

PERSPECTIVE ON THE IMPLEMENTATION OF THE TRANSFORMATIVE CHILD MAINTENANCE INTERVENTIONS IN SOUTH AFRICA

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Abstract

This paper examines the implementation of transformative child maintenance interventions in South Africa specifically addressing maintenance issues and the significant role the judiciary is playing in the interpretation and delivery of judgements in maintenance related matters. The paper accentuates that parents have an obligation to provide for their children and the obligation is continuous until the child attained adulthood and self-dependency even if the relationship between the parents is no longer in existence.

Keywords: child care, parents, justice system, maintenance officers, South Africa.

JEL Classification: K30, K33, K38

1. Introduction

The accomplishment of a democratic administration in South Africa in 1994 led to drastic changes in the transformation of children's national strategies to preserve the interest of children pertaining to their rights. One such transformation is the child maintenance system, one of the children's legislative interventions being used by the courts to enforce maintenance compliance in the best interest of a child.³

This paper deals with previous legislation such as the Maintenance Act 1963 which was aimed at addressing maintenance issues through the judiciary and the current maintenance system. It looks at the historical overview of the origin of the Maintenance Act, assesses the Maintenance Act of 1963, and thereafter the Maintenance Act of 1998.

Parents should provide for their children and this obligation is bound to linger even if the relationship between the parties (i.e. the parent(s) or legal guardian and the child) is no longer in existence or it is broken.

A non-custodian party not staying with the child is accountable for child maintenance as the custodian parent will be providing other necessities for the child. Of note, the non-custodian parent is often the father. For instance, in the case of *Meyers v Leviton* 1949 (1) SA 203 (T), the courts have a preference for mothers when it comes to the custody of the children. According to the courts, mothers could only be challenged if it can be proved that the mother is unfit to carter for the child. Even though fathers can be granted custody of the child, the common belief is that mothers are the best in nurturing children was challenged in the case of *Van der Linde v Van der Linder* 1996 (3) SA 509 (O). Importantly, the duty of support between a parent and a child comes into existence from birth, and it only ends when the child is self-sustaining, however, this duty is sometimes bridged and not fulfilled due to various reasons.⁴

Before addressing challenges faced by child maintenance claimants in today's world, it is of vital importance to clearly define the concept of child maintenance.

Maintenance as a duty to support a child (child maintenance) means that parents should make

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³ See Bonthuys, E. (2008). Realizing South African Children'S Basic Socio-Economic Claims Against Parents and the State: What Courts Can Achieve. *International Journal of Law, Policy and the Family*, 22(3):333-355.

⁴ See Collings, S. & Wright, A.C. (2020). Two families joined by a child: The role of direct contact in fostering relationships between birth and career families in permanent care. <https://www.tandfonline.com/doi/abs/10.1080/13229400.2020.1756899>.

reasonable provisions for the child for his/her proper living and upbringing.⁵ Child maintenance does not only incorporate the essentials of life, such as food, clothing, and housing but also extends to teaching, providing education, and provision of care during ill-health/sickness. In terms of the common law definition of maintenance, it can be summarised as follows: the duty of support encompasses the provision of refreshments, clothing, accommodation, medical expenses, and schooling.⁶

Quantifying child maintenance obligation is dependent upon the financial position of the parties (i.e., the parents or legal guardians) concerned.⁷ It will ultimately depend on the overall investment of the parties concerned including income and expenses when determining the amount to be paid towards the child's upbringing. Child maintenance can also incorporate other issues beyond necessities of life, that are of great importance to the upbringing of the child and that can assist in nurturing the child.⁸ The court has discretion to decide on the duty of support if one party refuses to provide for the money agreed during the maintenance inquiry. The court will decide on the precise amount payable and the party responsible to support the child based on financial affordability.

If the party who is supposed to pay child maintenance still refuses to pay, the court would constrain the person to fulfil it with a judgement positioning the accurate scope of the defaults that will determine the execution of property to clear the child maintenance debts.

