

## PRE-READING



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

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The purpose of this pre-reading is to set out the legislation and rules of court as discussed in the webinar handout. This pre-reading sets out the provisions and rules verbatim as found in the legislation and can be consulted during the webinar discussions.

### 1. Discussion of section 16

Section 16 of the Maintenance Act reads as follow:

(1) After consideration of the evidence adduced at the enquiry, the maintenance court may –

(a) In the **case where no maintenance order is in force** -

- (i) make a maintenance order against any person proved to be legally liable to maintain any other person for the payment during such period and at such times and to such person, officer, organisation or institution, or into such account at such financial institution, and in such manner, which manner may include that an arrangement be made with any financial institution for payment by way of any stop-order or similar facility at that financial institution, as may be specified in the order, of sums of money so specified, towards the think fit relating to the payment of medical expenses in respect of such other person, including an order requiring such other person, if the said other person qualifies therefor, to be registered as a dependent of such person at a medical scheme of which such person is a member;
- (ii) make an order against such person, if such other person is a child, for the payment to the mother of the child, of such sum of money, together with any interest thereon, as that mother is in the opinion of the maintenance court entitled to recover from such person in respect of expenses incurred by the mother in connection with the birth of the

child and of expenditure incurred by the mother in connection with the maintenance of the child from the date of the child's birth to the date of the enquiry; or

(b) 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; or

(c) make no order.

(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, 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 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,

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.

(2)(b) A court –

(i) contemplated in paragraph (a)(i) shall only make an order referred to in paragraph (a) on application; and

(ii) that convicts any person of an offence referred to in section 31(1) shall make such order whether or not any penalty is imposed in respect of that offence or any order is made under section 40(1).

(3) (a) In order to give effect to an order referred to in subsection (2), the maintenance officer shall within seven days after the day on which such order was made or whenever it is afterwards required, in the prescribed manner cause a notice, together with a copy of such order, to be served on 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 has been made directing the former person to make the payments specified in the notice at the times and in the manner so specified.

(b) Whenever the person on whom the notice has been served, is for any reason discharged from the obligation of paying any such sums of money, he/she shall, within seven days after the day on which he/she is so discharged, give notice thereof in the prescribed manner to the maintenance officer of the court where the maintenance order in question was made.

(c) The person on whom the notice has been served shall give priority to the payments specified in that notice over any order of court requiring payments to be made from any other moneys due to the person against whom the maintenance order has been made.

(4) If any person against whom a maintenance order has been made under subsection (1)(a)(i) or (b)(i) changes his/her place of residence or employment during the currency of the maintenance order, he/she shall, within seven days after the day of such change, give notice thereof in writing to the maintenance officer of the court where the maintenance order was made, and, if payment in terms of that order is to be made to any person, officer, organisation or institution, then also to the person, officer, organisation or institution to whom payment is to be made and shall state fully and clearly where his/her new place of residence or employment is situated.

## **2. Discussion of section 26**

Section 26(1)(b) of the Act reads as follow: “Whenever any person 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 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.”

## **3. Discussion of section 17 & 18**

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.

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.

- (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.
- (3) A copy of an order in respect of any person not present at the enquiry shall be delivered or tendered, as soon as may be practicable in the circumstances, to him/her 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 shall be deemed to be sufficient proof of the fact that he/she was aware of the terms of the order in question.
- (4)
  - (a) The person in respect of whom a maintenance court has made an order by default may apply to the maintenance court for the variation or setting aside of the order.
  - (b) The application shall be made in the prescribed manner within 20 days after the day on which the person became aware of the order by default or within such further period as the maintenance court may, on good cause shown, allow.
  - (c) Any person who wishes to make an application under paragraph (a) shall give notice of his/her intention to make the application to the person who lodged the complaint, which notice shall be served at least 14 days before the day on which the application is to be heard.
  - (d) The maintenance court may call upon (i) the person who has made the application to adduce such evidence, either in writing or orally, in support of his/her application as the maintenance court may consider necessary; or (ii) the person who has lodged the complaint to adduce such evidence, either in writing or orally, in rebuttal of the application as the maintenance court may consider necessary.
- (5) After consideration of the evidence, the maintenance court may –
  - (a) make an order confirming the order by default referred to in subsection (2)(a);

- (b) vary such order by default, if it appears to the maintenance court that good cause exists for such variation; or
- (c) set aside such order by default, if it appears to the maintenance court that good cause exists for such setting aside, and convert the proceedings into a maintenance enquiry.
- (6) (a) Any person in whose favour an order by default has been made may consent in writing to the variation or setting aside of the order.  
  
