to the formal enquiry before a magistrate. One last attempt at mediation can possibly also be built into the process at the formal enquiry stage, just before a matter proceeds to court.

F Streamlining of the maintenance application procedure

2.89 The Commission takes cognisance of the fact that, where necessary, a maintenance matter should be treated as an urgent matter and that a presiding officer has to play in inquisitorial role at the initial stage. The Commission suggests that once the maintenance matter is lodged and proof of income of the person legally liable to maintain is available, the matter should be taken to the court on the same day or at the earliest possible date, so that the court may make an interim maintenance order similar to situations in the Domestic Violence Court where emergency monetary relief is granted in cases of economic abuse.[156] However, in circumstances where there is no order and proof of the financial circumstances of the person legally liable to maintain has not been supplied by the applicant, or where there is an order, and application for a substitution or a discharge of such order has been made, then an interim maintenance order should not be issued. Instead, the maintenance officer must investigate the application or complaint by way of either the prescribed manner, or as provided for by the Act to obtain documentary proof of available means of the person legally liable to maintain, and any other documentary evidence applicable.

2.90 The Commission takes cognisance that the Act, as it stands, does not provide *for ex parte* applications for maintenance, which may be necessary for a court to make interim maintenance orders. This may be necessary in instances where the delay may jeopardise the well-being of the maintenance recipient, similar to the situation in which the Domestic

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[156] Section 5 (2) (b) of the Domestic Violence Act 116 of 1998.

Violence Court may make interim awards for emergency monetary relief in terms of the Domestic Violence Act 133 of 1998. If the maintenance court is empowered to hear *ex parte* applications and make interim maintenance orders, it will provide immediate relief for applicants. As complainants are very rarely granted emergency monetary relief in terms of the Domestic Violence Act 133 of 1998,[157] it is the Commissions opinion that the Act under discussion should be amended to make provision for a similar process in the maintenance court.

2.91 The Commission further suggests that as maintenance matters should be regarded as urgent, they may be brought outside court hours, if circumstances warrant that. If one party appears before a maintenance officer without the required documents, then the matter should be referred to the court so that such party can explain his or her reasons for failing to bring the required documents. The court should warn him or her to bring the documents on the date set.

2.92 Furthermore, there is a need for the Act to state the duty of a magistrate during an enquiry so that he or she can play an inquisitorial role in maintenance matters. In order to achieve this, it is suggested that sections 6 and 10 of the Act be amended to give the court the necessary authority to deal with maintenance matters on an urgent basis.

2.93 As the Commission also feels that there is a need for the Act to stipulate the duty of a maintenance officer so that whoever holds such position clearly understand his or her role, it is further suggested that section 4 of the Act be amended.

2.94 As an enquiry by the Office of the Family Advocate in respect of the welfare of minor children may be necessary in maintenance matters, and there are many maintenance courts in whose areas of jurisdiction there are no family advocates to carry out investigations pertaining to the welfare of children, it is also necessary to amend section 10 (1A) of the Act to ensure that children's best interests are not jeopardised by the unavailability of family

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[157] See the study of protection orders granted in three areas by Artz L and Smythe C "Bridges and Varriers: A Five Year Retrospective of the Domestic Violence Act" 2005 *Acta Juridica* 200 at 207-208. See also Bonthuys E "Domestic Violence" in Heaton J (ed) *The Law of Divorce and Dissolution of Life Partnerships in South Africa* (2014) 482.

advocates. Section 10 (1A) of the Act provides that where circumstances permit and where a family advocate is available, a maintenance court may cause an investigation to be carried out by a family advocate in whose area of jurisdiction that maintenance court is with regard to the welfare of the minor or dependent child affected by such enquiry. Since not all maintenance courts have family advocates, it is the Commission's opinion that the functionality relating to the investigation of the welfare of children should be extended to other professionals, such as a designated social worker as contemplated in section 47 of the Children's Act, to cater for the best interest of children.

2.95 Furthermore, in order to ensure the smooth running of an enquiry of maintenance matters, the Act needs to empower a court to warn any person who attends maintenance proceedings not to leave the court unless he or she is granted permission by the court, even though such a person is not subpoenaed as a witness. This also needs to be added to section 10 of the Act.

2.96 The Commission also suggests that the Act should provide that if an interim maintenance order is obtained *ex parte*, such order will remain in force until it is set aside by a competent court.

2.97 Lastly, it is clear that there is a need for the Act to state the duty of a magistrate during an enquiry so that he or she can play an inquisitorial role to make sure that any evidence which may assist a court is adduced.

G Evaluation and recommendation

2.98 To make provision for the streamlining of the maintenance application procedure as set out above, various provisions of the Act need to be amended. In the first place, the Commission recommends that section 4 be amended to include the duty of a maintenance officer so that whoever holds such position understands his or her role. The Commission recommends that the duties of a maintenance office include, among others, to ensure that all relevant evidence from both parties is placed before court. He or she must be present at all matters, even in cases where both parties are represented in order to assist the maintenance court to come to a just decision.

2.99 The Commission further recommends that section 6 of the Act be amended quite substantively by inserting various new subsections, making provision for a streamlined application procedure and the mediation of maintenance disputes.

2.100 The Commission is of the opinion that section 7 also needs to be amended to make provision for both applications and complaints. A "complaint" is submitted to the maintenance officer on an Application Form (see Annexure C to the Discussion Paper). However, not all "application forms" contain a "complaint" – if an applicant applies for an increase in maintenance because the child is going to attend high school next year, one cannot define it as a "complaint".

2.101 The Commission also submits that there is a need that the duty assigned to family advocates in terms of section 10 (1A) be extended to other experts in circumstances where an investigation is necessary to determine the welfare of a child. The Commission therefore recommends that such investigations into the welfare of children also be carried out by social workers because they are experts in dealing with matters affecting children. The Commission further suggests that social workers assigned to conduct investigations regarding the welfare of children in maintenance matters should be those referred to in section 47 of the Children's Act.[158] In order to achieve this, it is recommended that section

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[158] Section 47 of the Children's Act:
Referral of children by other court for investigation
47. (1) If it appears to any court in the course of proceedings that a child involved in or affected by those proceedings is in need of care and protection as is contemplated in section 150, the court must order that the question whether the child is in need of care and protection be referred to a designated social worker for an investigation contemplated in section 155 (2).
(2) If, in the course of any proceedings in terms of the Administration Amendment Act, 1929 (Act No. 9 of 1929), the Matrimonial Affairs Act, 1953 (Act No. 37 of 1953), the Divorce Act, the Maintenance Act, the Domestic Violence Act, 1998 (Act No. I16 of 1998) or the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998), the court forms the opinion that a child of any of the parties to the proceedings has been abused or neglected, the court-
(a) may suspend the proceedings pending an investigation contemplated in section 155 (2) into the question whether the child is in need of care and protection; and
(b) must request the Director for Public Prosecutions to attend to the allegations of abuse or neglect.
(3) A court issuing an order in terms of subsection (1) or (2) may also order that the child be placed in temporary safe care if it appears to the court that this is necessary for the safety and well-being of the child.

10(1A) of the Act be amended to also empower social workers with the responsibility to conduct an investigation.

2.102 The Commission further submits that section 10 (2) be amended to empower the court to warn any person who attends the maintenance proceedings not to leave the court unless he or she is granted permission by the court. The Commission also recommends that a person who fails to adhere to the request of the court commits an offence and may be found guilty of an offence and provides sanctions for such offences.

2.103 The Commission also recommends that section 10 be amended further by inserting a new subsection (6) (d), which is to make provision for an interim order issued in terms of section 6 (5) to remain in force until it is set aside by a competent court, and a new subsection (7), which is to make provision for extended duties of a magistrate at an enquiry.

2.104 Lastly, the Commission recommends that section 19, which deals with the variation or setting aside of orders, be amended to be in line with the new provisions which enable the streamlining of the maintenance application procedure.

It is suggested that section 4 be amended by inserting a new subsection (5), (2), or (4) (depending on which option is chosen for amendment of section 4 (1) and (2) as alluded to in chapter 6 of this Discussion Paper):

(5/2/4) A maintenance officer–

(a) is responsible to ensure that all relevant evidence from both parties is placed before the court; and

(b) must be present at all matters, even where both parties are represented;

in order to assist the maintenance court to come to a just decision.

It is suggested that section 6 be amended

(a) By changing the heading of section 6 as follows:

6. Applications or complaints relating to maintenance

(b) By changing subsection (1) as follows:

(1) **[Whenever a complaint to the effect –]**An application for an order for payment of maintenance may be lodged with the maintenance officer in circumstances where –

(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].

(c) By inserting the following subsections after subsection (1):

(1A) (a) If the applicant is not represented by a legal representative, the clerk of the court must inform the applicant or complainant of all forms of relief available in terms of this Act.

(b) The application or complaint shall be made in the prescribed manner and shall be accompanied by—

(i) a statement under oath or by affirmation setting forth the needs of the person to be maintained, and the means of the applicant; and

(ii) documentary evidence of:

(aa) the needs of the person to be maintained (as far as possible), and

(bb) means of the applicant (as far as possible)

(c) The application or complaint may be accompanied by –

(i) *prima facie* proof of the financial circumstances of the person legally liable to maintain and/or

(ii) supporting affidavits by persons who have knowledge of the matter concerned.

(1B) (a) Once the application or complaint has been lodged with the Maintenance Officer, in case where there is –

(i) no order and *prima facie* proof of the financial circumstances of the person legally liable to maintain, and the needs of the person to be maintained has been supplied by the applicant; or

(ii) where there is an order; and an application to vary such order is made

(aa) for designating another person, officer, organisation, institution or account at a financial institution to whom, or to which or into which payment is to be made or

(bb) by determining a different manner in which payment is to be made;

the maintenance officer must forthwith institute proceedings 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.

(b) In case where –

(i) there is no order and proof of the financial circumstances of the person legally liable to maintain has not been supplied by the applicant; or

(ii) where there is an order and application for substitution or discharge of such order has been made;

the maintenance officer must investigate the application or complaint by way of either the prescribed manner, or as provided for by the Act–whichever will be most appropriate in the circumstances, to obtain documentary proof of available means of the person legally liable to maintain and any other documentary evidence applicable.

(d) By amending subsection (2) as follows:

(2) After investigating the application or complaint the maintenance officer may institute proceedings 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.

(e) By inserting subsections (3) to (14) after subsection (2):

(3) (a) An application lodged in terms of subsection (1) may be lodged by any applicant or complainant as defined in section 1 of this Act.

(b) The application referred to in subsection (1) may be brought outside ordinary court hours or on a day which is not an ordinary court day, if the court is satisfied that the applicant may suffer undue hardship if the application is not dealt with immediately.

(4) (a) After investigating the application or complaint, the maintenance officer must advise the parties to attempt to resolve the matter through mediation, which can be provided by:

(i) a private mediator, whose costs must be shared equally between the applicant and the respondent unless they agree otherwise; or

(ii) if such a mediator is available, a community-based mediator, whose costs, if any, must be shared by the applicant and the respondent unless they agree otherwise; or

(iii) the maintenance officer dealing with the matter;

and which mediation must be concluded within 30 days, unless the mediator provides the parties with a reasonable explanation, in writing, for a delay.

(b) If the parties would like to attempt mediation but are not in agreement to opt for mediation as referred to in subsection (a) (i) and (ii), the mediation must take place in terms of subsection (a) (iii).

(5) (a) The application for maintenance may be made *ex parte*.

(b) The court must, as soon as is reasonably possible in the circumstances, consider an application submitted to it in terms of subsection (a).

(c) The interim order must call upon the respondent to show cause on the return date specified in the order, why a final order should not be issued.

(d) Upon the issuing of an interim maintenance order,

(i) a of copy of the application referred to in section 6 (1), and

(ii) the interim maintenance order,

must be served on the person legally liable to maintain, in the prescribed manner, by the maintenance officer, investigator, sheriff or peace officer–

(aa) by hand, at the physical address for service specified in the application; or

(bb) via electronic mail, facsimile, short messaging service or other known social media platform of the person who must be served; provided that proof of service effected in that manner must be provided to the court.

(e) The respondent may, prior to the return date and in the prescribed manner, consent to the interim maintenance order being made final *in absentia*.

(6) The return date for an interim order may be anticipated to an earlier date by the respondent upon not less than 24 hours' written notice to the applicant and the court.

(7)(a) If the respondent appears on the return date in order to oppose the issuing of the maintenance order, the court must advise the parties that they may attempt to resolve the matter through mediation, which can be provided by:

(i) a private mediator, whose costs must be shared equally between the applicant and the respondent unless they agree otherwise; or

(ii) if such a mediator is available, a community-based mediator, whose costs, if any, must be shared by the applicant and the respondent unless they agree otherwise; or

(iii) the maintenance officer dealing with the matter;

and which mediation must be concluded within 20 days, unless the mediator provides the parties with a reasonable explanation, in writing, for a delay.

(b) If the parties would like to attempt mediation but are not in agreement to opt for mediation as referred to in subsection (a) (i) and (ii), the mediation must take place in terms of subsection (a) (iii).

(c) Should the parties wish to opt for mediation, the court must postpone the enquiry to a future date.

(8) On the return date, the court must proceed to hear the matter and–

(a) consider any evidence previously received in terms of section 6(1A) (2) and (3), and

(b) consider such further affidavits or oral evidence, both from the respondent and applicant, which evidence must form part of the record of the proceedings.

(9) On the return date, the respondent must provide documentation in support of arguments raised.

(10) If there are disputes of fact in the versions before it which cannot be decided upon, the court may extend the return date for the hearing of oral evidence, with no more than 20 days at a time.

(11) If the respondent appears on the return date contemplated in subsection (5) (c), but the applicant does not appear, the court must extend the interim order and the return date, and the clerk of the court must notify the applicant of the extended date: Provided that the court may discharge the interim order if the applicant does not appear on the extended date.

(12) (a) If the applicant appears on the return date contemplated in subsection (5) (c), but the respondent does not appear; and if the court is satisfied that service has been effected on the respondent; the court may—

(i) make an order contemplated in section 18; or

(ii) extend the interim order and the return date for the hearing of oral evidence, and the clerk of the court must notify the parties of the extended date: Provided that the court proceed if the respondent does not appear on the extended date.

(b) If neither the applicant nor the respondent appears on a return date contemplated in subsection (5) (c), the court may discharge the matter.

(13) (a) In circumstances where the court does not issue an interim maintenance order in terms of subsection (5), the court must direct the maintenance officer to immediately inform the respondent telephonically or otherwise of the application, and to source his attitude and response to the application.

(b) If the respondent does not oppose the application, or makes a counteroffer, such information must immediately be brought to the attention of the applicant and where possible, the matter settled without any undue delay.

(c) If the respondent indicates an intention to oppose the application, the court must direct the maintenance officer to cause certified copies of the application together with all supporting documentation to be served on the respondent, accompanied by a notice calling on the respondent to show cause on the return date specified in the notice, why a maintenance order should not be issued.

(d) A document referred to in subsection (13) (c), must be delivered to a police officer, sheriff or maintenance investigator who must, in the prescribed manner, forthwith serve it upon the person referred to in the said document by delivering a copy of the document in one of the following manners:

(i) by hand, at the physical address for service specified in the application; or

(ii) electronic mail, facsimile, short messaging service or other known social media platform of the person who must be served: Provided that proof of service effected in that manner must be provided to the court.

(14) An interim order will remain in force until set aside by a competent court.

It is recommended that section 7 be as follows:

(a) By changing the heading of the section as follows:

7. Investigation of applications or complaints

(b) By amending the section as follows:

(1) In order to investigate any application or 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 application or complaint;

(b) gather information concerning –

(i) the identification or whereabouts of any person who is legally liable to maintain the person mentioned in such application or 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 application or 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 application or 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.

(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;

(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;

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

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

(3) (a) If an application or 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 application or 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 application or 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 applicant or 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.

It is recommended that section 10 be amended as follows:

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) a Family Advocate, contemplated in the Mediation in Certain Divorce Matters Act, 1987, in whose area of jurisdiction that maintenance court is, or

(b) by a designated social worker as contemplated in section 47 of the Children's Act, 2005,

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) (a)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.

(b) A person who—

(i) is in attendance at any proceedings under this Act, though not subpoenaed as a witness; and

(ii) is warned by the court to remain in attendance at the proceedings;

must remain in attendance until excused by the court.

(c) Any person who is subpoenaed in terms of section 9 or warned in terms of subsection 10 (2) (b) to attend proceedings and who fails to—

(i) attend or to remain in attendance;

(ii) appear at the place and on the date and at the time to which the proceedings in question may be adjourned;

(iii) remain in attendance at those proceedings as so adjourned; or

(iv) produce any book or document specified in the subpoena in terms of section 9;

is guilty of an offence.

(d) Any person who is convicted of an offence referred to in subsection (2) (c), is liable on conviction—

(i) in the case of a first offender, to a fine or imprisonment for a period not exceeding three months; or

(ii) in the case of a second or subsequent offender, to a fine or imprisonment for a period not exceeding six months.

(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.

(d) an interim order issued in terms of section 6 (5) will remain in force until it is set aside by a competent court.

(7) (a) The responsibility of adducing evidence at an enquiry not only rests on parties but also on the maintenance officer and the magistrate.

(b) Even where parties have legal representation, the magistrate must play an active role, and where important evidence is lacking, it is the duty of the magistrate to call for such evidence to make sure that it is adduced.

It is suggested that section 19 be amended as follows:

19. 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;]**

(i) designating another person, officer, organisation, institution or account at a financial institution to whom, or to which or into which payment is to be made; or

(ii) determining a different 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.

CHAPTER 3: DETERMINATION OF MAINTENANCE AWARDS

A Background

3.1 There are currently two systems that regulate provision of family support or maintenance for those who cannot do so themselves. There is the state maintenance system, which provides child support grants for children and the judicial private maintenance system regulated by the Act under review.[159] In terms of the judicial system of maintenance, the duty of support arises from a common law duty and in terms of the Act under review.[160] In terms of common law, the duty to support is proportionate between the parents according to their respective means. The term "means" is not explained but has been interpreted in various court judgments to mean the income of parents.[161]

3.2 Under South African law both parents have a legal duty to support their children.[162] The parents' duty to support their children is to the extent that they are able to do so. Section 15 (1) of the Act, which deals with the duty of parents to support their children, provides that:

> Without derogation from the law relating to the liability of persons to support children who are unable to support themselves, a maintenance order for 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.

3.3 Although the subsection above does not shed light on what needs to be taken into account to determine the amount of maintenance to be paid to an applicant for maintenance,

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[159] Mamashela 2005 *SAJHR* 490.
[160] 99 of 1998 – section 15 (1) (hereinafter referred to as the Act). See also Mamashela 2005 *SAJHR* 490.
[161] Carnelley and Easthorpe "Judicial discretion in the determination of post-divorce child support: A brief overview of the application of the South African Maintenance Act 99 of 1998 as compared to the Canadian Federal Child Support Guidelines of 1997" 2009 *Obiter* 370 at 371-376. See also *Mentz v Simpson* 1990 (4) SA 455 (A) 158A-B; *B v B* [1999] All SA 289 (A) 29; *Bannatyne v Bannatyne (Commission for Gender Equality, as Amicus Curiae)* 2003 (2) SA 362 (CC).
[162] Van Zyl *Handbook of the South African Law of Maintenance* (2010) 4.

it reinforces the common law position on the duty of support, which is that both parents have an obligation to support their children according to their means.

3.4 As will be discussed in this section, the scope of the duty of support under common law includes provision for necessities such as food, accommodation, clothing, medical care and education.[163] It is also argued that the things comprising the basket of the necessities required for a child will depend on the circumstance of each case. Meaning that the specific circumstances of the child for whom maintenance is claimed, together with the circumstances of the parents, need to be looked at when deciding the amount of support that is required.[164] Factors that the courts take into account include the child's needs, age and state of health; the means, income and social status of the person who is liable for maintenance; and the fact that the person in whose care the child is meets his or her duty of support by undertaking the responsibilities involved in exercising care.[165] The child's needs must first be established; then the amount of the liable person's maintenance contribution must be calculated, taking into account both parents' means.[166] The provision of the amenities described above is therefore dependent on the economic position of the parents expected to contribute towards the child's maintenance. What is generally taken into account when determining awards are the needs of the children and the ability of the parent/s to provide. Despite the difficulties that have been associated with the determination of maintenance, these should not undermine the importance of focusing on the needs of a child who requires the support. The duty to maintain should go beyond the bare necessities that are required for the child's upbringing.[167] What also needs to be looked at is the standard of living of the parents, that is, their socio economic status, which will indicate the standard of living of a child.[168] It should be emphasised that when determining the parents' ability to

[163] Section 15 (2) of the Maintenance Act. See also Van Zyl *The handbook of the South African Law of Maintenance* (2010) 3; Mamashela 2005 *SAHJR* 490 and Heaton and Kruger *South African Family Law* 325.
[164] Heaton and Kruger *South African Family Law* 325.
[165] Heaton and Kruger *South African Family Law* 304.
[166] ibid
[167] Van Zyl South African Law of Maintenance 8.
[168] Van Zyl South African Law of Maintenance 9.

maintain a child, it is not simply a fact of looking at the affordability of the maintenance obligation on the parent responsible to pay, but about putting the needs of the child first.[169]

3.5 The duty of support owed to children in society is reinforced by the Constitution, which promotes that child's best interests are of paramount interest in every matter concerning the children.[170] Section 28 (1) of the Constitution emphasises the rights of children and relevant for this investigation are the rights stipulated in subsection (c) which provides that every child has the right "to basic nutrition, shelter, basic health services and social services." The duty rests primarily on the child's parents and family. It passes to the state only if the child's parents and family fail or are unable to meet their obligations.[171]

3.6 Besides the Maintenance Act and the Constitution, the Children's' Act[172] also emphasises the responsibility and right that parents have to contribute to the maintenance of their children. Section 18 of the Children's Act deals with parental responsibilities and rights and in terms of subsection (2) these now include the responsibility and right to contribute to the maintenance of the child.[173] The Children's Act, however, provides no definition of the responsibility and right to contribute to the child's maintenance.[174] Nonetheless, in terms of the Children's Act,[175] failure to pay maintenance is an offence and punishable with a fine and/or imprisonment of up to 10 years for first offenders, and up to 20 years for second time offenders.[176]

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[169] Ibid.
[170] Section 28 (2) of the Constitution of the Republic of South Africa, 1996.
[171] Heaton and Kruger *South African Family Law* (2015) 305. See also *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC); *Minister of Health v Treatment Action Campaign* 2002 (12) BCLR 1033 (CC) and *Bannatyne v Bannatyne (Commission for Gender Equality, as Amicus Curiae)* 2003 (2) SA 362 (CC).

[172] Act 38 of 2005.
[173] Van Zyl *Handbook of the South African Law of Maintenance* (2010) 4.
[174] De Jong "A better way to deal with the maintenance claims of adult dependent children upon their parents' divorce" 2013 (76) *THRHR* 663.
[175] Section 305 (4) provides that 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.
[176] See section 305 (6) and (7).

3.7 Maintenance is also dealt with in the context of divorce and this is regulated by the Divorce Act.[177] The provisions of the Divorce Act do not supersede the common law duty of support but are ancillary thereto.[178] What is instructive in this Act is the prerequisite that the court must first be satisfied before granting a divorce order that all issues relating to the welfare of a child have been complied with.[179] Thus a court may not grant a decree of divorce unless it is satisfied with the arrangements that are made with regard to the welfare of a child. Section 6 (3) states that a court may make an order with regard to guardianship, care, contact and maintenance once it has considered all evidence before it and is satisfied with the arrangements made in connection with the welfare of the child.[180] Thus, a court which grants a divorce order may make any order it deems fit with regard to the maintenance of a dependent child of the marriage.[181] Since the duty of support in the Divorce Act is ancillary to the common law duty, it goes without saying that the duty of support post-divorce also extends to reasonable provision of food, clothing, accommodation, medical care and education.[182]

3.8 The Divorce Act deals with spousal and child maintenance as two distinct categories of maintenance provided post-divorce.[183] With regard to spousal maintenance, section 7 of the Divorce Act regulates among other things issues around spousal maintenance. Section 7 (2) provides a list of factors that have to be taken into account when granting spousal maintenance and these factors are:

> … the existing or prospective means of each of the parties, their respective earning capacities, financial needs and obligations, the age of each of the parties, the duration of the marriage, the standard of living of the parties prior to the divorce, their conduct in so far as it may be relevant to the break-down of the marriage, an order in terms of subsection (3) and any other factor which in the opinion of the court should be taken into account, make an order which the court finds just in respect of the payment of maintenance by the one party to the other for any period until the death

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[177] Sections 6 and 7.
[178] Van Zyl *South African Law of Maintenance* 6.
[179] These relate to provision of section 6 (1) (a) and (b) of the Act.
[180] Boezaard in Heaton *The Law of Divorce* 188.
[181]Section 6 (3) of the Divorce Act.
[182] Section 15 (2) of the Act. See also Van Zyl *South African Law of Maintenance* 6.
[183] Section 7 which deals with division of assets and maintenance of parties also deals with spousal maintenance while section 6 is aimed at safeguarding interests of dependent and minor children born of the divorcing parents. These sections will be dealt with in turn.

or remarriage of the party in whose favour the order is given, whichever event may first occur.

3.9 It should be emphasised that spousal maintenance is discretionary, and the court must consider the circumstances of the divorcing couple before awarding spousal maintenance.

3.10 Likewise, child maintenance awards are discretionary and there is no standard that the courts use to determine the amount of money payable to an applicant as maintenance. Concerns have been raised over a period of time around the absence of consistency in the awards that the courts make to applications for maintenance.[184] It is often argued that the magistrates make maintenance orders based "on their own ideas of reasonableness."[185] This is seen as a disadvantage as it could reflect on the ignorance of some males adjudicating the disputes on issues around the running of households.[186]

3.11 As already indicated above, the duty of support that parents have is according to their "means".[187] Various interpretations have been given to what the term "means" represent in the determination of maintenance awards. While some courts view "means" to refer only to income only some quarters believe that it is broader than just income. In *Farrell v Hankey*[188] the court ignored some assets (immovable property) that should have been considered in the determination of the amount that the father had to pay for arrear maintenance. Some suggestions have been made with regard to the aspects that the term "means" encompasses and these are income,[189] capital,[190] assets donated away[191] and

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[184] Carnelley and Easthorpe 2009 *Obiter* 375.
[185] Wamhoff and Burman 2002 *Social Dynamics* 159.
[186] Ibid. [Wamhoff and Burman 2002 *Social Dynamics* 159]
[187] Mamashela 2005 *SAJHR* 490. See also Carnelley and Easthorpe 2009 *Obiter* 370.
[188] 1921 TPD 590
[189] This includes income one derived for his or her employment, income derived from trusts, share dividends, interest on capital donations and rental income.
[190] This is capital in the form of savings and assets, including immovable assets.
[191] This includes donations made to trusts. If a trust is found to be a sham and also when there is abuse of a trust form and a finding that a trust veil must be pierced is just and equitable, the trust assets must be taken into account in addition to the maintenance debtor's personal means. This will be dealt in detail later in chapter 15.

assets of a new marriage that is concluded in community of property.[192] What remains problematic is quantifying the amount that needs to be paid, especially by the non-caregiving parent. Indeed the court is expected to look at various factors such as the child's needs, age and health and the income and status of the parents.[193] While there is credence to the arguments by some academic writers that the needs of the child need to be looked at when a determination of maintenance is made, there is currently no legal provision prescribing such scrutiny.[194]

3.12 As will be seen in the discussion below, lawyers, officials of the court and presiding officers use their own methods in calculating the amount of maintenance awards that applicants for maintenance are entitled to. This on its own exposes users of the maintenance system to an unpredictable and sometimes unfair adjudication of the maintenance claims.

3.13 The Commission therefore, saw this investigation as an opportunity to address the deficiencies in the law and provide guidance on how the amount of maintenance awards should be calculated. In the issue paper, the Commission introduced the idea of introducing a formula or guidelines for purposes of calculating the amount of maintenance awards. Stakeholder input on the suggested route to be taken is dealt with in detail below. It is expected that the formula or guidelines that the Commission will propose will go a long way in providing a framework within which maintenance awards are determined.

B Challenges associated with determining maintenance awards

3.14 The challenges associated with the determination of maintenance awards are raised by the Commission in the issue paper that it published at the inception of this investigation. The purpose was to look for a possible solution to these challenges. These challenges are

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[192] Carnelley and Easthorpe 2009 *Obiter* 373-374. See also van Zyl *South African Law of Maintenance* 9. Van Zyl also includes capital over and above income as a factor to be considered when determining maintenance for a child.
[193] Heaton and Kruger *South African Family Law* 304.
[194] See eg *Mentz v Simpson* 1990 (4) SA 455 (A) and *Douglas v Douglas* [1996] 2 All SA 1 (A).

not new as they have been raised in literature and various reports commissioned by various government departments on the subject.

3.15 The issues and or challenges identified around the determination of maintenance awards should be seen in the context of the lived realities of many people who use the system. The socio-economic situation of those who rely on the maintenance system is also a contributing factor to all the issues that bedevil the maintenance system.[195]

3.16 While it is accepted that parents have a responsibility to maintain their children, the central issue in the determination of maintenance awards is the fact that such responsibility has to be fulfilled even in circumstances where women, who are mostly the caregivers, are usually unemployed or engaged in limited paid employment.[196] The situation is worse for rural women whose struggle also includes challenges of accessing the maintenance system.[197]

3.17 The position of women in the administration of the private maintenance system needs particular attention as it is they that mostly bear the burden of taking care of the children who need maintenance for their upbringing. Women are the ones who initiate the maintenance dispute; collect the money from the cash halls;[198] where the money is insufficient they have to approach the court for an increase the maintenance amount; and where a man defaults she is the one who approaches the court to initiate the enforcement process.[199] All of the responsibilities placed on women by the maintenance system add to those they already have, such as their child care responsibilities. All these responsibilities impact on the women's ability to participate in the economy in the same way that men do. This in turn has an impact on their ability to access employment opportunities and their earning capacity in cases where they are employed.[200] The courts are currently working on

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[195] Approximately 41,2% of the country's households were headed by women in 2012 – see Statistics South Africa Report No 03-19-00 (2002-2012) Social Profile of Vulnerable Groups 2002-2012

[196] De Jong and Sephai "New measures to better secure maintenance payments for disempowered women and vulnerable children" 2014 *THRHR* 197.

[197] Ibid. [de Jong and Sephai 2014 THRHR 197]

[198] However, the MojaPay smart paying system was introduced in an effort to do away with the collection of cash at the court. In terms of this system, cash can only be paid in case of emergency.

[199] Bonthuys "Child maintenance and child poverty in South Africa" 2008 *THRHR* 198-199.

[200] Bonthuys 2008 *THRHR* 200.

the processes where maintenance can be paid directly into the bank account of a maintenance claimant. However, there are still some employers that cannot make individual payments which consequently forces the claimant to collect payment from the court.

3.18 More often than not the role of women in the upbringing of their children is ignored when consideration is made of the money to be paid for maintenance for the child. What is usually considered is the income of the parents and nothing is said about the huge contribution that a woman makes in the caring for the child. The role that a woman plays in the provision of child care and the impact that child care has on her ability to earn an income is often ignored, possibly due to the difficulties associated with quantifying, in monetary terms, the contribution that the woman has made.[201] The law has therefore failed women in that there is no provision for consideration of the role that they play in childcare and the financial vulnerability necessitated by provision of childcare when maintenance awards are made.

3.19 The situation of men who are expected to pay maintenance also requires some attention to better understand the challenges they face that make them abandon their responsibilities. Many men fail to provide maintenance to their children because of poverty and unemployment that affects millions of South Africans.[202] While the failure to pay maintenance due to unforeseen circumstances such as unemployment and lack of means may be justified, there are some other reasons that may not be justified. There are some men who view the use of the judicial maintenance system as bad for social relations that impacts negatively on relationships that they believed had some hope of being fixed.[203] This is because many men regard maintenance claims against them as an attack.[204] This may result in situations where men resist paying maintenance because they are punishing the caregiving parent. In some circumstances, the reason advanced for not paying maintenance is associated with allegations of abuse of the system by women who claim child maintenance

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[201] Bonthuys 2008 *THRHR* 200-201.
[202] Mamashela 2005 *SAJHR* 496.
[203] Khunou G "Money and gender relations in the South African Maintenance system"2012 (43) 1 *South African Review of Sociology* 12.
[204] *Ibid*.

for themselves while the children are left to live with grandparents without them benefiting from the maintenance money.[205]

3.20 Another situation that is prevalent and makes the determination of maintenance awards a challenge is one where men are self-employed or their income is inadequate. While the situation of self-employed men might be an issue for executing on a maintenance debt, it also is an issue for determining maintenance awards.[206] An example of a taxi operator is a good one as it illustrates the situation of men who are self-employed and where it may be difficult to determine their actual income for the purpose of calculating a maintenance award against him. Where a man's income is inadequate, the state maintenance system will, out of necessity, come into play.

3.21 As indicated above, the current maintenance system regulated by the Act does not prescribe how maintenance courts should calculate the amount of maintenance awards. It relies on the principles of common law when it comes to determining the maintenance award that should be paid to children.

3.22 The concern that has been raised is that there is a lacuna in the Act in that it fails to provide guidelines on how the amount of maintenance awards should be calculated. Various reports on the issue have highlighted how the absence of guidelines or a formula for determining maintenance awards often leads to dire consequences for those who rely on maintenance for their livelihood.[207] Available literature and studies conducted in the recent times have focused on the failures associated with the Act and these relate mainly to the failures in the enforcement mechanisms in assisting poor women and children who rely on the maintenance system. Very few in-depth studies, investigations or reviews have been conducted on the problems that surround the determination of maintenance awards.

