

# WEBINAR HANDOUT



Webinar: **SUBSISTENCE & TRAVEL ALLOWANCE, JURISDICTION, INTER-PROVINCE APPLICATIONS AND HOW TO TRANSFER A MAINTENANCE FILE FROM ONE COURT TO ANOTHER?**

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**During this lunch hour we deal with topics which include:**

PART A: SUBSISTENCE & TRAVEL ALLOWANCE, JURISDICTION, AND INTER-PROVINCE APPLICATIONS .....3

1. Subsistence & travel allowance for applicants travelling to court and having to take of work (discussion of section 11(1)) .....3

2. Will the court pay the travel fees of the respondent or myself to come to court? .....3

3. Discussion on how to establish jurisdiction or which court should be used for a maintenance application, increase or decrease application .....4

4. Explanation, with practical examples, on how to conduct a maintenance inquiry where the respondent is living or working in another province .....4

5. Discussion of sections 23(1) and 19(a) and regulation 14 .....5

PART B: HOW TO TRANSFER A FILE FROM ONE COURT TO ANOTHER? .....6

6. Circumstances under which a file could be transferred from one court to another .....6

7. Discussion of the application for transfer and explanation of the internal procedure that the maintenance officer/ clerk of the court needs to follow .....6

8. Reference to the DOJ Codified Instructions 26/2015 (paragraph 35) .....8

PART C: INTERIM MAINTENANCE ORDERS .....9

9. Discussion of Form E (Regulation 8) interim maintenance order .....	9
10. What is meant by an “interim maintenance order”? .....	9
10.1 General point of departure .....	9
10.2 Interim child maintenance pending divorce .....	11
11. Which court may grant an interim maintenance order? Discussion of section 16(1)(a) and section 10(6)(b).....	12
12. Duty of maintenance officers when it comes to interim maintenance orders.....	13
13. Explanation of consequences of non-compliance with an interim order.....	14
14. Interim orders v final orders .....	14

## **PART A: SUBSISTENCE & TRAVEL ALLOWANCE, JURISDICTION, AND INTER-PROVINCE APPLICATIONS**

### **1. Subsistence & travel allowance for applicants travelling to court and having to take of work (discussion of section 11(1))**

Section 11 of the Maintenance Act deals with subsistence and travel allowances for applicants who have to take time of work in order to travel to court. Section 11(1) reads as follow: “Any person, other than a person against whom a maintenance order may be made under this Act, attending the enquiry as a witness shall be entitled to an allowance as if he/she were attending criminal proceedings as a witness for the State”.

Section 11(2) reads as follow: “The maintenance court may direct that any person against whom a maintenance order may be made under this Act shall (a) be paid the prescribed allowances for subsistence and for travel to and from the court; and (b) shall be paid such allowances as may be paid to a witness for the accused in criminal proceedings.”

### **2. Will the court pay the travel fees of the respondent or myself to come to court?**

The wording of section 11(1) does not expressly make provision for the applicant to claim subsistence and travel allowances therefore some courts might not grant such allowances. However, the wording “any person” by implication includes the applicant. The applicant who is applying for maintenance is not acting in her own interests, but is rather acting in the best interests of her child (section 28 of the Constitution). In acting for her child’s best interests, the applicant had to miss a day of work, and by implication lose a day’s wage. It is clear from section 11(2) that a respondent may claim an allowance for subsistence and for travel to and from the court. This is expressly provided for in the subsection.

Therefore, it is possible for both the respondent and the applicant to claim a travel and subsistence allowance from the court. This is done by way of an application to court. The respondent must inform their employer that they have been subpoenaed to court and the employer must allow them to attend court. In terms of section 11 of the maintenance act, a witness testifying in a maintenance matter is entitled to an allowance as if he or she were attending criminal proceedings as a witness for the state. A witness may be paid an allowance for subsistence and for travel to and from the court.

*See attached a template for the application for subsistence and travel allowance in terms of section 11(1) of the Maintenance Act.*

### **3. Discussion on how to establish jurisdiction or which court should be used for a maintenance application, increase or decrease application**

An application for maintenance can be made against a respondent (person against whom the maintenance is being claimed) at any Maintenance court in the district where the applicant (person who is claiming for maintenance) or the child, on whose behalf maintenance is being claimed, resides or is employed. Therefore, the Maintenance Court has the jurisdiction to hear any matter relating to maintenance, including the increase or decrease of existing maintenance orders.