(b) the consent in writing shall be handed in at the hearing of the application for the variation or setting aside of the order by default.”

#### **4. Discussion of the High Court and Magistrate’s Court Rules**

##### **4.1 Magistrate’s Court Rules**

The process of appeal is set out in the Magistrate’s Court Rules, as well as the High Court Rules. Rule 51 of the rules sets out the process and reads as follow:

- (1) Upon a request in writing by any party within 10 days after judgment and before noting an appeal the judicial officer shall within 15 days hand to the registrar or clerk of the court a judgment in writing which shall become part of the record showing (i) the facts he/she found to be proved; and (ii) his/her reasons for judgment.
- (2) The registrar or clerk of the court shall on receipt from the judicial officer of a judgment in writing supply to the party applying therefor a copy of such judgment and shall endorse on the original minutes of record the date on which the copy of such judgment was so supplied.
- (3) An appeal may be noted within 20 days after the date of a judgment appealed against or within 20 days after the registrar or clerk of the court has supplied a copy of the judgment in writing to the party applying therefor, whichever period shall be the longer.
- (4) An appeal shall be noted by the delivery of notice, and, unless the court of appeal shall otherwise order, by giving security for the respondent’s costs of appeal to the amount of R1000: Provided that no security shall be required from the State or, unless the court of appeal otherwise orders, from a person to whom legal aid is rendered by a statutorily established legal aid board.
- (5) Money paid into court under subrule (4) and outstanding for more than three years, may be paid into the State Revenue Fund, after three months’ notice of such intention in writing has

been given to the parties concerned, whereafter the parties concerned may apply for a refund of the amount paid into the said Fund.

- (6) A cross-appeal shall be noted by the delivery of notice within 10 days after the delivery of the notice of appeal.
- (7) A notice of appeal or cross-appeal shall state (a) whether the whole or part only of the judgment is appealed against, and if part only, then what part; and (b) the grounds of appeal, specifying the findings of fact or rulings of law appealed against.
- (8) (a) Upon the delivery of a notice of appeal the relevant judicial officer shall within 15 days thereafter hand to the registrar or clerk of the court a statement in writing showing (so far as may be necessary having regard to any judgment in writing already handed in by him or her)
  - (i) The facts he/she found to be proved;
  - (ii) The grounds upon which he/she arrived at any finding of fact specified in the notice of appeal as appealed against; and
  - (iii) His/her reasons for any ruling of law or for the admission or rejection of any evidence so specified as appealed against.(b) A statement referred to in paragraph (a) shall become part of the record.  
(c) This rule shall also, so far as may be necessary, apply to a cross-appeal.
- (9) A party noting an appeal or a cross-appeal shall prosecute the same within such time as may be prescribed by rule of the court of appeal and, in default of such prosecution, the appeal or cross-appeal shall be deemed to have lapsed, unless the court of appeal shall see fit to make an order to the contrary.
- (10) Subject to rule 50 of the Rules Regulating the Conduct of the Proceedings of the Several Provincial and Local Divisions of the High Court of South Africa, the registrar or clerk of the court shall, within 15 days after he or she receives notice that an appeal has been set down for hearing, transmit to the registrar of the court of appeal the record in the action duly certified.
- (11) (a) A respondent desiring to abandon the whole or any part of a judgment appealed against may do so by the delivery of a notice in writing stating whether he or she abandons the whole, or if part only, what part of such judgment.  
(b) Every notice of abandonment in terms of paragraph (a) shall become part of the record.

- (12) Where the parties agree in terms of section 82 of the Act that the decision of the court shall be final, either party may lodge the memorandum of such agreement with the registrar or the clerk of the court, and such memorandum shall thereupon become part of the record in the action or matter.