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[205] Mamashela 2005 *SAJHR* 496.
[206] De Jong and Sephai 2014 *THRHR* 200.
[207] For example, the Lund Committee on Child and Family Support *Report of the Lund Committee on Child and Family Support* 1996; ProBono.Org "An Assessment of ProBono.org's Maintenance Project at four courts in Gauteng" March 2012 (Unpublished Report).

3.23 One of the first instances when the issue was raised is by the Lund Committee[208] that was commissioned by the Department of Social Development to look at the social security policy alternatives available for South Africa. The Terms of Reference for the Committee included: evaluating the existing state support system in all departments; investigating the possibility of increasing parental financial support through the private maintenance system; exploring alternative policy options in relation to social security for children and families; developing approaches for targeted programmes for children and families and presenting a report of findings and recommendations.[209]

3.24 One of the areas that the Lund Committee looked at is the private maintenance system, which is part of the broader system of support for families.[210] It was necessary to look at this area as state maintenance grants could only be accessed where there was a demonstration that the applicant had attempted to source financial support through the judicial private maintenance system. At the time of the investigation by the Lund Committee, the 1963 Maintenance Act was in place and already there were concerns around its failures. Among the challenges identified about the private maintenance system administered in terms of the 1963 Act were the following: that the system was dysfunctional; a number of families were headed by single parents and that non-custodial parents were not contributing maintenance towards their children.[211]

3.25 Many issues were identified as problematic by the Lund Committee but of relevance for this investigation is the issue of the inconsistent determination of maintenance awards by various courts that they studied.[212] The arbitrary nature of arriving at maintenance awards was confirmed by the review that the Lund Committee conducted of maintenance cases

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[208] Lund Committee on Child and Family Support (Chairperson Ms F Lund) *Report of the Lund Committee on Child and Family Support* 1996. The committee will be referred to as the Lund Committee while the report it published as the Lund Committee report.
[209] Lund Committee Report 14.
[210] Ibid at Chapter 5.
[211] Lund Committee Report 49.
[212] The Lund Committee looked at various areas that were problematic at the time and still are even after the implementation of the current Act. These areas include: attitudes about maintenance; availability of statistics about maintenance matters, computerisation of the system, training of maintenance court staff, administrative and legislative discretion by clerks and officers.

dealt with by some of the maintenance courts in the Western Cape.[213] The discrepancies in the amounts awarded in several of the cases reviewed could not be explained.[214] The only basis upon which the awards were made was the income of the parents.[215]

3.26 The issues raised by the Lund Commission still remain in present day South Africa as evidenced firstly by a research conducted by a Non-Governmental Organisation (NGO), ProBono.Org, in Johannesburg in 2012.[216] One of the findings in the ProBono Report is that the claimants for maintenance usually did not receive the money they had claimed for maintenance and in most cases it was not explained to them how the court arrived at the amount of the maintenance award. This can be attributed to the lack of clear guidelines for maintenance awards,[217] because with clear guidelines it will be easier to explain to the claimants on how the court arrived at a specific figure. Secondly, cognisance should be taken of the research conducted by Hoctor and Carnelley[218] on maintenance arrears in four matters that came before the Cape High Court on automatic review.[219] Although the accused pleaded guilty and was convicted for defaulting on the relevant maintenance orders, the rate of payment for the arrears appeared inadequate in relation to the total arrears.[220] This proved that the court failed to conduct a proper financial inquiry and instead resorted to what the

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[213] Lund Committee Report 55. Different courts in the Western Cape had different average awards that they made in the cases reviewed. For Mitchell's Plain the average was R203.33, for Athlone R219.83 and for Wynberg R598.46.
[214] Ibid.
[215] Lund Committee Report**,** see also *Farrell v Hankey* 1921 TPD 590.
[216] ProBono.Org "An Assessment of ProBono.org's Maintenance Project at four courts in Gauteng" March 2012 (Unpublished Report). This report will be referred to as the ProBono Report. ProBono.org is an NGO based in Johannesburg, Pretoria and Durban. The research in the ProBono Report help desks based at four maintenance courts in the Gauteng province, namely Alberton, Roodeport, Vanderbijlpark and Vereeniging.
[216] In some instances it might be the fact that the application form (Form A) is not completed properly by the applicant and that they just ask for a thumb-sucked amount.
[216] Hoctor and Carnelley was conducted to evaluate the work done by its maintenance help desks based at four maintenance courts in the Gauteng province, namely Alberton, Roodeport, Vanderbijlpark and Vereeniging.
[217] It can perhaps also be attributed to the fact that the application form (Form A) is not completed properly by applicants and that they just ask for a thumb-sucked amount.
[218] Hoctor and Carnelley "Maintenance arrears and the rights of the child" TSAR 2007 (1) 199
[219] *S v November* 2009 (1) SACR 312 (C)
[220] Hoctor and Carnelley 2007 TSAR 202.

accused offered to pay. It clearly showed that without clear guidelines the court may make any order it deems fit which may hamper the rights of women and children.[221]

C Methods for determining maintenance awards

a) Determination of maintenance awards in terms of the Maintenance Act

3.27 The provision in the Act that deal with an investigation conducted by the maintenance officer informs us that the maintenance officer is required to gather certain pertinent information in connection with the investigation. Section 7 (1) of the Act outlines what needs to be done by the maintenance officer when conducting the investigation and it provides that:

> 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 or 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.

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[221] Hoctor and Carnelley "TSAR 2007 202.

3.28 The above provision illustrates what the focus of the investigation is, that is, all matters concerning the person liable to pay maintenance and the circumstances of the person claiming maintenance.[222]

3.29 Section 15 of the Act provides for a duty of parents to support their children. In terms of subsection (1) parents are liable to support their children who are unable to support themselves. Subsection (2) provides that the duty extends to such support as a child reasonably requires for his or her proper living and upbringing (including the provision of food, clothing, accommodation, medical care and education). Subsection (3) (a) provides that the duty of support is an obligation which the parents have incurred jointly pro rata according to their *respective means* and the duty exists irrespective of whether a child is born in or out of wedlock or is born of a first or a subsequent marriage. It further provides in paragraph (b) that the amount determined shall be an amount the maintenance court may consider fair in all the circumstances of the case. Subsection (4) provides that no provision of any law to the effect that any obligation incurred by a parent for a child of a first marriage will have priority over any obligation incurred by that parent for any other child will be of any force and effect.[223]

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[222] Heaton and Kruger *South African Family Law* 50.

[223] Section 15 of the Maintenance Act provides that:

(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 the child is an obligation which parents have incurred jointly;

(ii) that 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.

3.30 In terms of regulation 3 both parties are required to submit the necessary documentary proof for their financial position to be investigated.[224] It is submitted that such information will assist the court in coming to a maintenance order that is fair in the circumstances. In addition, regulation 2 prescribes that Form A of the Annexure should be used and in terms of this form the needs of the child needs to be determined.[225]

3.31 Section 40 of the Act, which deals with recovery of arrear maintenance speaks to issues that need to be considered when a court decides on the amount of maintenance that a convicted person is liable to pay. Section 40 (3), which deals with matters that the court has to take into consideration during the enquiry, provides as follows:

> 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. [Emphasis added]

3.32 The above subsection is more explanatory than is the case with section 15 (1) as it elaborates on the circumstances that the court should to take into account in the recovery of arrear maintenance. Despite the attempt to provide assistance with factors that need to be taken into account in determining arrear maintenance to be paid by a convicted person, the issue relating to the definition of “means” still arise.

3.33 It nonetheless appears that the Act is open for interpretation by presiding officers and maintenance officers and that children who receive maintenance are at the mercy of these officers who often make arbitrary awards in terms of the Act.

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[224] Regulation 3 of the Maintenance Act.
[225] The form is attached to this Discussion Paper as Annexure C.

b) Determination of child maintenance in terms of other legislation

3.34 Similarly, the Children's Act, specifically section 18, does not provide guidance on the nature and extent of maintenance that the parents of a dependent child are responsible for.[226] It can only be assumed that the maintenance relates to the meaning assigned to it at common law.[227]

c) Methods used by courts and legal practitioners in determining maintenance awards

3.35 Despite the above provisions and prescriptions of the Act, it appears that various methods have been used by those who use the maintenance system. The Lund Committee Report referred to above highlights the varying awards that have been granted in localities where parties are of the same socio-economic status. This illustrates how decisions are made at some courts, that is, without any justification and explanation.

3.36 In practice maintenance court officials are taught to follow the following steps in determining maintenance awards: Firstly, the needs of the child, which should be indicated on the application (Form A as referred to in the Regulations)[228] must be determined. Secondly, the income of both parties must be determined (it is suggested that the gross income is used). The respondent's (liable parent's) income is then divided by the total of both parties' income to determine his or her share of the child's needs. The respondent's share should then be multiplied with the total amount of the needs of the child to determine the maintenance award. Nonetheless, it appears that maintenance officers, who sometimes assist applicants in determining the maintenance amounts that they are entitled to, as well as presiding officers use their own discretion in determining maintenance awards.[229]

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[226] Boezaard in Heaton *The Law of Divorce* 212.
[227] Ibid [Boezaard in Heaton The Law of Divorce 212.]
[228] Regulation 2/J101.
[229] See *NB v Maintenance Officer, Butterworth and Another* 2014 (6) SA 116 ECM, *TM v ZJ* 2016 (1) SA 71 KZD which are discussed in paragraph c) below. See also para 3.38 below for the formulae used by Magistrate van Niekerk as set out in his submission on the Issue Paper.

3.37 However, in his submission on the issue paper Van Niekerk (a magistrate) mentions a different method that he uses in determining awards in the cases before his court. He states that he makes awards more or less between 15 to 20 percent of the maintenance debtor's after-tax income (after income tax, UIF and other compulsory deductions in which the non-resident parent had no choice to be deducted). This explanation by Van Niekerk further attracts the question of how many more methods are being used by presiding officers and maintenance officers in determining maintenance awards.

3.38 Some of the cases reviewed also reveal the amounts that parents claim as maintenance for their children do not reflect that the needs of the child have been at the centre of the demands made. For example, in *NB v Maintenance Officer, Butterworth and Another*[230] the parent initially claimed a monthly payment of R120 000 and later for R250 000.00 which she alleged was for the maintenance of five children. The claim is based on R24 000.00 per month for each child or R50 000.00 per child per month based on the last claim of R250 000.00 per month. It could be that because of the status of the family that each child required either the R24 000.00 per month or R50 000.00 per month. What is striking in the claim is that there is no breakdown of what the maintenance is required for. Similarly, in *TM v ZJ*[231] the applicant, in a rule 43 application had requested maintenance of R43 000 for herself and her minor children but the court granted her maintenance for R20 000.00 for herself and her children. No indication was given as to what amount would be for the applicant and what amount for the children. The cases illustrate that maintenance awards are not always determined meticulously by doing exact calculations based on the relevant parties' actual income and expenditure, which in some cases may have negative consequences for the children.

3.39 It further appears that attorneys follow the same approach as proposed by the Act.[232] The formula that is used is the following:

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[230] 2014 (6) SA 116 ECM.
[231] 2016 (1) SA 71 KZD.
[232] How to calculate child maintenance https://www.divorcelaws.co.za/how-to-calculate-child-maintenance.html (accessed on 01 June 2017)

(parents' gross income) (child's needs)

_____ X _____ = parent's contribution

(total gross income of both parents) 1

3.40 The problem with the formula used by lawyers and proposed by the Act is that it does not make provision for the fact that the amount so determined very often cannot be afforded by the parties due to their other living expenses. It also does not take into account that with the majority of maintenance cases one is dealing with indigent mothers who are not in a position to make a tangible financial contribution towards the maintenance of their children. In most maintenance cases, it will indeed be the case that the amount so determined is not reachable and will leave both parents/parties with a huge shortfall in their own budgets.

D Responses to the issue paper

3.41 The various submissions that were made by the respondents [233] are in agreement that there needs to be a more precise way in which maintenance awards are determined as the steps used by attorneys and proposed by the Act do not always lead to consistent maintenance awards in practice. There is, however, no standard agreement on which option should be followed as some support the use of a formula-based system, while others support the development of guidelines that would more effectively assist officials at the maintenance court and presiding officers in consistently determining appropriate and just maintenance awards.

3.42 Van Niekerk states that in the South African context formulas might be useful as long as there are safeguards to ensure that unfairness is avoided.[234] He says that although there may be looked at the developed countries, such as those in the Commonwealth, great care

[233] Inputs were received from Mr J van Niekerk, a Magistrate at the Tembisa magistrates' Court on 26 November 2014; Mr L Greyvenstein, an ADR Consultant, Trainer, Mediator & Facilitator on 1 December 2014; DOJCD, from an NPA Prosecutor, Mr MA Raletjena, an NPA prosecutor on 2 December 2014 and the Ministry of Social Development, Western Cape on 8 December 2014

[234] Van Niekerk submission 4.

should be taken to ensure that the African way of doing things is properly taken into consideration.[235] In this regard, cognisance should be taken that the focus in Commonwealth countries is on the individual, immediate families in the line of parents, children, grandparents and, to a lesser extent, siblings, whereas in the African culture the family is much broader-based and the whole extended family, including uncles and aunts, bears the responsibility of rearing a child whose parents cannot afford to do so themselves.[236]

3.43 As a person who has presided over maintenance cases for over a decade, he highlights the fact that most of the parties that appeared at his court are destitute. As indicated above he has been utilising the method in terms of which the person liable to pay maintenance is ordered to contribute more or less 15 to 20 percent of his (or her) income after tax towards child maintenance. This determination, he says, does not take into account the number of children that the non-resident parent has to make a contribution for.[237] In other words, the more or less 15 to 20 percentage is applied irrespective of the number of children who have to be maintained. The reason for this method was that the non-resident parents' income remained relatively low and such parents' living costs remained fixed. Van Niekerk further points out that it appears that the lower a non-resident parent's income the higher the percentage of his (or her) salary that will be awarded to his (or her) dependants. He refers to the example where R600 would be allocated to dependants where the non-resident parent earns R3 500 (which represents more than 17% of his salary) while R800 will be awarded to dependants where the non-resident parent earns say R6 000 per month (which represents only 13% of his salary). Van Niekerk concludes by suggesting that if a formula-based system was to be introduced, it should take into account the African tradition that regulates the lives of the majority of people using the maintenance system.

3.44 Greyvenstein also supports the introduction of formula-based system for determining maintenance awards and feels that such a move will reduce the workload of the court. He, however, insists that it should only be used for those maintenance debtors who are formally

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[235] Van Niekerk submission 4-5.
[236] Van Niekerk submission 5.
[237] Van Niekerk submission 5.

employed.[238] He suggests that the discretionary system should be retained for those maintenance debtors who are not formally employed.[239]

3.45 Furthermore, the Western Cape Department of Social Development supports the development of a consistent way of determining maintenance awards but rejects a prescribed formula for such a determination.[240] Their view is that a formula-based system will take away the judicial discretion that is sometimes useful for determining maintenance awards.[241]The WC DSD therefore supports the development of guidelines that will ensure consistency in the determination of maintenance awards while also allowing for judicial discretion.[242]

E Determination of maintenance awards in other jurisdictions

3.46 To enable the Commission to make a suitable recommendation on how the area of determining maintenance awards needs to be reformed, a comparative study was undertaken. Besides looking at Canada, the discussion paper will also focus on Namibia as it is one of the countries in Africa, which has recently passed legislation regulating maintenance.

a) Namibia

3.47 The maintenance system in Namibia, previously a protectorate of South Africa until its independence in 1990, was regulated by the 1963 Act until that was replaced by the Maintenance Act of 2003.[243] The 2003 Act brought about a number of innovations, which were aimed at improving the deficiencies found in the 1963 Act.

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[238] Greyvenstein submission 1.
[239] Ibid (Greyvenstein 1).
[240] Western Cape Department of Social Development 2.
[241] Ibid (Western Cape Department of Social Development 2)
[242] Ibid. (Western Cape Department of Social Development 2)
[243] Act 9 of 2003.

3.48 Of relevance to this section of this paper is the innovation that brought clarity on the extent of the duty to maintain a child and the factors to be taken into account when a maintenance order is made. Like South Africa, when Namibia got its independence it adopted a Constitution[244] that recognises various fundamental human rights that Namibians are entitled to. Of importance is the recognition of the rights of minorities and vulnerable groups whose rights were previously not recognised. Chapter 3 of the Constitution of Namibia outlines fundamental human rights and freedoms afforded to the people of that country. Article 15 deals with children's rights and article 15(1) provides for the right of children to be cared for by their parents. Article 19 promotes the right to culture and the exercise of this right is subject to the Constitution.

3.49 Unlike the 1963 Act, which recognised as a basis for the duty of support the common law duty, the 2003 Act extended the reach of the duty to instances identified in section 3 (1) (a) to (c).[245] Section 3 (2) sets out principles upon which the liability to maintain is based and subsection (b) states that "the parents of a child are primarily and jointly responsible for the maintenance of that child." In terms of section 3 (3), the duty of support is for amenities necessary for the child's proper living and upbringing and these are identified as food, accommodation, clothing, medical care and education. One conclusion or interpretation that can be given to the provision of section 3 (3) is that the items on the list are not a closed list and could include other things not so identified.

3.50 Section 4 goes further and identifies principles that are applicable in respect of maintenance. Subsection 1 deals with applicable principles where the beneficiary is a child and they are that:

(a) both parents of the child are primarily responsible for the maintenance of that child;

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[244] The Constitution of the Republic of Namibia was adopted on 9 February 1990.

[245] Section 3 (1) provides that:
Subject to section 26 and to the law relating to the duty of a parent to maintain a child who is unable to support himself or herself, both parents of a child are liable to maintain that child regardless of whether the-
(a) child in question is born inside or outside the marriage of the parents;
(b) child is born of a first, current or subsequent marriage; and
(c) parents are subject to any system of customary law which does not recognise both parents' liability to maintain a child.

(b) the parents must, in accordance with their respective means, fairly share the duty to maintain their child or children;

(c) the parental duty to maintain one particular child does not rank any higher than the duty to maintain any other child of that parent or any other parent;

(d) where a parent has more than one child, all the children are entitled to a fair share of that parent's resources; and

(e) the duty of a parent to maintain a child has priority over all other commitments of the parent except those commitments which are necessary to enable the parent to support himself or herself or any other person in respect of whom the parent has a legal duty to maintain.

3.51 Of importance is also the fact that a maintenance order will be made where the debtor is legally liable to maintain the beneficiary and is also able to make the contribution but has failed or neglected to provide reasonable maintenance.[246]

3.52 Section 16 of the Namibian Maintenance Act, which deals with maintenance and ancillary orders, provides for factors to be considered when making maintenance orders. Subsection 2 deals with factors pertaining to parents that are responsible for paying maintenance while subsections (3) and (4) deal with factors relating to the beneficiary/the child. Section 16 (2) provides that:

> When making a maintenance order under this Act or exercising any of the powers conferred on it by this Act, a maintenance court must have regard to the evidence adduced at the maintenance enquiry, all the circumstances of the case, and in particular to -
>
> (a) the lifestyle, income and earning capacity which each of the relevant persons has and is likely to have in the foreseeable future, including any increase in earning capacity, which the court considers a relevant person should reasonably take steps to acquire;
>
> (b) the property and resources which each of the relevant persons has and is likely to have in the foreseeable future;
>
> (c) the responsibilities and financial needs which each of the relevant persons has and is likely to have in the foreseeable future; and

[246] Section 5.

(d) the fact that the defendant delayed the process since filing of the complaint or that he or she contributed partially to the delay.

3.53 What is noteworthy is the fact that the subsection looks beyond the income of the parents of the child in that it looks at income, property, resources and responsibilities and financial needs of the parents.

3.54 Factors pertaining to the child are dealt with in subsections (3) and (4) and the relevant subsections provide as follows:

(3) Where the beneficiary is a child, the court must also have particular regard to -

(a) the financial, educational and developmental needs of the beneficiary, including but not limited to housing, water, electricity, food, clothing, transport, toiletries, child care services, education (including pre-school education) and medical services;

(b) the age of the beneficiary;

(c) the manner in which the beneficiary is being, and in which his or her parents reasonably expect him or her to be, educated or trained;

(d) any special needs of the beneficiary, including but not limited to needs arising from a disability or other special condition;

(e) the direct and indirect costs incurred by the complainant in providing care for the beneficiary, including the income and earning capacity forgone by the complainant in providing that care; and

(f) the value of the labour expended by the complainant in the daily care of the child.

(4) Where the beneficiary has disabilities, the court must have particular regard to -

(a) the extent of the disability;

(b) the life expectancy of the beneficiary;

(c) the period that the beneficiary would in all likelihood require maintenance; and

(d) the costs of medical and other care incurred by the beneficiary as a result of the disability.

3.55 In terms of these subsections the needs of each individual child are looked at holistically before a maintenance award is made. The factors that the court is expected to have regard to relate to the financial, educational and developmental needs of the child; the age of the child; the manner in which the child is being educated or trained; the special needs of the child; direct and indirect costs to the complainant of providing child care and

the value of the complainant' labour in providing childcare.[247] The reading of sections 16 (3) and (4) highlights the fact that looking at the factors identified is peremptory as the word "must" is used instead of "may".

3.56 South Africa can actually learn a great deal from the Namibian Maintenance Act to address some of the challenges and loopholes in the maintenance system. Section 4 of the Namibian Maintenance Act sets out a guideline similar to the Act under review[248] and the one followed by our practitioners to determine the amount each parent is liable to pay towards the maintenance of the child. The fact that a parent cannot use his expenses as an excuse to avoid paying maintenance is also regulated[249] and South Africa can include a similar clause in the Maintenance Act. Section 16 of the Namibian Maintenance Act looks beyond the income of the parents of the child in that it looks at income, property, resources, responsibilities and financial needs of the parents as well as what one is likely to have in the foreseeable future. In a sense, this could include trust property of the maintenance debtor, as it would qualify as resources, which a person has at his (or her) disposal. The inclusion of direct and indirect costs incurred by the complainant in providing care for the beneficiary is also a lesson to learn because mothers, in most instances, have indirect costs because of their child care responsibilities. So, such responsibilities need to be given value so that they can be considered in deciding on the amount of maintenance each parent is liable towards the child.

b) Canada

3.57 On 01 May 1997, Canada adopted the Federal Child Support Guidelines,[250] which enabled the federal government to change from a "needs-based" approach to a "means-

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[247] Legal Assistance Centre *Guide to the Maintenance Act 9 of 20*03 (2007) 12 -21.
[248] Section 15(3) (a) of the of the Maintenance Act.
[249] Section 4 (1)(e) of the Namibian Maintenance Act provides that where a beneficiary is a child, the maintenance court must, in determining the nature of the amount payable to that beneficiary, have regard to the principle that the duty of a parent to maintain a child has priority over all other commitments of the parent except those commitments which are necessary to enable the parent to support himself or herself or any other person in respect of whom the parent has a legal duty to maintain. .
[250] SOR/97-175 (hereinafter referred to as the Canadian guidelines).

test" approach.[251] The basic legal principle is that both parents have a joint financial responsibility to support their children, although it means different things for custodian (residential) and non-custodian (non-residential) parents. The non-residential parent has to pay maintenance and the residential parent has to supply the home.[252] The guidelines were aimed at establishing a child-focused, fair and more objective standard of support for children to ensure that they continue to benefit from financial means of both parents after separation.[253] To achieve this, the guidelines promote the following four objectives:

(a) to ensure children a fair level of support so that they will continue to benefit from the financial means of both parents;
(b) to reduce conflict between separated parents by replacing case-by-case litigation with a more objective method of calculating child support;[254]
(c) to improve the efficiency of the legal process by providing guidance[255] to courts and parents regarding appropriate support levels and encouraging settlement; and
(d) to ensure consistent treatment of parents and children in similar circumstances.[256]

3.58 In terms of the Canadian guidelines, only the income of the non-residential parent is relevant to calculate maintenance payable. It is assumed that the residential parent will contribute to the maintenance of a child that is typical of a person in his or her circumstances. The tables in the guidelines set out the basic amount that a non-residential parent should contribute in view of his or her income and the number of children. The tables differ from province to province due to differences in income tax rates.[257] The basic amount of support as established by the tables may be adjusted for specified extraordinary or special

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[251] Margaret Young "Child Support Guidelines" (1998) available at https://lop.parl.ca/Content/LOP/ResearchPublicationsArchive/pdf/inbrief1000/prb986-e.pdf (accessed on 30 August 2017). See also Carnelley and Easthorpe 2009 Obiter 376.
[252] See Carnelley and Easthorpe 2009 Obiter376.
[253] ibid.
[254] The formula sets support amount to reflect average expenditure on children by a parent with a particular number of children and level of income. The amounts are based on economic studies of average spending in children in families at different income levels and are calculated using a mathematical formula generated by a computer programme.
[255] The calculation of annual income forms the basis of the calculation and is determined using sources of income set out in Schedule III of the Canadian guidelines (section 16).
[256] section 1 of Canadian guidelines. See also Carnelley and Easthorpe 2009 Obiter 376.
[257] ibid 377.

expenses, provided they are reasonable and necessary considering the needs of the child and the means of the parents and the child.[258] In making such adjustment, the income of the residential parent and the family's spending patterns before separation are both taken into consideration.[259] The adjustments can only be effected by a court order. Annexure B, attached to this Discussion Paper, is the 2017 Simplified Federal Child Support Tables of Alberta where a non-residential parent has one to four children who are in the care of a residential parent that he/she is required to maintain.[260]

3.59 The basic amounts of support in the tables are based on the gross annual income of the non-residential parent taking into account the usual deductions such as taxes and the usual costs of access to the children.[261] The amount of maintenance payable is determined by the number of children that the non-residential parent has to maintain. If the non-residential parent, for example, earns 140 000 Canadian dollars per annum, the amount of maintenance he has to pay will differ depending on the number of children. It will be calculated as follows: for one child it will be 1 236 Canadian dollars, for two children 2 005 Canadian dollars, three children 2 620 Canadian dollars and four children 3 123 Canadian dollars per month. There is a table for monthly support of payments for five or more children. In terms of that table if the non-residential parent has five children he will pay 3 543 Canadian dollars and 6 or more children will be 3 898 Canadian dollars per month.[262]

3.60 The table amounts were determined after looking at what parents in different income brackets generally spend on their children.[263] The tables are applicable up to an annual income of 150 000 Canadian dollars of a non-residential parent.[264] Where a non-residential parent has an income of more than 150 000 Canadian dollars, the court may make a maintenance order it considers appropriate taking into account the condition, means, needs

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[258] Young (1998)
[259] ibid.
[260] http://www.justice.gc.ca/eng/fl-df/child-enfant/fcsg-lfpae/2017/pdf/aba.pdf (accessed on 31 May 2018)
[261] Family Law Information Centre Information Booklet *General Information Child Support* Alberta Government 5.
[262] https://www.justice.gc.ca/eng/fl-df/child-enfant/fcsg-lfpae/2017/pdf/abb.pdf (accessed on 11 December 2018)
[263] Ibid.
[264] Carnelley and Easthorpe 2009 Obiter 378.

and other circumstances of the children and the financial ability of each parent to contribute towards the maintenance of the children.[265]

3.61 It should be noted that one of the consequences of the guidelines is that the majority of cases are settled out of court because there is certainty about the amount due. This saves the emotional and financial costs that may be brought by litigation.[266] There is no automatic annual re-calculation process to update maintenance payments even though the non-residential parent's income may have increased. It is upon the residential parent to approach the court to seek an increase each time the income of the non-residential parent increases.

3.62 South Africa could clearly learn a good deal from the Canadian maintenance system to address issues like unpredictable discretion of the court in making maintenance awards. The outcome would in most instances be predictable and certain, and this would potentially address the over-burdening in the courts. It is worth taking note of the fact that the Canadian system of child support makes use of taxable income as provided by individuals to their respective Revenue Services. In South Africa, we will need to change the specifications of the Income Tax Act[267] because it currently prohibits the sharing of such information with a maintenance court, unless a High Court order is obtained. However, in the 2018/2019 tax year there were only 21 million individual taxpayers in South Africa, of which only 6,6 million persons were expected to submit tax returns – that from a population of 56 million at the time (2018/2019).[268] If we were to use the Canadian system of determining the amount of maintenance to be paid based on taxable income, such system will not be applicable to around 90% of persons legally liable to maintain.

3.63 There are indeed calls from parties who responded to the issue paper that South Africa should have similar tables as guidelines. Such tables can then be referred to during mediation as a starting point for negotiation. However, it is submitted that the court should still be the final arbiter in maintenance matters.

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[265] ibid
[266] Ibid 379.
[267] 58 of 1962
[268] Taxation in South Africa https://en.wikipedia.org/wiki/Taxation_in_South_Africa#Number_of_taxpayers (Accessed on 17 September 2020)

3.64 The duty that the residential parent has of going to court to lodge a claim and provide evidence would be minimised, thus reducing emotional trauma that the maintenance courts inevitably seem to cause. If similar guidelines were to be followed the maintenance claimant will no longer bear an onus to prove his or her claim because the guidelines will be clear on the maintenance amount he or she is entitled to receive. However, instead the onus of proof will be moved to the person legally liable to maintain if he or she does not want the guidelines to apply. In addition, the issue of annual adjustment of existing maintenance may be considered to alleviate the necessity of returning to court for an increase when required.

F Evaluation and recommendation

3.65 The issue paper raised the issue of determination of maintenance awards as an area that requires attention. The basis for raising this issue as requiring the Commission's attention is the fact that the determination of maintenance awards remains a concern, especially for those who rely on maintenance for their sustenance. It cannot be that a matter as important as this remains unresolved decades after it was raised by the Lund Commission. The need to reform this area is critical and how it is addressed will be informed by the needs of the section of the community that uses the maintenance system.

3.66 The Commission appreciates the situations that parents who are liable to pay maintenance find themselves in. Poverty and unemployment are a reality for many people in our country and that cannot be ignored. On the other side of the coin are the rights of children that need to be promoted and protected and the rights of the mothers in whose care such children usually are.

3.67 The absence of a formula or guidelines in the maintenance system on how the amount of maintenance awards should be calculated has dire consequences for women who are often the caregivers of the children who depend on maintenance and may also be dependent on spousal maintenance. This is so because their opportunities to earn an income are limited and even where they are employed the income they earn is not enough to sustain them and their children. Maintenance awards should therefore take their situation into account.

3.68 It seems that the sentiment of the all stakeholders who made inputs to the issue paper and some academics[269] support the development of guidelines for the determination of maintenance as opposed to a strict formula. This will ensure that the awards are more predictable and fairer to those who depend on maintenance; however, the final say on an award is left to the court. It will also alleviate the onus of proof on the applicant, usually the mother of the children.

3.69 The failure of the Act to provide clear factors, principles and guidelines for consistent maintenance awards and the resultant consequences are noted. Section 7 (2) of the Divorce Act, which deals with post-divorce spousal maintenance provides a clear indication of what needs to be taken into account when a spousal maintenance is made.[270] The same can be said about section 16 of Namibia's Maintenance Act, which deals with maintenance and ancillary orders that a court can make in maintenance matters. Section 16 (3) and (4) of the Namibia's Maintenance Act provide a very useful list of factors that the court needs to consider when determining maintenance.

3.70 Looking specifically at the needs of the child demonstrate the child-centred approach that has to be followed when dealing with matters affecting the child. The Commission proposes that the Act incorporates the factors that the court should look at in case of child maintenance and these are:

1. the age of the child;

2. the number of children or beneficiaries for whom maintenance is claimed;

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[269] Bonthuys 2008 THRHR 206.

[270] Section 7 (2) of the Divorce Act provides as follows:

In the absence of an order made in terms of subsection (1) with regard to the payment of maintenance by the one party to the other, the court may, having regard to the existing or prospective means of each of the parties, their respective earning capacities, financial needs and obligations, the age of each parties, the duration of the marriage, the standard of living of the parties prior to divorce, their conduct in so far as it may be relevant to the break-down of the marriage, an order in terms of subsection (3) and any other factor which in the opinion of the court should be taken into account, make an order which the court finds just in respect of the payment of maintenance by one party to the other for any period until the death or remarriage of the party in whose favour the order is given, whichever may first occur.

3. the financial, educational and developmental needs of the child, including but not limited to food, clothing, housing, electricity, child care services, medical services and education (including tertiary education where possible);

4. the direct and indirect costs incurred by the complainant in providing care for the child or beneficiary; and

5. where the beneficiary has a disability; the court should have regard to the following:

a) the extent of the disability;

b) the period that the child or beneficiary will require maintenance;

c) the cost of medical and other care required as a result of the disability

3.71 The Commission further proposes that the Act should empower the Minister to publish guidelines (preferably in the regulations under the Act) which are suitable to the South African situation so that it will be easier to calculate the amount of maintenance. The Commission further proposes that the informal guideline, which is used currently, should be formalised. Such guideline entails that firstly, the needs of the child must be determined. Secondly, the gross income of both parties must be determined. The respondent's (liable parent's) income is then divided by the total of both parties' income to determine his or her share of the child's needs. The respondent's share should then be multiplied with the total amount of the needs of the child to determine the maintenance award. The basic amount of support as established by such tables may be adjusted for specified extraordinary or special expenses, provided they are reasonable and necessary considering the needs of the child and the means of the parents and the child. What needs to be done is to have a standard table, considering both parents' income. The figures on the table can only be deviated from if special circumstances warrant it. The Maintenance Act will need to be amended to include a provision in section 44 that the Minister may develop guideline tables to assist in calculating the maintenance award and prescribe such tables from time to time.

