

# WEBINAR HANDOUT



Webinar: **HOW TO APPLY FOR THE VARIATION OF A MAINTENANCE ORDER?**

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

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## 1. Discussion (with reference to case law) on when you may request the court for an increase

### 1.1 “Sufficient reason” or “adequate cause” as a prerequisite

Section 16(1)(b) of the Maintenance Act (“the Act”) reads as follow: “After consideration of the evidence adduced at the enquiry, the maintenance court may in the case where a maintenance order is in force –

- (i) Make a maintenance order contemplated in paragraph (a)(i) in substitution of such maintenance order; or
- (ii) Discharge such maintenance order.”

Section 8 (1) of the Divorce Act 70 of 1979 reads as follow: “A maintenance order or an order in regard to the custody or guardianship of, or access to, a child, made in terms of this Act, may at any time be rescinded or varied or, in the case of a maintenance order or an order with regard to access to a child, be suspended by a court if the court finds that there is sufficient reason therefor: Provided that if an enquiry is instituted by the Family Advocate in terms of section 4(1)(b) or (2)(b) of the Mediation in Certain Divorce Matters Act, such an order with regard to the custody or guardianship of, or access to, a child shall not be rescinded or varied or, in the case of an order with regard to access to a child, not be suspended before the report and recommendations referred to in the said section 4 (1) have been considered by the court.”

In other words, section 8(1) of the Divorce Act states that a maintenance order may be varied if the court finds that there is sufficient reason therefor and Section 10 (2) of the now repealed Matrimonial Affairs Act 37 of 1953 required good cause for a variation. A maintenance order can be varied (increased or decreased) either because the amount has become insufficient for your needs, or if you can no longer afford to pay the amount of maintenance due. Variation of a maintenance order may be in order where *good cause* exists for such variation. Once such good cause is alleged and lodged, the maintenance officer may investigate and instate an enquiry in the maintenance court. This has been confirmed by the court in *M v M* (A301/17) [2018] ZAGPPHC 607. The court stated that Maintenance Act in itself does not provide a test to be applied when an application is made for the variation or discharge of a maintenance order.

The court in *Roos v Roos* 1945 TPD provided the following: “Variation will be ordered not only in cases of breach by either party, but because there has been such a change in the conditions that

existed when the order was made, that it would now be unfair that the order should stand in its original form.” The court in *Havenga v Havenga* 1988 (2) SA 438 stated that the court will generally only vary an existing maintenance order where there has been a change in conditions, otherwise there would not be a sufficient reason for a change.

## 1.2 Frequency of application

The frequency of applying for variation of a maintenance order may also have an effect on the successfulness of such application. This is especially the case where an applicant constantly applies to have their maintenance increased or decreased, without a valid or true reason for it. Such troublesome applications may amount to vexatious proceedings, and applicants must therefore take care to only apply for a variation of a maintenance order if they really do need it and have adequate cause to apply as such. Case law has elaborated on when a court will regard frequent applications for variation as a vexatious proceeding. In both *Cohen v Cohen* and *Greyvenstein v Clayton*, the court regarded repeated variation applications as a vexatious step.

The frequency of applying for variation in maintenance order may however not be fatal to an application for variation of a maintenance order. In *Watson v Watson*, the court held that a short time between the initial maintenance order and application for variation may still warrant a variation if it is within the children’s true interests. However, in *Dawe v Dawe* it was held that frequent variation of a child maintenance order is ultimately undesirable and unpractical.

## **2. Explanation of the term “good cause” as a requirement for variation of an order**

### 2.1 What is “good cause”?

Maintenance Courts may vary an existing maintenance order if good cause exists. Whether or not good cause exists has to be assessed on the particular facts of each case. Good cause, or ‘sufficient reason’ is a prerequisite to applying for a variation of a maintenance order. This does not mean that a change in financial position is required, but it can establish good cause as such. The burden to prove good cause for variation is on the party seeking variation to show sufficient reason for such variation in the High Court or Magistrate’s Court. Maintenance-related court officials do however have the responsibility to place such evidence before the maintenance court.

The following factors play a role in establishing whether good cause exists:

*(a) Failure to establish material circumstances of financial position and/or any attempt to mislead the court as such*

A party's failure to establish the material circumstances of their financial position will likely be detrimental to their case. This is because the court will not be likely to grant an increase or decrease in the maintenance order if the parties' financial position do not allow for it as such. A party asking for an increase must therefore show that their financial position has diminished and that they need more maintenance as a result. Conversely, a party seeking a decrease will also have to show that they have a diminished financial position and that they need a decrease in the payable maintenance as such. The following factor also illustrates how a change in financial circumstances is taken into account when deciding on maintenance.

