

# WEBINAR HANDOUT



Webinar: **HOW TO COMPLAIN ABOUT AND ESCALATE YOUR MAINTENANCE MATTER?**

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

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## **1. Grounds for a complaint if your maintenance matter is taking too long with reference to section 10(6)**

Section 10(6) of the Maintenance Act reads as follow:

- (a) "A maintenance court shall conclude maintenance enquiries as speedily as possible and shall ensure that postponements are limited in number and duration.
- (b) 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).
- (c) When the maintenance court subsequently makes any order under section 16, the maintenance court may (i) make an order confirming the interim maintenance order referred to in paragraph (b); or (ii) set aside such interim maintenance order or substitute it with any other order which the maintenance court may consider just in the circumstances."

## **2. What is meant by "postponements are limited in number and duration"?**

Section 10 of the Maintenance Act makes it clear that the maintenance court has a duty to ensure that maintenance enquiries are conducted and handled as quickly as possible, which means that if possible postponements should be avoided. In other words, a maintenance matter should only be postponed if it is absolutely necessary.

"Postponements are limited in number and duration" therefore means that the maintenance court should at best attempt to deal with maintenance matters as fast as possible without the need to postpone the matter.

Moreover, if the maintenance matter is postponed, the maintenance court must if there are sufficient grounds(i) 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 should make an interim maintenance order under section 16(1)(a) of the Maintenance Act.

Section 16(1)(a) of the Act reads as follow: 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 maintenance of such other 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 qualifies therefor, to be registered as a dependant 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 maintenance of the child from the date of the child's birth to the date of the enquiry.”

### **3. Discussion of the duties of the maintenance officer in terms of the DOJ Codified Instructions 26/2015**

The duties and/or responsibilities of a maintenance officer include the following:

- Obtaining financial information from applicants and respondents for the purpose of conducting maintenance enquiries;
- Guiding maintenance investigators to effectively perform their duties and responsibilities as such;
- Implementing bench orders;
- Performing various administrative functions as required.

**Section 6(1) of the Maintenance Act reads as follow:** “Whenever a complaint to the effect –

- (a) that any person legally liable to maintain any other person fails to maintain the latter person;
- or

(b) that good cause exists for the substitution or discharge of a maintenance order, has been made and is lodged with a maintenance officer in the prescribed manner, the maintenance officer shall investigate that complaint in the prescribed manner and as provided in this Act.”

**Section 6(2) of the Maintenance Act reads as follow:** “After investigating the complaint, the maintenance officer may institute an enquiry in the maintenance court within the area of jurisdiction in which the person to be maintained, or the person in whose care the person to be maintained is, resides with a view to enquiring into the provision of maintenance for the person so to be maintained.”

**Section 7(1) of the Maintenance Act reads as follow:** “In order to investigate any complaint relating to maintenance, a maintenance officer may -

- (a) obtain statements under oath or affirmation from persons who may be able to give relevant information concerning the subject of such complaint;
- (b) gather information concerning (i) the identification or whereabouts of any person who is legally liable to maintain the person mentioned in such complaint or who is allegedly so liable; (ii) the financial position of any person affected by such liability; or (iii) any other matter which may be relevant concerning the subject of such complaint;
- (c) request a maintenance officer of any other maintenance court to obtain, within the area of jurisdiction of the said maintenance officer, such information as may be relevant concerning the subject of such complaint; or
- (d) require a maintenance investigator of the maintenance court concerned to perform such other functions as may be necessary or expedient to achieve the objects of this Act.”

**Section 7(2) of the Maintenance Act reads as follow:** “A maintenance investigator shall, subject to the directions and control of a maintenance officer –

- (a) locate the whereabouts of persons (i) required to appear before a magistrate under section 8(1); (ii) who are to be subpoenaed or who have been subpoenaed to appear at a maintenance enquiry; (iii) who are to be subpoenaed or who have been subpoenaed to appear at a criminal trial for the failure to comply with a maintenance order; or (iv) accused of the failure to comply with a maintenance order;
- (b) serve or execute the process of any maintenance court;

- (c) serve subpoenas or summonses in respect of criminal proceedings instituted for the failure to comply with a maintenance order as if the maintenance investigator had been duly appointed as a person who is authorised to serve subpoenas or summonses in criminal proceedings;
- (d) take statements under oath or affirmation from persons who may be able to give relevant information concerning the subject of any complaint relating to maintenance;
- (e) gather information concerning (i) the identification or whereabouts of any person who is legally liable to maintain the person mentioned in such complaint or who is allegedly so liable; (ii) the financial position of any person affected by such liability; or (iii) any other matter which may be relevant concerning the subject of such complaint; or
- (f) gather such information as may be relevant concerning a request referred to in subsection (1)(c).”