Parents who are divorced are still eligible to contribute towards the upbringing of their children.⁹ Generally, the court has inherent power to order maintenance for the minor children after the dissolution of marriage.¹⁰ This is because both spouses who are divorced, are liable to contribute to the maintenance of the children born of the marriage in proportion to their financial means.¹¹ It also includes children who were adopted during the existence of the marriage. It is the discretion of the court to decide on what is a reasonable payment for the maintenance and whom to award the custody for the child to during the proceedings of the maintenance inquiry.¹²

According to the common law principle, the duty of the relevant party for child maintenance depends entirely on the circumstances of each case by way of the merits of the case in dispute. There is no comprehensive decision on how a child should be maintained as children are different by the way they are being nurtured. The court should ensure that the rights of the child are taken into reasonable cognisance whenever issues pertaining to the best interest of the child are being considered. As such, it is important to consider child maintenance in the South African context as detailed below.

2. Child maintenance in the South African context

Maintenance law is built upon a Roman-Dutch legal foundation known as common law in the South African legal context. The essentials regarded in maintenance obligations as the right of children are grounded in common law principles. Based on the premise of the common law, the South

⁵ See Raday, R. (2019). Gender equality and women's rights in the context of child custody and child maintenance. <https://www.unwomen.org/sites/default/files/Headquarters/Attachments/Sections/Library/Publications/2019/Gender-equality-and-womens-rights-in-the-context-of-child-custody-and-child-maintenance-en.pdf>.

⁶ See Government H.M. (2006). *Working together to safeguard children: A guide to inter-agency working to safeguard and promote the welfare of children*. TSO Publications.

⁷ See Skinner, C., Bradshaw, J. & Davidson, J. (2007). Child support policy: An international perspective. https://www.researchgate.net/profile/Christine-Skinner..2/publication/242615881_Child_support_policy_An_international_perspective/links/53ff18f60cf21eda fd15b9c9/Child-support-policy-An-international-perspective.pdf.

⁸ See Mamashela, M.P. (2005). The implementation of the Maintenance Act 99 of 1998: two NGO's throw down the Gauntlet a model for the country: notes and comments. <https://journals.co.za/doi/abs/10.10520/EJC53185>.

⁹ See Ahrons, C.R. (2007). Family ties after divorce: Long-term implications for children. <https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1545-5300.2006.00191.x>.

¹⁰ See Atrey, S. & Whittier, J. (2010). Divorcing Parents, Alienating Children: Devising a Constructive Theory of Child Rights in Case of Divorce. <https://heinonline.org/HOL/LandingPage?handle=hein.journals/wjcfad10&div=9&id=&page=>

¹¹ See Kelly, K.B. (2007). Children's living arrangements following separation and divorce: Insights from empirical and clinical research. <https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1545-5300.2006.00190.x>.

¹² See Khunou-Baba, G. (2006). Fathers don't stand a chance: Experiences of custody, access, and maintenance in South Africa. <https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.463.7264&rep=rep1&type=pdf#page=275>.

African law system adopted the common law system in dealing with maintenance matters. Maintenance in South Africa is instituted in the courts of law mainly by women on behalf of children. This is because it is predominately women who care for children both inside and outside of marriage. Child maintenance does not only cater for children who were born inside the marriage but also those who were born out of wedlock.¹³

Child maintenance does not discriminate against legitimate and illegitimate children as a party responsible for support, is required by law to maintain the child.¹⁴ It does not matter about the marital status of the party responsible for payment. Many households in the country are headed by single women making them eligible to institute actions against the fathers to maintain their children. Generally, child maintenance is viewed as a mother's claim on behalf of the child against the father of the child for support.¹⁵ These women are sometimes not employed and are from poverty-stricken families and the child maintenance pay-out becomes their only source of income for supporting the entire family in that household, especially those in the rural villages. Consequently, it can be argued that child maintenance plays a significant role in South Africa societies.¹⁶ Without this maintenance in most households, it becomes extremely difficult to adequately provide for children.

The amount for child maintenance is not fixed and there are various factors often utilized to determine the amount of maintenance that a child may need in his/her upbringing such as:

- the family's standing status and financial resources are factors to be considered when a child's needs are being determined.

- the child's age plays an important factor in determining the amount to be paid for the maintenance of the child. For instance, a toddler who still needs to go to the foundation phase at school will need more money (e.g creche fees will have to be paid) than a child who is at high school who only pays a yearly school fee.

