

# WEBINAR HANDOUT



Webinar: **WHAT TYPE OF ORDERS CAN THE COURT MAKE AND WHAT ORDERS CAN BE APPEALED**

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

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# 1. Discussion of section 16 and the different types of orders that a presiding officer may make

## 1.1 General point of departure

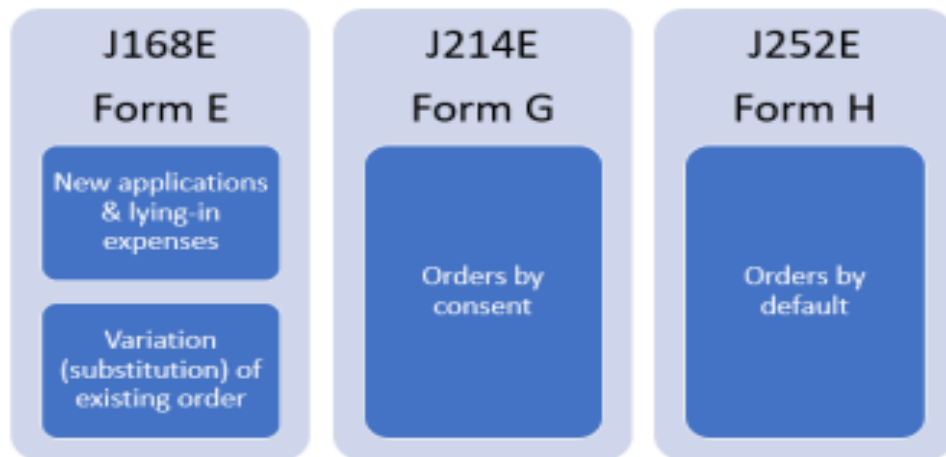
A maintenance court is empowered to make various orders upon formal enquiry of the maintenance complaint. These include orders such as:

a) Form E or J168E:

- New maintenance order
- Maintenance order for lying-in expenses
- Order to substitute existing order
- Order against person contractually liable to maintain

b) Form G or J214E: Orders by consent

c) Form H or J252E: Orders by default



According to Regulation 8, any order of a court made under Chapter 4 of the Act, excluding an order by consent (FORM G (J214E)) or an order by default (FORM H (J252E)), shall substantially correspond with FORM E (J168E) of the Annexure.<sup>1</sup> These orders will be elaborated under subsequent headings below.

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<sup>1</sup> A van der Merwe's Maintenance Manual for Presiding Officers 32.

According to the Act, a presiding officer may order various things depending on whether there is an existing maintenance order or not. Such presiding officer may make the following orders.<sup>2</sup>

### 1.2 First time maintenance applications and lying-in expenses

As a point of departure, the presiding officer is able to make an order against a person who is legally liable to maintain their children. In other words, the court can make a maintenance order against any person who is legally liable to maintain their children.<sup>3</sup> Moreover, the presiding officer is able to make an order for the payment of lying-in expenses. Lying-in expenses are those expenses which a mother has incurred during pregnancy, birth and after birth.<sup>4</sup> These expenses must however be claimed when the initial maintenance application is being instituted in the Maintenance Court.

- *Schmidt v Schmidt*: 1996 (2) SA 211 (W): The maintenance court may make an order which includes provision for the payment of recurring and unquantified medical expenses, including expenses for treatment and therapy given by a person who is not a medical practitioner, and for the recurring costs of education.
- *Sager v Bezuidenhout*: 1980 (3) SA 1005 (O): Maintenance in connection with lying-in expenses - both parents responsible therefore according to their means. Where no clear proof of actual maintenance a reasonable amount is awarded.

### 1.3 Where there is already a maintenance order in force

The maintenance court is able to make an order for the substitution of the original maintenance order. Substitution of a maintenance order means to either increase or decrease the maintenance amount that was claimed in the initial maintenance order (also known as a variation of the maintenance order).<sup>5</sup> The maintenance court is also able to make an order for the discharge of the original maintenance order. This means that the original maintenance order is cancelled, and there is no longer a maintenance order in force against the respondent.<sup>6</sup> Moreover, it is also possible that the maintenance court may make no order.<sup>7</sup>

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<sup>2</sup> Section 16 of the Maintenance Act of 1998.

<sup>3</sup> Section 16(1)(a)(i).