It is suggested that section 15 of the Maintenance Act be amended by inserting the following after subsection (3) (a) (iii):

<u>(iv) the direct and indirect costs incurred by a party in providing care for the child, including any income and earning capacity forgone in providing that care;</u>

(v) the value of the labour expended by a party in the daily care of the child;
(vi) any special needs of a child, including but not limited to needs arising from a disability or other special condition.

It is suggested that section 44 of the Maintenance Act be amended by inserting this provision after subsection (1):

(1A) The Minister may develop and prescribe guidelines based on both parents' income and means to assist with the calculation of maintenance awards in respect of children.

CHAPTER 4: RECOGNITION OF OTHER FORMS OF PAYMENT OF MAINTENANCE AWARDS

A Introduction

4.1 As can be gleaned from the preceding section, issues around the administration of the maintenance system do not consider the realities of the majority of South Africans. Most concepts around provision of child maintenance are based on Eurocentric concepts, which have no bearing on how the majority of the users of the system live. We need to move from those Eurocentric concepts and focus on the Afrocentric concepts to accommodate the majority of the users of the maintenance system. As discussed in the above section, the determination of maintenance is based on the "means" of both parties and this relates to either income or capital. The same can be said about what is recognised as a form of satisfying a maintenance debt. Linked to the issue of means, maintenance debt is satisfied by the provision of money to the person who is responsible for taking care of the child for whom maintenance is claimed. Clearly, money alone or its equivalent such as capital in the form of investments cannot be the only way through which maintenance can be paid. The awarding of maintenance money to mothers may have unintentional views on gender relations, parenting and money as some men view transfer of money to women as a threat to their authority because they believe that maintaining control over their money is one way a man has of maintaining control over a woman.[271] This may also affect the relationship between women and men because some men view the use of the judicial maintenance system as interference by an impersonal outsider, the state, in personal matters that have nothing to do with the state.[272]

4.2 It is for this reason that the Commission has invited a relook at the forms of maintenance payment that are recognised. The issue paper initiated this discussion around

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[271] See Armstrong A *Struggling Over Scarce Resources: Women and Maintenance in Southern Africa Regional Report: Phase One* Women and Law in Southern Africa Research Trust (1992) Harare: University of Zimbabwe.

[272] See Khunou (2012) at 13.

the Act that the current forms of payments recognised do not take into account the lived realities of those who live in rural communities. There is a one-size-fit-all approach that has been used, that is, that money is the only commodity that can be exchanged to secure the needs of a child. At issue is the fact that in South Africa, not many people are employed or engaged in formal employment or have disposable income or money to enable them to pay their dues to those that it is owed to. The issue paper highlights the fact that in some communities, for example rural communities, other forms of paying maintenance should be considered to ensure that some form of contribution is made for the maintenance of their children.

B Recognition of other forms of maintenance payment in modern day South Africa

a) Introduction

4.3 It is common knowledge that there are challenges associated with the enforcement of maintenance awards awarded in terms of Act. This has necessitated a relook at the awards that the courts can make for the maintenance of children. Awards made by the courts are usually in the form of money that the maintenance debtor has to pay to the caregiving parent for the needs of the child. As stated above, not many maintenance debtors are employed and are therefore able to make maintenance payments in the form of money. It is not enough that when a maintenance debtor does not have money he (or she) can escape liability to pay maintenance. It is for the reasons stated above that there is a need to look at other forms of paying maintenance to cater for those maintenance debtors who have other means to satisfy their maintenance responsibilities.

4.4 In the issue paper, the Commission called for the consideration of the circumstances of people in rural communities, who in most cases are not employed and therefore are unable to satisfy any order sounding in money. The call by the Commission in the issue paper is based on the realities of many people in our country who are mostly unemployed and do not have an identifiable source of income.

4.5 Innovative ideas have been brought to the fore on how maintenance debtors can make a contribution towards the maintenance of their children. Some of the literature reviewed has demonstrated that it is sometimes possible to accept other forms of payment of maintenance, other than money. In the study conducted by the NGO's in Pietermaritzburg referred to in this paper, that assisted communities with maintenance matters, innovative forms of payment were also accepted as payment for maintenance.[273] For example, in instances where the father was not comfortable to give money to the mother of the child, allocating the responsibility to him to buy groceries for the children was also accepted as a form of paying maintenance.[274] This order can be made taking into consideration that in certain situations, the parties are not on speaking terms and it may be difficult to comply with. If such an order is made, there should be a clear specification on what groceries to buy.

4.6 Unemployment rates in South Africa are high and as such not many people are employed in the traditional sense. A number of maintenance debtors are self-employed and it is sometimes not possible to determine their income. The father, who runs a taxi business, can be ordered to transport the children to school on a daily basis or to transport the mother from a rural area to town once a month so that she can buy her necessities and groceries for her and the children.[275] Such an order can only be made if it is going to be practically possible to implement it. Therefore, the relationship between the parties needs to be assessed first to determine if it is going to be practically possible to comply with the order.

4.7 Besides the example in the issue paper, that is, that maintenance could be paid by a head of cattle, the Commission is of the view that its proposal should not be restricted to that example but rather that orders not sounding in money be considered, such as any payment in kind. Examples such as where a maintenance debtor owns a taxi service could contribute by transporting his children to school instead of the caregiver paying for the

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[273] Mamashela 2005 SAJHR 495.
[274] Ibid [Mamahsela 2005 SAJHR 495]
[275] Ibid Mamashela 2006 Obiter 603

transport of the children to school.[276] Also, a maintenance debtor can assist the caregiver by assisting with chores such as bathing the child, helping the child with homework and so forth.[277] Consideration of payments in kind will also resolve challenges faced by rural people where they have means other than money to pay maintenance.

b) Challenges posed by existing laws with regard to orders that courts can make

4.8 Current law makes provision for courts to make certain specified orders, such as orders sounding in money and those ordering specific performance. This is provided for in section 29 of the Magistrate's Court Act.[278] Section 29 provides for jurisdiction in respect of causes of action and subsection 1 therefore provides as follows:

> (1) Subject to the provisions of this Act and the National Credit Act, 2005 (Act 34 of 2005), a court in respect of causes of action, shall have jurisdiction in-
>
> (a) actions in which is claimed the delivery or transfer of any property, movable or immovable, not exceeding in value the amount determined by the
>
> Minister from time to time by notice in the *Gazette*;
>
> (b) actions of ejectment against the occupier of any premises or land within the district or regional division: Provided that, where the right of occupation of any such premises or land is in dispute between the parties, such right does not exceed the amount determined by the Minister from time to time by notice in the *Gazette* in clear value to the occupier;
>
> (c) actions for the determination of a right of way, notwithstanding the provisions of section 46;
>
> (d) actions on or arising out of a liquid document or a mortgage bond, where the claim does not exceed the amount determined by the Minister from time to time by notice in the *Gazette*;
>
> (e) actions on or arising out of any credit agreement as defined in section 1 of the National Credit Act, 2005 (Act 34 of 2005);

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[276] Mamashela 2006 *Obiter* 603. Even though the issue of self-employment is identified as a hurdle in enforcement of a maintenance order that could yield a positive result as the taxi could be seen as a means with which the maintenance debtor can contribute towards the maintenance of his children.
[277] De Jong and Sephai 2014 THRHR 203.
[278] Act 32 of 1944 as amended.

(f) actions in terms of section 16 (1) of the Matrimonial Property Act, 1984 (Act 88 of 1984), where the claim or the value of the property in dispute does not exceed the amount determined by the Minister from time to time by notice in the *Gazette*;

(fA) actions, including an application for liquidation, in terms of the Close Corporations Act, 1984 (Act 69 of 1984);

(g) actions other than those already mentioned in this section, where the claim or the value of the matter in dispute does not exceed the amount determined by the Minister from time to time by notice in the *Gazette*.

4.9 It is true that the provisions in section 29 (1) could pose a hindrance in considering other forms of maintenance as will be argued below. This is so because the orders that the court can make should be orders sounding in money or for specific performance. It is argued that where an order for specific performance is made there has to be an alternative for an order sounding in money.

4.10 It is true that the Magistrate's Court Act may prohibit courts from making orders for specific performance without an alternative of an order sounding in money, but that should not be the case with maintenance orders. The nature of the contribution that the parent responsible for paying maintenance makes should not only be in a form of money because what is important is that such a parent contributes towards the wellbeing of the child.

C Responses to the issue paper

4.11 Some inputs were received on the question of recognition of other forms of maintenance from some of the stakeholders referred to elsewhere in this paper.[279] These inputs will be dealt with in detail below.

4.12 Van Niekerk acknowledges and welcomes the Commission's discussion of the issue; however, he also outlines some of the challenges associated with the recognition of other forms of payment of maintenance. About the suggestion in the issue paper that cattle be

[279] Inputs were received from Mr J van Niekerk, a Magistrate at the Tembisa magistrates' Court on 26 November 2014; Mr L Greyvenstein, an ADR Consultant, Trainer, Mediator & Facilitator on 1 December 2014; DOJCD, from an NPA Prosecutor, Mr MA Raletjena, an NPA prosecutor on 2 December 2014 and the Ministry of Social Development, Western Cape on 8 December 2014.

considered as a form of payment he argues that it is problematic to use customary ways of life to address westernised duties.[280] He suggests that there rather be a review of certain of the definitions in the Act. He focuses on two definitions in the Act and these are the definitions for "emoluments" and "maintenance order".[281] For ease of reference, the definitions for "emoluments" and "maintenance order" in section 1 of the Act are as follows:

> …
>
> "emoluments" includes any salary, wages, allowances or any other form of remuneration, whether expressed in money or not.
>
> …
>
> "maintenance order" means any order for the payment, including the periodical payment of sums of money towards the maintenance of any person issued by the 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.

4.13 With regard to the definition of emoluments, he argues that the definition could cover the situation that the Commission wants addressed. This is so because emoluments refer to forms of remuneration whether expressed in money or not. These may then include remuneration in the form of parcels of food or other household items, which could be paid as maintenance to children. He argues further that the only problem is that the term "emoluments" in terms of the Act apply only to arrear maintenance. He offers two suggestions, firstly, that emoluments be included in the definition of "maintenance order", and secondly, the deletion of the reference to "sums of money" in the definition of "maintenance order" and the inclusion therein of "payment of non-monetary items".

4.14 Van Niekerk cautions against the use of other forms of payment of maintenance as these are open to abuse. As an example, he refers to the situation where the non-resident parent is ordered to buy clothing for a child for an amount of R600. He is of the opinion that it is problematic where the non-resident parent would buy one item of clothing (for example, a pair of trousers) for the amount ordered without any consideration that the child may also

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[280] Van Niekerk submission 6.
[281] Ibid [Van Niekerk submission 6]

be in need of a range of other clothing items instead of the one item bought and thereby still leaving the resident parent with the onus to buy such other items.[282]

4.15 Greyvenstein and the Western Cape Department of Social Development support the consideration of additional forms of paying maintenance as long as those other options suit the needs of the parties and/or children involved in the dispute.[283] The argument is that the acceptance of the additional forms should be anchored on the needs of the child.

D Lessons from other jurisdictions

4.16 The Namibian Maintenance Act 9 of 2003, referred to in detail in the preceding section, addresses the issue of consideration of forms of paying maintenance other than money. Section 17 of that Act deals with orders that the court can make in relation to maintenance claims. Section 17 (4) provides that:

> A maintenance order may direct that payment be made in kind by specified goods or livestock, for all or some portion of the settlement of amounts already owing or the future payment of instalments.

4.17 An order made in terms of section 17 (4) is unique and is a departure from the norm and a reflection of consideration of the way of life in Namibia. Payments in kind are contributions that are made by the liable parent in any other form than money, and this could be in the form of livestock or property.[284] It is stated that the recognition of payments in kind are aimed at assisting defendants who have no regular income but may have assets such as those families mostly in rural areas.[285]

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[282] Van Niekerk submission 6-7.
[283] Greyvenstein submission 2 and WC Department of Social Development submission 2.
[284] Legal Assistance Centre *Summary of the Maintenance Act* 2005 64.
[285] Ibid. [Legal Assistance Centre *Summary of the Maintenance Act* 2005 64.]

E Evaluation and recommendation

4.18 The call by the Commission for an exploration of other forms of payment of maintenance is necessitated by the fact that a number of people liable to pay maintenance might not be formally employed and therefore may be unable to make a monetary contribution. This is the case even for those who are employed in the informal sector or are self-employed. The latter group might be unable to make maintenance contributions because their income might be insufficient for them to support their children. South Africa can learn a lesson from section 17 of the Namibian Maintenance Act, which allows for other forms of maintenance to cater for a non-caregiving parent who has no money to pay for maintenance but does have property or livestock.

4.19 It is the Commission's view that other forms of paying maintenance should be considered to ensure that that both parents contribute their fair share towards the wellbeing of their children. Suggestions have been made, which are creative, to consider payment of maintenance in kind. The defendant may, for example -

- make a certain monthly payment plus annual delivery of cattle;
- provide the complainant with a house to live in instead of contributing towards the costs of rent;
- give a child a free lift to school each day to reduce the complainant's expenses;
- take on chores such as bathing a child or helping the child with homework. [286]

4.20 The Commission is convinced that recognising other forms of payment of maintenance other than payment of money will go some way in assisting poor families in this country especially in the current climate of high unemployment rates. The Commission therefore recommends that section 1 of the Act be amended by inserting the words: "payment in kind, either by way of supplying specified goods, which may be livestock, or providing a service or services, and/or and order" in the definition of "maintenance order".

It is suggested that the Maintenance Act be amended as follows:

[286] De Jong and Sephai 2014 THRHR 206-207.

Add the following to the definition of “maintenance order” in the section 1 “Definitions”:

“**maintenance order**” means any order for

(a) payment in kind, either by way of supplying specified goods, which may be livestock, or providing a service or services, and/or

(b) payment of sums of money, including the periodical payment thereof,

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.

It is suggested that section 16 of the Maintenance Act be amended by inserting the following subsection after subsection (1):

16(1A) Any court making an order for payment in kind as defined in section 1, must make an order in the alternative, for payment of a sum of money equivalent to the estimated value of the order for payment in kind.

CHAPTER 5: LOCUS STANDI

A Background

5.1 The issue of *locus standi* for maintenance beneficiaries who have reached the age of majority is not provided for in the Act. Specifically, the Act does not pronounce on who has *locus standi* in maintenance cases where a child beneficiary has reached the age of majority but still depends on his or her parents for support. The Act also does not specify what needs to be done in cases where a beneficiary who has reached the age of majority refuses to claim maintenance from the responsible parent. Nowhere in the Act is there express provision made for the regulation of claims for maintenance by offspring who have reached the age of majority but are unable to support themselves.

5.2 The issue of *locus standi* for maintenance beneficiaries who have reached the age of majority does not relate to the situation where there is an existing maintenance order and a child becomes a major. Our case law is very clear that in such situations the mere fact that a child turned 18 does not necessarily constitute good cause for an amendment to the maintenance order.[287]

5.3 Current law provides that a claim for maintenance can be made by a person who is owed a duty of support by another person when the first-mentioned person cannot support him- or herself. It is assumed that the said duty of support is available either to minors who have to be cared for by their parents, or to adults who cannot support themselves due to reason of divorce and other circumstances.

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[287] *Bursey v Bursey and Another* 1999 (3) SA 33 (SCA), *Haywood v Haywood* [2014] JOL 31970 (WCC), *Hess v Hess*(A3062/2007) [2007] ZAGPHC 266 (12 October 2007)

B Recent South African case law

5.4 Because the common law duty of support prescribes that parents have a duty to support their children when they are unable to do so themselves, this duty extends beyond the age of majority if the dependant is unable to support him- or herself. In other words, the duty of support is not time-bound and does not depend on the age of the chid.[288] In *Kemp v Kemp*[289] the court held that the duty of support did not terminate when the child reached a particular age but that it might terminate after the age of majority.[290] The decision in the *Kemp* judgment was confirmed in *Bursey v Bursey*,[291] where the Supreme Court of Appeal ruled that the duty of support continues until the beneficiary being maintained becomes self-supporting, even if this occurs only after they attain majority.[292]

5.5 The challenge becomes more apparent in situations where a beneficiary child has reached the age of majority but is still unable to support him- or herself. In such instances, the pertinent question becomes "who bears the responsibility to institute the claim for maintenance?" In *Smit v Smit*[293] the court stated that when a child reaches the age of majority, a claim by one parent against the other parent for that "adult child's" portion based on the common-law parental duty to support is no longer relevant.[294] It is the child him or herself who must claim directly against one or both parents to the extent that he or she may have a claim for support.[295] The challenge is exacerbated in situations where the beneficiary child who has reached the age of majority refuses or is unable to claim maintenance against the parent responsible to support him or her.[296] It is unreasonable to insist that a young and

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[288] *Glickman V Talekinsky* 1955 (4) SA 468 (W). See also Botha MFT "The duration of the duty to maintain and of a maintenance order" 2008 *SALJ* 715-716.
[289] 1958 (3) SA 736 (D & CLD).
[290] *Kemp v Kemp* at 737 H.
[291] 1999 (3) SA 33 (SCA).
[292] *Bursey v Bursey* at 38 C-D.
[293] 1980 (3) SA 1010 (OPD)
[294] Ibid 1018B-C
[295] Ibid.
[296] De Jong M "A better way to deal with the maintenance claims of adult dependent children upon their parents' divorce" 2013 (76) *THRHR* 654-665

rather vulnerable adult dependant institutes his or her own maintenance claim against one or both parents.[297]

5.6 In *Butcher v Butcher*[298] a mother applied for maintenance for herself and her two daughters aged 18 and 21 who lived with her, pending divorce litigation. She applied for maintenance in a specified monthly amount for herself as well as certain expenses relating to the household and the daughters' clothing, cell phone accounts, pocket money and maintenance to their motor vehicles. The court confirmed that only an adult child has *locus standi* to sue the other parent for his or her maintenance.[299] The court consequently dismissed the claim for specific individual expenses in respect of the adult children, such as their pocket money, cell phone accounts, clothing accounts and motor vehicle expenses; finding that the children themselves must claim these expenses as maintenance.[300] However, the court held that a parent with whom the adult dependant lives may include amounts relating to that dependant's general expenses, such as food and groceries and other general household expenses, which may also relate to the dependant, in her own claim for maintenance. This is based on the fact that if an adult dependant lives with a parent, that parent has to use her household budget to run the family home and provide for groceries for all of them.[301] This obligation was taken into consideration in determining the amount of the interim maintenance to which the mother was entitled.[302]

5.7 However, in *JG v CG*,[303] where the mother sought maintenance for herself and her 21-year-old-son, who was a full-time student, in one aggregated amount, the court rejected the decision in *Butcher* and allowed the parent to claim not only the shared or general expenses, but also specific individual expenses in respect of an adult dependent child who had not been joined in the proceedings.[304] The court emphasised that this type of award would not be appropriate in every case, but the facts and circumstances of each case must

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[297] Ibid 665.
[298] 2009 2 SA 421 (C)
[299] Ibid para 15
[300] Ibid para 16
[301] ibid para 17
[302] ibid
[303] 2012 3 SA 103 (GSJ)
[304] Ibid para 46

determine whether the court should make the order requested.[305] The court's reasoning is based on an expansive interpretation of rule 43 of the Uniform Rules of Court and section 6 of the Divorce Act. Although rule 43(1)(c) and (d), which deals with interim custody or care and interim access or contact, specifically deals with interim orders made in respect of *minor children*, rule 43(1)(a), which deals with interim maintenance orders, contains no such restriction. The same applies to section 6 (3) of the Divorce Act, which distinguishes between the court's power upon divorce to make a maintenance order of a *dependent child* of the marriage and the court's power to make a guardianship, custody or care, access or contact order in respect of a *minor* child of the marriage.[306]

5.8 This view is supported by De Jong.[307] She clearly explains that adult dependent children should not be joined as parties in divorce proceedings for their own maintenance claims.[308] Her argument is based on an expansive interpretation of section 6 of the Divorce Act and sections 33 to 35 of the Children's Act[309] to include adult dependent children in respect of their maintenance upon their parents' divorce, recommending that their parents should deal with such claims together with minor siblings' maintenance claims in parenting plans. She also points out that it is prejudicial or undesirable for children to become involved in the matrimonial conflict between their parents by being joined as parties in divorce proceedings, whether these children are minors or young adults because children should preferably retain a meaningful relationship with both parents after divorce and not become involved in litigation against either of their parents.[310] Therefore, if the parents cannot agree on a parenting plan or settlement agreement, the parent with whom the adult dependent child resides should be able to institute a maintenance claim on behalf of the child.[311]

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[305] Ibid para 55
[306] See De Jong 2013 (76) *THRHR* 659
[307] De Jong 2013 (76) *THRHR* 654-665
[308] Ibid 655
[309] Sections 33 to 35 of Children's Act 38 of 2005.
[310] Ibid
[311] De Jong 2013 (76) *THRHR* 654-665

C Responses to the issue paper

5.9 Van Niekerk made an input to this issue and suggested that allowance should be made for a person to claim maintenance in respect of an adult dependent child and that such right should be made conditional on the unwillingness or refusal on the part of an adult child to be maintained to lodge a complaint.[312] In terms of this suggestion, it must first be determined whether an adult dependent child is willing to claim maintenance on his or her own behalf and it will of necessity draw such dependent child into the conflict between his or her parents. As indicated above, this should be avoided and the conditional right to claim maintenance on behalf of an adult dependent child cannot be supported.

5.10 The Western Cape Ministry of Social Development argued that it is not necessary or desirable to deal with the *locus standi* of an adult dependent child in the Act because the Act applies to any person who is entitled to be supported by any person, and it would be a question of fact whether the adult child still may be in need of maintenance in each case.[313] The Commission does not support this view because if an adult dependent child refuses to claim maintenance on his or her own, this places the care-giving parent in an undesirable financial position.

D *Locus standi* in maintenance matters in other jurisdictions

5.11 To enable the Commission to make a suitable recommendation on how *locus standi* in maintenance matters needs to be reformed, a comparative study was undertaken. The discussion paper focusses on Namibia, as it is one of the countries in Africa, which has recently passed extensive legislation regulating maintenance. The Namibian Maintenance Act has widened the scope of who can claim maintenance by including the definition of an applicant or a complainant to mean –

(a) a beneficiary;

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[312] Van Niekerk submission 13.
[313] Western Cape Ministry of Social Development submission 4.

(b) a parent or other legal custodian or primary caretaker of a beneficiary;

(c) any other person who has an interest in the well-being of the beneficiary, including but not limited to a relative, social worker, health care provider, teacher, traditional leader, religious leader and employer.

5.12 South Africa can learn from the Namibian Maintenance Act by widening the scope of the applicant in a maintenance claim. By doing so, this will give any person who has an interest in the well-being of a maintenance beneficiary *locus standi* to institute a claim on behalf of such beneficiary.

E Evaluation and recommendation

5.13 Currently, an adult beneficiary who still needs support from his or her parents has *locus standi* to claim such maintenance from the parents. However, it is the Commission's view that the parent who resides with such beneficiary or is still the primary care-taker of such beneficiary should have *locus standi* to claim maintenance on behalf of the beneficiary. To give effect to this it will be necessary to insert a definition of a complainant in section 1 of the Act to widen the scope of parties who have *locus standi* to claim maintenance.

It is suggested that the Maintenance Act be amended by inserting the following definition of an applicant or a complainant in section 1:

Definitions

"**applicant**" or "**complainant**" means

(a) a beneficiary;

(b) a parent or another legal or primary caregiver of a beneficiary; or

(c) any other person who has an interest in the well-being of the beneficiary, including but not limited to a relative, a social worker, a health care provider, a teacher, a traditional leader, a religious leader and an employer.

It is suggested that section 6 of the Maintenance Act be amended by inserting the following provision after subsection (2):

(2A) An application or complaint lodged in terms of subsection (1), may be lodged by any applicant or complainant as defined in section 1 of this Act.

CHAPTER 6: APPOINTMENT OF MAINTENANCE OFFICERS

A Background

6.1 One of the issues the Department requested the Commission to investigate is the appointment of maintenance officers. The Department questioned whether it is desirable for purposes of service delivery and accountability to have two incumbents appointed by two different employers under different legislations to perform the same functions.

6.2 Section 4 of the Act provides for the appointment of maintenance officers by the Director of Public Prosecutions (DPP) from a pool of prosecutors,[314] and also gives the Minister or any delegated official of the Department of Justice the power to appoint maintenance officers.[315] It provides as follows:

> 4.(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; and
> (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 –

[314] Those are appointed in terms of the National Prosecuting Authority Act 32 of 1998.
[315] Those are appointed in terms of the Public Service Act 103 of 1994.

> (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.
> [Own emphasis added]

6.3 The concept of maintenance officers was introduced in the South African maintenance legislation by the repealed Maintenance Act,[316] which is the predecessor to the Act under review. Section 3 (1) of the repealed Maintenance Act provided as follows:

> "Subject to any laws governing the public service, the Minister or any officer delegated by him may appoint for any maintenance court maintenance officers to appear in such court in proceedings under this Act and to perform functions and duties assigned to maintenance officers by or under this Act."

6.4 It is alleged that this past text of the law never caused any implementation difficulties in practice, as prosecutors were doing maintenance matters without sharing them with another kind of officer as is now the case.[317] One should, however, bear in mind that during the period which the repealed Act was in operation, prosecutors were appointed by the Department since it was before the National Prosecuting Authority Act[318] was passed. Prosecutors are now appointed under the National Prosecuting Authority Act and are required, amongst others, to be licensed by the delegation issued to them to appear in court and perform functions under section 20 (5) of the National Prosecuting Authority Act, which provides as follows:

> "Any prosecutor shall be competent to exercise any of the powers referred to in subsection (1) to the extent that he or she has been authorised thereto in writing by the National Director, or by a person designated by the National Director."

6.5 The maintenance officers that are appointed in terms of section 4 (1) are prosecutors, delegated by the DPP to act as maintenance officers in the designated maintenance courts located in their respective magistrates' courts.[319] By contrast, section 4 (2) provides for the

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[316] 23 of 1963
[317] National Prosecuting Authority as per Adv Raletjena's e-mail dated 07 February 2012.
[318] 32 of 1998
[319] Section 16 (3) of the National Prosecuting Authority Act provides that the Minister may from time to time, in consultation with the National Director and after consultation with the Directors, prescribe the appropriate legal qualifications for the appointment of a person as prosecutor in a lower court.

appointment of maintenance officers by the Minister or any other officer of the Department. The appointment of some maintenance officers by the DPP and others by the Minister or a designated official of the Department leads to unclear lines of accountability, discrepancies in qualification requirements, and disparities in remuneration. The appointment of maintenance officers in terms of section 4 (1) and in terms of section 4 (2) does cause some confusion. At the centre of the confusion are issues around what criteria should be used when such appointments are made. This may also lead to confusion in monitoring their performance.

6.6 Maintenance officers appointed in terms of section 4 (1) are given the right of appearance in the High Court as State Advocates,[320] and prosecutors are given a delegation to appear in the lower courts.[321] However, maintenance officers appointed in terms of section 4 (2) have not been given such a "right of appearance" and apparently there are some magistrates who refuse for such maintenance officers to deal with maintenance matters in a maintenance court before them. This shows that there is a need for the Act to provide a process for maintenance officers appointed in term of section 4 (2) to acquire the right of appearance.

6.7 There is also a perceived dilemma created by appointing prosecutors to do maintenance court work; prosecutors are specialists in criminal law and are employed to prosecute criminal matters adjudicated upon in their courts, while maintenance matters are more civil in nature. A counterargument to this perception is that many criminal matters are currently being dealt with by prosecutors by way of "restorative justice" – which is a process of mediation between victims and perpetrators that takes place outside the formalities of a criminal court. This proves that prosecutors can indeed perform the duties of a mediator. In addition, there are training courses convened by Justice College on a yearly basis in order for prosecutors to become better skilled as mediators.

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[320] See sections 24, 25 and 26 of the Legal Practice Act 28 of 2014 for admission, enrolment, right of appearance and minimum qualifications for legal practitioners.
[321] See section 20 (5) of the National Prosecuting Act.

6.8 Nonetheless, the challenges created by having two categories of maintenance officers are a concern to the Department. The Department's Turnaround Strategy proposes to address these challenges while awaiting law reform, which the Department acknowledges is a lengthy process.[322] However, to date nothing has been done to this effect.

B Responses to the issue paper

6.9 Van Niekerk's input on this issue is that maintenance officers should be appointed and controlled by the National Prosecuting Authority.[323] He argued that the system of maintenance officers being appointed by the Department is ineffective in that such maintenance officers are placed under the control of administrative staff that at times does not have legal qualifications and knowledge pertaining to the role, duties and functions of a maintenance officer.[324] This often creates administrative bureaucracy, which leads to tensions and conflicts because of lack of understanding by administrative supervisors.[325] He suggested that there has to be control from persons who possess equal or better qualifications and knowledge.

6.10 This notion was supported by the Western Cape Ministry of Social Development and they argued that there should be one category of maintenance officers with one line of accountability and one set of qualifications and appointment criteria.[326] They further suggested that there should be one department responsible for the appointment of these officers.[327]

6.11 Greyvenstein, on the other hand, argues that maintenance officers should not come from the rank of Public Prosecutors because they are trained to deal with criminal matters and have no empathy to deal with family matters of a civil nature.[328] He further argues that

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[322] DOJCD Turnaround Strategy at 40.
[323] Van Niekerk's submission 12.
[324] Ibid 13.
[325] Ibid.
[326] Ministry of Social Development submission 4.
[327] Ibid.
[328] Greyvenstein submission 2.

since they have no civil experience, they are unable to process civil documents in maintenance matters.[329]

C Evaluation and recommendation

6.12 The Commission have decided to give stakeholders an opportunity to weigh which option is the best when it comes to the appointment of maintenance officers. The **first option** is to keep both maintenance officers appointed in terms of section 4 (1) and those appointed in terms of section 4 (2), and to address the problems, which are experienced in practice.

6.13 The first challenge is an allegation that some prosecutors appointed in terms of section 4 (1) are not trained to deal with mediation matters. To deal with this challenge, the Commission suggests that all maintenance officers need special training to deal with maintenance matters, which involves family matters of a personal nature. To give effect to this it is suggested that section 4 of the Act be amended by inserting the words “providing training of all maintenance officers, including training on family mediation, to be able to deal with maintenance enquiries” in a new subsection (3) of section 4.

6.14 The second challenge is that some magistrates do not allow maintenance officers appointed in terms of section 4 (2) to appear in the maintenance court. The Commission is of the view that maintenance officers appointed by the Department should be given a right of appearance so that they can appear in court without difficulties. In order to achieve this suggestion, subsection (2) should be amended to include provisions authorising a Chief Magistrate to give such maintenance officers the right of appearance.

6.15 The third challenge is that maintenance officers, who are legally qualified, must report to administrative officers who have no legal qualifications. The Commission suggests that such maintenance officers should report to the senior prosecutor because a senior prosecutor understand the nature of their professional work and will be able to provide

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[329] Ibid.

proper guidance.[330] To achieve this it is suggested that a new subsection (2) (d) should be inserted to provide that maintenance officers appointed by the Department as regards their professional work need to report to the senior prosecutor who deals with maintenance matters.

6.15 The Commission is of the view that there should be uniform requirements for someone to be appointed as a maintenance officer. Maintenance officers should possess a legal qualification and have the right of appearance.[331] Furthermore, all maintenance officers need special training to deal with maintenance matters, which involves family matters of a personal nature.

6.16 The Commission also suggests that the Act should provide a measure for various stakeholders to talk to each other with regard to roles and responsibilities, priorities and strategies, and to report on progress and achievement of objectives. To achieve this, it is suggested that a new subsection (4) should be inserted to deal with such measures.

It is suggested that section 4 be amended as follows:
[ ] Words in bold type in square brackets indicate omissions from existing enactments.

_____ Words underlined with a solid line indicate insertions in existing enactments.

4(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 the functions as maintenance officers under this Act; and
(ii) building a more dedicated and experienced poof of trained and specialised maintenance officers to deal with maintenance enquiries and to prosecute maintenance defaulters.

[330] In contrast to reporting about everyday control, such as leave arrangements and attendance at work, which will still be to the Court Manager.
[331] Section 25 of the Legal Practice Act 28 of 2014 provides the requirements one needs to comply with to be granted the right of appearance.

(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;**[.]** and,

(c) to be sworn in by the Chief Magistrate as officer of the court with a right of appearance; and such appointed maintenance officer shall report to a senior prosecutor assigned to deal with maintenance matters.

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(3) (a) The Director-General 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 subsection (1) and maintenance officers appointed in terms of subsection (2);

(ii) building a more dedicated and experienced pool of trained and specialised maintenance officers to deal with maintenance enquiries and to prosecute maintenance defaulters; and

(iii) providing training for all maintenance officers appointed in terms of subsections (1) and (2), including training on family mediation, to enable maintenance officers to deal with maintenance enquiries efficiently.

(b) The Minister must submit any directives issued in terms of this subsection to Parliament before those directives take effect.

(4) The Director-General: Justice and Constitutional Development, after consultation with the National Director of Public Prosecutions, is responsible for developing the draft policy directives, referred to in subsection 3 (a), which must include guidelines for-

(a) the implementation of the priorities and strategies contained in the national policy framework;

(b) measuring progress on the achievement of the national policy framework objectives;

(c) ensuring that the different organs of state comply with the roles and responsibilities allocated to them in terms of the national policy framework and this Act; and

(d) monitoring the implementation of the national policy framework and this Act.