The institution of an investigation, by way of a directive, is governed by the provisions of regulations 3(1) and 3(2).

**Regulation 3(1) reads as follow:** “ 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(2) reads as follow:**

- (a) “A direction contemplated in sub-regulation (1) may be given in the manner the maintenance officer deems fit.
- (b) The maintenance officer shall keep record of the manner in which the direction was given.”

**Section 9(1)of the Maintenance Act reads as follow:**

- (a) A maintenance officer who has instituted an enquiry in a maintenance court may cause any person, including any person legally liable to maintain any other person, to be subpoenaed (i) to appear before the maintenance court and give evidence; or (ii) to produce any book, document or statement.

(b) A book, document or statement referred to in paragraph (a)(ii) includes (i) any book, document or statement relating to the financial position of any person who is affected by the legal liability of a person to maintain any other person; and (ii) in the case where such person is in the service of an employer, a statement which gives full particulars of his or her earnings and which is signed by the employer.”

**Section 9(2) of the Maintenance Act reads as follow:**

- (a) Any person to be subpoenaed as a witness shall, subject to paragraph (b), be subpoenaed in the manner in which a person may be subpoenaed to appear before a magistrate’s court in a criminal trial.
- (b) The form of the subpoena shall be as prescribed.
- (c) The provisions of section 181 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), are, subject to section 11(2), not applicable to any person against whom a maintenance order may be made under this Act.”

**4. Explanation of *Mthimunye v Minister of Justice and Constitutional Development* 2014 JDR 1066 (GP) and the implications for maintenance officers**

**Facts of the case:**

While working as a teacher, the father was obligated to pay the plaintiff maintenance for his two minor children. The father left his job in or around 2006, and his pension fund was obligated to give him a payout. The plaintiff claims that she informed the maintenance officers of the father’s resignation and subsequent right to a benefit paid by the fund on numerous occasions.

In order to support her claim, the plaintiff had repeatedly asked the maintenance officers to attach the pension benefit of the father. The maintenance officials’ testimony revealed that they were not completely aware of the legal options available to them with relation to the attachment of pension benefits.

The court concluded that the maintenance officials had been grossly negligent. As a result, the plaintiff had suffered pure economic loss in the amount of the arrear maintenance due of R 24 500. The court came to the conclusion that the maintenance officers as a group had failed to follow the law (the effective performance of their duties and responsibilities).

### What was the claim based on?

The plaintiff brought a legal action against the National Prosecuting Authority in its capacity as the employer of the various maintenance officers involved in the matter, as well as the Minister of Justice and Constitutional Development in its capacity as the political head of the Department of Justice.

The suit brought by the plaintiff was founded on the maintenance officers' negligent and illegal failure to take action in accordance with the Maintenance Act 99 of 1999 to attach a pension benefit while acting in the course and extent of their employment.

This ruling should send a clear message to all maintenance officials to remind them of their important duty to implement and fulfil the maintenance rights of the various maintenance creditors.

### **5. Guide on the process that a complainant needs to follow in order to expedite a maintenance matter**

**Step one:** Determine which Magistrate's court has jurisdiction to hear the maintenance enquiry. The Magistrate's court nearest to where the applicant lives/works is the court which will have jurisdiction to hear the matter.

**Step two:** The applicant must then complete the J101E application form. This form is obtained at the Maintenance office at Court.

**Step three:** To make the process go a bit quicker the applicant must ensure to have all the necessary documents filed accordingly in order to give to the maintenance officer. I.e., three months bank statements, slips of all purchases in respect of the child, certified copies of identity documents and/or birth certificates, certified copy of marriage certificate, if divorced the divorce court order etc.

**Step four:** The maintenance officer will hold a section 6 enquiry (informal hearing). This is where the applicant and the respondent together with the assistance of the maintenance officer to agree to the amount of maintenance.

**Step five:** The maintenance court will then provide the applicant with a trial/court date on which both the respondent and the applicant must be present. Should the parties not be

able to come to an agreement regarding the amount of maintenance to be paid at the enquiry before the maintenance officer; the matter would have to go before the maintenance magistrate for a formal enquiry. This is known as the section 10 enquiry.