Every District Court is also a Maintenance Court within its jurisdiction. The Maintenance Court has jurisdiction to receive maintenance complaints from individuals who reside within that Court's district. This means that the aggrieved party will have to lodge their complaint at the District Court in the area where they live and pursue the matter there. Complaints regarding new or even existing maintenance orders can be made in this Court.

### **4. Explanation, with practical examples, on how to conduct a maintenance inquiry where the respondent is living or working in another province**

#### Section 6 maintenance inquiry:

The section 6 inquiry can be conducted remotely i.e., skype. This is done to save the Respondent a trip to a different province. The section 6 enquiry is an informal enquiry and consists mostly of negotiations between the parties.

#### How would this work?

The maintenance officer will request that the applicant and the respondent submit their documentation electronically. These documents include i.e., J101, J107, founding affidavit, index page, financial disclosures form and supporting financial statements. The parties will then via skype have a joint session. The maintenance officer will then do a caucus with both parties individually and return to a joint session later on in the maintainancy enquiry.

#### Section 10 maintenance inquiry:

Section 10 is however a formal inquiry. The court can at any time subpoena any person to come and testify at court if the court deems it necessary that such evidence is needed. During any stage of the enquiry, the court may refer the matter to a Family Advocate for investigation. A maintenance court shall conclude maintenance enquiries as speedily as possible and shall ensure that postponements are limited in number and in duration. If a postponement is necessary, the court may make an order for interim maintenance pending finalization of the inquiry.

#### **5. Discussion of sections 23(1) and 19(a) and regulation 14**

Section 23 of the Maintenance Act deals with how files (maintenance court orders) can be transferred from one maintenance court to another court for example in another province. The provision reads as follow:

- (1) "Subject to the directions prescribed in connection with the transfer of maintenance orders, the maintenance officer may in writing direct the clerk of the court where a maintenance order was made to transmit the maintenance order, together with the prescribed records, to the clerk of the maintenance court within the area of jurisdiction of which the person in whose favour the maintenance order was made, or the person in whose care that person is, resides, carries on business or is employed.
- (2) On receipt of the maintenance order, the clerk of the maintenance court shall register such maintenance order in the prescribed manner.
- (3) Any maintenance order registered in terms of subsection (2) shall for the purposes of this Act be deemed to be a maintenance order made under section 16 by the maintenance court where the order has been so registered."

Regulation 14 in terms of the Regulations to the Maintenance Act reads as follow:

- (1) The clerk of the court where a maintenance order was issued shall, when the maintenance order is to be transferred in terms of section 23(1) of the Act –
  - retain certified copies of all orders or judgements, including previous amended orders, and documents with regard to the record of payment which are applicable to the particular case; and
  - send by registered post all the original documents referred to in paragraph (a) to the clerk of the maintenance court where the person in whose favour the maintenance order was made resides.

- (2) On receipt of the maintenance order referred to in subregulation (1), the clerk of the maintenance court shall register the order by numbering it with the following consecutive number for maintenance cases for the year during which it was received.

## **PART B: HOW TO TRANSFER A FILE FROM ONE COURT TO ANOTHER?**

### **6. Circumstances under which a file could be transferred from one court to another**

It is possible that a maintenance file can be transferred from one court to another. The most common situation where this would happen is where the applicant in whose favour the court order was made moves to a different province. The maintenance file will then have to be transferred from the previous province to the new province in order to allow the applicant to approach the maintenance court in their area of jurisdiction for any issues relating to the maintenance order.

The Applicant now has a choice to register her/his maintenance file at her/his convenience at the closest court where she/he resides or where she/he is employed.

There are two scenarios:

- (1) Where the applicant already relocated to the new residential area or;
- (2) Where the applicant intends on relocating or wishes his/her file to be transferred for convenience close to his/her place of employment to ensure that he/she can return to work (since some courts do not regard the applicant as a any other witness in terms of section 11 eligible for witness fees (subsistence and travel allowance)).

### **7. Discussion of the application for transfer and explanation of the internal procedure that the maintenance officer/ clerk of the court needs to follow**

The applicant wishing to transfer the file will have to complete an application for transfer either at the court where they have opened the maintenance file or the court in the new area where they are currently residing. It is recommended that the applicant submit the form to the clerk where the original maintenance file was opened, and that clerk will scan and transfer the application for transfer to the new court closest to where the applicant is currently or intends on residing or is employed (i.e., after relocation).