- the geographical and socioeconomic location of the child should be considered when determining money to be paid for the upbringing of the child. For instance, a child who stays in a rural village and a child who stays in suburbs will have different needs when determining the amount to be paid for his/her upbringing. A child who resides in an urban area will probably need monthly school fees because in the suburbs they pay monthly fees unlike in rural villages where most of the schools are free and some pay only once a year.

- the state of health of the child should be considered in determining the maintenance. A child who is in a chronic medical condition will need expensive and pathetic care from parents because of the care involved in taking care of the child. A child who has medical conditions or needs e.g, a disabled child who might need a wheelchair, hearing aids, spectacles may be considered for more money than a child without medical conditions. When determining the capacity of each parent of "the duty of support", the court will decide the demands of the child to be maintained. The allocation of the expenditure is therefore spread between the parents and will be shared according to their financial ability. There is no rigid regulation in common law that guides the calculation of the reasonable needs of the child. It will depend on the merit of the case during the calculation of all the needs of the child and the financial status of parents. The courts can calculate and manage the process through the Act to ascertain how the interest of the children will be taken care of. "Parental rights and responsibilities in determining child maintenance are set out briefly in section 7 of the Children's Act". The duty of support, i.e child maintenance can be summarised as follows.

¹³ See Oyenubi, A. & Kollamparambil, U. (2022). Does the child support grant incentivise childbirth in South Africa? *Economic Analysis and Policy*, 73:812-825.

¹⁴ See Maldonado, S. (2011). Illegitimate harm: law, stigma, and discrimination against nonmarital children. <https://heinonline.org/HOL/LandingPage?handle=hein.journals/uflr63&div=14&id=&page=>

¹⁵ See Goldblatt, B. (2005). Gender and social assistance in the first decade of democracy: a case study of South Africa's Child Support Grant. <https://www.tandfonline.com/doi/abs/10.1080/02589340500353581>.

¹⁶ See Granlund, S. & Hochfeld, T. (2020). That child support grant gives me powers!—exploring social and relational aspects of cash transfers in South Africa in times of livelihoodChange. <https://www.tandfonline.com/doi/full/10.1080/00220388.2019.1650170>.

2.1. The duty to support

The duty of support affords all parents the responsibility to care for their children as contemplated by section 15(1) of the Maintenance Act 1998. Child maintenance covers food, clothing, school, shelter, and entertainment expenses for children deemed necessary for the upbringing of the child. Both parents are accountable to contribute the maintenance of their children. The main purpose of child support/maintenance is to provide for children even in situations where parents are not staying with them. Parents have a duty to fulfil financial obligations to their children. Child maintenance is intended towards the expenses involved in the upbringing of the child. Unmarried fathers have a duty to support their children regardless of whether they are no longer living together with the mother of the child.

2.2. The extent of the duty of support

According to section 15(2) of the Maintenance Act, the duty to support extends to the provisioning of necessities for the upbringing of the child. Although one might argue that children should be below the age of 18 years to be maintained/supported, there are more than 12 million learners going to school who are above the age of 18 years, and they still need to be maintained/supported.¹⁷

2.3. The Constitutional mandate on the duty of support

The responsibility to pay child maintenance is often primarily placed on the parents from the birth of the child. Parents are obliged to provide for their child “in terms of section 28(1) of the Constitution” to fulfil the basic requirements in the upbringing of the child. However, there are instances where parties “parents” are unable to provide essentials to their children as envisaged, and the governments usually intervene to assist in this regard. The obligation of the government to fulfil this mandate can be summarised as follows;

1) If parents cannot provide shelter for themselves and their children, the government will eventually come to the rescue by providing shelter to enable the children to be fed and raised in a proper environment. As such, these parents are provided with housing facilities such as the housing development spearheaded by the Department of Cooperative Governance and Traditional Affairs in different Province’s incorporation with local municipalities to accommodate the children.

2) The state is liable to provide basic education and social services to enable the positive upbringing of the children. The department of Basic Education has made provision for all children to attend school for free till they pass matriculation (complete Grade 12), and food is also provided during breaks at schools through the National School Nutrition Programme. To avoid stigmatizing children who are from poor background families from being the only ones provided with food, the department has offered these services for free to all children, and community members are employed to cook and distribute food for needy children at school. Orphans and abandoned children are also catered for by the state who provides for their basic needs. In terms of those who are abandoned, the state can place them in a place of safety until they are adopted. Their needs are being provided for by the state if their parents are untraceable. Because of the constitutional obligation, it becomes imperative to ensure that each child is taken care of until they can self-support.