<sup>4</sup> Section 16(1)(a)(ii).

<sup>5</sup> Section 16(1)(b)(i).

<sup>6</sup> Section 16(1)(b)(ii).

<sup>7</sup> Section 16(1)(b)(iii).

#### 1.4 Where there is non-compliance with the maintenance order

Section 26 of the Maintenance Act deals with the enforcement of maintenance or other orders. Consult the pre-reading material for the discussion on the legislation. The maintenance court has the authority to make an order where the respondent has failed to make timeous maintenance payments in accordance with a maintenance order. These are known as the civil and criminal remedies that are available to an applicant. The maintenance court can make an order in terms of the following civil remedies (to enforce the payment of the arrear maintenance) –

- (i) An order in respect of any amount together with any interest thereon by execution against property as contemplated in section 27;
- (ii) An order in respect of any amount together with any interest thereon by the attachment of emoluments as contemplated in section 28; or
- (iii) An order in respect of any amount together with any interest thereon by the attachment of any debt as contemplated in section 30.”

#### **2. Contemplating the question if a court can make an order pertaining to an amount in arrears except as provided for in sections 26 and 31?**

The respondent is the person who is not paying the maintenance in accordance with the maintenance court order. This means that they are in arrears with the maintenance payments. If the respondent is in arrears with the maintenance payments there are a number of remedies available to the applicant to enforce payment.

Section 26(1)(a) & (b) of the Maintenance Act reads as follow: “Whenever any person against whom any maintenance order has been made has failed to make any particular payment in accordance with that maintenance order; or 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;
- (iii) By the attachment of any debt as contemplated in section 30.”

Section 31(1) of the Maintenance Act reads as follow: "Subject to the provisions of subsection (2), any person who fails to make any particular payment in accordance with a maintenance order shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding three years or to such imprisonment without the option of a fine."

### **3. May a maintenance court make an order that the arrear amount must be written off?**

When someone is liable to pay maintenance in terms of a maintenance order, and they fail to do so as such, they are in arrears with maintenance payments. Such a person also be described as defaulting on their maintenance order, thereby failing to comply with the order as such. The primary caregiver of the child can approach the maintenance office and lay a formal complaint to this effect. The primary caregiver must further show records of payments, as well as non-payments, as it shows what amount is still owed or outstanding. The court can also be approached to order maintenance payments via the defaulting parent's employers

Maintenance is a legal right to which a child is entitled. Both parents have a duty to support their child. Failure to pay in accordance with a maintenance court order is a criminal offence. The failure to make timeous payments amounts to contempt of court and is punishable by a fine or imprisonment not exceeding three years. The court will always make an order that is in the best interests of the child. The court ultimately permits the defaulting parent to explain why they failed to pay, but without good reason such parent could potentially face an order to the effect of paying the entire amount of outstanding maintenance or criminal charges. The court will usually order the liable parent to pay the arrear maintenance, unless they have a good reason. Criminal charges are also possible against a maintenance defaulter. Not paying maintenance is a criminal offence and the respondent can be fined or imprisoned or both. The maintenance officer may also have the respondent blacklisted. To escape such criminal punishment, the respondent must show to the satisfaction of the court that he/she could not pay maintenance due to a lack of money or income.

Therefore, a maintenance court can never write off an amount of maintenance ever. The different types of maintenance order that a maintenance court can make include:

- (1) Before the enquiry - make an interim maintenance order.
- (2) If there is no maintenance order is in force, the court can make a new section 16 maintenance order. This new order may include an order for payment by way of a stop order or similar facility at a financial institution. It may also include an order for the payment of medical

expenses, including an order requiring the person to be maintained to be registered as a dependent at a medical scheme of which the person legally liable is a member. The court can also include an order for the lying-in expenses of the mother (this is the expenses incurred by the mother in connection with the birth of the child and includes maintenance for the child from the birth of the child to the date of the enquiry).

- (3) Where there is an existing maintenance order, the court can make an order substituting the existing order.
- (4) Garnishee order - Whether it is a new or a substitution order, the court can make an order directing the employer to make on behalf of the employee, periodical payments from the moneys at present or in future owing or accruing to the latter person as may be required to be made in accordance with the maintenance order. The order will thus have the effect of an emolument attachment order.
- (5) Make an order by consent (where parties agree and consent in writing, their presence at the enquiry will not be necessary).
- (6) Make an order by default (where the person legally liable to pay maintenance fails to attend the enquiry).
- (7) Orders for the recovery of arrear maintenance in terms of section 26 of the Act.