Once the clerk of the court where the applicant intends on residing or area where the applicant is employed receives the application for transfer, that clerk must make a copy thereof and hand the applicant a copy and keep a copy. A copy is then scanned and emailed to the old court of origin. Once the old court of origin receives the application form that clerk will hand it to the maintenance officer. The maintenance officer is then responsible for checking that all the court documents are in order and signed, and must check that the minimum standards in the Department of Justice Code 26 of 2015 are complied with.

Once the maintenance officer has done this, he/she has to take the maintenance file to the magistrate in chambers to request that the magistrate order the transfer of the file to the new magisterial district. Once the court order to transfer the file is obtained the clerk of court will copy and certify all court orders including the J214, and all other court documents and archive the copied documentation in the court archive. The respondent and employer must be informed that the maintenance file was transferred to a new magisterial district to ensure that the respondent files a J107 reduction/variation application at the correct court.

The original file will then be handed to the messenger who has to sign for the maintenance file before taking receipt of the maintenance file. If the new court is within the messenger's delivery area the messenger can drop the file at the new court and ensure that he/she obtains the signature of the person taking receipt of the file. Once the file is received the clerk must register the maintenance file with the new court number and acknowledge receipt by email to the old court of origin. At the old court of origin, the new number and acknowledgement of receipt will be filed with the copied maintenance file in the court archives.

Checklist for requesting your file to be transferred:

- Applicant filed application for transfer form;
- Maintenance officer checked that all of the court documents are correct and have been signed;
- File was taken to the magistrate in chambers in order for it to be transferred to the new court;
- The clerk has made copies of the file and all copies have been certified and kept for the archives;
- The clerk has complied the DOJ letter to accompany the original file to the new court;
- A messenger has been arranged and confirmed to dispatch the original file to the new court, or the file will be sent via registered mail;

- The clerk of the new court has confirmed receipt of the file, and the confirmation of receipt has been filed with the copied file in the archives.

## **8. Reference to the DOJ Codified Instructions 26/2015 (paragraph 35)**

Paragraph 35 of the DOJ Codified Instructions 26/2015 deals specifically with the transfer of the maintenance file in terms of section 23 and regulation 14.

35.1) The Clerk of the Maintenance Court must upon receipt of a request for transfer of a maintenance order, file it immediately on the appropriate file and hand the file to the Maintenance Officer for a directive.

35.2) In terms of section 23(1), the Maintenance Officer must give a directive to the Clerk of the Maintenance Court which includes inter alia the following:

- certified copies of the application/directive for the transfer of file;
- certified copies of all orders or judgments, including previous amended orders;
- certified copies of documents with regard to the record of payment which are applicable to the particular case where applicable, from the maintenance report on the JDAS System;
- all other documents contained in the file;
- Section 212 of the Act 51 of 1977, statement in respect of the payments;
- dispatch by registered post all the original documents referred to above to the Clerk of the Maintenance Court where the beneficiary resides/ employed;
- notify the Respondent and Employer of the transfer of the file and the particulars of the new Maintenance Court by Registered mail;
- the file must also be transferred on the Maintenance Module – JDAS system.

35.3) Receipt of the maintenance file from another court. In terms of Section 23(2) and Regulation 14(2):

- The Maintenance Officer of the court receiving the transferred file, if needs be, must approach the court to vary the terms of the order to reflect the new details or particulars of that courthouse (for example, the banking details of the new district in instances where the place of payment is the courthouse) to facilitate the payment;



- Clerk of the Maintenance Court, who receive the maintenance file must by registered mail notify the Applicant, the Respondent and the Employer of the of the file, the new file number and particulars of the new courthouse.

## **PART C: INTERIM MAINTENANCE ORDERS**

### **9. Discussion of Form E (Regulation 8) interim maintenance order**



FORM E [REGULATION 8]

REPUBLIC OF SOUTH AFRICA

#### **INTERIM MAINTENANCE ORDER IN TERMS OF THE MAINTENANCE ACT, 1998 (ACT No. 99 OF 1998)**

Regulation 8 of the Regulations to the Maintenance Act<sup>1</sup> reads as follow: “Any order of a court made under Chapter 4 of the Act, excluding an order contemplated in section 17 or 18 of the Act, shall substantially correspond with Form E of the Annexure.” In the event of an order by consent Form G (J214) must be used, and in the event of an order by default Form H (J252) must be used.

