

WEBINAR HANDOUT



Webinar: **HOW TO DEAL WITH EMPLOYERS REFUSING “GARNISHEE” ORDER & ENQUIRIES RELATING TO POPIA**

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1. Explanation of how the emoluments attachment order (“garnishee”) process works

Emoluments Attachment Order (also known as a “garnishee order” or EAO) is one of the civil remedies available to a complainant to enforce the payment of arrear maintenance. This is confirmed in section 26(1)(a) of the Maintenance Act. Section 26(1)(a)(ii) 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 such order shall be enforceable in respect of any amount which that person has so failed to pay, together with any interest thereon by the attachment of emoluments as contemplated in section 28.

It is a court order that allows for deduction of money owed directly from a respondent’s salary or wage. This means that a portion of the respondent’s earnings is automatically deducted from their paycheck and paid directly to the complainant until the court terminates the maintenance order. The court order is issued as part of the maintenance order. The maintenance order is a court order requiring one person to provide financial support to another, such as a parent providing support for their child or a spouse providing support for their ex-partner.

Section 28 of the Maintenance Act 99 of 1998 deals with the attachment of emoluments (“garnishee” orders). The provision reads as follow:

- (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);
 - (c) when such court suspends the order for the attachment of debt under section 30(1); and
 - (d) where applicable, after hearing the evidence, either in writing or orally, of the employer of the person in question,

make an order for the attachment of any emoluments at present or in future owing or accruing to the person against whom the maintenance or other order in question was made 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 attachment or execution, which order shall authorise any employer of the latter person to make on behalf of the latter person such payments as may be specified in the order from the emoluments of the latter person until such amount, interest and

costs have been paid in full: 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 paragraph (d) will give rise to an unreasonable delay in the finalization of the enquiry, to the detriment of the person or persons to be maintained.”

2. Service of the emoluments attachment order on employer and the effect thereof

The garnishee order is served by the sheriff (or messenger) on the respondent’s employer, ordering the employer to make deductions from the salary or wages of the respondent in order to pay the arrear maintenance. In the case of a maintenance order, the emoluments of attachment order are used to ensure that the person who is supposed to be receiving support actually gets the money they are owed, even if the person responsible for paying the support is not willing or able to make the payments voluntarily.

The employer then has an obligation to make the necessary deductions from the salary/wage of the respondent and pay that amount to the applicant for the arrear maintenance. It is enforced against the employer of the respondent, and not the respondent him/herself. If the employer fails to make the necessary deductions, he/she can be held liable for the payments.

Section 29(1) of the Maintenance Act reads as follow: “In order to give effect to an order for the attachment of emoluments referred to in section 28(1), the maintenance officer shall, within seven days after the day on which such order was made by the maintenance court or whenever it is afterwards required, in the prescribed manner cause a notice together with a copy of such order, to be served on the employer concerned directing that employer to make the payments specified in the notice at the times and in the manner so specified.”

Section 65J (2) of the Magistrates Court Act 32 of 1944 provides the following: “an emoluments attachment order may be issued by a Clerk of the Magistrates Court:

- if the judgment debtor consents thereto, and/or
- if the judgment creditor has sent a registered letter to the debtor informing him or her that an emoluments attachment order will be issued pursuant to the judgment debt if such debt is not paid in full, and such letter must also be filed with the Clerk of the Court together with an affidavit.”

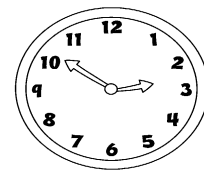
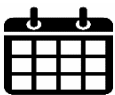
It is important to note that an emoluments of attachment order can only be issued by a court and must be based on a valid court order, such as a maintenance order. Additionally, there are limits to the amount that can be deducted from a person's salary or wage, based on their income and other factors. If the respondent becomes unemployed the employer must give notice to the maintenance officer within seven days.

Section 29(2) of the Maintenance Act reads as follow: “whenever any person to whom the notice relates leaves the service of the employer, that employer shall, within seven days after the day on which he/she so leaves the service, give notice thereof in the prescribed manner to the maintenance officer of the court where the order in question was made.”

The constitutional court in Bayport Financial Services v Mziwoxolo (2018) clarified that an EAO can only be granted after a court has determined that the debtor is able to pay the amount owing. The court also emphasized the importance of ensuring that EAOs do not lead to excessive or unfair deductions from an individual's salary. Moreover, the High court of South Africa in Ramikosi v Viljoen and Others (2018) held that a garnishee order could not be granted against an individual who was already subject to an Emoluments Attachment Order (EAO) for maintenance. The court held that the priority should be given to the EAO for the maintenance of the debtor's dependents.

