



HOW DOES FUTURE MAINTENANCE WORK?



www.lunchandlearn.org.za



Introduction

Webinar Overview

Our discussion for today will deal with future maintenance:

- What is future maintenance?
- When can future maintenance be claimed?
- Case law on where maintenance defaulters has the intention to defeating a maintenance order by spending money that is due to them in terms of a pension payout
- Discussion of *the Soller v Magistrate, Wynberg* 2006 case in detail
- Explanation of the process to claim future maintenance (Notice of Motion with supporting affidavits)
- Drafting all court documents to claim future maintenance discussed



What to expect

Structure of our Lunch and Learn webinars

Pre-reading
material

Webinar

Resources &
Templates



How does future maintenance work?

Introductory remarks



- **Definition:** Maintenance payable in the future.
- Where the respondent retires or resigns before their obligation to maintain has ceased.
- **Effect:** Maintenance obligation stands even if party retires before child is self-supporting.
 - Introduction to anti-dissipation interdicts

How does future maintenance work?

What is future maintenance?



- Discussion on anti-dissipation interdicts
 - Not specifically dealt with in the Maintenance Act
- BUT **S26(4)** allows attachment of pensions, gratuities and annuities to satisfy the maintenance order.
 - *Knox D'Arcy Ltd and Others v Jamieson and Others.*
 - *Sentinel Retirement Fund v Mtambo.*

How does future maintenance work?

Relevant legislation



- Maintenance Act sections 15(1) and 26(4): common law duty to support does not cease upon end of employment.

- Other legislation and international law:
 - Section 37A(1) Pension Funds Act 24 of 1956: attachment of any pension, annuity, gratuity, compassionate allowance or similar benefits;
 - Section 28(2) Constitution of the Republic of South Africa
 - Section 7 & 9 Children's Act
 - Article 3 United Nations Convention on the Rights of the Child

Child's best interests principle

How does future maintenance work?

When can future maintenance be claimed? (cont..)



- Requirements to claim:
 - 1) Existing maintenance order (via court OR verbal/ written) **AND**
 - 2) Reasonable suspicion that future maintenance obligations will not be met
= in arrears OR bad faith dealings.

- Case law elaborates context in the next slide.



How does future maintenance work?

(..cont) Claiming future maintenance

▪ Case law as context:

- The person legally liable to maintain failed to do so - *Mngadi v Beacon Sweets* 2004 (5) SA 388 (D).
- Court can draw the inference that person legally liable to maintain will not be able to meet future maintenance payments (*mala fides*) - *Magewu v Zozo* 2004 (4) SA 578 (C) and - *Soller v Magistrate Wynberg* 2006 (2) SA 66 (C).
- ‘Where the future maintenance claims of a minor child are threatened...whether or not the recalcitrant parent is in arrears’.
- *Gerber v Gerber* (CPD) Case nr. 12166/07.

How does future maintenance work?

Jurisdictional issues (cont..)



- Maintenance Act does not generally authorize attachment of a maintenance debtor's assets in respect of future maintenance payment.
- Execution and attachment usually only upon arrears.
 - **Therefore** guiding principles are needed.

How does future maintenance work?

Guiding principles on jurisdiction (cont..)



Constitution and Case law	Maintenance Act, 1998
S28(2) Constitutional best interest principle	Preamble.
<i>Bannatyne v Bannatyne</i> : effective enforcement of maintenance is crucial to secure for vulnerable children and women.	S3 : Every Magistrate's Court is a Maintenance Court.
<i>Soller v Magistrate, Wynberg</i> (detail in next slide)	<i>Sui generis</i> nature of Maintenance Court.

How does future maintenance work?

Case law on jurisdiction

- ***Soller v Magistrate, Wynberg 2006 (2) SA 66 (C):***
 - ✓ Remedies not limited to what is contained in the Maintenance Act – innovative remedies needed – implies future maintenance awards.
 - ✓ In *casu*: High Court granted the Maintenance Courts jurisdiction to authorise attachment of a maintenance debtor's assets in respect of future maintenance payments.
 - ✓ S28(2) overrides any limitations as to Magistrate's Court jurisdiction.
 - ✓ Continued default on payments justified attachment of retirement annuity.
 - ✓ Absurd to be required to approach HC due to previously-mentioned jurisdictional issues.



How does future maintenance work?

How to claim future maintenance?



1) *Ex parte* application via Notice of Motion

- Apply at nearest Magistrate's Court where either party works or lives.
- S26 application to enforce arrears may be lodged simultaneously.
- Supporting affidavit to substantiate claim.
- Rule *nisi* granted: interdicts bank/ pension fund (etc.) with regard to respondent's payments, pending return date.

2) Return date & Final Order

- Final order via confirmation, amending or setting aside of rule *nisi*-order.
- Lump sum not payable to complainant – moneys not yet due and payable.

How does future maintenance work?

Steps to apply for future maintenance



- Form to be completed: **J306**
- Documents needed:
 - 1) An identity book (green book with your photo) or passport or drivers licence and/or immigration permit;
 - 2) Certified copies of the child/children's birth certificates;
 - 3) Three months bank statement (LATEST);
 - 4) Three months proof of income (payslip) or the signed letter from the employer confirming your income;
 - 5) Physical/work address of the person responsible for paying the maintenance money;
 - 6) List of your income and expenditure e.g. water and lights bill, till slips for groceries, school expenses; medical and travel receipts, clothing accounts, etc.
 - 7) Full name of parent/person responsible for paying the maintenance money;
 - 8) Copy of Decree of Divorce (in the case of divorce).

How does future maintenance work?

Other relevant case law



- ***Government Pension Fund v Bezuidenhout***: joinder of Pension Fund as a party before order is final.
- ***Burger v Burger and Another***: pension attached upon suspicion of default.
- ***Gerber v Gerber***: minor child - attachment of proceeds from immovable property.
- ***Mngadi v Beacon Sweets & Chocolate Provident Fund and Others***: bad faith/*mala fides* dealings justifies attachment of pension fund.
- ***Magewu v Zozo***: attachment of pension is effective at ensuring rights of women and children.
- ***Mbhele v Mbhele & others***: curator *bonis* may be appointed.

Citations
referenced in
handout material

How does future maintenance work?

Discussion



info@lunchandlearn.org.za



www.lunchandlearn.org.za



How does future maintenance work?

Proudly sponsored by:



Oppermans Inc.



PROKUREURS • ATTORNEYS • MEDIATORS

Lawyers. Just different.

Family Law Practitioners

DIVORCE | MAINTENANCE | DOMESTIC VIOLENCE | PARENTING PLANS | VISITATION RIGHTS | MEDIATION

☎ 021-2000 470 (9 lines)
✉ info@oppermansinc.co.za
f Oppermans Inc.

83 MILLER STREET • GORDONS BAY

🌐 www.oppermansinc.co.za



**INSTITUTE FOR SOCIAL
DEVELOPMENT & JUSTICE**

NON-PROFIT COMPANY NPC 2022/457232/08

Thanks to our team:

Eugene Opperman (Director, attorney & mediator from Oppermans Inc Attorneys): Host
Caro Opperman (Candidate attorney & mediator from Oppermans Inc Attorneys): Research & Handouts
Adv Deon Ruiters (Senior Maintenance Prosecutor: NPA): Guest speaker