### **10. What is meant by an “interim maintenance order”?**

#### **10.1 General point of departure**

The law provides a mechanism to applicants in situations where they have no income, or where a divorce takes a long time to finalize. This mechanism is known as “interim relief”. It assists the applicant for an interim period during divorce proceedings. Rule 43 of the Uniform of Court and Rule 58 of the Magistrate’s Court Rules deal with these types of interim orders. These interim orders include the following:

- Interim care or contact with the child;
- Maintenance for the wife and/or children;

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<sup>1</sup> Regulation: No. R. 1361 of 1999 - Maintenance Act 1998. Regulation Gazette, No. 6675.

- Enforcing certain payments, such as for the bond on the matrimonial home, vehicles, school fees, medical aid premiums and even deposits on new accommodation and relocation costs;
- Interim contribution towards the costs of the divorce and legal fees; and/or
- An order for delivery of a car, furniture, etc.

The rules provide interim relief pending matrimonial matters in respect of maintenance and costs. The Applicant can claim interim maintenance (both spousal and child maintenance) during the divorce litigation process, a contribution towards costs of the pending divorce litigation, interim care of a child and interim contact with a child. The applicant must prove on a balance of probabilities that they are entitled to the relief (maintenance) depending on the living standards of the parties. If the court grants the interim order, this order will regulate the terms between the parties pending the divorce being finalised.

In order to be entitled to the interim relief (maintenance) the applicant must prove on a balance of probabilities:

- That he/she has insufficient means; and
- That the Respondent is able to afford the amount being sought as interim relief.

The following factors are taken into account by the Court in the determination of the amount of maintenance:

- Existing or prospective means of each of the parties;
- The parties respective earning capacities;
- Financial needs and obligations;
- The age of each of the parties;
- The duration of the marriage;
- The standard of living of the parties prior to the divorce;
- The conduct of the parties so far as it may be relevant to the breakdown of the marriage;
- Any other factor which in the opinion of the court should be taken into account.

## 10.2 Interim child maintenance pending divorce

Rule 43 of the High Court Rules provides a comparatively inexpensive and speedy remedy when maintenance pendente lite (pending the suit) are sought by one of the parties. The equivalent is a Rule 58 in the Regional Magistrate's Courts.

The provisions of the High Court rule must however be observed strictly. The procedure laid down requires the applicant to deliver a sworn statement in the nature of a declaration setting out the relief claimed and the grounds on which it is claimed. 'Grounds' refer to factual allegations, not inferences made from facts not set out, therefore the respondent must deliver a sworn reply within ten days of receiving the statement. The registrar of the court then sets the matter down for hearing on ten days' notice to both the applicant and the respondent. If the respondent is in default, however, notice to him or her is unnecessary.<sup>2</sup> An order in terms of rule 43 falls within the meaning of 'maintenance order' and the maintenance court has the power to suspend the order, provided such power is exercised with caution.<sup>3</sup>

The term 'maintenance pendente lite' in rule 43(1) 'connotes periodic maintenance payments' and does not include lump-sum payments.<sup>4</sup> Ultimately, such urgent interim maintenance application must guard against lengthy documentation as it defeats the point of expediency. Courts have previously issued warnings against the drafting of unnecessarily lengthy papers and held that long-winded application in a rule 43 proceeding is an abuse of process because it defeats the purpose of the rule.<sup>5</sup>

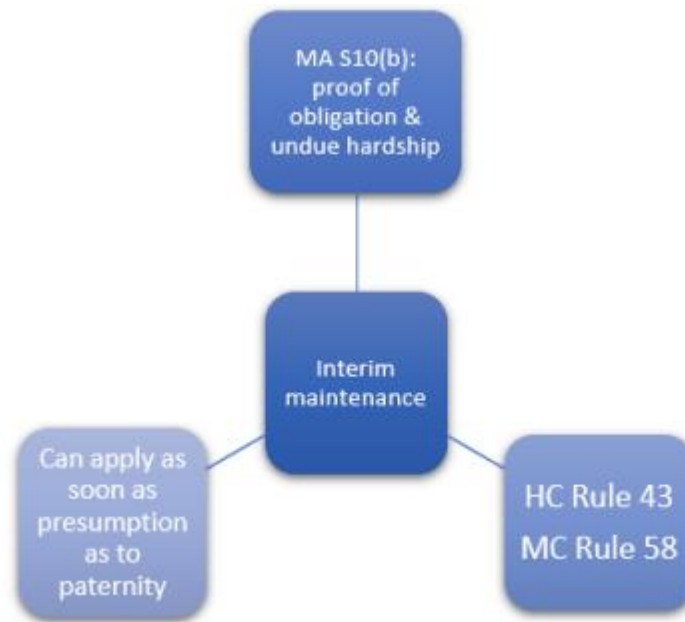
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<sup>2</sup> B Clark's Handbook of the South African Law of Maintenance (2016) 54.