6. 16 The **second option** is that prosecutors should continue to be deemed as maintenance officers, subject to additional training on maintenance matters. The advantage

of this option is that prosecutors are required to have a legal qualification[332] and they have the right of appearance. Right of appearance is a requirement for a maintenance officer to appear in court in proceedings under the Act. Prosecutors are given right of appearance in writing by the National Director of Public Prosecutions or a person designated by the National Director.[333] They just need special training to deal with maintenance matters. The disadvantage of this option is that prosecutors are trained to deal with criminal matters and they may have no empathy to deal with maintenance matters which are of a civil nature. To give effect to the first option, it is suggested that section 4 of the Act be amended by deleting subsection (2) and inserting the words "to deal with maintenance enquiries and to prosecute maintenance defaulters" at the end of section 4 (1) (b) (ii). Maintenance officers should further be offered with special training to deal with maintenance issues, which involves family matters of a personal nature. This should be made provision for in a new section 4 (1) (b) (iii).

It is suggested that section 4 be amended as follows:

[ ] Words in bold type in square brackets indicate omissions from existing enactments.

_____ Words underlined with a solid line indicate insertions in existing enactments.

4(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; **[and]**

[332] Section 16 (3) of the National Prosecuting Authority Act provides that the Minister may from time to time, in consultation with the National Director and after consultation with the Directors, prescribe the appropriate legal qualifications for the appointment of a person as prosecutor in a lower court.

[333] See section 20 (5) of the National Prosecuting Act.

(ii) building a more dedicated and experienced pool of trained and specialised maintenance officers to deal with maintenance enquiries and to prosecute maintenance defaulters; and**[.]**

(iii) providing imperative training of public prosecutors, including training on family mediation, to be able to deal with maintenance enquiries.

(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.]

6.17 The **third option** is that public prosecutors should no longer be deemed as maintenance officers because maintenance is a family matter where children are involved and needs a non-confrontational approach.[334] Prosecutors only role in the maintenance court should be to prosecute defaulters in terms of section 31 of the Act. There should therefore be a pool of dedicated maintenance officers appointed by the Minister to deal with maintenance matters in the maintenance courts. The advantage of this option is that such maintenance officers can only focus on maintenance matters on a daily basis. The disadvantage may be the fact that maintenance officers may not necessarily have the right of appearance because nothing is mentioned in the Act about how such maintenance officers obtain the right of appearance. To give effect to the second option, it is suggested that section 4 of the Act be amended by deleting subsection (1) and inserting a provision in subsection (2) to set a benchmark for the appointment of maintenance officers and also to give the Director-General authority to issue policy directives relating to norms and standards, as well as training of maintenance officers. There is also a need to have a provision in the Act which gives the Director-General an authority to give maintenance officers the right of appearance.

[334] See section 6 (4) (a) of the Children's Act.

It is suggested that section 4 be amended as follows:

[ ] Words in bold type in square brackets indicate omissions from existing enactments.

_____ Words underlined with a solid line indicate insertions in existing enactments.

4. **[(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; and

(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)] (1) Subject to the laws governing the public service, the Minister, or **[any officer]** the Director-General of the Department of Justice authorised thereto in writing by the Minister, may appoint one or more persons with a law degree or equivalent qualification 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.

(2) The Director-General shall, in consultation with the Minister, issue policy directions with a view to –

(a) establishing uniform norms and standards to be observed by maintenance officers in the performance of their functions under this Act;

(b) building a more dedicated and experienced pool of trained and specialised maintenance officers; and

(c) providing imperative training of maintenance matters, including training on family mediation.

(3) Any maintenance officer shall be competent to exercise any of the powers referred to in the Act to the extent that he or she has been authorised thereto in writing by the Director-General, or by any person designated by the Director-General.

6.18 It lastly needs to be pointed out that the current reality of South Africa, especially against the background of the Covid-19 pandemic and its economic impact on the country, makes it highly unlikely that each and every magisterial district will have its own maintenance officer in the near future. The sobering truth is that we are stuck with the current resource allocation and staff establishments until there is some improvement on the economic front.

CHAPTER 7: POWER OF ARREST BY INVESTIGATING OFFICERS

A Background

7.1 In terms of the Act, maintenance investigators do not have the power to arrest maintenance debtors. This situation seems a hindrance, considering the amount of time, it usually takes for maintenance investigators to trace and finally locate maintenance debtors. The Department is of the view that justice would be better served if maintenance investigators had the power to arrest maintenance debtors or defaulters who try to evade the law.

7.2 The Criminal Procedure Act[335] regulates the power of arrest by peace officers and by private individuals. Section 40 regulates arrests by peace officers,[336] whereas section 42

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[335] Act 51 of 1977.

[336] Section 40 provides as follows;

(1) A peace officer may without warrant arrest any person-
(a) who commits or attempts to commit any offence in his presence;
(b) whom he reasonably suspect of having committed an offence referred to in schedule 1, other that the offence of escaping from lawful custody;
(c) who has escaped or who attempts to escape from lawful custody;
(d) who has in his possession any implement of housebreaking or car breaking as contemplated in section 82 of the General Law Third Amendment Act, 1993, and who is unable to account for such possession to the satisfaction of the peace officer;
(e) who is found in possession of anything which the peace officer reasonably suspects to be stolen property or property dishonestly obtained, and whom the peace officer reasonably suspects of having committed an offence with respect to such thing;
(f) who is found at any place by night in circumstances which afford reasonable grounds for believing that such person has committed or is about to commit an offence;
(g) who is reasonably suspected of being or having been in unlawful possession of stock or produce as defined in any law relating to the theft of stock or produce;
(h) who is reasonably suspected of committing or of having committed an offence under any law governing the making, supply, possession or conveyance of intoxicating liquor or of dependence-producing drugs or the possession or disposal of arms or ammunition;
(i) who is found in any gambling house or at any gambling table in contravention of any law relating to the prevention or suppression of gambling or games of chance;
(j) who wilfully obstructs him in the execution of his duty;
(k) who has been concerned in or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists that he has been concerned in any act committed outside the Republic which, if committed in the Republic, would have been punishable

regulates arrests by private individuals. Offences in terms of section 40 are schedule 1 offences and none of the offences listed in section 31 of the Maintenance Act is included in the schedule 1 offences. In cases of arrest for committing a schedule 1 offence, the arrested person must be brought before court within 48 hours and in the least evasive manner. If these prescriptions are not followed, civil claims against the State might be instituted. Section 42, which allows for an arrest by citizens (other than people working in the security cluster) is aimed at ensuring that people who are suspected of breaking the law can be apprehended.[337] On the face of it, extending the power of arrest to maintenance investigators would ensure that they are able to apprehend and bring to justice those errant maintenance debtors who would otherwise not be brought to justice for a long time.

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as an offence, and for which he is, under any law relating to extradition or fugitive offenders, liable to be arrested or detained in custody in the Republic;

(l) who is reasonably suspected of being a prohibited immigrant in the Republic in contravention of any law regulating entry into or residence in the Republic;
(m) who is reasonably suspected of being a deserter from the South African National Defence Force;
(n) who is reasonably suspected of having failed to observe any condition imposed in postponing the passing of sentence or in suspending the operation of any sentence under this Act;
(o) who is reasonably suspected of having failed to pay any fine or part thereof on the date fixed by order of court under this Act;
(p) who fails to surrender himself in order that he may undergo periodical imprisonment when and where he is required to do so under an order of court or any law relating to prisons;
(q) who is reasonably suspected of having committed an act of domestic violence as contemplated in section 1 of the Domestic Violence Act, 1998, which constitutes an offence in respect of which violence is an element.

(2) If a person may be arrested under any law without warrant and subject to conditions or the existence of circumstances set out in that law, any peace officer may without warrant arrest such person subject to such conditions or circumstances.

[337] Section 42 provides as follows:

(1) Any private person may without warrant arrest any person-

(a) who commits or attempts to commit in his presence or whom he reasonably suspects of having committed an offence referred to in Schedule 1;

(b) whom he reasonably believes to have committed any offence and to be escaping from and to be freshly pursued by a person whom such private person reasonably believes to have authority to arrest that person for that offence;

(c) whom he is by any law authorized to arrest without warrant in respect of any offence specified in that law;

(d) whom he sees engaged in an affray.

(2) Any private person who may without warrant arrest any person under subsection (1) (a) may forthwith pursue that person, and any other private person to whom the purpose of the pursuit has been made known, may join and assist therein.

(3) The owner, lawful occupier or person in charge of property on or in respect of which any person is found committing any offence, and any person authorized thereto by such owner, occupier or person in charge, may without warrant arrest the person so found.

7.3 There are other pieces of legislation, such as the Domestic Violence Act,[338] that empower a peace officer to arrest a person who is reasonably suspected of having committed an offence with an element of violence against the complainant.[339] This usually happens where the complainant has obtained an interdict with the accompanying warrant of arrest having been issued to him or her by a magistrate in a process before a court. Such complainant will then hand such warrant to the peace officer, which will enable him or her to proceed to arrest the perpetrator. In such circumstance the peace officer still has discretion to either arrest or warn the perpetrator to appear in court. The offences listed in the Maintenance Act do not involve an act of violence.

B Responses to the issue paper

7.4 The Western Cape Ministry of Social Development is of the view that it would be appropriate for investigating officers to be granted with powers of arrest where a person is suspected of having committed an offence in terms of the Act.[340] This notion is shared by Van Niekerk who emphasises that the power to arrest should not only be afforded to arrest maintenance defaulters, but it should be for all offences created in terms of the Act.[341] He specifically emphasises that investigating officers should be granted with powers to arrest those witnesses who are being served with a subpoena, or persons on whom an order has been served but fail to provide the required information or fail to attend the court.

C Evaluation and recommendation

7.5 The Commission is of the view that because maintenance investigators have the addresses of maintenance defaulters there is no reason why summons cannot be issued in

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[338] Act 116 of 1998.

[339] Section 3 of the Domestic Violence Act provides as follows:

> a peace officer may without a warrant arrest any respondent at the scene of an incident of domestic violence whom he or she reasonably suspects of having committed an offence containing an element of violence against a complainant.

[340] Western Cape Ministry of Social Development submission 4.

[341] Van Niekerk's submission 13.

the first instance, if there is a prima facie case, to secure the maintenance defaulter's court appearance. If a warrant of arrest for non-payment of maintenance is issued before establishing whether there is a *prima facie* case to answer, the state might be unable to prove *mens rea* at the time of non-payment. The consequence would be that the state may be sued for unlawful arrest.

7.6 The Commission, having regard to the provisions of the Criminal Procedure Act and the Domestic Violence Act which provide that a peace officer may arrest in cases where there is an element of violence, submits that maintenance investigators should not be granted the power to arrest considering that there is no violence in cases of maintenance. If maintenance investigators are given the power to arrest maintenance debtors or defaulters who try to evade the law they will need to be kitted out with weapons, bullet proofs vests which might come at huge financial costs. They will also have to be trained to exercise proper arrest procedures, which is a training course South African Police Officers need to go through and repeat from time to time for refresher courses. The power to arrest by maintenance investigators might also lead to civil claims against the state should they fail to follow the necessary steps when arresting a maintenance defaulter, and/or bringing the accused before court within the stipulated time. It is the view of the Commission that the investigators can be utilised far more productively in assisting with investigating financial circumstances and locating whereabouts of parties, and that arrests can be dealt with by the SAPS, who are best suited for the task.

CHAPTER 8: FUTURE MAINTENANCE

A Background

8.1 Section 15 (1) of the Act, which deals with the duty of parents to support their children, provides that without derogation from the law relating to the liability of persons to support children who are unable to support themselves, a maintenance order for 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. In light of this, if the maintenance debtor left his or her employment, the duty of support shall not terminate as it is expected to continue.[342] However, the Maintenance Act currently does not regulate future maintenance, as it firstly does not provide clarity on when an application for future maintenance can be made. Secondly, it does not indicate who is responsible for administering the benefits that are eligible for attachment or execution under a warrant, such as any pension benefit, annuity, gratuity or compassionate allowance or other similar benefit.

8.2 In terms of our law, it is well established that a pension benefit may be attached in order to secure a claim for arrear maintenance.[343] Section 26 of the Act,[344] which deals with enforcement of maintenance orders, do not allow an applicant for maintenance to claim future maintenance from the party that has an obligation to maintain the beneficiaries. Section 26 suggests that an enforcement claim can only be made where there is default

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[342] http://www.justiceforum.co.za/JET/JET-LTN/e-Mantshi_issue_98.pdf (accessed on 27 February 2019)

[343] Jeram N "A warning to all maintenance court officials" 2014 September *De Rebus* 43.

[344] Section 26 (1) relates only to arrear amounts or specified amounts of money. Section 26 (1) of the Act provides as follows:

26 (1) 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) 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-

following an order for maintenance. Section 31 of the Act, which deals with offences relating to maintenance orders, only creates offences for the recovery of arrear maintenance and maintenance that is required for the present needs of the beneficiaries. Similarly, the provisions of section 40 (1) which deals with recovery of arrear maintenance allows the court to grant an order for recovery of any amount a maintenance debtor has failed to pay as per maintenance order, plus interest accrued. All these processes are not forward looking and does not deal with issues of future maintenance that are not yet due and payable. This matter has so far been left to the courts to exercise their discretion in making decisions about whether or not to make an order for future maintenance.

B Recent South African case law

8.3 Various cases exist where presiding officers have made findings on future maintenance, and this is a step in the right direction. The following cases illustrate instances where courts have used their discretion in making orders for future maintenance, despite the absence of a provision dealing with this issue in the Act.

8.4 In *Mngadi v Beacon Sweets and Chocolate Provident Fund*[345] the father had defaulted on maintenance payments for his minor children. The father had in fact voluntarily stopped working precisely so that he would not be expected to pay maintenance. An application for execution against the father's pension was unsuccessful, because the Pension Fund Adjudicator was of the view that the said funds were not regulated by the Maintenance Act. On appeal to the High Court, the Court ordered that the said money be attached to pay for future maintenance of the children. The court held that to refuse the application would be to undermine the rights of children and disempower women, but to grant it will be to thwart an unreasonable, unwilling father who has no respect for the provisions of the maintenance court order or his common law duties to maintain his own family.[346]

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[345] [2003] 2 All SA 279 (D).
[346] Ibid 289B-C.

8.5 In *Magewu v Zozo*[347] the father was not responsible for losing his job; he had been retrenched. What the court had to decide was whether his pension fund money and retrenchment package could be withheld from him, so as to benefit (be paid out to) individuals that he was responsible to maintain. The court ordered the attachment of the father's benefits to secure his child's future maintenance claims. The court held that even though the father was not in arrears with his maintenance payment and was not attempting to avoid the maintenance order, his previous conduct did not create in impression that he was willing to abide by the maintenance order.[348] So, the attachment of his pension benefits for future maintenance was a direct and effective means of ensuring that the rights of the child and the dignity of women were upheld.[349]

8.6 In *Soller v Maintenance Magistrate, Wynberg*[350] the High Court granted an anti-dissipation interdict to prevent the maintenance defaulter from making withdrawals from his annuity until such time his child becomes self-supporting; except with the leave of the applicant or the maintenance court. This interdict secured the future maintenance of his child because it prevented the maintenance defaulter from depleting or dissipating the funds of the annuity. The court further directed the fund to make periodic payments to the maintenance applicant for the benefit of the child. What had transpired in the matter is that a divorce court had granted an order for maintenance, which the maintenance debtor had not complied with. The applicant for maintenance had discovered that the debtor was making withdrawals from his annuity fund, to the detriment of the rights of the child he was ordered to maintain. The maintenance court had turned down her application for an order of attachment of her ex-husband's annuity; the court stated that it did not have the jurisdiction to make such an order. The applicant then approached the High Court for an interdict, the terms of which were as described above. Her application was successful. The court held that the maintenance court could make an order for future maintenance because section 28 (2) of the Constitution overrides any real or ostensible limitation relating to the jurisdiction of magistrates' courts. The court further 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

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[347] 2004 (4) SA 578 (C).
[348] Ibid 586D-E.
[349] Ibid 587C-D
[350] 2006 (2) SA 66 (C).

the High Court for such relief because of jurisdictional limitations adhering to the magistrates' court.[351]

8.7 In other similar cases, courts have attached annuities or the proceeds of the sale of immovable property to secure the future maintenance rights of children. In *Burger v Burger*[352] the High Court granted the applicant an interdict prohibiting payment of the proceeds of the sale of an immovable property to her ex-husband. The applicant's ex-husband had fallen into arrears on his maintenance payments as ordered by the divorce court. The court in this case acknowledged that there was no precedent for it to grant an attachment to secure future maintenance. However, the court held that there was scope for the extension of the Maintenance Act for it to make such an order, as the court could exercise its inherent powers to grant an order it would be entitled to award under common law. The inherent powers are not merely derived from the need to make the court's order effective, and to control its own procedure, but also to hold the scales of justice where no specific law provides directly for a given situation.[353]

8.8 The common thread in the cases referred to above is that orders for future maintenance were granted by High Courts in various Provincial Divisions. It is encouraging to note that the courts have taken a lead in rectifying this anomaly in the legislation. In all cases, the maintenance courts had been unable to assist the applicants for maintenance, mostly because the Act is silent or does not regulate future maintenance, but only deals with arrears. But however noble the endeavours of the courts, a legislative prescription is required to ensure that, first, there is consistency in the orders made by the various courts for future maintenance; and secondly, to ensure that the rights of beneficiaries are protected from errant maintenance debtors – who would otherwise squander the money that should be earmarked for the future maintenance of children. In one case, the Public Protector stepped in to assist a mother after the Government Employees Pension Fund (GEPF) failed to comply with an order to pay a sum of money from the father's pension fund towards future

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[351] Ibid 76C.
[352] 2006 (4) SA 414 (D).
[353] Ibid 419A-B.

maintenance.[354] The court granted an order for the attachment of R344 000 (R104 000 for arrear maintenance and R240 000 for future maintenance) of the defaulting father's pension fund held at the GEPF, but the GEPF failed to comply with that order. The mother then sought assistance from the Public Protector's office. The Public Protector contacted the Government Pension Administration Agency, which then paid the mother all that was due to her within five months after the Public Protector's intervention.[355]

8.9 The cases illustrate the need for future maintenance of children to be regulated by the Act in much the same way as arrear maintenance. If benefits such as pensions, annuities, gratuity or compassionate allowances and other similar benefits can be attached to recover arrear maintenance, the same should be possible with regard to future maintenance. Both types of claim are aimed at securing the rights of maintenance beneficiaries. However, arrear maintenance is a benefit that can be paid to the claimant immediately, while future maintenance is an interest, which needs to be administered by someone in the meantime until such time as it becomes due and payable.

8.10 One should bear in mind that once the court grants an order for future maintenance, it might not be viable to expect the institution or the fund, which administered the fund while the maintenance debtor was still employed, to keep administering it even after the maintenance debtor had left employment. This was the situation in *Government Employees Pension Fund v Bezuidenhout*,[356] where the court decided not to order the Government Employees Pension Fund (GEPF) to retain the funds and make periodical payments to beneficiaries because the GEPF made a submission that it does not have the systems in place to retain an amount or a portion thereof and make periodical payments to beneficiaries.[357] Another reason advanced was that the GEPF also cannot invest monies in an interest bearing account.[358] The court could also not order the maintenance court to retain and administer the lump-sum amount as the maintenance courts did not have the necessary

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354 https://www.timeslive.co.za/news/south-africa/2019-02-15-dad-has-more-than-r300000-taken-from-pension-fund-for-arrears-maintenance/ (accessed on 18 February 2019)
355 Ibid.
356 Case number: 3113/04 (TPD) – unreported. See also Jemillo C "The Guardians Fund and Child Maintenance in South Africa" unpublished research proposal for LLM at UNISA.
357 Ibid at para 6.5
358 Ibid

infrastructure to do so.[359] The court then ordered that the funds be paid to the Guardians' Fund.[360]

C Institutions to administer money attached for future maintenance

8.11 The Act's failure to deal with future maintenance is identified by the Department Turnaround Strategy as an area requiring attention.[361] The question that the Department raised about the administration of funds from sources such as pension funds, annuities, gratuities or compassionate allowances or similar benefits is valid. The Department created interventions, and the Office of the Chief Master was approached with the request to put in place processes to enable the Guardians' Fund to cater for funds received on behalf of future maintenance beneficiaries. Based on the *Bezuidenhout* decision the maintenance courts are making court orders, which instruct banks, attorneys or pension funds to pay funds earmarked for future maintenance of children into the Guardians' Fund.[362]

8.12 The problem is, however, that moneys paid into the Guardians' Fund do not accumulate interest.[363] The first option should therefore be that the fund or institution be ordered to retain the benefit and make monthly maintenance payments to the maintenance beneficiary until the duty lapses, i.e the child becomes self-supportive or no longer need maintenance. The reason behind this is that such fund may keep the money in an interest generating account, which will then have the benefit of growth to a beneficiary. The second option should be that if the fund or institution is unable to administer monthly maintenance payments, then such fund should be ordered to transfer the pension to the Guardians' Fund

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[359] Ibid

[360] The Guardian's Fund is established by s 86(1) of the Estates Act which provides that "[t]he guardian's fund established by section *ninety one* of the Administration of Estate Act, 1913 (Act No 24 of 1913), shall continue in existence, and shall consist of all moneys – (*a*) in that fund at the commencement of this Act; or (*b*) received by the Master under this Act or any other law or in pursuance of an order of Court; or (*c*) accepted by the Master in trust for any known or unknown person."

[361] Department Turnaround Strategy at 41–42.

[362] Chief Master's Directive 1 of 2017

[363] Chief Master's Directive 1 of 2018.

(or now the Justice Administered Fund),[364] for safe keeping so that monthly maintenance payments can be made until the maintenance beneficiary no longer needs maintenance. Therefore, what the courts should do is to order the pension fund scheme or institution to retain and administer the funds on behalf of the maintenance beneficiary for future maintenance. If the pension fund scheme or institution due to any reason whatsoever is unable to administer the monthly payment, the court should then consider ordering the Guardians' Fund to administer future maintenance on behalf of claimants.

8.13 Recently, the Department made possible the payment of lump sum future maintenance into the Justice Administered Fund.[365] In terms of the recent Department Circular 33 of 2020,[366] all monies that are claimable or payable and that are older than 30 days should be paid to the Reserve Account on a regular basis, except monies for future maintenance. To prevent future maintenance from being accidentally paid to the Reserve Account, courts must ensure that all future maintenance are marked as such when capturing master data for maintenance cases. If future maintenance is accidentally paid to the Reserve Account, a court must follow a process on MojaPay[367] to effect transfer from the Reserve Account to the original MojaPay, from where payment can be effected to the relevant beneficiary.

8.14 Payment of monies into the Justice Administered Fund, however, has its challenges, which may frustrate maintenance beneficiaries. It was reported on 03 August 2020 that about 1 500 child maintenance beneficiaries were left without their monthly payments since April after the MojaPay payment system crashed.[368] The Minister of Justice and Correctional Services, Minister Ronald Lamola, revealed this in a written response to parliamentary questions by DA MP Chantel King, who asked for details regarding the MojaPay system crash of 4 May. The system crash affected all provinces, hence Minister Lamola estimated 1 500 beneficiaries could not receive their money. This prompted Justice and Correctional

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[364] See the next paragraph.
[365] The Justice Administered Fund was established by section 2 of the Justice Administered Fund Act 2 of 2017.
[366] Dated 05 June 2020
[367] MojaPay is an electronic payment system that is used to capture maintenance received and pay such to beneficiaries thereof.
[368] Legalbrief Today dated 03 August 2020.

Services Minister Ronald Lamola to instruct acting Director-General, Adv Jacob Skosana, to determine what caused the crash and to prevent such incidents in future.

D When should orders for future maintenance be made?

8.15 Although there seems to be consensus that the rights of children should be secured by attaching pension funds for future maintenance, some commentators maintain that this type of attachment should remain an exception rather than become the rule.[369] They argue that the attachment of pension benefits should be applied only in cases where maintenance debtors have demonstrated their intention not to comply with their obligations. They further argue that the applicant would have to prove that the maintenance debtor will dissipate the funds and thereby obstruct the beneficiaries' maintenance claims.

8.16 De Jong and Heaton raise a very good argument that even though the case law discussed above concerned maintenance for children, the court might in future also be willing to attach a maintenance debtor's pension, provident fund or proceeds of a sale of immovable property to secure future maintenance payable to his or her former spouse.[370] They argue that such an approach, in which substantive gender equality is taken into account in the enforcement of maintenance orders against recalcitrant maintenance debtors, would surely be a step in the right direction.[371] Presiding officers should incorporate reasoning into their judgements to ensure that gender-sensitive practices are developed through a "gendering" of our maintenance laws, which should include the promotion of dignity and the equal worth of all.[372] In principle, awards for future maintenance should also be available to secure future spousal maintenance.

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[369] Sigwadi M "Pension-fund benefits and child maintenance: The attachment of a Pension-Fund benefit for purposes of securing payment of future maintenance of a child: 2005 *SAMLJ* 340 at 346.
[370] De Jong M and Heaton J " Post-divorce maintenance for a spouse or civil union partner" in Heaton J (ed) *The Law of Divorce and Dissolution of Life Partnerships in South Africa* (2014) 160.
[371] Ibid.
[372] Ibid 122.

E Competing fundamental rights

8.17 One may argue that attachment of maintenance debtor's pension fund or similar benefit may infringe his or her fundamental right to privacy, which entails not to have his or her possession seized.[373] However, the harm done by the infringement of the maintenance debtor's fundamental rights is slight in comparison to the beneficial purpose the limitation is designed to achieve.[374] It should therefore be reasonable and justifiable to limit the maintenance debtor's fundamental rights in order to secure for vulnerable children and disempowered women their maintenance entitlements.[375] The question to be asked is whether the fund may legally withhold the benefit for future maintenance. If one looks at the rulings of the courts in accepting that there can be a claim for future maintenance (including the strong emphasis on the courts taking all possible steps to protect the rights of children and vulnerable women) and the approach taken by the courts one can make a compelling argument supporting the withholding of benefit pending the maintenance enquiry.[376] If the persistent and widespread concerns of maintenance beneficiaries and commentators are to be addressed, the issue of future maintenance cannot be left purely to the judiciary to decide and maintenance applicants should specifically be allowed to request the court to request the court to issue an anti-dissipation order to secure future maintenance.

F How much of a lumpsum can be withheld to secure future maintenance?

8.18 An important question is, however, how much of the lump sum can be withheld to secure future maintenance. There should be a uniform criterion to be followed to avoid disparities, which may occur in the absence of such a yardstick or guideline. With a clear guideline it will be easy for a court to decide on the exact amount to be withheld to secure future maintenance. Nonetheless, it is proposed that once it has been established that the

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[373] Section 14 (c) of the Constitution of the Republic of South Africa, 1996.
[374] De Jong and Sephai "New measures to better secure maintenance for disempowered women and vulnerable children" 2014 (77) *THRHR* 215.
[375] Ibid.
[376] Jeram 2014 *De Rebus* 44.

person legally liable to maintain was mala fide, not bona fide or recalcitrant with regards to his or her maintenance obligations, all of the money available in the relevant fund should be attached. In none of the current available case law on this specific topic could any of the respondents (liable parents) make a case for keeping some of the money themselves. If all of the available lump sum is left with the relevant fund a benefit would be that should another applicant later approach the court to claim maintenance for other children of the same respondent, another future maintenance order can be made and implemented by the relevant fund for these children as well. The calculation of the amount of future maintenance should therefor only be done in cases where it cannot be avoided at all, for instance where there are other minor biological children of the respondent residing with him at the time of the attachment, which minor children's claim to being maintained should also be taken into consideration by the court. In those rare cases where calculation of the amount to be withheld is indeed necessary, the court should calculate the amount by taking into consideration the age of the beneficiary, the number of years it will take for the child to reach the age of majority, whether the parents can afford to pay for tertiary education for the child and the academic record of the child in question, so as to include an estimated amount for tertiary education.

G Responses to the issue paper

8.19 Van Niekerk supports the view that the Act should regulate future maintenance.[377] But, his concern is that because of the inevitable and unforeseen changes that occur in life, the determination of the quantum of future maintenance is not easily determinable compared to arrear maintenance.[378] He argues that the courts mostly relied on actuarial reports to determine future maintenance, which would not be feasible because the majority of litigants in maintenance matters are indigent and it will be too costly for the government to fund such reports.[379] He then suggested that the Act may make provision to establish formulas to quantify future maintenance.[380] He suggests that a table similar to Table B of the Estate Duty

[377] Van Niekerk submission 8
[378] Ibid.
[379] Ibid.
[380] Ibid.

Act[381] may be used to calculate future maintenance.[382] However, if the approach is followed that generally all of the money available in the relevant fund should be attached, the problems to which Van Niekerk refers would be negated.

8.20 The Western Cape Ministry of Social Development are of the view that there should be a provision to safeguard the pay-outs in the hands of a fund such as a pension fund or a trust fund to secure future maintenance of children.[383] They argue that such aspect could be regulated similar to emolument attachment orders to provide for the attachment of pay-outs from funds.[384]

8.21 The Western Cape Ministry of Social Development responded to the question of which institution is appropriate to administer funds for future maintenance by suggesting that the funds should be held in the original pension fund or trust until payment is due to the child.[385] They also suggested that money attached as future maintenance, which is not held by a pension fund or a trust fund can be paid to the Guardians' fund.[386]

H Evaluation and recommendation

8.22 It is the Commission's view that the Act should regulate the issue of future maintenance and give the maintenance court the power to make an order for future maintenance. To make this possible the definition of "maintenance order" in section 1 of the Act needs to be extended and a new chapter 4A should be inserted in the Act to include a provision that should a maintenance debtor resigns, retire (where no monthly pension will be paid) or be dismissed from his or her employment or is due to receive any lump sum from

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[381] 45 of 1955.
[382] Van Niekerk submission 8. Table B of the Estate Duty Act is used to calculate if the estate duty is payable on the estate and to calculate the amount of maintenance of surviving spouse and dependents of the deceased.
[383] Western Cape Ministry of Social Development submission 4.
[384] Ibid
[385] Ibid.
[386] Ibid.

any source,[387] while he or she still has a duty to maintain, then a pension benefit or that lump sum may be attached to secure future maintenance.

8.23 The courts do not have to rely on actuarial reports to calculate future maintenance, as firstly, it is suggested that in general the whole amount should be attached and, secondly, where a calculation is necessary in the specific circumstances of a case the calculation can be done by the maintenance officer taking into consideration the number of years it will take for the child to reach the age of majority, whether the parents can afford to pay for tertiary education and also if the child in question has good exam results currently, so as to include an estimated amount for extended basic education (because there are some pupils over 20 years still in high school and/or busy with their tertiary education). The Commission is of the view that this simple calculation should be followed as this will save actuarial costs, which are expensive. The Commission concludes that there should be a guideline to assist the court in determining future maintenance amount to be withheld. The Commission suggests that a simple calculation to be followed should be:

Monthly maintenance X 12 (for a year) X number of years to complete school and/or tertiary studies. This amount must be adjusted annually in accordance with the weighted average of the Consumer Price Index.

It is suggested that sections 1 and 8 of the Maintenance Act be amended and that a new chapter, Chapter 4A, be inserted after Chapter 4 dealing with maintenance and other orders.

Section 1 should be amended by substituting the definition of "maintenance order" with the following definition:

"**maintenance order**" means any order for the

(a) payment of sums of money, including the periodical payment**[, of sums of money]** thereof;

(b) payment in kind, either by way of supplying specified goods, which may be livestock, or providing a service or services; and/or

(c) payment of future maintenance, including the periodical payment thereof;

[387] For example, proceeds from sale of a house, trust moneys that are to be paid out, etc.

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.

Section 8 (1) should be amended by adding the underlined phrase:

(1) A magistrate may, prior to or during a maintenance enquiry, or prior to or during attachment of future maintenance in terms of section 25A, 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.

The following chapter needs to be inserted after chapter 4:

CHAPTER 4A

FUTURE MAINTENANCE

25A (1) (a) Whenever any person legally liable to maintain another had been *mala fide*, not *bona fide*, or recalcitrant with regards to his or her maintenance obligations at any given time in the past; or

(b) where the future maintenance claim of a beneficiary is threatened by conduct of reckless spending, whether or not the person legally liable to maintain had been recalcitrant, or has been *mala fide* or not *bona fide* with regards to his maintenance obligations at any given time in the past;

the person to be maintained or the person in who's care the person to be maintained is, may apply for an anti-dissipation interdict in the court within the area of jurisdiction where the person to be maintained, or the person in who's care the person to be maintained is, resides, works or does business.

(2) A maintenance court may, on application referred to in subsection (1) make an order for attachment of future maintenance.

(3) Notwithstanding anything to the contrary contained in any law,

(a) any sum of money from any source whatsoever – due to the person against whom the order was made – payable in a lump sum, or payable in instalments over any period of time (including any pension, annuity, gratuity, payment from a living annuity or similar product, or compassionate allowance or other benefit) shall be liable for attachment to secure future maintenance in favour of a maintenance beneficiary;

(b) any property previously held in the name of the person against whom an order for payment of maintenance has been made, but to which the rights thereto – since the date the order was made – were transferred or abandoned by way of delivery, payment, release, compromise or donation, in terms of any contract and not for value, shall, in absence of proof to the contrary, be deemed to belong to the person against whom the order for payment of maintenance has been made, and be liable for attachment to secure future maintenance in favour of a maintenance beneficiary.