3. Usual time periods for deductions (payment runs)

A garnishee order takes effect when it is served on the garnishee. Furthermore, under section 118 of the Criminal Procedure Act, payment of a debt that is the subject of a garnishee order must generally be made within 14 days of the order being served on the garnishee. However, payments can take up to three months before it is paid to the applicant.



4. Non-compliance with an emoluments attachment order – how to report non-compliance and what will happen next?

4.1 Can an employer refuse to deduct the money from the respondent's salary/wage?

The employer cannot refuse to deduct the money from the respondent's salary or wage because he/she is legally obliged in terms of the court order to commence with the deductions immediately

upon being served with the order. An emoluments attachment order is a court order that directs an employer to deduct a specified amount from an employee's salary/wage and pay it to the creditor who obtained the order, and the employer has a legal obligation to comply with the terms of the order.

If an employer refuses to deduct money from an employee's salary in accordance with an emolument's attachment order, the creditor can take legal action against the employer. The creditor may also apply for an order compelling the employer to comply with the terms of the EAO and make the required deductions from the employee's salary. Moreover, non-compliance with the notice by the employer is a criminal offence (section 38(a)).

Section 38 of the Maintenance Act deals with offences relating to certain notices and section 38(a) reads as follow: "Any person who without sufficient cause, refuses or fails to make any payment in accordance with a notice under section 16(3)(a), 29(1) or 30(1) shall be **guilty of an offence** and liable on conviction to a fine or to imprisonment for a period not exceeding two years."



4.2 Remedies in case of failure of the employer to deduct the necessary amount

Section 29(2) reads as follow: "Whenever any person to whom the notice relates leaves the service of the employer, that employer shall, within seven days after the day on which he or she so leaves the service, give notice thereof in the prescribed manner to the maintenance officer of the court where the order in question was made."

Section 29(3) reads as follow: "Any employer on whom a notice has been served for the purposes of satisfying a maintenance order shall give priority to the payments specified in that notice over any order of court requiring payments to be made from the emoluments due to the person against whom that maintenance order was made."

Section 29(4) reads as follow: "If an employer 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 in respect of any

amount which that employer has so failed to pay, and the provisions of this chapter shall, with the necessary changes, apply in respect of that employer, subject to that employer'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)".

In other words, this means that if the employer must give priority to these garnishee payment, and if he/she fails to deduct the necessary amount in accordance with the garnishee order, **that employer shall be held liable for the amount owed**. That maintenance order will then be legally enforceable against the employer.

The Labour court of South Africa in *South African Post Office v Member of the Executive Council: Department of Education, KwaZulu-Natal* (2019) held that an employer could be held liable for failing to deduct amounts from an employee's salary in accordance with an EAO. The court emphasized that employers have a legal obligation to comply with EAOs and that failure to do so could result in legal action. The constitutional court in *Mahlangu v Minister of Police* (2020) ruled that EAOs can be used to enforce maintenance orders against members of the South African Police Service. The court also noted that employers have a responsibility to ensure that EAOs are enforced and that deductions from employees' salaries are made in accordance with the law.

4.3 Can a warrant of execution be granted against the employer who does not comply with the garnishee order? [J397]

Where the employer refuses to make the necessary deductions; then section 29(4) of the Maintenance Act can be invoked and the full amount can be deducted from the employer's bank account or the employer's assets can be attached on Form L in terms of section 29(4). The employer can be prosecuted in terms of section 38. The defaulting respondent will be charged in terms of section 31 and the employer in terms of section 38.

The court issues a warrant of execution of the movable assets of the employer. The warrant of execution must be executed at the residential and/or business address of the employer or could be executed against the company's assets. The residential address is the address where the employer's movable assets are found. These assets are then attached by the Sheriff. The process of execution takes the form of a warrant or writ of execution. The process is initiated once the clerk of the court issues a writ of execution after application has been made to the maintenance court. The warrant of execution is addressed to the Sheriff, authorising him/her to

raise on the movable property of the judgment debtor (the employer) an amount sufficient to satisfy the judgment debt, the cost, and the cost of the Sheriff.

The employer will be sent a warning letter if he/she has not complied with the notices in terms of the garnishee order. That warning letter will set out what could happen: it will warn the employer that their companies assets could be attached to satisfy the garnishee order.

5. Duties and responsibilities of maintenance officers relating to non-compliant employers

Regulation 3(1) states: '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 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.'

Regulation 3(3) provides that: 'Any person who fails to comply with a direction contemplated in sub regulation (1) shall be guilty of an offence and liable on conviction to imprisonment for a period not exceeding six months.'

6. Documents that need to be completed and explanation of the process

The applicant ("creditor") is able to apply for the attachment of emoluments –

- At any time by consent (J214);
- During a section 6 enquiry;
- During court proceedings (section 16(2));
- If the respondent is in arrears for more than 10 days (J306);
- Application to court (section 28).