The Constitution enjoins parents to provide for their children. However, if they are unable to, government should step in, bearing in mind that the best interests of the child are paramount.

It is of great significance to acknowledge that South Africa ratified and signed the United Nations Convention on the Rights of the Child. The commitment by the South African government as a signatory to the Convention reaffirms its position to conform with the Convention on the rights

¹⁷ See Reyneke, M. (2016). Realising the Child’s Best Interest: Lessons from the Child Justice Act to improve the South African Schools Act. *Potchefstroom Electronic Law Journal*, 19(1):1-29.

of children. The affirmation has been legislated further by the promulgation of the Maintenance Act currently operating in our courts of law.

The intention of the Maintenance Act is to develop a maintenance mechanism that is fair and reasonable to all citizens of the country. However, before dealing with the current legislation, it is important to historically review the Maintenance Act of 1963 to highlight the development brought by the new Maintenance Act of 1998.

3. Maintenance Act 23 of 1963

The 1963 Maintenance Act was introduced to grant every magistrate court function as a maintenance court in terms of section 3 of the Act. Therefore, it has wide-ranging powers in enforcing the duty of parents to support their children as provided in section 15 of the Act. The Act was promulgated mainly to guide two major specific conceptions in the handling of child maintenance cases and inquiries in the courts of law.

The main two developments under the Act are the creation of maintenance officers and the handling of maintenance inquiries during a hearing. According to sections 1 and 2 of the Act, Maintenance officers are created to manage child maintenance inquiries and to resolve cases brought in by complainants. The two developments will be discussed separately under different headings later in the study.

3.1. Creation and roles of maintenance officers

The Maintenance Officer was established in terms of section 3(1) of the 1963 Maintenance Act to properly investigate complaints related to child maintenance Officer's duties amongst others are:

- to guarantee that a legal duty exists between the parties involved before a child maintenance inquiry can be conducted. This duty will have to be identified immediately when a new application is brought to the maintenance office. The party bringing the case should be legally responsible for the wellbeing of the child.
- to conduct a hearing for the parties involved in the inquiry.
- to assist the court in conducting such a hearing for the parties involved in the inquiry.

3.2. The child maintenance inquiry

The Maintenance Act introduced an approach to maintenance inquiries and processes in child support. According to section 5 of the Act, the inquiry process must be established to grant a maintenance order or to discharge a maintenance order when the duty of support no longer exists between the relevant parties. The inquiry process was initiated by the Act specifically to develop procedures that will assist the court in handling maintenance inquiries through certain procedural steps. It was created to avoid haphazard work in dealing with inquiries that might end up disadvantaging children in their upbringing. According to the procedure to be followed in the process but a determined process is developed by the maintenance officer during the proceedings of the maintenance inquiry.

4. The maintenance acts

There were flaws in the implementation of the Maintenance Act of 1963 within the system as it was developed before the democratic era at that time to deal with maintenance issues. There were many challenges within the Act of 1963 and some of which continued with the new 1998 Maintenance Act. The flaws identified within the 1963 Act are:

4.1. Administration of the maintenance processes in court

During its implementation, there were serious challenges in the administration of cases. Even though it was regarded as an offense not to comply with an order of the court, it has been difficult to arrest and deal with child maintenance defaulters. The court could not succeed in imposing sanctions towards the perpetrators, as the court did not want to be seen as insensitive in arresting a child's parent or legal guardian for child maintenance, so many cases were left unattended.

4.2. Incapacitated maintenance officers and other staff dealing with maintenance inquiries

Maintenance officers were originally clerks of the court who were seconded to the maintenance offices, therefore they were often unqualified officers handling maintenance inquiries. They had to handle inquiries and chair court proceedings without fully understanding the role of maintenance officers. Of note, some of the maintenance clerks were not legally knowledgeable in understanding maintenance matters as provided in the Act and the interpretation of the Constitution.