(4) (a) Notwithstanding anything to the contrary contained in any law, the amount attached to secure future maintenance shall be retained, and maintenance payments shall be administered by the ~~f~~und/entity from which the attachment is made.

(b) Where the fund/entity is not in a position to administer maintenance payments to the person in whose favour the order was made, the fund/entity shall transfer the amount for future maintenance to the Department of Justice to be administered in terms of the Justice Administered Fund Act, Act 2 of 2017.

(5) The person against whom the future maintenance order has been made, or his estate, shall be entitled to be paid from the sum being retained, any balance that remains once the children are no longer in need of support, or the maintenance order has been discharged.

(6) The maintenance officer, prior to making the application for an order for the attachment of future maintenance as contemplated in subsection 1, may at the request of the applicant, lodge an investigation to determine possible assets susceptible for such attachment.

CHAPTER 9: RECOVERY OF FUTURE DEFAULT AMOUNTS AS A RESULT OF A DELAY IN THE EXECUTION PROCESS

A Background

9.1 Chapter 5 of the Act deals with civil execution, however, it does not provide for future default amounts which arise because of the delay in the execution process. Ordinarily, when default amounts arise because of the lengthy legal process, the applicant cannot deal with the increased amount in the same attachment under execution, as the new amount would not be contained in the original order. Compensation for shortfalls, which arise through delays caused by having to obtain an execution order or by the lengthy execution process, needs to be provided for in the Act. None of the submissions received on the issue paper have dealt with this issue.

B Evaluation and recommendation

9.2 It is the Commission's view that the Act should regulate the issue of future default amounts, which may arise because of the delay in the civil execution process. The Commission notes that it is not easy for a maintenance applicant to know how long the execution process is going to take, and any delay may place him or her in a financial predicament. Due to the possibility of future default amounts arising because of delays in the execution process, the Commission suggests that maintenance creditors should be able to make an affidavit before the service of a warrant of execution, an emolument attachment order or the attachment of a debt, in which it is stated that they had not received maintenance payments from the date on which an order in terms of section 26 (1) was made. The court may then make an order for an automatic adjustment of the warrant of execution or the amount to be attached in case of the attachment of a debt.

It is suggested that section 26 be amended by inserting the following subsection after subsection (4):

(5) The court making an order in terms of subsection (1) may – on the strength of an affidavit under oath or affirmation by the applicant – make an order for an automatic adjustment of the amount claimed, where such amount, due to the delay in the civil execution process, has changed since the application was made because of maintenance payments received, or not.

It is further suggested that section 27 be amended by inserting the following subsection after subsection (6):

(7) The court making an order in terms of subsections (3) and (4) may – on the strength of an affidavit under oath or affirmation by the applicant – make an order for an automatic adjustment of the amount claimed, where such amount, due to the delay in the civil execution process, has changed since the application was made because of maintenance payments received, or not.

It is further suggested that section 28 be amended by inserting the following subsection after subsection (2):

(3) The court making an order in terms of subsections (1) and (2) may – on the strength of an affidavit under oath or affirmation by the applicant – make an order for an automatic adjustment of the amount claimed, where such amount, due to the delay in the civil execution process, has changed since the application was made because of maintenance payments received, or not.

It is further suggested that section 30 (2) be amended by inserting the following subsection after subsection (2) (c):

(d) The court making an order in terms of subsections (1) and (2) may – on the strength of an affidavit under oath or affirmation by the applicant – make an order for an automatic adjustment of the amount claimed, where such amount, due to the delay in the civil

execution process, has changed since the application was made because of maintenance payments received, or not.

CHAPTER 10: CONSEQUENCES FOR DEFAULTING ON MAINTENANCE OBLIGATIONS

A Background

10.1 The issue paper published by the Commission for this investigation identified that where an order for civil execution has been granted against a debtor, the judgment creditor has a choice to proceed by way of blacklisting the debtor until the debt is paid in full.[388] The process followed in civil judgments was not extended to maintenance court judgments, despite the latter being equivalent to that granted by civil courts. The reason for investigating this area was because of the challenges associated with the enforcement mechanisms contained in the Act. Over the years, the Department has lamented the high rates of failure by maintenance debtors to comply with their maintenance obligations. The enforcement of maintenance orders is important to secure the rights of children and promote the rights of women; it is also critical for upholding the values enshrined in the Constitution.[389]

10.2 Various interventions have been explored to improve South Africa's maintenance system and bring maintenance defaulters to book. One such intervention is the Department's "Operation Isondlo" project. Among other things, this project concentrated on apprehending maintenance nonpayers and arresting them at roadblocks and compelling them to pay maintenance in terms of the orders granted against them.

10.3 During the course of this investigation by the Commission, some provisions of the Act were amended. The Maintenance Amendment Act,[390] through sections 11 and 13 (b), which respectively inserted sections 26 (2A) and 31 (4) in the Act under review, addressed the problem.[391] These two sections came into operation on 05 January 2018 in terms of Proc R. 44 of *GG* 41352 dated 21 December 2017 (thus not with the rest of the Amendment Act,

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[388] South African Law Reform Commission Issue Paper 28 par 2.52.
[389] *Bannatyne* at 377E-G.
[390] Act 9 of 2015.
[391] Note that these sections came into operation on 5 January 2018 in terms of Proc R44 of GG 41352 of 21 December 2017.

which came into operation on 9 September 2015 – GN 821 in *GG* 39183 dated 9 September 2015).

10.4 Section 26 (2A) now makes credit-bureau reporting compulsory and provides as follows:

> (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.[392]

10.5 Similarly, section 31 (4) of the Act now makes it peremptory to furnish particulars of a maintenance defaulter convicted in terms of section 31 (1)[393] to businesses that grant credit or conduct credit ratings and provides as follows:

> (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 as its object the granting of credit or is involved in the credit rating of persons.[394]

10.6 Section 31 (4), as amended, allows for the handing over of the details of a defaulter to businesses that grant credit or which conduct credit ratings, only after a conviction. In other words, a conviction envisaged in subsection (1)[395] has to precede the process of

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[392] Section 26 (2A)) has been amended by section 11 of the Maintenance Amendment Act 9 of 2015 in GN 821 GG 39183 of 09 September 2015. It came into operation on 05 January 2018.
[393] Section 31 (1) provides that any person who fails to make any particular payment in accordance with a maintenance order shall be guilty of an offence and is liable on conviction to a fine or imprisonment for a period not exceeding three years or to such imprisonment without the option of a fine.
[394] Section 31 (4) has been amended by section 13 of the Maintenance Amendment Act 9 of 2015 in GN 821 GG 39183 of 09 September 2015. It came into operation on 05 January 2018.
[395] Section 31 (1) provides that any person who fails to make any particular payment in accordance with a maintenance order shall be guilty of an offence and is liable on conviction to a fine or imprisonment for a period not exceeding three years or to such imprisonment without the option of a fine.

handing over the details of the maintenance defaulter to businesses that grant credit or conduct credit ratings.

B Responses to the issue paper

10.7 Van Niekerk supports the view that handing over of details of maintenance defaulters to credit rating agencies should form part of Chapter 5 of the Act, specifically in section 26 which is a prelude and general enabling section for enforcement of maintenance orders.[396] He also supports the notion that section 31 (4) be retained in addition to the similar provision inserted in Chapter 5 of the Act.[397] In terms of the old section 31 (4) before it was amended on 5 January 2018, it only made provision for credit-bureau reporting in the discretion of the maintenance officer. Greyvenstein argues that maintenance obligations are court orders of a civil nature and if they are not complied with, they must be dealt with just like any other civil matter.[398] He argues that once a defaulter falls into arrears for 10 days, their particulars should be handed over to credit bureaus just like any other civil debt, and not only on conviction.[399] The Western Cape Ministry of Social Development on the other hand argues that particulars of a person against whom a maintenance order is granted should be available to credit agencies once the maintenance order is granted.[400] They also support a view that when a maintenance payer defaults on an order this should be reported to credit bureau. They argue that the format of maintenance judgment needs to be amended to move the details of the minor child from page 1 to page 2 of the judgment, so that the credit bureau can scan and upload the first page of the judgment to their system without having access the confidential details of the minors.[401]

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[396] Ven Niekerk sumbmission 7.
[397] Ibid.
[398] Greyvenstein submission 2.
[399] Ibid.
[400] Western Cape Ministry of Social Development submission 3.
[401] Ibid.

10.8 The Department received a query from the e4 Strategic Proprietary Limited,[402] which argue that section 31 should provide for the handing over of details of maintenance debtor to credit rating agencies immediately after a maintenance order is granted, irrespective of whether he or she has defaulted on his or her payment. This is because credit providers rely on disclosures made by the person applying for credit as to whether or not they have a maintenance obligation without any concomitant means of verifying that which is disclosed or not disclosed in the credit application against a credit report provided by credit bureaus.[403] They also argue that the Maintenance Act, before it was amended on 5 January 2018, was not in line with the National Credit Act[404] (NCA), which requires a consumer to accurately disclose to the credit provider all financial obligations to enable the credit provider to conduct a credit affordability assessment.[405] Regulation 17(1) of the National Credit Act provides that maintenance judgments in terms of the Maintenance Act are to be displayed as part of the consumer credit information to be used for purposes of credit assessment. They argue that the word maintenance judgment in the National Credit Act includes maintenance orders in terms of the Maintenance Act.[406] They further argue that the delay in making sure that the judgment debtor is at fault or is convicted before his or her particulars are handed over to businesses that grant credit or conduct credit ratings may prejudice the people who are dependent on such maintenance for their livelihood because he or she will continue to make more debts, because the maintenance order is not used for the purpose of credit assessment.

C Evaluation and recommendation

10.9 The principle set out in sections 26 (2A) and 31 (4) is in line with the rule applicable in civil judgments, where a maintenance officer is obliged to hand over the particulars of debtors as soon as the civil judgment is granted by the court.[407] It means that a maintenance

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[402] e4 Strategic Proprietary Limited sent a letter to the Department dated 12 September 2017 to provide comments and input on the proposed Maintenance Amendment Act 9 of 2015.
[403] Ibid 2.
[404] 34 of 2005.
[405] Regulation 23A(6) and (12) of the National Credit Act.
[406] e4 Strategic Proprietary Limited at 2.
[407] Section 65A of the Magistrates' Court Act.

debtor's details have to be handed to credit bureaus after he or she failed to pay maintenance and the court has made an order to that effect. However, it seems that the Department was not ready for implementation of the two subsections as it was only after the subsections were operational that the Department established the necessary processes.

10.10 The Commission have regard for the view raised by e4 Strategic Proprietary Limited in that if a maintenance order is considered in credit assessment this will protect the interest of people in whose favour the maintenance order was made. However, it should be born in mind that not all maintenance orders are made because liable parents do not want to maintain their children. Sometimes orders are made to safeguard the liable parent in the case where the applicant expected him/her to contribute towards all the needs of the child (not *pro rata* according to his or her means); or to provide clarity. There are also some people who maintain their children outside of the court and without a maintenance order in place and it would be grossly unfair to have records of people who have maintenance orders against them to be submitted to credit rating agencies, even though they are not at fault or in default. The Commission is of the view that there is no need to include a provision that compels the maintenance officer to furnish credit rating agencies with particulars of maintenance order, if a maintenance debtor has not defaulted on his or her payment.

CHAPTER 11: CHOICE OF REMEDY, CIVIL EXECUTION AND OTHER PROCEDURAL MATTERS INCLUDING INTERIM ATTACHMENT ORDERS

A Background

11.1 The Department has identified a number of provisions dealing with civil execution that need to be looked at. This section deals with issues that the Department has identified with regard to the following:

- choice of remedy;
- the attachment of movable property; and
- the proposal for rules to clarify the execution process.

11.2 The Commission has also identified a number of aspects which are necessary to deal with as far as execution of maintenance orders are concerned, namely:

- interim attachment orders;
- jurisdiction;
- application of *audi alteram partem* principle in maintenance matters;
- application for stay of a warrant of execution; and
- insolvency of a maintenance debtor.

B Choice of remedy

11.3 The Department is of the view that the civil remedies available to maintenance creditors are inadequate – this is because maintenance creditors are required but not in a position to make a choice regarding the remedy to pursue, where the maintenance debtor fails to meet his or her obligation under a maintenance order issued by a court. In practice, the problem is that many times the maintenance creditor does not know anything about the financial circumstances of the liable parent, which makes it difficult to choose the appropriate remedy. For example, a maintenance creditor may not know what property, emolument or

debt is available for attachment. Section 26 (1) of the Act provides for three specific remedies. These are as follows:

- execution against property;
- attachment of emoluments; or
- attachment of debts.

11.4 The plain interpretation of section 26 (1), by virtue of the use of the word "or" rather than "and", is that the said remedies are available as alternatives; that is, the maintenance creditor has the option to pursue one remedy above the other two at any given time. The Department contends that the maintenance creditor should be allowed to apply in the alternative for all the remedies at the onset. It should then be left over for the court to make a final decision as to which remedy will have the best potential. The maintenance officer, with the assistance of the maintenance investigator, should then investigate the matter and inform the court. The court should have the final say.

C Responses to issue paper

11.5 The Western Cape Ministry of Social Development argues that in light of the constitutional rights of children, the courts have interpreted section 26 not to be a *numerus clausus* and extended the enforcement possibilities available to the courts by holding that the intention of the legislature was not to restrict the remedies contained in the Act.[408] They also support an amendment of the Act to the effect that all remedies may be pursued simultaneously. Greyvenstein supports the notion and argues that it should be the complainant's choice whether he or she wants to pursue various remedies at the same time.[409]

11.6 Van Niekerk also shares the same sentiments and argues that the choice of remedy listed in section 26 is outdated and too limited.[410] He further argues that the list of remedies

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[408] Western Cape Ministry of Social Development submission 6. See also *Bannatyne v Bannatyne (Commission for Gender Equality, as Amicus Curiae*) 2003 (2) SA 363 (CC) par 21.
[409] Greyventein submission 2.
[410] Van Niekerk submission 16.

should not be a closed list and that courts have a constitutional duty to create innovative and effective remedies where traditional remedies are not available.[411] He further submits that the choice of remedy should not be specified as this may render the entire process obsolete, for example, where application is made for attachment of emoluments, but during the process it is established that the liable parent does not receive any emoluments. Even though there are other attachable assets the application stands to be dismissed unless there is a substantive application for variation of the initial application.[412] He argues that if an applicant's options are left open, then the most suitable remedy can be chosen at the end of the enquiry.[413]

11.7 In addition, De Jong and Sephai suggest innovative ways to improve the maintenance system and ensure that women and children receive their maintenance entitlements.[414] They suggest cancellation of defaulters' drivers' licences; refusal to issue passports to defaulters; orders for payment in kind; sms notifications of payments due, amongst others.[415] They explained that the cancellation of a defaulter's licence and the denial of a passport could only be used in cases of chronic default, for instance where a maintenance defaulter had been in arrears for a number of months.[416] If the defaulter pays the arrears in full or satisfactorily reschedules payments for arrears, then his or her licence should be returned to him or her.[417] An exception can be made if the defaulter requires a driver's licence or passport for purposes of employment.[418] With regard to sms notification of payments due, they argue that it will assist in preventing the build-up of arrears and court officials would then deal with fewer defaulters as all liable parents would be reminded of their monthly payments before they fall due and be notified when they missed a payment.[419]

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411 Ibid.
412 Ibid.
413 Ibid17.
414 M de Jong & KKB Sephai "New Measures to Better Secure Maintenance for Disempowered Women and Vulnerable Children" 2017(77) *THRHR* 205.
415 Ibid.
416 Ibid.
417 Ibid 206.
418 Ibid.
419 Ibid 207.

The sms notification can also be used to remind the parties of informal maintenance enquiries and court hearings.[420]

D Evaluation and recommendation

11.8 The Commission notes the challenges around the civil remedies and how they are experienced by maintenance applicants. The reading of the Act indicates that an applicant can choose only one remedy to pursue. Should the maintenance creditor be given the option of proceeding with one or more of the remedies simultaneously, one should bear in mind what the implication of using all the remedies simultaneously would be, especially if all the remedies are successful at the same time.

11.9 The Commission submits that the choice of remedy in maintenance matters should not be limited and the applicant should be afforded an opportunity to apply for each of them in the alternative to avoid delay in case the first choice of remedy proves not achievable or workable. The Commission recommends that the Act should allow for a financial investigation to be conducted by the maintenance officer or maintenance investigator to determine which enforcement remedy would work best in specific circumstances of each case. The Commission also recommends that the list of remedies should not be a closed list so that the court may have the discretion to make an order it deems just and equitable under the circumstances. The Commission therefore also recommends inclusion of suggestions by De Jong and Sephai[421] as discussed above.

11.10 Accordingly, it is therefore submitted that sections 26 of the Act be amended to give the applicant a choice of applying for more than one remedy in the alternative and also to empower the courts to make any other order it deems just and equitable under the circumstances. In addition, section 8 of the Act must be amended to also make provision for an investigation by the maintenance officer in case of the attachment of arrear maintenance.

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[420] Ibid.
[421] De Jong & Sephai 2017(77) *THRHR* 195.

E Execution of movable property

11.11 The Department is concerned that the Act does not properly provide for procedures/processes to identify movable property that is susceptible for attachment. The Department proposes that the remedy in relation to execution against movable property needs to be more specific; that is, the Act must specify which types of movable property are susceptible to attachment.

11.12 Section 27 (1) of the Act, which provides for warrants of executions, prescribes that the maintenance court may –

> 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 execution.

11.13 The execution process in the maintenance system is undertaken in terms of the Magistrates' Court Rules. These rules provide for the identification of movable property susceptible to attachment.

11.14 Rule 41 of the Magistrate's Court Rules provides as follows:

> **Execution against movable property**
>
> 41(1)(a) The sheriff shall, upon receiving a warrant directing him or her to levy execution on movable property, repair to the residence, place of employment or business of the execution debtor or to another place pointed out by the execution creditor where movable property is to be attached as soon as circumstances permit, and there demand payment of the judgment debt and costs or else require that so much movable property be pointed out as the said sheriff may deem sufficient to satisfy the warrant, and if such last-mentioned request be complied with the sheriff shall make an inventory and valuation of such property.
>
> (b) If the property pointed out in terms of paragraph (a) is insufficient to satisfy the warrant, the sheriff shall nevertheless proceed to make an inventory and

valuation of so much movable property as may be pointed out in part execution of the warrant.

(c) If the execution debtor does not point out any property as required in terms of subrule (1), the sheriff shall immediately make an inventory and valuation of so much of the movable property belonging to the execution debtor as he or she may deem sufficient to satisfy the warrant or of so much of the movable property as may be found in part execution of the warrant.

(d) If on demand the execution debtor pays the judgment debt and costs, or part thereof, the sheriff shall endorse the amount paid and the date of payment on the original and copy of the warrant, which endorsement shall be signed by him or her and counter-signed by the execution debtor or his or her representative.

(2) So far as may be necessary to the execution of any warrant referred to in subrule (1), the sheriff may open any door of any premises, or of any piece of furniture, and if opening is refused or if there is no person there who represents the person against whom such warrant is to be executed, the sheriff may, if necessary, use force to that end.

(3) The sheriff shall exhibit the original warrant of execution and shall hand to the execution debtor or leave on the premises a copy thereof.

(4) As soon as the requirements of this rule have been complied with by the sheriff, the goods inventoried by him or her shall be deemed to be judicially attached.

…

F Responses to the issue paper

11.15 Greyvenstein argues that property to be attached should not be any different from civil matters and that any property may be attached including trusts.[422] This view is supported by the Western Cape Ministry of Social Development that it is not necessary to identify a category of movable property that is liable for attachment in the Act and that the Magistrates Court Rules relating to attachment should apply.[423] Van Niekerk argues that the Magistrate's

[422] Greyvenstein submission 2.
[423] Western Cape Ministry of Social Development submission 5.

Court rules clearly identify what property may be executed on and what not.[424] The challenge is that in most instances it is found that the only assets of value are the maintenance debtor's tools of trade, which are his or her only source of trade.[425]

G Evaluation and recommendation

11.16 The Commission is of the view that there is no problem in identification of movable property that are susceptible to attachment. There would be no recourse for a maintenance applicant if the defaulter does not possess movable property that is prescribed for attachment, but does possess other movable property that is not prescribed for attachment.[426] The Commission recommends that just like in other civil matters tools of trade are not susceptible to attachment since they are the maintenance debtor's source of income-generating assets and without them he or she will not be able to pay maintenance.

H Rules governing the execution process

11.17 The Department proposes that rules are necessary to regulate the execution process in maintenance matters. The Department is of the view that the Act should contain a provision that will enable the Rules Board to develop such rules for an execution procedure to be followed in the maintenance system.

11.18 The Rules Board for Courts of Law (the Rules Board) is a statutory body established in terms of the Rules Board for Courts of Law Act 107 of 1985. The Rules Board makes and reviews the rules of the courts, subject to the approval of the Minister of Justice. Section 6 of the Rules Board Act empowers the Rules Board to make, amend or replace rules for the Supreme Court of Appeal, the High Courts, and the lower courts. This process is intended to ensure the efficient, timely and uniform administration of justice.

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[424] Van Niekerk submission 13.
[425] Ibid.
[426] Section 67 of the Magistrates' Court Act 32 of 1944 as amended provides a list of movable property exempted from execution, and section 68 provides for property executable.

11.19 The maintenance court has been applying the rules of the Magistrates' Court to all its processes including the execution process. The Department's proposal that rules should be developed for the execution process in maintenance matters is unclear, since the proposal does not clarify whether such rules should only apply to execution processes, and whether other processes should continue to follow the rules for the Magistrates' Court or not.

11.20 The Department also articulates the challenges that have been created in the maintenance system by the Magistrates' Court rule[427] that permits the sheriff to demand security for costs before carrying out any execution process. The execution process includes the requirement for a maintenance applicant to pay surety before a sheriff will execute the warrant of attachment. The Department is concerned that the requirement for security for costs renders the execution process ineffective, as most applicants for maintenance do not have the resources to provide the requisite security. The reality is that most women who claim for maintenance are unemployed and have no other source of income.

I Responses to issue paper

11.21 Van Niekerk argues that there is a dire need to regulate the execution process because the use of the Magistrates Court Rules is a transitional provision contained in section 46 (a) of the Act.[428] He argues that the costs in relation to warrants of execution can be high and that most maintenance complainants are indigent and uneducated. He further argues that that the requirement to pay security for costs may cause most women to abandon their maintenance claims, because most women cannot afford to pay such costs.[429] He further argues that the process followed by sheriffs for executing warrants more often than not confuses complainants and the requirement of providing security creates more

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[427] Rule 38 of the Magistrates' Courts

[428] Van Niekerk submission 14. Section 46 (a) relates to transitional arrangements in respect of execution or other orders. Section 46(a) provides as follows:
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 judgement or order of a magistrate's court; or

[429] Van Niekerk submission 13.

burdens on the complainants especially where the complainant is required to make arrangements with distant sheriffs.[430] He says in most instances, the monies raised after the maintenance debtor's property was auctioned off covers mostly only the sheriff's cost of execution and the complainant is often left with very little or no money. He argues that if the sheriff's cost can be cut out, it would be more conducive in realising monies in the hands of the complainant.[431] He then suggests that cheaper and more effective ways should be made available to obtain better returns of attached property, like using websites and printed media for placing free adverts for the sale of any property and if those adverts fail to render results within a reasonable time, then the property may be auctioned off.[432] The Western Cape Ministry of Social Development holds a similar view and further argues that the Uniform Rules of the Rules Board for Courts of Law established in terms of the Rules Board for Courts of Law Act[433] should also apply to the execution process in maintenance matters.[434]

J Evaluation and recommendation

11.22 The Commission supports the proposal to develop special rules to govern the execution process in maintenance cases. This is based on the challenges that the current situation poses to women who use the maintenance system. As stated by Van Niekerk, it appears that most women who seek to execute warrants against maintenance debtors are unable to do so because they cannot afford to pay the security that is required by the sheriff in anticipation of the execution process. Surely, it could not have been the intention of the legislature that the applicants would be faced with such hurdles when making claims for maintenance.

11.23 The Commission recommends that the Act should provide for reasonable and more effective regulations for the execution process, such as using websites and printed media for placing free adverts for the sale of any property with the hope that those processes lead to better returns of attached property. To give effect to this the Commission suggests that

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[430] Ibid 15.
[431] Ibid.
[432] Ibid.
[433] 107 of 1985.
[434] Western Cape Ministry of Social Development submission 5

the Minister should make regulations in terms of section 44 (1) (d) to allow use of free website and printed media to advertise sale of the property attached.

K Interim attachment orders

11.24 There may be instances where the maintenance debtor, although in arrears with maintenance payments and pleading poverty, has transferred money or property to a third party, for no value in return. It will be unfair to the maintenance applicant if the maintenance debtor fails to honour his or her obligation solely on the reason that he has no money or valuable property at hand, while a third party is in possession of a valuable property belonging to the maintenance debtor. In order to address this unfairness, there must be a way in which the applicant can seek assistance from the court.

L Evaluation and recommendation

11.25 The Commission recommends that if it can be established that there is a debt/emolument/property belonging to the maintenance debtor, but in possession of a third party, then the court may make an interim attachment order calling on all parties involved to show cause why the money or property should not be attached in lieu of arrears (and future) maintenance. This will assist the maintenance applicant to secure the debt/emolument/property for attachment which could have been used to satisfy the maintenance order, but it was not yet done. The Commission recommends that section 26 (2) be amended by inserting a provision that deals with interim attachment order.

M Jurisdiction

11.26 Another challenge in the execution process of maintenance is jurisdiction as it applies in section 26 (2). Section 26 (2) (a), as it currently stands, allows for application for enforcement only at the court where the applicant is resident. In an instance where the mother (with whom the children to be maintained previously resided, and where a maintenance order made in her favour has not been complied with) is residing in a different area of jurisdiction than the father (with whom the children now resides, who now institutes

proceedings to claim maintenance from the mother), two concurrent matters with regards to the maintenance of the children need to be instituted in two different courts to be heard by two different magistrates, and to be attended to by two different maintenance officers. It is a common fact that some respondents will deprive the applicant of maintenance in any way they can, only to convince her to allow for the children to stay with the father (as the mother cannot afford to have them staying with her) and then in turn, claim maintenance from the mother.

N Evaluation and recommendation

11.27 The Commission recommends that section 26 be amended to allow for the maintenance court within the area of jurisdiction in which the person to be maintained resides, or in which the person in whose care the person to be maintained is or was, resides, carries on business or is employed, to have jurisdiction.

O Application of *audi alteram partem* principle in maintenance matters

11.28 One of the rules of natural justice is the *audi alteram partem* rule, which is a basic principle of justice that an order should not be made against a party without giving him or her an opportunity to be heard. One should, however, bear in mind that this rule does not apply in all matters. Magistrates presiding over attachment of arrears maintenance matters following the *Louw v Louw*[435] judgement, lost sight of the fact that *audi alterm partem* principle does not apply in all matters. In *NDPP v Gumede*[436] it was stated that the *audi alteram partem* rule does not apply if the following two conditions are satisfied: firstly, that giving the respondent such an opportunity appears likely to cause injustice to the applicant, by reason either of the delay involved or the action which it appears likely that the respondent himself or others would take before the order can be made; and secondly, when the court is satisfied that any damage which the respondent may suffer through having to comply with

[435] 2006 JDR 0474 (NC).
[436] 2020 JDR 0613 MN.

the order is compensatable under cross-undertaking or that the risk of uncompensatable loss is clearly outweighed by the risk of injustice to the applicant if the order is not made.[437] The principle *audi alteram partem* can be displaced only by invoking the overriding principle of justice, which enables the court to act at once when it appears likely that otherwise injustice will be caused.

11.29 The Constitutional Court in *SS v VVS*[438] emphasised that "[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'".[439] The applicant in this case applied for leave to appeal against the judgment of the High Court, Gauteng Division, Pretoria, authorising the issue of a warrant of execution against his immovable property. This warrant was issued in respect of maintenance obligations due by the applicant to the respondent in respect of their minor child. It transpired that the applicant was in substantial arrears with his basic maintenance obligations. This, inevitably, led to the discussion whether it would undermine the court's integrity to hear the dispute while the applicant remained in default with his admitted maintenance obligations. Kollapen AJ, writing for the majority of the Constitutional Court, held that courts are not only entitled, but are rather obliged to deal with the non-compliance with court orders, including maintenance orders in divorce proceedings.[440] It was held that the concession of non-payment of basic maintenance obligations cannot simply pass without consequence and that judicial authority vests in all courts, and obliges courts to ensure that there is compliance with court orders to safeguard and enhance their integrity, efficiency, and effective functioning.[441] 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, 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".[442] In finding that the applicant in this case had not remedied his conduct and was unable to give an adequate explanation as to why he failed to honour his maintenance obligation,

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[437] See para 37.
[438] 2018 (6) BCLR 671 (CC).
[439] Ibid 677G.
[440] Ibid 676 H.
[441] Ibid 676 H – 677 A.
[442] Ibid 678 C.

Kollapen AJ, writing for the majority of the Constitutional Court, dismissed his application for leave to appeal.[443] Thus, in finding that a party to legal proceedings is in contempt of court, ie contemptuous of the authority of the order issued by a court, the court may order as part of the relief granted that, unless the offending party purges his contempt, he or she will face the risk of being precluded from continuing with any litigation in court.

11.30 *Louw v Louw supra* also created a conundrum in the following circumstances: namely where there is an application for attachment of arrears in terms of section 26, a rule *nisi* order is made, and the respondent is personally served. The respondent, however, does not appear in court on the return date, and the rule *nisi* order is made final. Once the attachment is affected, though, the respondent makes application in terms of section 28 (2) or section 30 (2) for suspension, amendment or recession of the order, effectively having the proverbial "second bite at the cherry". This means he is afforded another opportunity to cause a delay in recovering arrears.

P Evaluation and recommendation

11.31 Some liable parents, despite having recourse in terms of section 6 of the Act, which allows for a person liable to maintain to make application for substitution or discharge of a maintenance order on good cause shown, do not apply for such. Some do apply, but if a decision not to enrol such application is made, and they are not happy with the decision of the maintenance officer, they do not take the decision on review. In some other instances substitution/discharge that had been applied for, is dismissed, but not taken on review. Then, when the person in whose favour the order for payment of maintenance was made, applies for enforcement of the amount of arrears maintenance that has not been received, the person liable to maintain will file an affidavit containing all sorts of allegations to question *inter alia* the validity of the maintenance order, to try to pave the way for the maintenance order itself to be revisited, years after the order had been made, and in some instances after some payments have been made after the order was granted. Instead of being dealt with as an urgent matter to provide for (mostly) minor children left without bread on the table, such matters become long drawn-out affairs. The person liable to maintain, by not having made

[443] Ibid 680 G – 681 H.

use of the recourse supplied in law prior to such application for enforcement being lodged (and referred to earlier in paragraph 11.30), should not be allowed to cause unnecessary delay. This is based on the fact that a maintenance court is a creature of statute, and that section 26 only allows for the attachment to be granted, or not.

11.32 Consequently, it is recommended that section 26 be amended by inserting a provision to the effect that if there is no documentary evidence to the contrary, there is *prima facie* proof that the order for payment of maintenance has not been discharged, and there is an arrear amount not yet paid, then it can be argued that the person liable to maintain is in contempt of the maintenance order. The Commission recommends that a new section 26 (2) (c) to (f) be inserted to provide for the following:

1. The Applicant be required to provide documentary evidence to substantiate the application, and that a rule *nisi* cannot be granted in the absence of evidence of an existing court order to pay maintenance and proof of non-payment in terms of such court order.

2. The Application be made *ex parte* and on an urgent basis with a return date of no more than 15 days.

3. (a) Service of any document in terms of this section must be effected immediately on the person affected by it at his or her residence or place of business, employment or study in the prescribed manner by the clerk of the court, a maintenance investigator, the sheriff or a peace officer.

(b) If a document cannot be served as contemplated in paragraph (a), service must be effected by electronic mail, facsimile, short messaging service or other known social media platform of the person who must be served: Provided that proof of service effected in that manner must be provided to the court.

4. The Respondent – should he (or she) wish to oppose the application – be required to provide documentary evidence to substantiate all defences raised.

5. In the absence of documentary evidence to substantiate the defences raised by the Respondent, the rule *nisi* must be made final on the return date.

11.33 It is further recommended that sections 28 (2) and 30 (2) be amended to provide for the application for suspension, rescission or amendment to be done by any person other than the person against whom the order for payment of maintenance has been made – that is to provide for an innocent party caught in the middle - to be able to do an interpleader, if necessary.

Q Application for the stay of a warrant of execution

11.34 The Act does not allow for an application for the stay of a warrant of execution. Therefore, in case where a warrant of execution was issued by a Maintenance Court in terms of section 26 read with section 27, and the respondent in the matter wish to apply for the stay of such warrant, the only recourse in law available to him is to apply for such in terms of section 62 (2) of the Magistrates Courts Act 32 of 1944, before a civil court with jurisdiction. This leaves the unrepresented applicant with a two-folded predicament: First and foremost – that he/she has to defend the matter him-/herself (without the assistance of the maintenance officer) and, secondly – in case where the respondent is residing in a different area of jurisdiction than the applicant, such respondent, in terms of civil court rules, will make use of a court in another district, than the district in which the maintenance matter has been instituted.