Any attempt to mislead the court will however be detrimental to your case. This dishonest misconduct will only amount to abuse of court processes and may be fatal to a party's case for variation. Therefore, parties must never lie about their financial position when asking the court for a variation of a maintenance order.

*(b) Alteration in financial circumstances*

A change in the parties' financial circumstances may warrant their application for variation of payable maintenance. For example, if a custodial parent's expenses have increased to such an extent that they require more maintenance for their child's reasonable needs, they may ask for an increase in the maintenance amount. Conversely, if a non-custodial parent's expenses have also increased to the extent that they are no longer able to afford the amount due, they may ask for a decrease in the maintenance amount. This illustrates how a change in financial circumstances may justify an application for variation.

There are however instances where a mere change in financial circumstances did not warrant the granting of variation of the maintenance order. In *Davis v Davis*, an upward variation of maintenance was not justified due to increased expenditure due to emigration. This case serves as an example that mere emigration and increased costs as such will not necessarily automatically justify a variation in maintenance. A mere alteration of financial position will not justify the variation, but it may give context as to why the variation is sought and needed as such. Therefore, a party seeking variation of a maintenance order must keep this factor in mind.

*(c) Spousal maintenance with regard to factors in section 8 of the Divorce Act*

In an application for the variation of a child maintenance order, the granting of spousal maintenance may also be relevant. The factors considered in awarding spousal maintenance is therefore relevant and these factors include:

- Parties' conduct
- Age
- Health and
- Ability to support themselves.

Where parties comply with the requirements for spousal maintenance in that they are not regarded as sufficiently skilled to have earning capacity to cover their reasonable needs by entering the workforce, it may count in their favour when applying for variation of child maintenance amounts. If a parent is regarded as economically dependent on their divorced spouse, it may further justify asking for an increase in maintenance where other factors indicate the need as such. This factor is therefore not decisive, but will still be taken into account upon a variation application. The variation of spousal maintenance is further elaborated under the last heading of this webinar.

*(d) Moral considerations*

However, since South Africa has moved away from fault-based divorce grounds it is questionable whether moral considerations or conduct of a party truly play a role in whether a court will grant the variation of a maintenance order or not. On the other hand, a party's dishonesty and/ or vindictiveness may amount to vexatious proceedings if they do not approach the court with valid reasons for seeking the variation.

*(e) Deterioration of maintenance debtor's financial position*

A maintenance debtor is the person who is liable to pay the maintenance amount. The above-mentioned factors have already shown how more expenses, and a diminished financial position of the person paying maintenance as such, may warrant an application to have the amount payable decreased. A downward variation of a maintenance order will however not be entertained if it is unreasonable in light of the child's needs.

A maintenance debtor must further show that the deterioration of their financial position was not due to their own control. For example, willingly moving to a more expensive neighborhood and increasing your expenses/ decreasing your financial capacity is not beyond the control of such person and will not amount to a valid reason to apply for variation of maintenance.

*(f) Cost of living*

The cost of living for both parties is considered in an application for variation of a maintenance order. This means that the maintenance amount payable will purport to cover the cost of living for the person entitled to maintenance, while still recognizing that the person liable to pay maintenance must also have enough funds for their respective cost of living. An increase or decrease in the cost of living may therefore also justify applying for a variation, provided that sufficient evidence is shown as to the reasonable cost of living for the parties and their child/ children. An increase in the cost of living is however not decisive and additional factors must further show that the applicant has good cause to ask for the variation (*Louis v Louis*).

*Vedovato v Vedovato* is an example of successfully proved increased cost of living, which justified the application for variation as such. Courts have further confirmed in *Levin v Levin* that a sudden, unexpected increase in the cost of living will constitute sufficient reason for variation of a child maintenance order or agreement.

Inflation may play a role in the general cost of living. Courts have indeed taken judicial notice of the impact of inflation on spousal maintenance in *Joffe v Lubner* and *Kommisaris van Binnelandse Inkomste v Steyn*. However, in *Grasso v Grasso* it was held that inflation is not decisive and other factors must be considered in conjunction with this factor. Further, parties' intention as to annual increases and/ or escalation clauses must be very clear to cater for inflation in the maintenance agreement.