#### **4. Can a court make an order that maintenance be deducted from a pension fund or from the benefits in a provident fund?**

Money contained in a pension (retirement) fund is protected by law from any form of attachment by an order of court. However, there are exceptions to this general rule. Both the Maintenance Act and the Pension Funds Act allows an applicant to a maintenance case to claim maintenance from the pension fund of the Respondent. If the Respondent fails to make timeous maintenance payments (arrear maintenance), there are three civil remedies available to the Applicant to enforce the original maintenance order. As a last remedy the Act, under Section 30, provides for a Maintenance Court to make an order in terms of the attachment of any debt. If the complainant knows that someone else owes the respondent money, for example, an attachment of debt order can be granted, which will order the respondent's debtor to pay the monies owed to the complainant instead.

If either the order has remained unsatisfied for a period of ten days from the day on which the amount became payable or the order was made, as the case may be, or the maintenance court

suspends a warrant of execution under the Act, the maintenance court may make an order for the attachment of any debt owing then or in the future or accruing to the person against whom the order was made into the amount necessary to cover both the amount that person has failed to pay, together with any interest, and the costs of the attachment or execution. The order must direct the person obliged to pay the debt to pay the amount specified in the order within a certain time and manner. On good cause shown, the maintenance court may at any time suspend, amend or rescind such an order.

The Maintenance Investigator will then find out whether the Respondent has a pension fund, and if so, the administrator of the pension fund will be served with a subpoena to release information in terms of the pension fund. The information being sought relates to the value of the fund and the benefit that is due to the Respondent. If it becomes clear from the information obtained that the Respondent does have a pension fund benefit due to them, the court will order that the maintenance amount that is outstanding be deducted from the fund benefit.

## **5. Brief discussion of orders by default and orders by consent**

Section 17 of the Maintenance Act deals with orders by consent. Section 17 of the Maintenance Act reads as follow:

- (1) Any order referred to in section 16(1)(a) or (b) may be made at the enquiry in the absence of one or both of the parties involved in the enquiry, if it is made in accordance with his/her or their consent in writing handed in by the maintenance officer at the enquiry.
- (2) A copy of an order made at the enquiry in the absence of one or both of the parties as provided for in subsection (1), shall be delivered or tendered to him/her or them, as the case may be, by any maintenance officer, police officer, sheriff or maintenance investigator, and the return of any such officer, sheriff or investigator showing that such copy was delivered or tendered to the particular person or persons shall be deemed to be sufficient proof of the fact that he/she was or they were aware of the terms of the order in question.



REPUBLIC OF SOUTH AFRICA

**CONSENT AND MAINTENANCE ORDER**  
**IN TERMS OF SECTION 17 READ WITH SECTION 16 OF THE MAINTENANCE ACT, 1998 (ACT No. 99 OF 1998)**

An order may be awarded as it corresponds to consent in writing. Even where the respondent is not there, an order may be made in accordance with their consent. In terms of a consent order the parties do not have to be at court. The consent form that needs to be completed is the Form J214 (Form G). The Maintenance Officer may request both parties to sign a written consent form and have that made an order of the court. The court then makes an order for payment of maintenance in accordance with the agreement between the two parties. Where parties do not reach an agreement, the matter is then referred to court for formal enquiry. In other words, if the parties are in agreement regarding the amount of maintenance payable that agreement can be made an order of court.

Orders by default are relevant when a respondent fails to appear at court on the date that their matter is heard. Section 18 of the Maintenance Act deals with orders by default. *Section 18(1) reads as follow:*

- (1) If a maintenance court is satisfied on the grounds of sufficient proof or otherwise –
  - (a) That any person against whom an order may be or has been made under section 16(1)(a) or
    - (b) or that any person in whose favour such an order has been made –
      - (i) Has knowledge of a subpoena issued under section 9; or
      - (ii) Has appeared before the court and was warned by the court to appear at a later date, time and place before the court; and
  - (b) that he/she has failed to appear before the maintenance court on the date and at the time and place –
    - (i) Specified in such subpoena; or
    - (ii) In accordance with a warning referred to in paragraph (a)(ii),



the maintenance court may, on application of the maintenance officer for an order by default, call upon the person who has lodged the complaint to adduce such evidence, either in writing or orally, in support of his/her complaint as the maintenance court may consider necessary.