R Evaluation and recommendation

11.35 Where the Maintenance Court is empowered by law to hear an application to stay its own warrant (which in terms of section 26 read with section 27 of the Act as it currently stands it is not empowered to do), and the civil court (Magistrates Court) then proceeds on application in terms of section 62 (2) of the Magistrates Court Act, it will be “inconsistent” in terms of section 46 of the Maintenance Act, and consequently the problem (where a maintenance matter is dealt with in a Magistrates Court (civil court), and even sometimes in another jurisdiction altogether) should not occur.

11.36 The Commission therefore is of the view that the Act should make allowance for an application for the stay of a warrant of execution. To make this possible, the Commission

suggests that section 27 of the Act be amended by inserting subsection (8), which is to deal with this issue.

S Insolvency of a maintenance debtor

11.37 The Act, as it currently stands, is silent on whether one can use sequestration as a remedy to enforce a claim for arrear maintenance. In *LV v MV*[444] the applicant applied for the provisional sequestration of the estate of a respondent because the respondent was in arrears and had no sufficient assets to satisfy the claim. The court granted provisional sequestration based on the fact that there is a reason to believe that it will be to the advantage of creditors if the respondent's estate is sequestrated.[445]

11.38 Sequestration may not be the appropriate remedy to enforce a claim for maintenance, as the applicant, being the so-called petitioning creditor, may be liable to contribute if the proceeds of the free residue of the insolvent estate were eventually found to be insufficient to cover the costs of the sequestration. This would be the position even where the applicant did not prove a claim against the insolvent estate. After rehabilitation of the insolvent, all his debts, including the arrear maintenance debts which became due before sequestration, will, in terms of the Insolvency Act,[446] be discharged. On the contrary, the international trend is to render maintenance debts non-dischargeable and hence exclude them from the eventual debt discharge, which is usually granted at the conclusion of insolvency proceedings.

T Evaluation and recommendation

11.39 The Commission submits that claims for maintenance should enjoy priority directly after the sequestration costs. The Commission recommends that maintenance creditors with claims for arrear or future maintenance should not be held liable for contribution where the free residue is insufficient to cover the sequestration costs, and such creditors should be

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[444] 2018 JDR 1062 (GP).
[445] Ibid 13 para 7.3
[446] 24 of 1936.

relieved of the obligation of proving claims in the usual way prescribed by the Insolvency Act. The Commission further submits that comprehensive discharge of insolvent debts should not include “sensitive debt” such as maintenance debt because a discharge of the maintenance debt may constitute an infringement of fundamental human rights and be unconstitutional.

11.40 To give effect to these submissions, the Commission recommends that the Act should insert a provision after section 30 which specifically deals with the insolvency of a maintenance debtor.

U Amendments proposed to the Act in terms of this chapter of the Discussion Paper

In terms of the various evaluations and recommendations in this chapter, the following changes to the Act under review are proposed:

[ ] Words in bold type in square brackets indicate omissions from existing enactments.

_____ Words underlined with a solid line indicate insertions in existing enactments.

It is recommended that section 8 (1) of the Act be amended as follows:

(1) A magistrate may, prior to or during a maintenance enquiry, or prior to or during attachment of future maintenance in terms of section 25A, or prior to or during civil execution in terms of section 26, 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) he 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.

It is recommended that section 26 (1) and (2) of the Act be amended as follows:

(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**[.]**; or

(iv) by any other remedy as the court deems just and equitable in the circumstances of the case to encourage a maintenance defaulter to comply with his or her duty of support.

(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**,** working, doing business, or where the child to be maintained 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)**[;]** or

(iv) for any other remedy as the court deems just and equitable in the circumstances of the case to encourage a maintenance defaulter to comply with his or her duty of support.

(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**[.]**; and

(iii) proof of non-payment.

(c) The person in whose favour the maintenance order was made may request the maintenance officer to, prior to the application being made, investigate the complaint in order to determine possible assets susceptible for attachment.

(d)(i) An application by a person in whose favour a maintenance order was made for the issuing of an interim attachment order may be made *ex parte* and on an urgent basis.

(ii) The court must as soon as reasonably possible in the circumstances consider an application submitted to it in terms of paragraph (d)(i).

(iii) The interim attachment order must call upon the respondent to show cause on the return date specified in the order, why a final order should not be issued.

(iv) The return date referred to in paragraph (iii) may not be more than 15 days after the date that the interim attachment order had been issued.

(v) Upon the issuing of an interim attachment order,

(aa) a of copy of the application referred to in section 26 (1); and

(bb) the record of any evidence noted in terms of section 26 (2); and

(cc) the interim attachment order;

must be served on the respondent, in the prescribed manner, by the maintenance officer, investigator, sheriff or peace officer by hand, at the physical address for service specified in the application; or via electronic mail, facsimile, short messaging service or other known social media platform of the person who must be served; provided that proof of service effected in that manner must be provided to the court.

(e) (i) If the respondent does not appear on a return date contemplated in subsection (d) (iv) and if the court is satisfied that-

(aa) service has been effected on the respondent; and

(bb) the application contains documentary evidence that the respondent has failed to make any particular payment in accordance with a maintenance order;

the court must issue a final attachment order.

(ii) A copy of the final attachment order made in respect of any person not present at the hearing must be delivered or tendered, as soon as may be practical in the circumstances, to him or her by any maintenance officer, police officer, sheriff or maintenance investigator and the return showing that the 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 attachment order in question.

(iii) If the respondent appears on the return date in order to oppose the issuing of the attachment order, the court must proceed to hear the matter and-

(aa) consider any evidence previously received in terms of section 26 (2); and

(bb) consider such further affidavits or oral evidence, both from the respondent, and the applicant in rebuttal, which evidence must form part of the record of the proceedings.

(iv) The respondent in opposing the application must provide documentation in support of all defences raised.

(v) If the respondent appears on the return date contemplated in subsection (ii), but the applicant does not appear, the court must extend the interim order and the return date and the clerk of the court must notify the applicant of the extended date; Provided that the court may discharge the interim order if the applicant does not appear on the extended date.

(vi) If neither the applicant nor the respondent appears on the return date contemplated in subsection (d) (iv), and if the court is satisfied that—

(aa) service has been affected on the respondent; and

(bb) the application contains documentary evidence that the respondent has failed to make any particular payment in accordance with a maintenance order;

the court may extend the interim order and the return date for the hearing of oral evidence, and the clerk of the court must notify the parties of the extended date; or the court may discharge the matter.

(vii) The court may, after consideration of the evidence contemplated in subsection 26 (2) (b) (vi) (bb) -

(aa) make an order confirming the interim attachment order referred to in subsection 26 (2) (d) (iii);

(bb) vary such interim order, if it appears to the maintenance court that good cause exist for such variation, and issue a final order for the amount the court found to be in arrears, and for the attachment of property, emolument or debt the court so direct; or

(cc) set aside the interim attachment order if it appears that good cause exist for such setting aside.

(viii) An interim order issued in terms of this section remains in force until it is set aside by a competent court.

(f) In the absence of documentary evidence to the contrary, the attachment must succeed if documentary proof exists that –

(i) the order for payment of maintenance has not been varied or discharged,

(ii) no application for variation or discharge was lodged prior to the application for enforcement being lodged by the applicant, and

(iii) the amount of maintenance claimed has not been received by the person in whose favour the order was made.

(iv) The court may not refuse to issue an attachment order merely on the grounds that other legal remedies are available to the applicant.

Furthermore, it is submitted that section 26 be amended by inserting the following subsection after the new subsection (5) (making provision for automatic adjustment):

(6) Any property previously held in the name of the person against whom an order for payment of maintenance has been made, but to which the rights thereto, since the date the order was made, were transferred or abandoned by way of delivery, payment, release, compromise or donation, in terms of any contract and not for value, shall, in the absence of proof to the contrary, be deemed to belong to the person against whom the order for payment of maintenance has been made, and be liable for attachment, on declaratory order by the maintenance court.

It is also submitted that section 26 be amended by inserting the following subsection after the new subsection (6) to provide for sections 7 to 14 to apply in case of attachment of arrears so as to make provision for investigation and witnesses to be subpoenaed, if necessary :

(7) Sections 7 to 14 shall, with the necessary changes, apply in case of attachment of arrear maintenance.

Furthermore, it is submitted that section 27 be amended by inserting the following subsection after the new subsection (7) (making provision for automatic adjustment):

(8) Pending the finalisation of an application in terms of subsection (3) read with subsections (4) and (5), the maintenance court may, on good cause shown, stay the warrant of execution issued by itself.

It is recommended that section 28 (2) (a) be amended by inserting the following:

(2)(a) An order under this section may at any time, on application by any person other than the person against whom the order for payment of maintenance has been made, on good cause shown, be suspended, amended or rescinded by the maintenance court.

It is recommended that section 30 (2) (a) be amended by inserting the following:

(2)(a) An order under this section may at any time, on application by any person other than the person against whom the order for payment of maintenance has been made, on good cause shown, be suspended, amended or rescinded by the maintenance court.

It is also submitted that the following new section should be inserted after section 30:

30A. Insolvency of a maintenance debtor

(1) When a maintenance debtor is sequestrated, any arrear maintenance or future maintenance payable by such maintenance debtor shall be regarded as a preferent debt.
(2) Upon the rehabilitation of a maintenance debtor who had been sequestrated, any arrear maintenance or future maintenance payable by such maintenance debtor shall be excluded from the eventual discharge of debts which occurs after the rehabilitation of such maintenance debtor.

Lastly, it is suggested that section 44 (1) (d) should be amended by inserting the following at the end of this subsection:

(d) as to the execution of maintenance or other orders of maintenance courts, including regulations in respect of sales in execution.

CHAPTER 12: HOLDING A FINANCIAL INQUIRY

A Background

12.1 The Department raised a concern about the absence in the Act of a provision to deal with holding a financial enquiry. The reading of the Act indicates that various provisions in the Act do indeed provide for a financial inquiry. These are sections 6 (2); 7 (1) (b) (ii); 7 (2) (e) (ii); 8 (1) (b); and 9 (1). The specific provisions are set out below.

Complaints relating to maintenance

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, carries on business or is employed with a view to enquiring into the provision of maintenance for the person so to be maintained.

Investigation of complaints

7(1)…In order to investigate any complaint relating to maintenance, a maintenance officer may –

…

(b) gather information concerning–

…

(ii) the financial position of any person affected by such liability;

…

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

…

(e) gather information concerning–

…

(ii) **the financial position of any person affected by such liability**;

…

Examination of persons by maintenance officer

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–

…

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

…

Maintenance officer may cause the witness to be subpoenaed

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 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 any 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. …(emphasis added)

12.2 The enquiry stage in the maintenance process requires full disclosure of the financial status of the parties involved.[447] At this stage, the person from whom maintenance is being claimed has the duty to disclose his or her financial means, and to assist the authorities in determining the amount that he or she must pay in respect of maintenance. The

[447] Van Zyl L *Handbook of the Law of Maintenance* at 63.

maintenance officer is empowered in terms of the Act to subpoena any person to appear before the maintenance court to produce documentation or statements relating to the maintenance debtor's financial position.[448] The Act further empowers the court holding the inquiry to cause any person to be subpoenaed as a witness, or to be examined even where that person was not subpoenaed as a witness.[449]

12.3 The Department's concern that insufficient provision is made in the Act for holding a financial enquiry may be attributed to the manner in which maintenance cases have generally been investigated, and the manner in which maintenance amounts have been calculated. Case law illustrates the challenges faced by the courts, especially with regard to enforcing maintenance orders. *S v November*[450] is a good case to illustrate how the courts still struggle with issues related to the financial enquiry. All four cases heard by the court under the same reference number demonstrate how the justice system fails children who rely on maintenance.[451] In all these cases, no clear reasons were given for the defaulters' failures to meet their maintenance obligations, or for the courts having set the repayment of arrears at a low rate.[452] The court lamented the failure by the presiding officers to conduct proper financial enquiries and their having resorted to accept whatever the accused (maintenance debtors) offered to pay.[453]

B Responses to the issue paper

12.4 The Western Cape Ministry of Social Development argues that the provisions of the Act that deal with financial enquiries appear to be sufficient and problems can be attributed to lack of capacity and training of presiding officers.[454] Van Niekerk also shares the same sentiments and suggests that the only possible improvement is to make rules pertaining to

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[448] Section 9.
[449] Section 10.
[450] 2006 1 SACR 213 (C).
[451] S Hoctor and M Carnelley "Maintenance Arrears and the Rights of the Child *S v November*" (2017) 1 *TSAR* 205.
[452] Ibid 202.
[453] Ibid
[454] Western Cape Ministry of Social Development submission 5.

the discovery of documents.[455] He suggests that a failure to discover documents should permit the court to draw a negative inference against a party who failed to make discovery.[456]

C Evaluation and recommendation

12.5 The Commission submits that the Department's concern is unsubstantiated as various provisions in the Act (referred to above) do provide for the holding of a financial enquiry. The problem might rather be with the implementation of the provisions that deal with financial enquiries.

[455] Van Niekerk submission 14.
[456] Ibid.

CHAPTER 13: COST ORDERS

A Background

13.1 The Department pointed out that the Act does not give maintenance courts the power to make cost orders, except for costs associated with the service of process (and obtaining the contact information of persons through electronic communications service providers).[457] The Department, however, believes there is a need to give maintenance courts the power to award cost orders, such as punitive costs, against maintenance debtors who abuse court processes with the intention of frustrating claims instituted against them. The proposal by the Department is premised on the fact that if cost orders are permitted for the service of process (and obtaining the contact information of persons through electronic communications service providers), there is no reason why the same principle cannot be extended to costs for the abuse of processes in the maintenance system. The Department thus proposes that the Act should make provision for cost orders against people who abuse court processes.

13.2 However, the Maintenance Act was promulgated with the intention to make the process of claiming maintenance simpler, speedier, cheaper and more effective. Although costs awards against parties who frustrate the maintenance process is important and may deter maintenance debtors/defaulters from abusing the system, Wamhoff and Burman argue that it is beneficial that cost orders are currently unavailable in the maintenance court, as this prevents expensive formal representation.[458] They further argue that if cost orders were to be made and the applicant's attorney's fees are driven up because of the respondent's endless postponements, then the respondent should be required to pay the costs.[459]

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[457] Section 20.
[458] S Wamhoff & S Burman "Parental Maintenance for Children: How the Private Maintenance System might be Improved*" Social Dynamics* 28:2 (2002) 161
[459] Ibid.

13.3 There are indeed instances where the maintenance debtor may be responsible for the delay. However, at times a delay might also be occasioned by the complainant. In the latter instance, the person (usually a woman) claiming maintenance may be required to pay for wasted costs, which are sometimes charged at a hefty rate if the maintenance debtor is represented by an attorney or advocate. Very often, the debtor does have such representation.

13.4 There needs to be consensus on whether cost orders would be appropriate in all maintenance matters, where the affected parties often rank among the most vulnerable in our society. For example, it would not be fair to require a child claimant to be penalised with a cost order if that child is unable to attend court due to lack of funds. The same argument can be made about poor women complainants who depend solely on maintenance money for their survival. If a cost order is issued against such complainants there will be no chances of recovering such costs.

13.5 Despite the possibility that cost orders may disadvantage complainants, other pieces of legislation do make provision for the cost awards. For example, the Domestic Violence Act[460] provides that "the court may only make an order as to costs against any party if it is satisfied that such party has acted frivolously, vexatiously or unreasonably."[461]

13.6 If a similar provision for an order as to costs is inserted in the Act under review, attention must further be given to the fact that in most maintenance matters, the applicant/complainant does not have a legal representative. Therefore, even if the respondent is found to have acted "frivolously, veraciously or unreasonably" and an order as to costs is made, it will mean nothing, as the applicant is not represented and would not have incurred any legal costs for which the respondent could be held accountable. Furthermore, there are considerably more respondents than applicants who are represented in maintenance matters. In every one of those cases, the respondent will then potentially be able to apply for a cost order against the applicant, who might be unable to pay such costs and by reason thereof be discouraged to approach the maintenance court with an

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[460] Act 116 of 1998.
[461] Ibid, section 15.

application. If orders as to costs are available in the maintenance court it might deter applicants/complainants, who desperately need maintenance, to approach the maintenance court.

B Responses to issue paper

13.7 Van Niekerk argues that there is definitely a need for the maintenance court to make cost orders in maintenance matters as the process is being abused mostly by maintenance debtors.[462] He further argues that the power to award costs should be worded along the lines of the empowering provision in the Domestic Violence Act.[463] He warned that to avoid practical difficulties that are encountered in the Domestic Violence Act, the maintenance court should be empowered to, in its discretion, award a specific amount of costs, alternatively to set a prescribed table for the computation of such costs or prescribe which table of the Magistrates' Court rules should be applied.[464]

13.8 Greyvenstein also supports the view that there is a need for the maintenance court to make cost orders in maintenance matters. He argues that cost orders should also be made when the parties fail to participate in mediation.[465]

13.9 The Western Cape Ministry of Social Development does not support the awarding of costs against parties in maintenance matters at it will have the unintended consequences of taking money from a maintenance defaulter which could have been paid towards the maintenance of a child.[466] They also argue that awarding of costs may deter applicants who apply on behalf of minors to proceed with claims.[467]

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[462] Van Niekerk submission 15.
[463] Ibid 16.
[464] Ibid.
[465] Greyvenstein submission 2.
[466] Western Cape Ministry of Social Development submission 6.
[467] Ibid.

C Comparative study

13.10 The Namibian Maintenance Act of 2003[468] has a provision that deals with orders as to costs where wasted costs were incurred during the enquiry due to a party's failure to attend an enquiry without a good cause. The section reads as follows:

> 20. Orders as to cost
>
> (1) The maintenance court holding a maintenance enquiry may, having regard to the conduct of the persons involved in the enquiry so far as it may be relevant, make such an order as the court may consider just relating to the costs of the service of process and wasted costs due to a party's failure without good cause to attend an enquiry.
>
> (2) In making an order contemplated in subsection (1), the court must have regard to the conduct and means of the person against whom the order for costs is to be made.
>
> (3) An order for payment of costs made under this section has the same effect as a civil judgment and it may be enforced by any method specified in part VII.

13.11 From the reading of the section it is clear that Namibia gives the maintenance courts powers to deal with anyone who may abuse the maintenance processes in a clear and coherent manner. Cognisance should also be taken of the means of the person against whom an order for costs is made. The courts will therefore be prevented from making a costs order against an applicant who cannot afford to pay such costs.

D Evaluation and recommendation

13.12 The Commission considered the Namibian Act's provision and all responses to the issue paper, but decided to make no changes to the Act as regards cost orders. The Commission is of the opinion that maintenance complainants should in no way be

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[468] Section 20 of the Namibia Maintenance Act.

discouraged from approaching the maintenance court. The Commission is of the view that if the Act were to provide for cost orders, this will not benefit those the Act was supposedly legislated for, namely the vulnerable.

CHAPTER 14: TRUSTS

A Background

14.1 The Department has identified the establishment of trusts as an area requiring attention. In some instances, trusts have been established to allow a maintenance debtor to evade his or her maintenance obligations.[469] In *VZ v VZ*[470] the first respondent was in arrears with his maintenance obligation. In an attempt to attach his assets it was found that he had no assets in his personal name as he placed all his assets into four trusts.[471] The applicant sought an order for payment of arrears and for piercing the corporate veil of the trusts. Her argument was that the trusts were established as the *alter ego* of the first respondent and that he used the trusts to place his assets out of the reach of the applicant.[472] The court referred to the fact that trusts are well recognised as permissible vehicles for estate and financial planning and that they may provide a shelter for their beneficiaries.[473] The court, however, noted that in exceptional circumstances a court may be entitled to pierce or lift the corporate veil where the corporate entity is the *alter ego* of the controlling person.[474] The court found that the evidence showed that the first respondent regarded all the assets, income and expenses of the four trusts as his own and concluded that he had therefore treated the trusts as his *alter ego*. The court then made an order that the first respondent had to pay all arrears due and declared that all the assets of the trusts were to be deemed to be the assets of the first respondent.

14.2 In terms of South African law, trusts are regulated by the Trust Property Control Act 57 of 1988. The Trust Property Control Act defines a trust as follows:

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[469] See the section dealing with determination of maintenance wards at footnote 196 above.
[470] (2011/5122) [2014] ZAGPJHC 42 (14-02-2014).
[471] Ibid para [2].
[472] Ibid para [23].
[473] Ibid para [9]
[474] Ibid.

> Means the arrangement through which the ownership in property of one person is by virtue of a trust instrument made over or bequeathed–
>
> (a) To another person, the trustee, in whole or in part, to be administered or disposed of according to the provisions of the trust instrument for the benefit of the person or class of persons designated in the trust instrument or for the achievement of the object stated in the trust instrument; or
> (b) To the beneficiaries designated in the trust instrument, which property is placed under the control of another person, the trustee, to be administered or disposed of according to the provisions of the trust instrument for the benefit of the person or class of persons designated in the trust instrument or for the achievement of the object stated in the trust instrument,
>
> but does not include the case where the property of another is to be administered by any person as executor, tutor or curator in terms of the provisions of the Administration of Estates Act, 1965 (Act No. 66 of 1965)

14.3 The Trust Property Control Act defines trust property as "movable or immovable property, and includes contingent interests in property, which in accordance with the provisions of the trust instrument are to be administered or disposed of by a trustee." On the reading of the Trust Property Control Act, it is unclear what the object of creating a trust is or should be. From the current wording, one may deduce that a trust can be created for any purpose as long as it complies with the requirements of the Act.

14.4 The common law position on parental support, which is restated in the Act, is that parents have the obligation to support their children in accordance with the parents' "means".[475] "Means" has been interpreted by various authors to include, among other things, income derived from employment,[476] but the use of this term suggests that something broader than earnings (ie remuneration for work) is intended. The word "means" may include any possessions that parents own, where such possessions may be considered or realised for the maintenance of their children.

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[475] Section 15 (1) (ii) and Section 40 (3) (a) of the Maintenance Act.
[476] Carnelley and Easthorpe 2009 *Obiter* 373–374.

B Responses to issue paper

14.5 Van Niekerk argues that High Courts have in the past lifted the corporate veil of trusts where such entity is used as the *alter ego* of an individual or otherwise intended to be a smokescreen to hide some thing or the other.[477] He is of the view that maintenance courts have the same powers and that it will be helpful if the Act can specifically refer to this power in respect of orders for current, arrear and future maintenance.[478] The view is supported by the Western Cape Ministry of Social Development and they argue that if it can be proven that the trust was established solely for the purpose of avoiding liability for maintenance, then such trust property may be attached.[479]

C Evaluation and recommendation

14.6 The Commission notes that trust property belongs to the trust. The Commission, however, recommends that if it can be established that there is an abuse of the trust form, a court may make an order to pierce the corporate veil of the trust and regard the assets of such trust as that of the maintenance debtor or defaulter. Trust property may therefore be taken into account if there is any evidence that the maintenance debtor controlled the trust and but for the trust he or she would have acquired and owned the assets in his or her own name.[480] Such kinds of trusts are referred to as alter ego trusts as opposed to sham trusts.

14.7 If it is found that a trust is a sham, the result is that no effect will be given to the transaction and the "founder" will remain owner of the "trust assets" and neither the "trustee(s)" nor the "beneficiaries" will acquire any rights with regard to these assets. In the context of maintenance matters, it will mean that where a trust is found or declared to be a

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[477] Van Niekerk submission 15.
[478] Ibid.
[479] Western Cape Ministry of Social Development submission 5.
[480] See also De Jong, Le Roux-Bouwer and Manthwa "Attacking trusts upon divorce and maintenance matters: Guidelines for the road ahead (1) 2017 (80) *THRHR* 203.

sham, the "trust assets" should be included in the maintenance debtor's personal estate.[481] The fact of the matter is that no trust ever came into existence.[482]

14.8 As regards the consequences of a successful call on the remedy of going behind the trust form or piercing the trust veil (sometimes also referred to as the practice of treating the trust as the *alter ego* of the controlling person), it should be noted that both the trustees and the beneficiaries will acquire rights with regard to the trust assets because a valid trust exists.[483] However, our common law provides the remedy of going behind the trust form or piercing the trust veneer to a third party who has been affected by an unconscionable or dishonest abuse of the trust form.[484] According to Binns-Ward J in *Van Zyl v Kaye*[485] "[t]he remedy might entail the making of a declaration that a trust asset shall be made available to satisfy the personal liability of a trustee, but it does not detract from the character of the asset as one of the trust and not that of the trustee; the existence of the trust remains acknowledged". The remedy is therefore used only for a particular purpose and for all other purposes the trust's separate existence remains unaffected.[486] In the context of maintenance matters, this would mean that a court can order that the value of certain or all trust assets should be added to a trustee's private assets for purposes of determining the extent of his or her estate.

14.9 In this regard, De Jong, Le Roux-Bouwer and Manthwa urge the courts not to shy away from their duty to give due consideration to any *alter ego* allegations and use their power to pierce the trust veil in maintenance matters to curb the abuse of the trust form.[487] They further urge the courts to be vigilant about finding that a trust in question is a sham

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[481] See also De Jong, Le Roux-Bouwer and Manthwa "Attacking trusts upon divorce and maintenance matters: Guidelines for the road ahead (1) 2017 (80) *THRHR* 203.
[482] De Waal 2012 *The Rabel J of Comp and Int Private L* 1097.
[483] De Waal 2012 *The Rabel J of Comp and Int Private* L 1097.
[484] See *Van Zyl v Kaye* para 22; *RP v DP* paras 15-21, 29, 31, 35, 41, and 56. See also 3.6 below for a discussion of *RP v DP*.
[485] Par 21.
[486] De Waal 2012 *The Rabel J of Comp and Int Private* L 1097.

where it is clear that the founder had no intention of creating a trust, but acted with a purpose of placing all assets out of the reach of a maintenance creditor.[488]

14.10 The Commission feels that specific provision should be made in the Act under review for courts to order that the value of certain or all trust assets should be added to a maintenance debtor's private assets for purposes of determining the extent of his or her means. Such inclusion might signal the intention by legislature to allow a maintenance applicant to identify aspects of wealth, beyond earnings, that would enable a maintenance debtor to support his or her children.

14.11 The Commission also suggests that the list of instruments in section 26 (4) that are liable to be attached or subjected to execution should be extended to include the assets of alter ego trusts. Alternatively, the list should be broadened to include not only income but also aspects such as capital, in the form of savings, assets, and assets donated away. As indicated in the section dealing with future maintenance, the Commission submits that the list of instruments liable for attachment for arrear maintenance should be extended so that it is similar to the corresponding list for future maintenance. To give effect to this the Commission recommends that sections 1, 16, 26, 27, 29 and 30 of the Act be amended as follows:

[ ] Words in bold type in square brackets indicate omissions from existing enactments.

_____ Words underlined with a solid line indicate insertions in existing enactments.

Section 1

It is recommended that the following definition is inserted:

"*alter ego* trust" means a valid trust but where there may be a justification to disregard the ordinary consequences of its existence for a particular purpose – such as where the separation of ownership and/or control from enjoyment has been debased or is being abused and a party treats the property of the trust as if it were his or her personal property and use the trust essentially as his or her alter ego.

Section 16

It is recommended that the following subsection be inserted after the new subsection (1A):

(1B) If a trust can be regarded as the *alter ego* of any person proved to be legally liable to maintain any other person, the court may, prior to making an order contemplated in subsection (1), make an order to disregard the separate legal personality of such trust.

It is recommended that section 16 (2) (a) be amended as follows:

(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);

(i) 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 or the trustee(s) of a trust upon a finding that the separate legal personality of the trust must be disregarded in the specific circumstances of a case, 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 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.

Section 26

It is recommended that section 26 (4) be amended as follows:

(4) Notwithstanding anything to the contrary contained in any law, <u>any assets held in an *alter ego* trust,</u> 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.

Section 27

It is recommended that section 27 (1) is amended as follows:

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, <u>or of a trust if the court makes an order that the separate legal personality of a trust veil must be disregarded in the specific circumstances of a case,</u> and, if the movable property is insufficient to satisfy such order, then against the immovable property of the latter person or <u>the trust in question</u> 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.

Section 29

It is recommended that the heading of section 29 be amended by inserting the following words at the end of the heading:

Notice relating to attachment of emolument and other orders.

It is further recommended that section 29 (4) is amended as follows:

(4) If any employer or trust 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 or trust in respect of any amount which that employer or trust has so failed to pay, and the provisions of this Chapter shall, with the necessary changes, apply in respect of that employer or trust, subject to that employer's or trust'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).

Section 30

It is recommended that section 30 (1) is amended by insertion of the underlined words:

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, or to a trust if the court makes an order that the separate legal personality of a trust must be disregarded in the specific circumstances of a case, to the amount necessary to cover the amount which the **[latter person]** maintenance defaulter 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.

CHAPTER 15: REVIEW OF MAINTENANCE MATTERS

A Background

15.1 The Act as it stands is silent with regard to maintenance matters being taken on review. Section 24 of the Supreme Court Act[489] provides for matters to be taken on review in the following circumstances:

> **24. Grounds of review of proceedings of inferior courts.**
>
> (1) The grounds upon which the proceedings of any inferior court may be brought under review before a provincial division, or before a local division having review jurisdiction, are -
>
> (a) absence of jurisdiction on the part of the court;
>
> (b) interest in the cause, bias, malice or the commission of an offence referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004, on the part of the presiding judicial officer;
>
> (c) gross irregularity in the proceedings; and
>
> (d) the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.

15.2 There are some cunning respondents who exploit section 24 of the Supreme Court Act and use the provision to take a maintenance matter on review to thwart processes of attachment. For example, they obtain a rule *nisi* order on review, which, due to the person to whom the maintenance is payable neither being able to afford legal representation, nor being able to secure assistance from Legal Aid, and the laws not specifically providing for an advocate affiliated with the Office of the Director of Public Prosecution (DPP) to provide input, might become final, correctly so or not. This situation leaves the person in whose

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[489] 59 of 1959.

favour the maintenance order was made, effectively without any recourse in law. There has been a longstanding arrangement in High Courts, though, that the Registrar will notify the Office of the DPP in case of a maintenance matter being taken on review, in order for an advocate affiliated with the Office of the DPP, to supply input,[490] as *amicus*, in case where the respondent cannot afford legal representation.

15.3 The task of an *amicus curiae* is to present the best possible case for the unrepresented party or interest. Traditionally, the most common form of *amicus curiae* is a person who appears at the request of the court to represent an unrepresented party or interest. In such cases, the role of the *amicus* does not differ in principle from that of the paid legal representative of a party. A second form of *amicus curiae* responds to a request by a court for counsel to appear before it to provide assistance in developing answers to novel questions of law which arise in a matter, or (less commonly) where a person asks leave to intervene for this purpose. In such cases, the *amicus* does not, ostensibly, represent a particular interest or point of view. A third common type of *amicus curiae* takes the form of the Law Society or Bar Council's intervention in an application for the admission of a legal practitioner. The new constitutional order introduced a fourth form of *amicus curiae*: a non-party requests the right to intervene so that it might advance a particular legal position which it has itself chosen. The *amicus* brings to a matter a far more informed decision and might lead a court to decide a matter differently than it would have otherwise, conscious of its impact through the "multidimensional and anti-foundational representation of people's lives".[491] Ultimately, *amicus curiae* participation sensitises a court in its decision-making process and ensures that a court is better informed when making its decision.

15.4 With regard to appeals against a maintenance order, an advocate affiliated with the Office of the DPP, will be tasked to make a submission to the High Court in case where the respondent cannot afford legal representation: This is provided for in section 25 (1) of the Act under review and the regulations under it as follows:

Section 25 Appeals against orders

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[490] See in this regard *Govender v Manikum* 1981 (1) SA 1178 (N).
[491] G Budlender, Constitutional Law of SA, Volume 1, Chapter 8 https://constitutionallawofsouthafrica.co.za/ (accessed on 10 February 2021)

(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.

And

Regulation 15(7)

15 Appeals against Orders

(7)(a) If the person in whose favour a maintenance order may be or was made notes an appeal or cross-appeal, as the case may be, and he or she cannot afford legal representation he or she shall inform the clerk of the maintenance court accordingly.

(b) The clerk of the maintenance court shall-

(i) inform the Director of Public Prosecutions concerned immediately of the appeal or cross-appeal and that the person in whose favour the maintenance order was made cannot afford legal representation;

(ii) on receipt of the statement of the presiding officer referred to in subregulation (3)[492] furnish the Director of Public Prosecutions concerned with a copy of all relevant documentation; and

(iii) within seven days of the receipt by him or her of a notice that the appeal has been set down for hearing notify the Director of Public Prosecutions concerned accordingly.

15.5 As the clerk of the court has to notify the Office of the DPP, the same will be indicated on documentation forwarded to the Registrar of the High Court. The appeal matter will then

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[492] Subregulation (3) provides as follows:
The officer who presided at an enquiry shall –
(a) within 14 days of the noting of an appeal; or
(b) if the proceedings at the enquiry were taken down or recorded in shorthand or by mechanical means, within 14 days after a transcription of the shorthand notes or mechanical record of the proceedings has been placed before such officer by the clerk of the maintenance court concerned, transmit to the clerk of the maintenance court a statement in writing setting out –
(i) the facts he or she found to be proved;
(ii) his or her reasons for any finding of fact specified in the notice of appeal as appealed against; and
(iii) his or her reasons for any ruling on any question of law or for the admission or rejection of any evidence so specified as appealed against.

be referred to the Office of the DPP for an advocate at the Office of the DPP to submit Heads of Argument, just like in case of criminal appeals. It therefore seems that the Minister tried to make amends in the Regulations, instead of including such provision in the Act. However, it is generally impermissible to use Regulations created by a Minister as an aid to interpret the intention of the legislature in an Act of Parliament.[493] The difference between the Act and Regulation is that an Act is legislation passed by Parliament. Acts can only be amended by another Act of Parliament. Acts set out the broad legal principles. Regulations are commonly known as "subsidiary legislation" and require publishing in the Government Gazette to become legal. These are the guidelines that dictate how the provisions of the Act are applied. Regulations can only be amended by a notice published in the Government Gazette. Regulations cannot be used to interpret the Act.[494] Generally, if it is a statement of law that is needed, then it is the Act that is required, if it is implementation detail, then the Regulation is required.