*(g) Cohabitation*

Cohabitation and/ or remarriage of a divorced spouse may have an impact on their spousal maintenance order and the variation of such an order. For example in *Schlesinger v Schlesinger* the court held that if, in terms of a divorce order, spousal maintenance ceases upon remarriage or death, it may amount to an express or implied clause as to cohabitation. This can also be regulated by including a *dum casta* clause in the spousal maintenance agreement, which has been discussed under the webinar relating to spousal maintenance. On the same facts, *Watson*

*v Watson* however held the above-mentioned clause not to extend to chastity, but adultery and/or cohabitation as sufficient reason to vary the order.

## 2.2 Case law on good cause for variation

In *Reid v Reid*, the court refused downward variation based on the parties' argument that the initial order was unjust. The court held that special circumstances must be shown to justify variation and the statement that the initial order was unfair does not constitute good cause for variation as such. In *Havenga v Havenga*, the court held that an absence of a real change in circumstances does not warrant the variation of a maintenance order. This is so even though 'altered financial circumstances' are not a statutory requirement. This is why a change in financial circumstances are an important factor in establishing good cause for variation.

An applicant applying for a reduction of a maintenance order would therefore be successful if they can prove either a reduction in income and/ or the inability to pay the current maintenance amount. This means that if you can successfully show the court that you are not earning your full salary, you may be able to successfully obtain a reduction in your maintenance.

*Hotz v Hotz* dealt with the fraudulent non-disclosure of a party's property when the maintenance order was granted. The order in that case was not set aside a whole, but the court rather determined the effect that the non-disclosure had on the order. Misleading the court will however not favour a party's case and fraudulent misconduct is not tolerable when applying for the variation of a maintenance order. With regard to spousal maintenance, *Hoal v Hoal* dealt with a non-variation clause included in spousal maintenance order. The court held that the clause did not bar an application to vary the order in terms of section 8 of the Divorce Act, provided sufficient reason is proven.

### **3. Documents needed for a variation**

- a) A complete statement of income and expenditure
- b) Statement explaining reasons for the application (to show your good cause)

### **4. Completion of the J107 application form for variation (either increase or decrease)**

The J107 Form must be completed in order to apply for the variation of a maintenance order. The form can be found electronically on:  
[https://www.justice.gov.za/forms/maintenance/MNT\\_Form%20B.pdf](https://www.justice.gov.za/forms/maintenance/MNT_Form%20B.pdf).



The J107 form will ask you to detail your current financial position (income and expenses). This must be done as comprehensively as possible to show any potential increases in cost of living, etc. It must be clear from your current financial position that some change in circumstances justify your application for a variation. Therefore, it is wise to take supplementary documentation to illustrate your financial landscape. The J107 will further require you to detail your reasons for asking for a variation of the maintenance order. This form is substantially similar to the J101 application form that is completed when you first claim maintenance.

## **5. Detailing the process that needs to be followed for a variation**

The same process as when a claim for maintenance is first instituted will be followed. These processes have been elaborated on in our previous webinars.

After completing the application for variation form (J107), that form and supporting documents will be used in the maintenance court. Both the above-mentioned documents (regarding financial position and reasons) must be submitted to the maintenance officer, regardless of whether you are the recipient or the payer of the maintenance amount. The maintenance officer will then conduct an informal section 6 enquiry to determine the facts of the case and in an attempt to settle the situation between the parties. If the variation is disputed and/or the parties cannot reach an agreement, the maintenance officer may send the matter to court for a formal section 10 enquiry.

## **6. Discussion of the effect if an order is substituted by a new order (section 22)**

Section 22 of the Maintenance Act provides that a variation (substitution or suspension) deletes the initial order insofar as expressed by the court. This means that the original maintenance order is no longer of force or effect as it is replaced by the new, varied maintenance order. Therefore, the new, varied maintenance order will be the enforceable order against the parties and the previous order is no longer enforceable.

Upon variation, the maintenance officer will give notice of the decision to the registrar or clerk in the jurisdiction where the maintenance order was initially issued. When a maintenance court varies a maintenance order that was originally part of a divorce order made in the High Court, the earlier order ceases to be of force and effect. The second order is therefore not an order made in terms of the Divorce Act, but a maintenance order by the maintenance court and cannot be varied by the High Court as such. The correct procedure for anyone wishing to approach the High Court is to appeal against the maintenance court order.