Section 26(2)(a) of the Maintenance Act reads as follow: "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 10 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 for an order for the attachment of emoluments referred to in section 28(1).” The applicant must complete the J306 (Form K). This is the application form for the enforcement or other order in terms of section 26 of the Maintenance Act (civil remedies for recovery).

The application for a garnishee order must include the prescribed application form (J360E) and the following documents:

- An affidavit stating who the person is that owes the maintenance amount;
- Confirmation (copy) of the order that was made in favour of the applicant;
- The full outstanding amount of debt and how much will be deducted every month.

7. Examples of court documents explained

7.1 Form K: J306E Application for the attachment of emoluments (“garnishee”) order

J306E



REPUBLIC OF SOUTH AFRICA

APPLICATION FOR ENFORCEMENT OF MAINTENANCE OR OTHER ORDER IN TERMS OF SECTION 26 OF THE MAINTENANCE ACT, 1998 (ACT No. 99 OF 1998)

The prescribe form that an applicant must complete is the J306 form. This is the application for enforcement of a maintenance or other order in terms of section 26 of the Maintenance Act, 1998.

Reference No. _____

* Delete whichever is not applicable

In the maintenance matter between:

(person in whose favour maintenance order was made)

and

(person against whom maintenance order was made)

To the Maintenance Officer of the Maintenance Court, _____

1. I, _____, (full name of person in whose favour order is to be/was made)

ID number

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 hereby apply -

*(a) for authorisation to issue a warrant of execution; or

*(b) for an order for the attachment of emoluments; or

*(c) for an order for the attachment of a debt.

The applicant (“creditor”) must approach the Magistrate’s court at which the original maintenance order was obtained and complete the J306E application form for the enforcement of the maintenance order. The application form refers to the original maintenance matter between the applicant (person in whose favour the maintenance order was made) and the respondent (the person against whom the maintenance order was made).

State which Magistrate’s court the application is being made to. State your full name and surname (the person in whose favour the order is to be/was made). State your full 13-digit South African identity number. Tick the appropriate order that you wish to apply for –

(a) Issue of a warrant of execution;

(b) Attachment of emoluments;

(c) Attachment of debt.

2. The following information is important for purposes of my application:

(Submit information relating to property and/or debts of the person against whom the order was made or his or her employer and income)

Submit relevant information pertaining to the property, debts or income of the respondent (the person against whom the order was made) or the employer of the respondent.

Provide the necessary information to ascertain the whereabouts of the respondent. State to the

3. The whereabouts of the person against whom the order was made are as follows:

.....
.....

(a) on (date) the attached order in terms of the Maintenance Act, 1998, was made by the above-mentioned maintenance court;

(b) the attached order has remained unsatisfied; and

Department of Justice and Constitutional Development

J306E

(c) the amount of R..... is still outstanding. The amount has been calculated as follows:

.....
.....

best of your knowledge their last known location either residential or place of employment.

The last part of the form is the oath and/or affirmation. This is to ensure that the application was made truthfully.

7.2 Form O: J448 Notices to and by Employer in terms of Section 29

Section 29(4) reads as follow: “If an employer 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 in respect of any amount which that employer has so failed to pay, and the provisions of this chapter shall, with the necessary changes, apply in respect of that employer, subject to that employer’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)”.

In other words, this means that if the employer must give priority to these garnishee payment, and if he/she fails to deduct the necessary amount in accordance with the garnishee order, **that employer shall be held liable for the amount owed**. That maintenance order will then be legally enforceable against the employer.

7.3 Form L: J397 Warrant of execution against Property in terms of Section 27 of the Maintenance Act

Where the employer refuses to make the necessary deductions; then section 29(4) of the Maintenance Act can be invoked and the full amount can be deducted from the employer's bank account or the employer's assets can be attached on Form L in terms of section 29(4).

8. Issues relating to POPIA

8.1 General point of departure

When maintenance officers or maintenance investigators call employers to request information on the salary of a respondent, some employers refuse to provide personal information of employees since they believe providing such personal information is in contravention of the POPI Act. Maintenance officers and maintenance investigators act in terms of the Maintenance Act 99 of 1998 and the duties of maintenance staff is legislated in terms of law which makes it lawful to require personal information from the employers.

8.2 Where an employer refuses to give the requested information to the maintenance officer

Compliance with the Protection of Personal Information (POPI) Act 4 of 2013 states that where it is a lawful request for information the company can assess the information requested and substance in terms of section 89 and 90 and make a decision whether to produce the required information.

Moreover, sections 7 and 8 of the Maintenance Act 99 of 1998 empowers maintenance staff to obtain the above information from an employer. In the event where the HR manager or company requires a summons to appear before a magistrate the maintenance investigator or maintenance officer can issue a summons in terms of section 8 and summon the HR manager or company owner to provide the information to be given under oath in terms of the Maintenance Act 99 of 1998.

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.