<sup>3</sup> *Thompson v Thompson* [1998] JOL 2316 (T), 1998 (4) SA 463 (T).

<sup>4</sup> *Greenspan v Greenspan* [1999] JOL 5300 (C), 2000 (2) SA 283 (C).

<sup>5</sup> *Du Preez v Du Preez* [2008] JOL 22600 (T), 2009 (6) SA 28 (T).



**11. Which court may grant an interim maintenance order? Discussion of section 16(1)(a) and section 10(6)(b)**

Interim maintenance orders are a useful remedy against a respondent who uses delaying-tactics just short of economically abusing their child by withholding maintenance. The Maintenance Amendment Act 9 of 2015 in this regard provides for interim child maintenance pending finalization of the relevant maintenance enquiries. Section 10(6)(b) allows such orders to be granted by a maintenance court.

Section 10(6)(b) of the Maintenance Act reads as follow: “A maintenance court may, where a maintenance order has not been made and a postponement of the enquiry is necessary and if the court is satisfied that –

- (i) There are sufficient grounds prior to such postponement indicating that one of the parties is legally liable to maintain a person or persons; and
- (ii) Undue hardship may be suffered by the person or persons to be maintained as a result of the postponement subject to paragraph (c), make an interim maintenance order which the maintenance court may make under section 16(1)(a).

From the provision it is evident that the requirements for an interim child maintenance claim include proof of:

- (1) Sufficient grounds that a maintenance obligation exists before postponement of the proceedings; and
- (2) That undue hardship may be suffered as a result of the postponed proceedings.

Ultimately, an application for interim maintenance can only be made if there was indeed a postponement of maintenance enquiries. However, maintenance courts are required to conduct maintenance enquiries as speedily as possible and limit the number and duration of postponement.

Section 16(1)(a) of the Maintenance Act reads as follow: “After consideration of the evidence adduced at the enquiry, the maintenance court may in the case where no maintenance order is in force –

- (i) Make a maintenance order against any person proved to be legally 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 maintenance of such person, which order may include such order as the court may 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 qualified 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.

## **12. Duty of maintenance officers when it comes to interim maintenance orders**

When dealing with an interim maintenance order, the duty of the maintenance officer is to:

- Provide maintenance for the wife and/or children
- Enforce certain payments, such as for the bond on the matrimonial home, vehicles, school fees, medical aid premiums and even deposits on new accommodation and relocation costs
- Provide interim contribution towards the costs of the divorce and legal fees
- Provide an order for delivery of a car, furniture, etc.

### **13. Explanation of consequences of non-compliance with an interim order**

Not attending to a maintenance order is a criminal offence and a defaulter can be convicted for this. The defaulter will be liable on conviction to a fine or imprisonment for a period not exceeding one year without the option of a fine. Once you laid your complaint, with the Complaint of Failure to Comply with a Maintenance Order for purposes of Section 31(1) of the Maintenance Act, 1998 (Act 99 of 1998) form, the maintenance court would subpoena the defaulter to the criminal court. The form can be obtained from your attorney, the maintenance court or from the Department of Justice's website. Once the date has been set for a trial you will be subpoenaed as a witness to give your evidence as per the maintenance order, the outstanding maintenance amount and any other relevant information. Should the court find the defaulter guilty, the court may grant an order for the recovery of the arrears maintenance together with the sentence imposed on the defaulter.

### **14. Interim orders v final orders**

There is a difference between an interim order and a final order. An interim order is granted to provide interim relief to an applicant and is not final. Interim orders are therefore temporary orders which are made until a magistrate/judge can hear all of the evidence and make his/her final decision. Final orders on the other hand are long term orders. In other words, the interim order stands until the final order is made by the magistrate/judge. Once the final order is made the interim order merely ceases to exist and does not have any effect/force anymore.

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