#### 4.2 High Court Rules

The High court rules set out the process which needs to be followed when appealing a maintenance order (civil appeal from the Magistrate's court). Rule 50 of the High court rules deal with the process and reads as follow:

- (1) An appeal to the court against the decision of a magistrate in a civil matter shall be prosecuted within 60 days after the noting of such appeal, and unless so prosecuted it shall be deemed to have lapsed.
- (2) The prosecution of an appeal shall ipso facto operate as the prosecution of any cross-appeal which has been duly noted.
- (3) If a cross-appeal has been noted, and the appeal lapses, the cross-appeal shall also lapse, unless application for a date of hearing for such cross-appeal is made to the registrar within twenty days after the date of the lapse of such appeal.
- (4) (a) The appellant shall, within 40 days of noting the appeal, apply to the registrar in writing and with notice to all other parties for the assignment of a date for the hearing of the appeal and shall at the same time make available to the registrar in writing his full residential and postal addresses and the address of his attorney if he is represented.  
  
(b) In the absence of such an application by the appellant, the respondent may at any time before the expiry of the period of 60 days referred to in subrule (1) apply for a date of hearing in like manner.  
  
(c) Upon receipt of such an application from appellant or respondent, the appeal shall be deemed to have been duly prosecuted.
- (5) (a) Upon receipt of such application, the registrar shall forthwith assign a date of hearing, which date shall be at least 40 days after the receipt of the said application, unless all parties consent in writing to an earlier date: Provided that the registrar shall not assign a date of hearing until the provisions of subrule (7) (a), (b), and (c) have been duly complied with.



(b) The registrar shall forthwith give the applicant written notice of the date of hearing, whereupon the applicant shall forthwith deliver a notice of set down and in writing give notice thereof to the clerk of the court from which the appeal emanated.

(6) A notice of set down of a pending appeal shall ipso facto operate as a set down of any cross-appeal and vice versa.

(7) (a) The applicant shall simultaneously with the lodging of the application for a date for the hearing of the appeal referred to in subrule (4) lodge with the registrar two copies of the record: Provided that where such an appeal is to be heard by more than two judges, the applicant shall, upon the request of the registrar, lodge a further copy of the record for each additional judge.

(b) Such copies shall be clearly typed on foolscap paper in double spacing, and the pages thereof shall be consecutively numbered and as from second January 1968, such copies shall be so typed on A4 standard paper referred to in rule 62 (2) or on foolscap paper and after expiration of a period of twelve months from the aforesaid date on such A4 standard paper only. In addition every tenth line on each page shall be numbered.

(c) The record shall contain a correct and complete copy of the pleadings, evidence and all documents necessary for the hearing of the appeal, together with an index thereof, and the copies lodged with the registrar shall be certified as correct by the attorney or party lodging the same or the person who prepared the record.

(d) The party lodging the copies of the record shall not less than fifteen days prior to the date of the hearing of the appeal also furnish each of the other parties with two copies thereof, certified as aforesaid.

(8) (a) Save in so far as these affect the merits of an appeal, subpoenas, notices of trial, consents to postponements, schedules of documents, notices to produce or inspect, and other documents of a formal nature shall be omitted from the copies of the record prepared in terms of the foregoing subrule. A list thereof shall be included in the record.

(b) (i) With the written consent of the parties any exhibit or other portion of the record which has no bearing on the point in issue on appeal may be omitted from the record.

(b)(ii) If a portion has been so omitted from the record, the written consent signed by or on behalf of the parties and noting the omission shall be filed, together with the incomplete record, with the Registrar.

(b)(iii) Notwithstanding the provisions of subparagraphs (i) and (ii) the court hearing the appeal may at any time request the complete original record and take cognisance of everything appearing therein.

(c) When an appeal is to be decided exclusively on a point of law, the parties may agree to submit such appeal to the court in the form of a special case, as referred to in rule 33 of the Rules, in which event copies may be submitted to the court of such portions only of the record which in the opinion of the parties may be necessary for a proper decision of the appeal: Provided that the court hearing the appeal may request that the entire original record of the case be placed before the court.

(9) Not less than fifteen days before the appeal is heard the appellant shall deliver one copy of a concise and succinct statement of the main points (without elaboration) which he intends to argue on appeal, as well as a list of the authorities to be tendered in support of each point, and not less than ten days before the appeal is heard the respondent shall deliver a similar statement. Three additional copies shall be lodged with the registrar in each case.

(10) Notwithstanding the provisions of this rule the judge president may, in consultation with the parties concerned, direct that a contemplated appeal be dealt with as an urgent matter and order that it be disposed of, and the appeal be prosecuted, at such time and in such manner as to him seems meet.

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