It is clear from section 18(1) that where the respondent has been subpoenaed to come to court, or where the respondent has been warned by the court to appear on a later date but that person does not appear and does not adhere to the subpoena, the maintenance court will call upon the applicant to bring evidence in support of their claim. This is done before default judgment is granted by the maintenance court.

*Section 18 continues to read as follow:*

- (2) After consideration of the evidence, the maintenance court may –
  - (a) make any order by default which the maintenance court could have made under section 16(1)(a) or (b);
  - (b) make such order as the maintenance court may consider appropriate in the circumstances of the case; or
  - (c) make no order.

It is clear from section 18(2) that the maintenance court has the authority to make a default order in the absence of the respondent. Moreover, the subsection provides that the court has the power to make any other order as it deems appropriate in the circumstances or it can make no order at all. The rest of the provision can be found in the pre-reading. The rest of the provision provides that the maintenance officer, sheriff or maintenance investigator must deliver the respondent a copy of the default order made in their absence.

The respondent is allowed to apply for a variation or the setting aside of the default order. The defaulter can utilize Form I or the J256E to exercise their rights and apply for setting aside or variation of the order: The application by the respondent for the variation of/or setting aside of the default order must be made in the prescribed manner, and be made within 20 days after the day on which the person became aware of the default order. The respondent must provide a notice of their intention to bring an application for the variation and/or setting aside of an order to the applicant. The notice must be given to the applicant at least 14 days before the application is heard in court. The maintenance court will then call upon the Respondent to bring evidence. After

considering the evidence the court will either confirm the default order, vary the default order if good cause exists, or set aside the default order if good cause exists.

Note: Form H deals with the order by Default and Notice in terms of Section 18 read with Section 16 of the Maintenance Act, 1998 [Form J252]. This Form is only issued by court officials and not the parties to the maintenance matter themselves.

## **6. How and when may an aggravated party appeal against an order made by the Maintenance Court?**

If a party is not satisfied with the order made by the maintenance court, that party is able to appeal the Maintenance order. The party is able to appeal the maintenance order to the High Court. The process that needs to be followed when appealing a maintenance court order is set out in the Magistrate's and High Court rules. This is confirmed in section 25(1) which reads as follows: "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."

## **7. Discussion of the orders that can be appealed against and orders that are excluded from appeal**

Section 25(4) of the Maintenance Act sets out which orders can be appealed and which orders are excluded from appeal. It reads as follows: "For 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."

## **8. Explanation of the process of appeal and the documents and time frames within which an appeal must be done**

The pre-reading sets out the rules of both the Magistrate's court and the High court dealing with the process of civil appeals. The purpose of this webinar is to explain the process as outlined in the rules. The focus is on the High court rules, because as we have already discussed, the Maintenance order can be appealed to the High Court. The procedure is a bit complicated and it is suggested that you make use of a legal practitioner to assist you should you wish to appeal a decision.

Rule 50 of the High Court rules deals with the process which needs to be followed. This handout will attempt to simplify the rules and explain the process. For purposes of consistency and to avoid confusion: The Appellant is the person who has now applied for the appeal, and the Respondent is the person who has not applied for the appeal. The Appellant who wishes to appeal the Maintenance order (decision by the magistrate) must note such intention to appeal. The Appellant must then within 40-days from the date of noting the intention to appeal apply in writing to the Registrar of the High Court for a date that the appeal can be heard. At the time of applying for a court date that person must furnish the Registrar with their full residential and postal address, as well as their attorney's address if represented. Moreover, he/she must also lodge two copies of the record. The record must contain a correct and complete copy of all the pleadings, evidence and documents which are necessary for the appeal hearing.

If the Appellant fails to lodge an application for a court date, then the Respondent may before the lapse of 60 days apply for a court date. Upon receipt of the application for a court date, the appeal is deemed duly prosecuted. Once the Registrar has received the application for a court date, the Registrar must then assign a date of hearing and that assigned date must be at least 40 days after receiving the application. The Registrar must then give the appellant a written notice of the date of hearing, and that appellant will then deliver a notice of set down in writing to the clerk of the court from which the appeal originated (the maintenance court – Magistrate's court).

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.