B Evaluation and recommendation

15.6 Unfortunately, the process whereby an advocate affiliated with the Office of the DPP is called upon for input, does not always happen. This does not seem to be in keeping with the spirit of the Maintenance Act that a complainant for whose benefit the machinery of the Maintenance Act has been created should be left to his or her own devices like a respondent in an ordinary civil appeal when an appeal against a maintenance order is noted.[495]

15.7 The Commission is of the view that the same protection afforded in the case of appeals should also apply in the case of reviews of maintenance matters. In order to achieve this, it is therefore recommended that section 25 of the Act be amended to include reviews against maintenance orders, as well as compel a maintenance officer to inform the Office of the DPP of such appeals and reviews and furnish the DPP with all documents so that an

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[493] *Rossouw v FirstRand Bank Ltd* 2010 (6) SA 439 (SCA) para 24. See also *Sebola v Standard Bank of SA Ltd* 2012 (5) SA 142 (CC) para 62: "…the Regulations cannot be used to interpret the Act."
[494] *Sebola v Standard Bank of SA Ltd* 2012 (5) SA 142 (CC) para 62.
[495] *Fernandes v Laubscher* 1980 (3) SA 765 (SWA) C.

advocate can make a submission to the High Court, in case where a maintenance applicant cannot afford legal representation.

[ ] Words in bold square brackets indicate omissions from existing enactments.

_____ Words underlined with a solid line indicate insertions in existing enactments.

It is recommended that section 25 is amended as follows:

25 Appeals and reviews 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,

(a) appeal against such order to the High Court having jurisdiction, or

(b) in circumstances provided for in terms of section 24 of the Supreme Court Act, bring an order made under this Act under review.

(2) On appeal, or review, 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,]** and unless the appeal or review is noted against an order for payment of maintenance in terms of section 16, prior to which a finding that the appellant is legally liable to maintain the person in whose favour the order was made**[.]**, the appeal or review under this section shall not suspend the payment of maintenance in accordance with the order in question.

(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.

(5) (a) If a person in whose favour a maintenance order has been made receives notice of an appeal or a review, and he or she cannot afford legal representation, he or she shall inform the maintenance officer of the maintenance court accordingly.

(b) The maintenance officer shall-

(i) inform the Director of Public Prosecutions concerned immediately of the appeal or review, and that the person in whose favour the maintenance order was made cannot afford legal representation, and

(ii) furnish the Director of Public Prosecutions concerned with a copy of all relevant documentation to enable the Director of Public Prosecutions to provide submissions to the Court hearing the appeal or the review.

CHAPTER 16: LIVING ANNUITIES AND/OR SIMILAR PRODUCTS

A Background

16.1 The Act does not include living annuities when it refers to assets in the estate of a maintenance debtor. This creates a challenge in situations where a maintenance debtor reaches the age of 55, and agrees for monies held in the retirement annuity fund to be transferred into a fund called a "living annuity". A "living annuity" in terms of the agreement between the retiree and the Fund, allows for the capital amount to become the "property" of the Fund. In turn, the Fund pays the retiree a percentage (between 2.5 and 17.5% of the capital amount) as income. By contractual arrangement between the Fund and the retiree (which contractual arrangements are based upon provisions of the Income Tax Act[496]), this income can be paid as a yearly lump sum, or in monthly instalments. Furthermore, the retiree has the right to dictate the percentage payout and can make changes to this percentage annually on the anniversary date of the policy. Thus, he or she can, for example, have 17.5% of the capital lump sum as a payout in year 1, and then for year 2 choose to have a payout of 2.5% of the capital lump sum only. The product also allows for a lump sum to be paid to a beneficiary named by the retiree, on death of the retiree, effectively bypassing any attachment of debt or an attachment for future maintenance that can be done.

16.2 Living annuities has been developed by insurance companies specifically to counter attachments of debt against retirement annuities. With regard to a retirement annuity, it is possible to attach from the capital lump sum for arrear maintenance, but this cannot be done from a living annuity. This is because in a living annuity the capital lump sum "does not belong" to the maintenance debtor. Consequently, it will only be possible to make a garnishee order for maintenance to be deducted from the benefit paid to the person liable to maintain. Attachment of arrear maintenance will be possible only in circumstances where the benefit due to the person liable to maintain is sufficient to accommodate the amount due

[496] 58 of 1962.

for arrears as well as the amount due for monthly maintenance. In circumstances where the person liable to maintain has opted for an annual pay-out of the benefit, an order for the Fund to pay monthly maintenance on behalf of the person liable to maintain will not be possible. Furthermore, a maintenance debtor will, annually on the anniversary date of such living annuity, be able to reduce the percentage pay out to as little as 2.5%, which will probably thwart payment of an order made in terms of section 16 (2).

B Recent South African case law

16.3 The issue of whether living annuity form part of the assets of the estate was brought before the court in *ST v CT*.[497] In this case the appellant appealed against the decision of court a *quo,* which ruled that a living annuity must be included as an asset of the appellant for purpose of calculating the accrual. The Supreme Court of Appeal held that the High Court erred by including a living annuity as part of the appellant's accrual. The SCA then held that only a monthly income derived by the appellant forms part of his total income, which has a bearing on his means to pay maintenance, if any to the respondent.[498] The SCA argued that capital value of the living annuity cannot be included as part of appellant's accrual because the capital belongs to the insurance company. The appellant only has a contractual right to be paid an annuity in an amount he selected within the specific range specified by law.[499]

16.4 However, in *Montanari v Montanari*,[500] another decision of the Supreme Court of Appeal, the applicant challenged the decision of the court a quo, which relied on *ST v CT*'s judgment that the living annuities do not form part of his estate for purposes of calculating accrual. The argument was based on the notion that a living annuity is not a pension interest as defined in the Divorce Act and is, therefore, not deemed to be an asset under those provisions.[501] The applicant's contention was that the court a quo erred in its finding that ownership of the living annuities belonged to the insurance company and did not form part

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[497] 2018 (5) SA 479 (SCA).
[498] Ibid 512 F-G.
[499] Ibid 511 G-I.
[500] (1086/2018) [2020] ZASCA 48 (5 May 2020).
[501] Ibid para 7.

of respondent's estate for the purpose of accrual.[502] She illustrated that a married person who accumulated R100 million before divorce could invest the whole amount in a living annuity, which would bear an untenable result of diminishing the respondent's estate to the detriment of his spouse because the value of his estate for purposes of calculating accrual would diminish by that sum.[503] The Supreme Court of Appeal held that the respondent has a clear right to the investment returns yielded by his re-investment with the insurance company in a form of a future annuity income, which he draws from the agreement. Such annuity income is evidently an asset in the respondent's estate, which is subject to accrual.[504]

C Evaluation and recommendation

16.5 The Commission is of the view that living annuities should be regarded as assets in the estate of a maintenance debtor. To achieve this, it is recommended that the definition of emoluments should be amended to include a living annuity. It is also recommended that sections 16 (2) (a) (iii) and 26 (4) be amended to include a living annuity as an asset in the estate of a maintenance debtor. The Commission also recommends that where a maintenance debtor dies whilst arrears and monthly maintenance are being deducted from the monthly or yearly income derived from the annuity and paid to the maintenance beneficiaries in terms of a court order, the fund administrator is, first and foremost, obliged to deduct and pay from the lump sum any outstanding arrears, where after, in case of minor children being the beneficiaries in respect of such maintenance order, the fund administrator must transfer the remainder of the death benefit to the Master of the High Court to be administered in terms of the Administration of Deceased Estates Act 66 of 1965, for the benefit of such minor children. The court may make such an order even though the deceased maintenance debtor had nominated a beneficiary for such lump sum.

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[502] Ibid para 11.
[503] Ibid.
[504] Ibid para 38.

16.6 To achieve this, it is recommended that section 26 be amended by inserting subsection (8) to empower the court to make an order for attachment of a lump sum benefit to cover arrear and/or future maintenance.

[ ] Words in bold type in square brackets indicate omissions from existing enactments.

_____ Words underlined with a solid line indicate insertions in existing enactments.

The definition of "emoluments" in Section 1 of the Act is hereby amended as follows:

"emoluments" includes any salary, wages, allowances, payments from annuities or living annuities and/or other similar products, or any other form of remuneration, whether expressed in money or not;

It is recommended that section 16 (2) (a) (iii) is amended by insertion of the following provision after paragraph (dd):

(ee) In the case where the order is made against a fund administering benefit payments from a living annuity or other similar product on behalf of the person legally liable to maintain, with exception of the provisions of the Income Tax Act 58 of 1962, but notwithstanding any other law or any arrangement between the person legally liable to maintain and the fund, the fund may be ordered to make payments at a percentage rate and at the intervals determined by the maintenance court.

It is recommended that the newly proposed section 25A (3) be amended by insertion of the following subsection after subsection (3) (b):

(c) where applicable, in the case where the order is made against a fund administering benefit payments from a living annuity or other similar product held in the name of the person legally liable to maintain, with exception of the provisions of the Income Tax Act

58 of 1962, the fund will be obliged to make payments to the maintenance applicant at a percentage rate, determined by the maintenance court.

It is recommended that section 26 be amended by insertion of the following provision after the new subsection (7):

(8) Where, prior to the death of a maintenance debtor, a maintenance order has been made against a fund administering benefit payments from an annuity, living annuity or other similar product held in the name of a maintenance debtor, and notwithstanding any law or any arrangement between such person and the fund administering the benefit payments (by way of which a beneficiary of the lump sum death benefit has been appointed), the fund must:

(a) within seven days after the day on which the fund administrator was made aware of the death of a maintenance debtor, give notice thereof to the maintenance officer of the court where the maintenance order in question was made;

(b) determine and pay to the maintenance beneficiary – from the death benefit – as far is possible all outstanding arrears (if any); and

(c) in case of any minor dependent(s) indicated on the order, pay the remainder of the death benefit to the Master of the High Court to be administered in terms of the Administration of Deceased Estates Act 66 of 1965

It is recommended that section 30 is amended by insertion of the following subsection after paragraph (1) (b):

(1A) In the case where the order is made against a fund administering benefit payments from a living annuity or other similar product on behalf of the person legally liable to maintain, with exception of the provisions of the Income Tax Act 58 of 1962, but notwithstanding any other law or any arrangement between the person legally liable to maintain and the fund, the fund may be ordered to make payments at a percentage rate and at the intervals determined by the maintenance court.

ANNEXURE A

2017 Simplified Federal Child Support Tables of Alberta where a non-caregiving parent has one to four children who are in the care of a care-giving parent that he is required to maintain.[505]

[505] http://www.justice.gc.ca/eng/fl-df/child-enfant/fcsg-lfpae/2017/pdf/aba.pdf (accessed on 31 May 2018)

Federal Child Support Amounts: Simplified Tables: Alberta

Montants fédéraux de pensions alimentaires pour enfants: Tables simplifiées

Income Revenu ($)	Monthly Award Paiement mensuel ($)				Income Revenu ($)	Monthly Award Paiement mensuel ($)				Income Revenu ($)	Monthl	
	No. of Children Nbre d'enfants					No. of Children Nbre d'enfants						
	1	2	3	4		1	2	3	4		1	
12000	0	0	0	0	***17500***	154	252	272	291	***23000***	200	
12100	8	9	10	10	***17600***	155	256	275	295	***23100***	201	
12200	17	18	19	21	***17700***	156	259	279	299	***23200***	201	
12300	25	27	29	31	***17800***	157	262	283	303	***23300***	202	
12400	33	36	38	41	***17900***	158	266	287	307	***23400***	203	
12500	42	45	48	52	***18000***	159	269	290	311	***23500***	203	
12600	50	53	58	62	***18100***	160	272	294	315	***23600***	204	
12700	58	62	67	72	***18200***	161	276	298	319	***23700***	204	
12800	66	71	77	82	***18300***	162	279	301	323	***23800***	205	
12900	75	80	86	93	***18400***	163	283	305	327	***23900***	206	
13000	83	89	96	103	***18500***	164	286	309	331	***24000***	206	
13100	87	93	100	107	***18600***	165	290	313	335	***24100***	207	
13200	90	97	104	112	***18700***	167	293	316	339	***24200***	207	
13300	94	101	109	116	***18800***	168	297	320	343	***24300***	208	
13400	97	104	113	121	***18900***	169	300	324	347	***24400***	209	
13500	101	108	117	125	***19000***	170	304	328	351	***24500***	209	
13600	104	112	121	130	***19100***	171	306	332	355	***24600***	210	
13700	108	116	125	134	***19200***	172	309	335	359	***24700***	211	
13800	111	120	129	139	***19300***	173	311	339	363	***24800***	211	
13900	115	124	134	143	***19400***	174	314	343	367	***24900***	212	
14000	118	128	138	148	***19500***	175	316	347	372	***25000***	213	
14100	119	132	142	152	***19600***	176	318	350	376	***25100***	214	
14200	120	135	146	156	***19700***	177	321	354	380	***25200***	215	
14300	121	139	150	160	***19800***	178	323	358	384	***25300***	216	
14400	122	142	154	164	***19900***	179	325	362	388	***25400***	216	
14500	123	146	158	169	***20000***	179	328	365	392	***25500***	217	
14600	124	150	161	173	***20100***	180	329	369	396	***25600***	218	
14700	125	153	165	177	***20200***	180	331	373	401	***25700***	219	
14800	126	157	169	181	***20300***	181	332	377	405	***25800***	220	
14900	127	160	173	185	***20400***	182	333	381	409	***25900***	221	
15000	128	164	177	189	***20500***	182	334	385	414	***26000***	222	

Federal Child Support Amounts: Simplified Tables: Alberta

Montants fédéraux de pensions alimentaires pour enfants: Tables simplifiées

Income Revenu ($)	Monthly Award Paiement mensuel ($)				Income Revenu ($)	Monthly Award Paiement mensuel ($)				Income Revenu ($)	Monthl	
	No. of Children Nbre d'enfants					No. of Children Nbre d'enfants						
	1	2	3	4		1	2	3	4		1	
34000	283	511	694	843	***39500***	317	575	783	951	***45000***	367	
34100	284	512	696	845	***39600***	318	577	784	953	***45100***	368	
34200	284	514	697	847	***39700***	318	578	786	955	***45200***	369	
34300	285	515	699	849	***39800***	319	579	788	957	***45300***	370	
34400	286	516	701	851	***39900***	320	581	790	959	***45400***	371	
34500	286	517	702	853	***40000***	321	582	791	961	***45500***	372	
34600	287	519	704	855	***40100***	322	583	793	963	***45600***	373	
34700	288	520	706	857	***40200***	323	585	795	965	***45700***	374	
34800	288	521	708	859	***40300***	324	586	797	968	***45800***	374	
34900	289	522	709	861	***40400***	325	588	798	970	***45900***	375	
35000	290	524	711	864	***40500***	326	589	800	972	***46000***	376	
35100	291	525	713	866	***40600***	326	591	802	974	***46100***	377	
35200	291	526	714	868	***40700***	327	592	804	976	***46200***	378	
35300	292	528	716	870	***40800***	328	593	806	978	***46300***	379	
35400	293	529	717	872	***40900***	329	595	808	981	***46400***	380	
35500	293	530	719	874	***41000***	330	596	809	983	***46500***	381	
35600	294	531	721	876	***41100***	331	597	811	985	***46600***	382	
35700	294	533	722	878	***41200***	332	599	813	987	***46700***	382	
35800	295	534	724	880	***41300***	333	600	815	989	***46800***	383	
35900	296	535	725	882	***41400***	334	602	816	992	***46900***	384	
36000	296	536	727	884	***41500***	335	603	818	994	***47000***	385	
36100	297	537	729	886	***41600***	335	604	820	996	***47100***	386	
36200	297	538	730	888	***41700***	336	606	822	998	***47200***	387	
36300	298	539	732	890	***41800***	337	607	824	1000	***47300***	388	
36400	298	541	733	892	***41900***	338	609	826	1002	***47400***	389	
36500	299	542	735	893	***42000***	339	610	827	1004	***47500***	390	
36600	300	543	736	895	***42100***	340	611	829	1006	***47600***	391	
36700	300	544	738	897	***42200***	341	613	831	1008	***47700***	391	
36800	301	545	740	899	***42300***	342	614	833	1010	***47800***	392	
36900	301	546	741	901	***42400***	343	616	834	1012	***47900***	393	
37000	302	547	743	903	***42500***	344	617	836	1015	***48000***	394	
37100	303	548	745	905	***42600***	344	618	838	1017	***48100***	395	
37200	303	549	746	907	***42700***	345	620	840	1019	***48200***	396	
37300	304	550	748	909	***42800***	346	621	842	1021	***48300***	397	

Federal Child Support Amounts: Simplified Tables: Alberta

Montants fédéraux de pensions alimentaires pour enfants: Tables simplifiées

Income Revenu ($)	Monthly Award Paiement mensuel ($)				Income Revenu ($)	Monthly Award Paiement mensuel ($)				Income Revenu ($)	Monthl	
	No. of Children Nbre d'enfants					No. of Children Nbre d'enfants						
	1	2	3	4		1	2	3	4		1	
56000	467	809	1082	1306	***61500***	520	892	1189	1431	***67000***	573	
56100	468	811	1084	1308	***61600***	521	893	1191	1434	***67100***	574	
56200	469	812	1086	1311	***61700***	522	895	1192	1436	***67200***	575	
56300	470	814	1088	1313	***61800***	523	896	1194	1438	***67300***	576	
56400	471	815	1090	1315	***61900***	524	898	1196	1441	***67400***	577	
56500	472	817	1092	1317	***62000***	525	899	1198	1443	***67500***	578	
56600	473	818	1094	1320	***62100***	526	901	1200	1445	***67600***	579	
56700	473	820	1096	1322	***62200***	527	902	1202	1448	***67700***	580	
56800	474	821	1098	1324	***62300***	528	904	1204	1450	***67800***	581	
56900	475	823	1100	1327	***62400***	529	905	1206	1452	***67900***	582	
57000	476	824	1102	1329	***62500***	530	907	1207	1455	***68000***	583	
57100	477	826	1104	1331	***62600***	531	908	1209	1457	***68100***	584	
57200	478	827	1106	1334	***62700***	531	910	1211	1459	***68200***	585	
57300	479	829	1108	1336	***62800***	532	911	1213	1461	***68300***	586	
57400	480	830	1110	1338	***62900***	533	913	1215	1464	***68400***	587	
57500	481	832	1112	1341	***63000***	534	914	1217	1466	***68500***	588	
57600	482	833	1114	1343	***63100***	535	916	1219	1468	***68600***	589	
57700	483	835	1116	1345	***63200***	536	917	1221	1471	***68700***	590	
57800	484	836	1118	1348	***63300***	537	919	1223	1473	***68800***	590	
57900	485	838	1120	1350	***63400***	538	920	1225	1475	***68900***	591	
58000	486	839	1121	1352	***63500***	539	922	1227	1478	***69000***	592	
58100	487	841	1123	1354	***63600***	540	923	1229	1480	***69100***	593	
58200	488	842	1125	1356	***63700***	541	925	1231	1482	***69200***	594	
58300	489	844	1127	1359	***63800***	542	926	1233	1485	***69300***	595	
58400	490	845	1129	1361	***63900***	543	928	1235	1487	***69400***	596	
58500	491	847	1131	1363	***64000***	544	929	1237	1489	***69500***	597	
58600	492	848	1132	1365	***64100***	545	931	1239	1491	***69600***	598	
58700	493	850	1134	1368	***64200***	546	932	1241	1493	***69700***	599	
58800	494	851	1136	1370	***64300***	547	934	1243	1496	***69800***	600	
58900	495	853	1138	1372	***64400***	548	935	1245	1498	***69900***	601	
59000	496	854	1140	1374	***64500***	549	937	1247	1500	***70000***	602	
59100	497	856	1142	1376	***64600***	550	938	1249	1502	***70100***	603	
59200	498	857	1144	1379	***64700***	551	940	1251	1505	***70200***	604	
59300	499	859	1146	1381	***64800***	552	941	1252	1507	***70300***	605	

Federal Child Support Amounts: Simplified Tables: Alberta

Montants fédéraux de pensions alimentaires pour enfants: Tables simplifiées

Income Revenu ($)	Monthly Award Paiement mensuel ($)				Income Revenu ($)	Monthly Award Paiement mensuel ($)				Income Revenu ($)	Monthl	
	No. of Children Nbre d'enfants					No. of Children Nbre d'enfants						
	1	2	3	4		1	2	3	4		1	
78000	679	1139	1507	1808	***83500***	732	1221	1613	1933	***89000***	785	
78100	680	1140	1509	1810	***83600***	733	1223	1615	1936	***89100***	786	
78200	681	1142	1511	1813	***83700***	734	1224	1617	1938	***89200***	787	
78300	682	1143	1513	1815	***83800***	735	1226	1619	1940	***89300***	788	
78400	683	1145	1515	1817	***83900***	736	1227	1621	1943	***89400***	789	
78500	684	1146	1517	1820	***84000***	737	1229	1623	1945	***89500***	790	
78600	685	1148	1518	1822	***84100***	738	1230	1625	1947	***89600***	791	
78700	686	1149	1520	1824	***84200***	739	1232	1627	1950	***89700***	792	
78800	687	1151	1522	1826	***84300***	740	1233	1629	1952	***89800***	793	
78900	688	1152	1524	1829	***84400***	741	1235	1631	1954	***89900***	794	
79000	689	1154	1526	1831	***84500***	742	1236	1633	1957	***90000***	795	
79100	690	1155	1528	1833	***84600***	743	1238	1635	1959	***90100***	796	
79200	691	1157	1530	1836	***84700***	744	1239	1636	1961	***90200***	797	
79300	692	1158	1532	1838	***84800***	745	1241	1638	1964	***90300***	798	
79400	693	1160	1534	1840	***84900***	746	1242	1640	1966	***90400***	799	
79500	694	1161	1536	1843	***85000***	747	1244	1642	1968	***90500***	799	
79600	694	1163	1538	1845	***85100***	748	1245	1644	1970	***90600***	800	
79700	695	1164	1540	1847	***85200***	749	1247	1646	1972	***90700***	801	
79800	696	1166	1542	1850	***85300***	750	1248	1648	1975	***90800***	802	
79900	697	1167	1544	1852	***85400***	751	1250	1650	1977	***90900***	803	
80000	698	1169	1546	1854	***85500***	752	1251	1651	1979	***91000***	804	
80100	699	1170	1548	1856	***85600***	753	1253	1653	1981	***91100***	805	
80200	700	1172	1550	1858	***85700***	753	1254	1655	1984	***91200***	806	
80300	701	1173	1552	1861	***85800***	754	1256	1657	1986	***91300***	807	
80400	702	1175	1554	1863	***85900***	755	1257	1659	1988	***91400***	807	
80500	703	1176	1556	1865	***86000***	756	1259	1661	1990	***91500***	808	
80600	704	1178	1558	1867	***86100***	757	1260	1663	1992	***91600***	809	
80700	705	1179	1560	1870	***86200***	758	1262	1665	1995	***91700***	810	
80800	706	1181	1562	1872	***86300***	759	1263	1667	1997	***91800***	811	
80900	707	1182	1563	1874	***86400***	760	1265	1669	1999	***91900***	812	
81000	708	1184	1565	1876	***86500***	761	1266	1671	2001	***92000***	813	
81100	709	1185	1567	1878	***86600***	762	1268	1673	2004	***92100***	814	
81200	710	1187	1569	1881	***86700***	763	1269	1675	2006	***92200***	815	
81300	711	1188	1571	1883	***86800***	764	1271	1677	2008	***92300***	816	

Federal Child Support Amounts: Simplified Tables: Alberta

Montants fédéraux de pensions alimentaires pour enfants: Tables simplifiées

Income Revenu ($)	Monthly Award Paiement mensuel ($) — No. of Children Nbre d'enfants				Income Revenu ($)	Monthly Award Paiement mensuel ($) — No. of Children Nbre d'enfants				Income Revenu ($)	Monthl	
	1	2	3	4		1	2	3	4		1	
100000	884	1458	1917	2293	***105500***	934	1534	2015	2409	***111000***	982	
100100	885	1459	1919	2295	***105600***	935	1535	2017	2411	***111100***	983	
100200	886	1461	1921	2297	***105700***	935	1537	2019	2413	***111200***	984	
100300	887	1462	1922	2299	***105800***	936	1538	2020	2415	***111300***	985	
100400	887	1464	1924	2301	***105900***	937	1539	2022	2417	***111400***	986	
100500	888	1465	1926	2304	***106000***	938	1541	2024	2419	***111500***	986	
100600	889	1466	1928	2306	***106100***	939	1542	2026	2421	***111600***	987	
100700	890	1468	1929	2308	***106200***	940	1544	2028	2423	***111700***	988	
100800	891	1469	1931	2310	***106300***	941	1545	2029	2425	***111800***	989	
100900	892	1470	1933	2312	***106400***	942	1547	2031	2427	***111900***	990	
101000	893	1472	1935	2314	***106500***	943	1548	2033	2430	***112000***	991	
101100	894	1473	1937	2316	***106600***	944	1549	2035	2432	***112100***	992	
101200	895	1475	1939	2318	***106700***	945	1551	2037	2434	***112200***	993	
101300	896	1476	1940	2320	***106800***	945	1552	2038	2436	***112300***	994	
101400	897	1478	1942	2322	***106900***	946	1553	2040	2438	***112400***	995	
101500	897	1479	1944	2325	***107000***	947	1555	2042	2440	***112500***	996	
101600	898	1480	1946	2327	***107100***	948	1556	2044	2442	***112600***	996	
101700	899	1482	1948	2329	***107200***	949	1558	2045	2444	***112700***	997	
101800	900	1483	1949	2331	***107300***	950	1559	2047	2446	***112800***	998	
101900	901	1485	1951	2333	***107400***	950	1561	2049	2448	***112900***	999	
102000	902	1486	1953	2335	***107500***	951	1562	2051	2451	***113000***	1000	
102100	903	1487	1955	2337	***107600***	952	1563	2052	2453	***113100***	1001	
102200	904	1489	1957	2339	***107700***	953	1565	2054	2455	***113200***	1002	
102300	905	1490	1958	2341	***107800***	954	1566	2056	2457	***113300***	1003	
102400	906	1492	1960	2343	***107900***	955	1568	2058	2459	***113400***	1004	
102500	906	1493	1962	2346	***108000***	955	1569	2059	2461	***113500***	1005	
102600	907	1495	1964	2348	***108100***	956	1570	2061	2463	***113600***	1005	
102700	908	1496	1966	2350	***108200***	957	1572	2063	2465	***113700***	1006	
102800	909	1497	1968	2352	***108300***	958	1573	2064	2467	***113800***	1007	
102900	910	1499	1969	2354	***108400***	958	1575	2066	2469	***113900***	1008	
103000	911	1500	1971	2356	***108500***	959	1576	2068	2472	***114000***	1009	
103100	912	1501	1973	2358	***108600***	960	1578	2070	2474	***114100***	1010	
103200	913	1503	1974	2360	***108700***	961	1579	2071	2476	***114200***	1011	
103300	914	1504	1976	2362	***108800***	962	1580	2073	2478	***114300***	1012	

Federal Child Support Amounts: Simplified Tables: Alberta

Montants fédéraux de pensions alimentaires pour enfants: Tables simplifiées

Income Revenu ($)	Monthly Award Paiement mensuel ($) — No. of Children Nbre d'enfants				Income Revenu ($)	Monthly Award Paiement mensuel ($) — No. of Children Nbre d'enfants				Income Revenu ($)	Monthl	
	1	2	3	4		1	2	3	4		1	
122000	1080	1762	2308	2755	***127500***	1128	1838	2404	2869	***133000***	1175	
122100	1081	1763	2310	2757	***127600***	1129	1839	2406	2871	***133100***	1176	
122200	1082	1765	2312	2759	***127700***	1130	1840	2408	2873	***133200***	1177	
122300	1083	1766	2313	2761	***127800***	1131	1842	2409	2875	***133300***	1178	
122400	1084	1767	2315	2763	***127900***	1131	1843	2411	2877	***133400***	1178	
122500	1085	1769	2317	2765	***128000***	1132	1844	2413	2879	***133500***	1179	
122600	1085	1770	2319	2768	***128100***	1133	1845	2415	2881	***133600***	1180	
122700	1086	1772	2320	2770	***128200***	1134	1847	2417	2883	***133700***	1181	
122800	1087	1773	2322	2772	***128300***	1135	1848	2418	2885	***133800***	1182	
122900	1088	1774	2324	2774	***128400***	1135	1849	2420	2887	***133900***	1183	
123000	1089	1776	2326	2776	***128500***	1136	1850	2422	2889	***134000***	1184	
123100	1090	1777	2328	2778	***128600***	1137	1852	2424	2891	***134100***	1185	
123200	1091	1779	2330	2780	***128700***	1138	1853	2425	2894	***134200***	1186	
123300	1092	1780	2331	2782	***128800***	1139	1854	2427	2896	***134300***	1187	
123400	1093	1782	2333	2784	***128900***	1140	1856	2429	2898	***134400***	1188	
123500	1094	1783	2335	2786	***129000***	1141	1857	2431	2900	***134500***	1188	
123600	1095	1784	2337	2789	***129100***	1142	1858	2433	2902	***134600***	1189	
123700	1095	1786	2339	2791	***129200***	1143	1860	2434	2904	***134700***	1190	
123800	1096	1787	2340	2793	***129300***	1144	1861	2436	2906	***134800***	1191	
123900	1097	1788	2342	2795	***129400***	1145	1862	2438	2908	***134900***	1192	
124000	1098	1790	2344	2797	***129500***	1146	1864	2440	2910	***135000***	1193	
124100	1099	1791	2346	2799	***129600***	1146	1865	2441	2912	***135100***	1194	
124200	1100	1793	2348	2801	***129700***	1147	1866	2443	2914	***135200***	1195	
124300	1101	1794	2349	2803	***129800***	1148	1868	2445	2916	***135300***	1196	
124400	1102	1796	2351	2805	***129900***	1149	1869	2447	2918	***135400***	1196	
124500	1103	1797	2353	2807	***130000***	1150	1871	2448	2920	***135500***	1197	
124600	1104	1798	2355	2810	***130100***	1151	1872	2450	2922	***135600***	1198	
124700	1105	1800	2357	2812	***130200***	1152	1874	2451	2924	***135700***	1199	
124800	1105	1801	2358	2814	***130300***	1153	1875	2453	2926	***135800***	1200	
124900	1106	1803	2360	2816	***130400***	1153	1876	2455	2928	***135900***	1201	
125000	1107	1804	2362	2818	***130500***	1154	1878	2457	2930	***136000***	1201	
125100	1108	1805	2364	2820	***130600***	1155	1879	2458	2932	***136100***	1202	
125200	1109	1807	2365	2822	***130700***	1156	1880	2460	2934	***136200***	1203	
125300	1110	1808	2367	2824	***130800***	1157	1882	2462	2936	***136300***	1204	

FEDERAL CHILD SUPPORT AMOUNTS: SIMPLIFIED TABL

MONTANTS FÉDÉRAUX DE PENSIONS ALIMENTAIRES PO

TABLES SIMPLIFIÉES

Income Revenu ($)	Monthly Award Paiement mensuel ($)				Income Revenu ($)	Monthly Award Paiement mensuel ($)			
	No. of Children Nbre d'enfants					No. of Children Nbre d'enfants			
	1	2	3	4		1	2	3	4
144000	1269	2056	2686	3201	***148500***	1305	2113	2759	3289
144100	1270	2057	2688	3203	***148600***	1306	2115	2761	3291
144200	1271	2059	2689	3205	***148700***	1307	2116	2763	3292
144300	1272	2060	2691	3207	***148800***	1308	2117	2764	3294
144400	1272	2061	2692	3209	***148900***	1309	2119	2766	3296
144500	1273	2062	2694	3211	***149000***	1310	2120	2768	3298
144600	1274	2064	2696	3213	***149100***	1311	2121	2770	3300
144700	1275	2065	2697	3215	***149200***	1312	2123	2771	3302
144800	1276	2066	2699	3217	***149300***	1313	2124	2773	3304
144900	1277	2068	2700	3219	***149400***	1313	2125	2774	3306
145000	1277	2069	2702	3221	***149500***	1314	2127	2776	3307
145100	1278	2070	2704	3223	***149600***	1315	2128	2778	3309
145200	1279	2072	2705	3225	***149700***	1316	2129	2779	3311
145300	1279	2073	2707	3227	***149800***	1317	2131	2781	3313
145400	1280	2074	2709	3229	***149900***	1318	2132	2783	3315
145500	1281	2076	2710	3231	***150000***	1318	2133	2784	3317
145600	1282	2077	2712	3233					
145700	1283	2078	2714	3235					
145800	1284	2080	2715	3236					
145900	1284	2081	2717	3238					
146000	1285	2082	2719	3240					
146100	1286	2083	2721	3242					
146200	1287	2084	2722	3244					
146300	1287	2086	2724	3246					
146400	1288	2087	2726	3248					
146500	1289	2088	2727	3249					
146600	1290	2089	2729	3251					
146700	1291	2091	2730	3253					
146800	1291	2092	2732	3255					
146900	1292	2093	2734	3257					
147000	1293	2094	2735	3259					

ANNEXURE B: DRAFT MAINTENANCE AMENDMENT BILL

It is suggested that the Maintenance Act be amended as follows:

[ ] Words in bold type in square brackets indicate omissions from existing enactments.