## **7. Can a maintenance court override a High Court order when it comes to maintenance?**

### **7.1 Child maintenance in terms of the Maintenance Act**

Maintenance courts ultimately have the power to vary or discharge maintenance orders, including such orders issued by the High Court.

### **7.2 Appeals to the High Court**

Any person aggrieved at the decision of a maintenance court granting, refusing, varying or discharging a maintenance order can appeal to the High Court. If an application for variation of a maintenance order, which ought to have been brought in the magistrate's court, is mistakenly brought in the High Court, an order for costs will be refused to an otherwise successful applicant, unless they demonstrate to the High Court's satisfaction that there were circumstances and reasons justifying the failure to utilize the magistrate's court.

## **8. Brief discussion about the increase or decrease of a spousal maintenance order made by a Divorce Court**

### **8.1 General point of departure**

In terms of Section 8 of the Divorce Act: the High Court or Regional Court may vary a maintenance order if the court finds there is sufficient reason to do so. The onus is on party seeking the variation to show sufficient reason for it (*Pieterse v Pieterse*).

### **8.2 Relevant factors**

As mentioned previously, a court will consider factors in determining whether there is sufficient reason to vary a spousal maintenance order. These factors include:

- the income of parties (*Acutt v Acutt*);
- parties age;
- conduct;
- health;
- ability to support themselves (*Hancock v Hancock*).

The factor which is of most importance is the decline in the maintenance debtor's financial position which must be due to circumstances beyond their control and amount to an inability to pay in order for them to successfully apply to have their maintenance order decreased in line with what is affordable.

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

### **Reference list:**

#### Books

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

## Articles

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

I Hendrikse's *Need to Apply for a Variation or Discharge of a Maintenance Order?* (2022).

B Clark's *An Analysis of the Effects of Marriage, Divorce and Death on the child maintenance obligation in South African Law with some comparative perspectives* (1999).

## Legislation

Divorce Act 70 of 1979.

Maintenance Act 99 of 1998.

Maintenance Amendment Act 9 of 2015.

## Case law

*Vedovato v Vedovato* [1980] 3 All SA 63 (T), 1980 (1) SA 772 (T).

*Joffe v Lubner* [1972] 4 All SA 472 (C), 1972 (4) SA 521 (C).

*Cohen v Cohen* 65 [2002] 4 All SA 21 (C), 2003 (1) SA 103 (C).

*Greyvenstein v Clayton* [1999] 1 All SA 156 (E).

*Levin v Levin* [1984] 3 All SA 500 (C); 1984 (2) SA 298 (C).

*Watson v Watson* [1979] 4 All SA 177 (A), 1979 (2) SA 854 (A).

*Dawe v Dawe* [1980] 3 All SA 224 (ZR), 1980 (1) SA 141 (Z).

*Owen-Smith v Owen-Smith* [1982] 3 All SA 204 (ZS), 1982 (1) SA 511 (ZS).

*Davis v Davis* [1993] 1 All SA 234 (SE), 1993 (1) SA 293 (SE).

*Louis v Louis* [1973] 2 All SA 590 (T), 1973 (2) SA 597 (T) 599.

*Kommissaris van Binnelandse Inkomste v Steyn* [1992] 1 All SA 158 (A), 1992 (1) SA 110 (A).

*Grasso v Grasso* [1987] 3 All SA 47 (C), 1987 (1) SA 48 (C).

*Schlesinger v Schlesinger* 1968] 2 All SA 217 (W), 1968 (1) SA 699 (W).

*Roels v Roels* [2003] 2 All SA 441 (C).

*Reid v Reid* [1992] 3 All SA 354 (E), 1992 (1) SA 443 (E).

*Havenga v Havenga* [1988] 4 All SA 78 (T), 1988 (2) SA 438 (T).

*Hotz v Hotz* [2001] JOL 9047 (W), 2002 (1) SA 333 (W).

*De Witt v De Witt* 1995 (3) SA 700 (T).

*Pieterse v Pieterse* [1965] 4 All SA 316 [T].

*Acutt v Acutt* 1990 (4) SA 873 (Z).

*Hancock v Hancock* 1957 (2) SA 500 (C).

*Schutte v Schutte* 1986 (1) SA 872 (A).

### **Additional reading material**

A Armstrong's *Maintenance Payments for Child Support in Southern Africa: Using Law to Promote Family Planning* (1992).

B Clark's *'Please, Sir, I want some more': New Developments in the South African Saga of Child Maintenance and Children's Rights* (2003).