4.3. Financial implications delayed the implementation of the Act

Budgetary constraints delay justice in the implementation of the Maintenance Act as the Department of Justice is allocated insufficient fund that is not able to accommodate all the required activities for the positive execution of orders and daily activities.

4.4. Maintenance staff not trained in customer services

During the 1963 Act, there were no *Batho Pele* principles as outlined in the White Paper on the Transformation of the Public Service. As such, employees were not trained in customer services such that these customers/clients were treated with bad attitudes, while some were turned away without being offered any help or assistance.

4.5. Lack of proper filing system and manual registration of maintenance cases

Even though there was a filing system in place during the implementation of the Act of 1963 the filing system used was manually recorded, it could not accommodate all cases reported and was poorly managed. Sometimes, cases disappear within the system without a trace and there was a high loss of files from the system thereby delaying the closure of cases.

4.6. Gender inequality in the maintenance offices

Because of gender inequality within the employment sector, majority of employees in the maintenance courts were males. It is commonly known that males were gender insensitive because they were not capacitated with women empowerment programmes such that they were unable to treat women with the dignity they deserve. There are currently no gender-sensitive programmes to sensitise employees as most programmes on gender roles and empowerment of women were developed after the democratically elected government came into place after 1994.

4.7. The long wait period for complainants due to inadequate staff in the maintenance office

Complainants coming to the maintenance offices often have to wait for long hours before they were assisted in the maintenance courts due to a lack of staff to handle their complaints efficiently and effectively. A gap in this Act was that the rights of complainants were not considered nor

prioritized because there were no specific laws outlining the functioning of the maintenance courts.

4.8. Locality of maintenance courts and resources

As maintenance offices are situated in the magistrate courts, it has been difficult to establish offices all over the country. Therefore, this has made it difficult for complainants to locate and go to maintenance offices as they must travel long distances to access the courts. In some cases, funds are utilized to travel to these offices forcing complainants to spend more money before they can even claim their pay-outs at magistrate offices.

Due to these challenges, amongst other factors encountered during the 1963 Maintenance Act, a new Maintenance Act as modified regulations to be implemented was enacted in 1998 to redress the situations experienced during the implementation of the Act.

5. The Maintenance Act 99 of 1998

The “Maintenance Act of 1998” replaced the 1963 Act to redress challenges found in the previous Act. The Act was established in 1998 and came into implementation on 26 November 1999. The new Act was created to correct the defects identified in the previous Act to bring transformation for an all-inclusive child maintenance system. The purpose of the 1998 Act is to convert the national maintenance system into a fair and reasonable maintenance system that will be accessible to all South African who need to benefit from the system. The new Act became significant in the new democratic dispensation to redress those marginalised previously to access maintenance payments. In its preamble, the Act acknowledges that child maintenance was historically proved to be a problematic battle to access.

The Maintenance Act of 1998 brings the following achievements:

5.1. Introduction of maintenance investigators

One of the major achievements in the Maintenance Act of 1998 that brought about positive transformation was the introduction of maintenance investigators. The new Act brought in the employment of qualified maintenance personnel to investigate maintenance cases. Maintenance officers and investigators were brought into the child maintenance system to assist with the investigation and tracing of child maintenance defaulters. Section 5(2) provides that each maintenance office must employ a qualified maintenance investigator. Functions of the maintenance investigator are as follow:

- to locate a party that is obliged to pay child maintenance or anyone who can provide information that could lead to his/her whereabouts. The principal function is to assist the complainant by getting and analysing all relevant information that could assist the courts to proceed with the finalization of the case.
- to serve subpoenas and summons to defaulters for failure to pay child maintenance.
- to serve or execute court documents and gather information from anyone liable to give information.
- to investigate and get the financial position of the defendant and all other applicable information regarding the defendant’s identity that will assist the court to arrive at an informed decision.
- to gather the information that will be of assistance to the child maintenance case, even if it is outside his scope of jurisdiction. Arrangements should be made to access all the information relevant to the proceedings.

Since the employment of “maintenance investigators”, challenges faced by complainants have been decreasing indicating the relevance of their role. As such, considering the duties outlined, the appointment of maintenance investigators plays a very important role in the execution of child maintenance cases particularly in assisting the complainant with their case until it is finalized.