_____ Words underlined with a solid line indicate insertions in existing enactments.

BILL

To amend the Maintenance Act, 1998, so as to regulate mediation of maintenance matters; to further regulate determination of maintenance awards; to recognise other forms of maintenance awards; to further regulate *locus standi* to apply for maintenance; to further regulate the appointment of maintenance officers; to regulate future maintenance; to make provision for the recovery of future default amounts as a result of a delay in the execution process; to further regulate the civil execution of maintenance orders; to regulate trusts created with the aim to defray maintenance; to further regulate the reviews of and appeals to maintenance orders; to make provision for living annuities to be taken into account; and to provide for matters connected therewith.

Parliament of the Republic of South Africa enacts as follows:—

Amendment of section 1 of the Act 99 of 1998

Section 1 of the Principal Act is hereby amended –

(a) by inserting the following definitions before the definition of "**courts in the Republic**" –

"***alter ego* trust**" means a valid trust but where there may be a justification to disregard the ordinary consequences of its existence for a particular purpose – such as where the separation of ownership and/or control from enjoyment has been debased or is being abused and a party treats the property of the trust as if it were his or her personal property and use the trust essentially as his or her alter ego.

"**applicant**" or "**complainant**" means

(a) a beneficiary;
(b) a parent or another legal or primary caregiver of a beneficiary; or
(c) any other person who has an interest in the well-being of the beneficiary, including but not limited to a relative, a social worker, a health care provider, a teacher, a traditional leader, a religious leader and an employer.

(b) by amending the definition of "emoluments" as follows:

"emoluments" includes any salary, wages, allowances, payments from annuities or living annuities and/or other similar products, or any other form of remuneration, whether expressed in money or not;

(c) by amending the definition of "**maintenance order**" as follows:

"**maintenance order**" means any order for the
(a) payment of sums of money, including the periodical payment**[, of sums of money]** thereof;
(b) payment in kind, either by way of supplying specified goods, which may be livestock, or providing a service or services; and/or
(c) payment of future maintenance, including the periodical payment thereof;
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.

Amendment of section 4 of Act 99 of 1998

Three different options are proposed for the amendment of section 4 of the Principal Act, namely:

Option 1:

4 (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 the functions as maintenance officers under this Act; and

(ii) building a more dedicated and experienced poof of trained and specialised maintenance officers to deal with maintenance enquiries and to prosecute maintenance defaulters.

(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;**[.]**

(c) to be sworn in by the Chief Magistrate as officer of the court with a right of appearance; and such appointed maintenance officer shall report to a senior prosecutor assigned to deal with maintenance matters.

(3) (a) 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 subsection (1) and maintenance officers appointed in terms of subsection (2);

(ii) building a more dedicated and experienced pool of trained and specialised maintenance officers to deal with maintenance enquiries and to prosecute maintenance defaulters; and

(iii) providing imperative training for all maintenance officers appointed in terms of subsections (1) and (2), including training on family mediation, to enable maintenance officers to deal with maintenance enquiries efficiently.

(b) The Minister must submit any directives issued in terms of paragraph (a) Parliament before those directives take effect.

(4) The Director-General: Justice and Constitutional Development, after consultation with the National Director of Public Prosecutions, is responsible for developing the draft policy directives, referred to in subsection 3 (a), which must include guidelines for–

(a) the implementation of the priorities and strategies contained in the national policy framework;

(b) measuring progress on the achievement of the national policy framework objectives;

(c) ensuring that the different organs of state comply with the roles and responsibilities allocated to them in terms of the national policy framework and this Act; and

(d) monitoring the implementation of the national policy framework and this Act.

(5) A maintenance officer–

(a) is responsible to ensure that all relevant evidence from both parties is placed before the court; and

(b) must be present at all matters, even where both parties are represented;

in order to assist the maintenance court to come to a just decision.

Option 2:

4 (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; [and]

(ii) building a more dedicated and experienced pool of trained and specialised maintenance officers to deal with maintenance enquiries and to prosecute maintenance defaulters; and**[.]**

(iii) providing imperative training of public prosecutors, including training on family mediation, to be able to deal with maintenance enquiries.

(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.]

(2) A maintenance officer–

(a) is responsible to ensure that all relevant evidence from both parties is placed before the court; and

(b) must be present at all matters, even where both parties are represented;

in order to assist the maintenance court to come to a just decision.

Option 3:

4. **[(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; and

(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)] (1) Subject to the laws governing the public service, the Minister, or [any officer] the Director-General of the Department of Justice authorised thereto in writing by the Minister, may appoint one or more persons with a law degree or equivalent qualification 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.

(2) The Director-General shall, in consultation with the Minister, issue policy directions with a view to –

(a) establishing uniform norms and standards to be observed by maintenance officers in the performance of their functions under this Act;

(b) building a more dedicated and experienced pool of trained and specialised maintenance officers; and

(c) providing imperative training of maintenance matters, including training on family mediation.

(3) Any maintenance officer shall be competent to exercise any of the powers referred to in the Act to the extent that he or she has been authorised thereto in writing by the Director-General, or by any person designated by the Director-General.

(4) A maintenance officer–

(a) is responsible to ensure that all relevant evidence from both parties is placed before the court; and

(b) must be present at all matters, even where both parties are represented;

in order to assist the maintenance court to come to a just decision.

Amendment of section 6 of Act 99 of 1998

Section 6 of the Principal Act is hereby amended –

(a) by changing the heading of the section as follows:

6. Applications or complaints relating to maintenance

(b) by amending subsection (1) as follows:

(1) **[Whenever a complaint to the effect –]**An application for an order for payment of maintenance may be lodged with the maintenance officer in circumstances where –

(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].

(a) by inserting the following subsections after subsection (1):

(1A) (a) If the applicant or complainant is not represented by a legal representative, the clerk of the court must inform the applicant or complainant of all forms of relief available in terms of this Act.

(b) The application or complaint shall be made in the prescribed manner and shall be accompanied by—

(i) a statement under oath or by affirmation setting forth the needs of the person to be maintained, and the means of the applicant; and

(ii) documentary evidence of:

(aa) the needs of the person to be maintained (as far as possible), and

(bb) means of the applicant (as far as possible)

(c) The application or complaint may be accompanied by –

(i) *prima facie* proof of the financial circumstances of the person legally liable to maintain and/or

(ii) supporting affidavits by persons who have knowledge of the matter concerned.

(1B) (a) Once the application or complaint has been lodged with the Maintenance Officer, in case where there is –

(i) no order and *prima facie* proof of the financial circumstances of the person legally liable to maintain, and the needs of the person to be maintained has been supplied by the applicant; or

(ii) where there is an order; and an application to vary such order is made

(aa) for designating another person, officer, organisation, institution or account at a financial institution to whom, or to which or into which payment is to be made or

(bb) by determining a different manner in which payment is to be made;

the maintenance officer must forthwith institute proceedings 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.

(b) In case where –

(i) there is no order and proof of the financial circumstances of the person legally liable to maintain has not been supplied by the applicant; or

(ii) where there is an order and application for substitution or discharge of such order has been made;

the maintenance officer must investigate the application or complaint by way of either the prescribed manner, or as provided for by the Act, whichever will be most appropriate in the circumstances, to obtain documentary proof of available means of the person legally liable to maintain and any other documentary evidence applicable.

(d) by amending subsection (2) as follows:

(2) After investigating the application or complaint, the maintenance officer may institute proceedings 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.

(e) by inserting the following subsections after subsection (2):

(2A) An application or complaint lodged in terms of subsection (1), may be lodged by any applicant or complainant as defined in section 1 of the Act.

(3) (a) An application lodged in terms of subsection (1) may be lodged by any applicant or complainant as defined in section 1 of this Act.

(b) The application referred to in subsection (1) may be brought outside ordinary court hours or on a day which is not an ordinary court day, if the court is satisfied that the applicant may suffer undue hardship if the application is not dealt with immediately.

(4) (a) After investigating the application or complaint, the maintenance officer must advise the parties to attempt to resolve the matter through mediation, which can be provided by:

(i) a private mediator, whose costs must be shared equally between the applicant and the respondent unless they agree otherwise; or

(ii) if such a mediator is available, a community-based mediator, whose costs, if any, must be shared by the applicant and the respondent unless they agree otherwise; or

(iii) the maintenance officer dealing with the matter;

and which mediation must be concluded within 30 days, unless the mediator provides the parties with a reasonable explanation, in writing, for a delay.

(b) If the parties would like to attempt mediation but are not in agreement to opt for mediation as referred to in subsection (a) (i) and (ii), the mediation must take place in terms of subsection (a) (iii).

(5) (a) The application for maintenance may be made *ex parte*.

(b) The court must, as soon as is reasonably possible in the circumstances, consider an application submitted to it in terms of subsection (a).

(c) The interim order must call upon the respondent to show cause on the return date specified in the order, why a final order should not be issued.

(d) Upon the issuing of an interim maintenance order,

(i) a of copy of the application referred to in section 6 (1), and

(ii) the interim maintenance order,

must be served on the person legally liable to maintain, in the prescribed manner, by the maintenance officer, investigator, sheriff or peace officer–

(aa) by hand, at the physical address for service specified in the application; or

(bb) via electronic mail, facsimile, short messaging service or other known social media platform of the person who must be served; provided that proof of service effected in that manner must be provided to the court.

(e) The respondent may, prior to the return date and in the prescribed manner, consent to the interim maintenance order being made final *in absentia*.

(6) The return date for an interim order may be anticipated to an earlier date by the respondent upon not less than 24 hours' written notice to the applicant and the court.

(7) (a) If the respondent appears on the return date in order to oppose the issuing of the maintenance order, the court must advise the parties that they may attempt to resolve the matter through mediation, which can be provided by:

(i) a private mediator, whose costs must be shared equally between the applicant and the respondent unless they agree otherwise; or

(ii) if such a mediator is available, a community-based mediator, whose costs, if any, must be shared by the applicant and the respondent unless they agree otherwise; or

(iii) the maintenance officer dealing with the matter;

and which mediation must be concluded within 20 days, unless the mediator provides the parties with a reasonable explanation, in writing, for a delay.

(b) If the parties would like to attempt mediation but are not in agreement to opt for mediation as referred to in subsection (a) (i) and (ii), the mediation must take place in terms of subsection (a) (iii).

(c) Should the parties wish to opt for mediation, the court must postpone the enquiry to a future date.

(8) On the return date, the court must proceed to hear the matter and–

(a) consider any evidence previously received in terms of section 6 (1A) (2) and (3), and

(b) consider such further affidavits or oral evidence, both from the respondent and applicant, which evidence must form part of the record of the proceedings.

(9) On the return date, the respondent must provide documentation in support of arguments raised.

(10) If there are disputes of fact in the versions before it which cannot be decided upon, the court may extend the return date for the hearing of oral evidence, with no more than 20 days at a time.

(11) If the respondent appears on the return date contemplated in subsection (5)(c), but the applicant does not appear, the court must extend the interim order and the return date, and the clerk of the court must notify the applicant of the extended date: Provided

that the court may discharge the interim order if the applicant does not appear on the extended date.

(12) (a) If the applicant appears on the return date contemplated in subsection (5) (c) but the respondent does not appear; and if the court is satisfied that service has been effected on the respondent; the court may—

(i) make an order contemplated in section 18; or

(ii) extend the interim order and the return date for the hearing of oral evidence; and

the clerk of the court must notify the parties of the extended date; Provided that the court proceed if the respondent does not appear on the extended date.

(b) If neither the applicant nor the respondent appears on a return date contemplated in subsection (5) (c), the court may discharge the matter.

(13) (a) In circumstances where the court does not issue an interim maintenance order in terms of subsection (5), the court must direct the maintenance officer to immediately inform the respondent telephonically or otherwise of the application, and to source his attitude and response to the application.

(b) If the respondent does not oppose the application, or makes a counteroffer, such information must immediately be brought to the attention of the applicant and where possible, the matter settled without any undue delay.

(c) If the respondent indicates an intention to oppose the application, the court must direct the maintenance officer to cause certified copies of the application together with all supporting documentation to be served on the respondent, accompanied by a notice calling on the respondent to show cause on the return date specified in the notice, why a maintenance order should not be issued.

(d) A document referred to in subsection (13) (c), must be delivered to a police officer, sheriff or maintenance investigator who must, in the prescribed manner, forthwith serve it upon the person referred to in the said document by delivering a copy of the document in one of the following manners:

(i) by hand, at the physical address for service specified in the application; or

(ii) electronic mail, facsimile, short messaging service or other known social media platform of the person who must be served: Provided that proof of service effected in that manner must be provided to the court.

(14) An interim order will remain in force until set aside by a competent court.

Amendment of section 7 of Act 99 of 1998

Section 7 of the Principal Act is hereby amended as follows:

7. Investigation of applications or complaints

(1) In order to investigate any application or 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 application or complaint;

(b) gather information concerning –

(i) the identification or whereabouts of any person who is legally liable to maintain the person mentioned in such application or 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 application or 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 application or 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.

(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;

(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;

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

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

(3) (a) If an application or 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 application or 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 application or 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 applicant or 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.

Amendment of section 8 of Act 99 of 1998

Section 8 (1) of the Principal Act is hereby amended as follows:

(1) A magistrate may, prior to or during a maintenance enquiry, or prior to or during attachment of future maintenance in terms of section 25A, or prior to or during civil execution in terms of section 26 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.

Amendment of section 10 of Act 99 of 1998

Section 10 of the Principal Act is hereby amended as follows:

(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) a Family Advocate, contemplated in the Mediation in Certain Divorce Matters Act, 1987, in whose area of jurisdiction that maintenance court is, or

(b) by a designated social worker as contemplated in section 47 of the Children's Act, 2005,

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) (a)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.

(b) A person who—

(i) is in attendance at any proceedings under this Act, though not subpoenaed as a witness; and

(ii) is warned by the court to remain in attendance at the proceedings;

must remain in attendance until excused by the court.

(c) Any person who is subpoenaed in terms of section 9 or warned in terms of subsection 10 (2) (b) to attend proceedings and who fails to—

(i) attend or to remain in attendance;

(ii) appear at the place and on the date and at the time to which the proceedings in question may be adjourned;

(iii) remain in attendance at those proceedings as so adjourned; or

(iv) produce any book or document specified in the subpoena in terms of section 9;

is guilty of an offence.

(d) Any person who is convicted of an offence referred to in subsection (2) (c), is liable on conviction—

(i) in the case of a first offender, to a fine or imprisonment for a period not exceeding three months; or

(ii) in the case of a second or subsequent offender, to a fine or imprisonment for a period not exceeding six months.

(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.

(d) An interim order issued in terms of section 6 (5) will remain in force until it is set aside by a competent court.

(7) (a) The responsibility of adducing evidence at an enquiry not only rests on parties but also on the maintenance officer and the magistrate.

(b) Even where parties have legal representation, the magistrate must play an active role, and where important evidence is lacking, it is the duty of the magistrate to call for such evidence to make sure that it is adduced.

Amendment of section 15 of Act 99 of 1998

Section 15 (3) (a) of the Principal Act is hereby amended as follows:

(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;**[.]**

(iv) the direct and indirect costs incurred by a party in providing care for the child, including any income and earning capacity forgone in providing that care;

(v) the value of the labour expended by a party in the daily care of the child; and

(vi) any special needs of a child, including but not limited to needs arising from a disability or other special condition.

Amendment of section 16 of Act 99 of 1998

Section 16 of the Principal Act is hereby amended –

(a) by inserting after section 16 (1) the following subsections:

(1A) Any court making an order for payment in kind as defined in section 1, must make an order in the alternative, for payment of a sum of money equivalent to the estimated value of the order for payment in kind.

(1B) If a trust can be regarded as the *alter ego* of any person proved to be legally liable to maintain any other person, the court may, prior to making an order contemplated in subsection (1), make an order to disregard the separate legal personality of such trust.

(b) by amending subsection (2) as follows:

(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 or the trustee(s) of a trust upon a finding that the separate legal personality of the trust must be disregarded in the specific circumstances of a case, 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, and

(ee) where applicable, in the case where the order is made against a Fund administering benefit payments from a living annuity or other similar product on behalf of the person legally liable to maintain, with exception of the Income Tax Act 58 of 1962, but notwithstanding any other law or any arrangement between the person legally liable to maintain and the Fund, the Fund may be ordered to

make payments at a percentage rate and at the intervals determined by the maintenance court;

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 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 to be maintained.

Amendment of section 19 of Act 99 of 1998

Section 19 of the Principal Act is hereby amended as follows:

19. 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;]**

(i) designating another person, officer, organisation, institution or account at a financial institution to whom, or to which or into which payment is to be made; or

(ii) determining a different 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.

Amendment of section 25 of Act 99 of 1998

Section 25 of the Principal Act is hereby amended as follows:

25. Appeals and reviews 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,

(a) appeal against such order to the High Court having jurisdiction, or

(b) in circumstances provided for in terms of section 24 of the Supreme Court Act, bring an order made under this Act under review.

(2) On appeal, or review, 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,]** and unless the appeal or review is noted against an order for payment of maintenance in terms of section 16, prior to which a finding that the appellant is legally liable to maintain the person in whose favour the order was made**[.],** the appeal or review under this section shall not suspend the payment of maintenance in accordance with the order in question.

(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.

(5) (a) If a person in whose favour a maintenance order has been made receives notice of an appeal or a review, and he or she cannot afford legal representation, he or she shall inform the maintenance officer of the maintenance court accordingly.

(b) The maintenance officer shall–

(i) inform the Director of Public Prosecutions concerned immediately of the appeal or review, and that the person in whose favour the maintenance order was made cannot afford legal representation, and

(ii) furnish the Director of Public Prosecutions concerned with a copy of all relevant documentation to enable the Director of Public Prosecutions to provide submissions to the court hearing the appeal or the review.

Insertion of new CHAPTER 4A after CHAPTER 4 of Act 99 of 1998

The following chapter is to be inserted after CHAPTER 4:

CHAPTER 4A

FUTURE MAINTENANCE

25A (1) (a) Whenever any person legally liable to maintain another had been *mala fide*, not *bona fide*, or recalcitrant with regards to his or her maintenance obligations at any given time in the past; or

(b) where the future maintenance claim of a beneficiary is threatened by conduct of reckless spending, whether or not the person legally liable to maintain had been recalcitrant, or has been *mala fide* or not *bona fide* with regards to his maintenance obligations at any given time in the past;

the person to be maintained or the person in who's care the person to be maintained is, may apply for an anti-dissipation interdict in the court within the area of jurisdiction where the person to be maintained, or the person in who's care the person to be maintained is, resides, works or does business.

(2) A maintenance court may, on application referred to in subsection (1) make an order for attachment of future maintenance.

(3) Notwithstanding anything to the contrary contained in any law,

(a) any sum of money from any source whatsoever – due to the person against whom the order was made – payable in a lump sum, or payable in instalments over any period of time (including any pension, annuity, gratuity, payment from a living annuity, or

compassionate allowance or other benefit) shall be liable for attachment to secure future maintenance in favour of a maintenance beneficiary;

(b) any property previously held in the name of the person against whom an order for payment of maintenance has been made, but to which the rights thereto – since the date the order was made – were transferred or abandoned by way of delivery, payment, release, compromise or donation, in terms of any contract and not for value, shall, in absence of proof to the contrary, be deemed to belong to the person against whom the order for payment of maintenance has been made, and be liable for attachment to secure future maintenance in favour of a maintenance beneficiary.

(c) where applicable, in the case where the order is made against a fund administering benefit payments from a living annuity or other similar product held in the name of the person legally liable to maintain, with exception of the Income Tax Act 58 of 1962, the fund will be obliged to make payments to the maintenance applicant at a percentage rate, determined by the maintenance court.

(4) (a) Notwithstanding anything to the contrary contained in any law, the amount attached to secure future maintenance shall be retained, and maintenance payments shall be administered by the ~~f~~und/entity from which the attachment is made.

(b) Where the fund/entity is not in a position to administer maintenance payments to the person in whose favour the order was made, the fund/entity shall transfer the amount for future maintenance to the Department of Justice to be administered in terms of the Justice Administered Fund Act, Act 2 of 2017.

(5) The person against whom the future maintenance order has been made, or his estate, shall be entitled to be paid from the sum being retained, any balance that remains once the children are no longer in need of support, or the maintenance order has been discharged.

(6) The maintenance officer, prior to making the application for an order for the attachment of future maintenance as contemplated in subsection 1, may at the request of the applicant, lodge an investigation to determine possible assets susceptible for such attachment.

Amendment of section 26 of Act 99 of 1998

Section 26 of the Principal Act is hereby amended –

(a) by amending subsection (1) as follows:

(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**[.]**; or

(iv) by any other remedy as the court deems just and equitable in the circumstances of the case to encourage a maintenance defaulter to comply with his or her duty of support.

(b) by amending subsection (2) as follows:

(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**,** working, doing business, or where the child to be maintained 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)**[;]** or

(iv) for any other remedy as the court deems just and equitable in the circumstances of the case to encourage a maintenance defaulter to comply with his or her duty of support.

(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**[.]**; and

(iii) proof of non-payment.

(c) The person in whose favour the maintenance order was made may request the maintenance officer to, prior to the application being made, investigate the application in order to determine possible assets susceptible for attachment.

(d)(i) An application by a person in whose favour a maintenance order was made for the issuing of an interim attachment order may be made *ex parte* and on an urgent basis.

(ii) The court must as soon as reasonably possible in the circumstances consider an application submitted to it in terms of paragraph (d)(i).

(iii) The interim attachment order must call upon the respondent to show cause on the return date specified in the order, why a final order should not be issued.

(iv) The return date referred to in paragraph (iii) may not be more than 15 days after the date that the interim attachment order had been issued.

(v) Upon the issuing of an interim attachment order,

(aa) a of copy of the application referred to in section 26 (1); and

(bb) the record of any evidence noted in terms of section 26 (2); and

(cc) the interim attachment order;

must be served on the respondent, in the prescribed manner, by the maintenance officer, investigator, sheriff or peace officer by hand, at the physical address for service specified in the application; or via electronic mail, facsimile, short messaging service or other known social media platform of the person who must be served; provided that proof of service effected in that manner must be provided to the court.

(e) (i) If the respondent does not appear on a return date contemplated in subsection (d) (iv) and if the court is satisfied that–

(aa) service has been effected on the respondent; and

(bb) the application contains documentary evidence that the respondent has failed to make any particular payment in accordance with a maintenance order;

the court must issue a final attachment order.

(ii) A copy of the final attachment order made in respect of any person not present at the hearing must be delivered or tendered, as soon as may be practical in the circumstances, to him or her by any maintenance officer, police officer, sheriff or maintenance investigator and the return showing that the 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 attachment order in question.

(iii) If the respondent appears on the return date in order to oppose the issuing of the attachment order, the court must proceed to hear the matter and –

(aa) consider any evidence previously received in terms of section 26 (2); and

(bb) consider such further affidavits or oral evidence, both from the respondent, and the applicant in rebuttal, which evidence must form part of the record of the proceedings.

(iv) The respondent in opposing the application must provide documentation in support of all defences raised.

(v) If the respondent appears on the return date contemplated in subsection (ii), but the applicant does not appear, the court must extend the interim order and the return date and the clerk of the court must notify the applicant of the extended date; Provided that the court may discharge the interim order if the applicant does not appear on the extended date.

(vi) If neither the applicant nor the respondent appears on the return date contemplated in subsection (d) (iv), and if the court is satisfied that—

(aa) service has been affected on the respondent; and

(bb) the application contains documentary evidence that the respondent has failed to make any particular payment in accordance with a maintenance order;

the court may extend the interim order and the return date for the hearing of oral evidence, and the clerk of the court must notify the parties of the extended date; or the court may discharge the matter.

(vii) The court may, after consideration of the evidence contemplated in subsection 26 (2) (b) (vi) (bb) –

(aa) make an order confirming the interim attachment order referred to in subsection 26 (2) (d) (iii);

(bb) vary such interim order, if it appears to the maintenance court that good cause exist for such variation, and issue a final order for the amount the court found to be in arrears, and for the attachment of property, emolument or debt the court so direct; or

(cc) set aside the interim attachment order if it appears that good cause exist for such setting aside.

(viii) An interim order issued in terms of this section remains in force until it is set aside by a competent court.

(f) In the absence of documentary evidence to the contrary, the attachment must succeed if documentary proof exists that –

(i) the order for payment of maintenance has not been varied or discharged,

(ii) no application for variation or discharge was lodged prior to the application for enforcement being lodged by the applicant, and

(iii) the amount of maintenance claimed has not been received by the person in whose favour the order was made,

(iv) the court may not refuse to issue an attachment order merely on the grounds that other legal remedies are available to the applicant.

(c) by amending subsection (4) as follows:

(4) Notwithstanding anything to the contrary contained in any law, any assets held in an *alter ego* trust, 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.

(d) by inserting the following subsection after subsection (4):

(5) The court making an order in terms of subsection (1) may – on the strength of an affidavit under oath or affirmation by the applicant – make an order for an automatic adjustment of the amount claimed, where such amount, due to the delay in the civil execution process, has changed since the application was made because of maintenance payments received, or not.

(e) by inserting the following subsections after the new subsection (5):

(6) Any property previously held in the name of the person against whom an order for payment of maintenance has been made, but to which the rights thereto, since the date the order was made, were transferred or abandoned by way of delivery, payment, release, compromise or donation, in terms of any contract and not for value, shall, in the absence of proof to the contrary, be deemed to belong to the person against whom the order for payment of maintenance has been made, and be liable for attachment, on declaratory order by the maintenance court.

(7) Sections 7 to 14 of this Act shall, with necessary changes, apply in case of attachment of arrear maintenance.

(8) Where, prior to the death of a maintenance debtor, a maintenance order has been made against a fund administering benefit payments from an annuity, living annuity or other similar product held in the name of a maintenance debtor, and notwithstanding any law or any arrangement between such person and the fund administering the benefit payments by way of which a beneficiary of the lump sum death benefit has been appointed, the fund must:

(a) within seven days after the day on which the fund administrator was made aware of the death of a maintenance debtor, give notice thereof to the maintenance officer of the court where the maintenance order in question was made;

(b) determine and pay to the maintenance beneficiary – from the death benefit – as far is possible all outstanding arrears; and

(c) in case of any minor dependent(s) indicated on the order, pay the remainder of the death benefit to the Master of the High Court to be administered in terms of the Administration of Deceased Estates Act 66 of 1965.

Amendment of section 27 of Act 99 of 1998

Section 27 of the Principal Act is hereby amended –

(a) by amending subsection (1) as follows:

(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, or a trust if the court makes an order that the separate legal personality of a trust must be disregarded in the specific circumstances of a case, and, if the movable property is insufficient to satisfy such order, then against the immovable property of the latter person or the trust in question 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.

(b) by inserting the following subsections after subsection (6):

(7) The court making an order in terms of subsections (3) and (4) may – on the strength of an affidavit under oath or affirmation by the applicant – make an order for an automatic adjustment of the amount claimed, where such amount, due to the delay in the civil execution process, has changed since the application was made because of maintenance payments received, or not.

(8) Pending the finalisation of an application in terms of subsection (3) read with subsections (4) and (5), the maintenance court may, on good cause shown, stay the warrant of execution issued by itself.

Amendment of section 28 of Act 99 of 1998

Section 28 of the Principal Act is hereby amended –

(a) by amending subsection (2) (a) as follows:

(2)(a) An order under this section may at any time, on application by any person other than the person against whom the order for payment of maintenance has been made, on good cause shown, be suspended, amended or rescinded by the maintenance court.

(b) by inserting the following subsection after subsection (2):

(3) The court making an order in terms of subsections (1) and (2) may – on the strength of an affidavit under oath or affirmation by the applicant – make an order for an automatic adjustment of the amount claimed, where such amount, due to the delay in the civil execution process, has changed since the application was made because of maintenance payments received, or not.

Amendment of section 29 of Act 99 of 1998

Section 29 of the Principal Act is hereby amended –

(a) by amending the heading of section 29 as follows:

Notice relating to attachment of emoluments and other orders.

(b) by amending subsection (4) as follows:

(4) If any employer or trust 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 or trust in respect of any amount which that employer or trust has so failed to pay, and the provisions of this Chapter shall, with the necessary changes, apply in respect of that

employer or trust, subject to that employer's or trust'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).

Amendment of section 30 of Act 99 of 1998

Section 30 of the Principal Act is hereby amended –

(a) by amending subsection (1) as follows:

(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, or to a trust if the court makes an order that the separate legal personality of a trust must be disregarded in the specific circumstances of a case, to the amount necessary to cover the amount which the **[latter person]** maintenance defaulter 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 maybe specified in that order within the time and in the manner so specified.

(b) by inserting the following provision after subsection (1) (b):

(1A) In the case where the order is made against a fund administering benefit payments from a living annuity or other similar product on behalf of the person legally liable to maintain, with exception of the provisions of the Income Tax Act 58 of 1962, but notwithstanding any other law or any arrangement between the person legally liable to maintain and the fund, the fund may be ordered to make payments at a percentage rate and at the intervals determined by the maintenance court.

(c) by amending subsection 30(2)(a) as follows:

(2) (a) An order under this section may at any time, on application by any person other than the person against whom the order for payment of maintenance has been made, on good cause shown, be suspended, amended or rescinded by the maintenance court.

(d) by inserting the following subsection after subsection (2) (c):

(d) The court making an order in terms of subsections (1) and (2) may – on the strength of an affidavit under oath or affirmation by the applicant – make an order for an automatic adjustment of the amount claimed, where such amount, due to the delay in the civil execution process, has changed since the application was made because of maintenance payments received, or not.

(e) by inserting the following provision after section 30:

30A. Insolvency of a maintenance debtor

(1) When a maintenance debtor is sequestrated, any arrear maintenance or future maintenance payable by such maintenance debtor shall be regarded as a preferent debt.

(2) Upon the rehabilitation of a maintenance debtor who had been sequestrated, any arrear maintenance or future maintenance payable by such maintenance debtor shall be excluded from the eventual discharge of debts which occurs after the rehabilitation of such maintenance debtor.

Amendment of section 44 of Act 99 of 1998

Section 44 of the Principal Act is hereby amended –

(a) by amending subsection (1) (d) as follows:

(d) as to the execution of maintenance or other orders of maintenance courts, including regulations in respect of sales in execution.

(b) by inserting the following subsection after subsection (1):

(1A) The Minister may develop and prescribe guidelines based on both parents' income and means to assist with the calculation of maintenance awards in respect of children.

ANNEXURE C

FORM A OF THE MAINTENANCE ACT

APPLICATION FOR MAINTENANCE ORDER

APPLICATION 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 application. If space is insufficient information should be supplied on an attached annexure.*]

I, (full name) ....., (called "the applicant")

born on | d | d | m | m | y | y | age | | ID number | | | | | | | | | | | | | | |

living at .....

……

……

……

……

tel. no (……) .....

working at .....

……

……

……

……

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 ……

…….....

…….....

The defendant has not supported *myself/the said child(ren) since (date) ..... and has made *no contribution towards maintenance/the following contribution towards maintenance:

…….....

…….....

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 (applicant), 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 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]: …..

.....

.....

.....

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
Other:		R	**Other income (state source of income)**		R
		R			R
		R			R
			Total income		R

Expenditure				Self	Child(ren)	Total
1	**Lodging (bond repayment/levy /rent/ board)**					
2	**Groceries/food/personal care (including hair care/cosmetics etc.)**					
3	**Household expenditure**	**Water and electricity / gas / paraffin**				
		Rates and taxes				
		Laundry/Dry-cleaning				
		Lunches				
		Telephone				
		Domestic worker				
		Garden services				
		Insurance (short term)				
4	**Clothing**	**Clothes and shoes**				
		School uniforms				
		Sports clothes				
5	**Transport**	**Bus / taxi / lift club**				
		Car	**Installments & Insurance**			
			Maintenance			
			Fuel			
			Licences			
			Parking			

Expenditure			Self	Child(ren)	Total
6	Educational expenditure	School fees			
		Crèche / day care / after school care			
		Insurance (study policy)			
		Books / Stationery			
		Outings / Extramural			
		Sports			
		Other school expenditure			
7	Medical expenditure	Doctor/dentist/etc.			
		Medication			
		Hospital			
		Other medical expenditure			
8	Insurance	Life			
		Annuity			
		House owners/House holders			
9	Pocket money/ Allowances				
10	Holidays, entertainment & recreation (incl M-Net)				
11	Maintenance, replacement and repairs of items	House			
		Household appliances			
		Kitchenware			
		Linen, towels, etc.			
		*Bicycles/bikes/scooters			
		Other items			
12	Personal loans				
13	Security alarm system				
14	Membership fees				
15	Religious contributions/ Charities				
16	Gifts				
17	TV licence				
18	Reading material	Books / Newspapers / Periodicals			
19	Lease / credit agreement payments	Furniture			
		Appliances			
		Other			
20	Pets	Food			
		Veterinary surgeon ("vet")			
		Licence			

Expenditure			Self	Child(ren)	Total
21	**Other (not specified above)**				
		Total expenditure			

Dated at ..... this ..... day of ..... year .....

.....
Signature of Applicant

*** 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 ..... Answer

(b) Do you have any objection to taking the prescribed ..... Answer

2. I certify that the applicant acknowledged that *he/she knows and understands the contents of this declaration. The applicant 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 applicant 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.....