5.2. The maintenance inquiry

After the process of reporting the case, the maintenance officer must start processing the case to enable both parties in the child maintenance case to attend the inquiry. The maintenance officer will invite both the complainant and defendant for inquiry to attend a hearing before a decision can be taken. The inquiry will be heard in the presence of the judicial officer of the maintenance court. The officer will subpoena any person relevant to provide more information pertaining to the case.

5.3. Additional maintenance orders

In addition to child maintenance, the court may further grant certain orders to assist the complainant to receive payout for the children. The 1998 Maintenance Act provides for a range of new orders which are discussed:

5.3.1. Lump sum payment granted by the court

In terms of section 1 of the Act, a maintenance order for periodical payments of sums of money towards someone's maintenance is merely one of the orders included within the meaning the description of maintenance orders". Further, the Act authorized the court to issue a court order for the lump payment to certify a court judgment. The defaulter may be required to pay a lump sum if he is unable to pay every month and has a lump sum.

5.3.2. Third parties directed to make periodical payments

In terms of section 16(2) of the 1998 Act, if a person owes maintenance debtor periodical instalments of money because of a contract between them, a maintenance court may direct that person to make periodical payments to the maintenance creditor and not to the maintenance debtor. The court can request the employer of the defendant to pay the complainant an amount agreed in court directly from the salary of the defendant. In the case where the defender will have to pay to the court, an order for the third party to deduct will be authorised and become an order of the court.

5.3.3. An order by default

Another progressive innovation proclaimed by the new Act is the provision for an order by default. In terms of section 18 of the Act, if the maintenance court is satisfied that the maintenance debtor knows that he or she has been subpoenaed to appear before the court but has failed to do so, it may invite the person who lodged the complaint to adduce evidence in support of the complaint. When the court has gathered all the relevant information, the court may grant an order by default if the defendant has intentionally failed to appear in court. The court may grant an order when the defendant is not available in court and follow up on the payment. The court can also discharge an order if the defendant is absent or it can be changed to suit the circumstances of the case at a particular time. A maintenance debtor who intentionally delays proceedings by simply not coming before the court can be issued with a default order.

5.4. Civil execution

A person who fails to pay child maintenance can be served with an order of civil execution. The order is enforceable against the defaulter in a maintenance judgement. An order in the execution can be against the property of the defaulter, attachment of emoluments, or attachment of any debt owed to the maintenance defaulter for a debt that remained unpaid. Section 24(1) of the new Act indicates that an order that was made in court has the effect of an order being made a civil action. It means that the maintenance order can be enforced in any civil matter and not only in terms of the

Maintenance Act 1998.

Furthermore, a defaulter who fails to pay child maintenance in terms of an order can be ordered to pay by enforcement of attaching any movable or immovable property to cover the debt owed.

A warrant of execution can be authorised when the debt has accumulated for more than ten days. A defaulter who fails to provide sufficient reasons for his inability to pay will be criminally charged.

6. Discussion on the challenges of the current maintenance system

Despite the implementation of the Maintenance Act of 1998, and the positive intentions of the policymakers, there are still challenges faced by mostly women who continue to suffer to get child maintenance pay-outs due to ineffectiveness found in maintenance offices and inadequate resources and capacity to handle maintenance issues in South Africa.¹⁸ The difficulties found in the maintenance system suggest that the system is not functioning effectively and efficiently thereby depriving complainants of the benefits of the Maintenance Act. There is an urgent need to develop remedies and resolutions that will address all the challenges encountered in the maintenance system such as the application of the Act and improving budgetary allocations for “the Department of Justice and Constitutional Development” to enhance service delivery in the maintenance system. To deal extensively with the hindrances encountered in the maintenance system, it is important to deal with some of the deficiencies and impediments identified in the Maintenance Act as follows:

6.1. Inadequate maintenance officers in the judicial system

It is evident from the literature review that there are not enough appointed employees to handle child maintenance cases in the magistrate courts.

6.2. Untrained and underqualified court staff

There is no uniformity or standard of qualifications set for maintenance investigators in the system as most appointed investigators have been employees for a long time as courts clerks before they were appointed in their new role of investigating cases. Therefore, those employed do not have the necessary knowledge and qualifications for the positions till recently when graduates were appointed to serve in magistrate offices.

6.3. Inadequate resources to implement the Act

Due to budgetary constraints in the Department of Justice and Constitutional Development, the maintenance offices are understaffed as it is difficult to employ qualified officers with a limited budget to handle maintenance inquiries. However, maintenance courts cannot function effectively in investigating cases if the necessary infrastructure is not provided. Furthermore, many maintenance courts are not easy to access and complainants often have to travel long distances and spend money before arriving at the maintenance courts.

6.4. Lack of tracers and investigators

One of the main challenges facing the child maintenance system is the lack of available tools and resources to trace evidence of defaulters for the courts. It has been reported that maintenance

¹⁸ See De Jong, M. (2009). Ten-year anniversary of the Maintenance Act 99 of 1998-a time to reflect on improvements, shortcomings and the wayforward. <https://uir.unisa.ac.za/handle/10500/21111>.

investigators are failing to trace defaulters with the resources provided by the department.¹⁹

6.5. Implementation of the Act

Section 2 of the current Maintenance Act¹⁹, gives the legal duty on any individual who is to support a child even if their relationship has lapsed. The Act is clear on the fact that; it is not important to deal with the marital status of the parties when issues of maintenance are being handled. If it can be proved that a person is responsible for child maintenance, then the Act shall be applied in that circumstance to enable the child to be taken care of.

Secondly, the Act should not be used in any way to derogate from any laws relating to the responsibility to maintain another person. Those parties that are responsible to pay maintenance should fulfil their mandate without prejudice.

6.6. Burden of proof

The challenge lies with the defendant to prove that he cannot afford to pay child maintenance during the proceedings. The court does not have the power to enforce an order if the defendant indicates lack of money as the reason for not providing child maintenance. The complainant will only rely on the maintenance investigator to probe further if indeed he cannot afford to pay. This exercise places a lot of strain on the maintenance investigator to work further on the case when already there are no resources to investigate the defendants' financial means. As such, this is likely to reduce the chances of quality work that will benefit the complainant.

6.7. Conversion of criminal procedure into an arrear enquiry

The court can change the criminal hearing into another procedure as an inquiry as to why the defendant did not comply with an order of the court. It will be based on arrears on the maintenance payment. However, this opportunity for change is often abused, leading to further reliance on the maintenance investigator to investigate the matter. This process has the potential of dragging for months to the detriment of the party instituting the action.

6.8. Completion of documents in English

All documents in the maintenance courts are written in English and those who cannot read or write the language find it difficult to fill the lengthy documentation. Even those who can read the language find it difficult to fill the forms because they are complicated and are repeatedly requesting the same information on the forms. The forms should be written in all official languages to accommodate those who cannot answer in English or Afrikaans. Women who normally lodge maintenance cases are women who cannot write English or Afrikaans, making it difficult for uneducated people to understand.

6.9. The locality of maintenance courts and available resources

The maintenance offices are often located in secluded areas of the court infrastructure making the offices inaccessible to communities. There is also a lack of waiting rooms to wait for proceedings, and those that are available are uncomfortable and poorly furnished.

¹⁹ See Singh, D. Naidoo, K.& Mokolobate, L. (2004). Coming to court for child support-the policy, the practice and reality. A case study of black women in the maintenance system at the Johannesburg Family Court. <https://journals.co.za/doi/abs/10.10520/EJC28833>.

6.10. Maintenance orders in terms of the Act

The magistrate can grant an order by consent in which the parties agree and sign on to be bound by the order. In case the defaulter does not attend hearings and there are no valid reasons for non-attendance, the court may grant an order by default.

6.11. Legal representation and affordability by the complainant

Complainants are unable to afford legal fees for child maintenance cases since people who always demand maintenance do not have the means to sustain their lives. Defendants in most cases must come represented by legal representatives to handle their matters.

6.12. Execution of subpoenas not served by sheriffs and police

Despite the implementation of the Maintenance Act and provision made for a subpoena to be issued, it is still difficult for law enforcement officers to trace defendants and the plaintiff is forced to locate the defendant on her own accord that will not always sow positive results.

6.13. Numerous postponements of cases that delay completion of cases

The defendant may cause delays in the maintenance proceedings to avoid liability thereby causing delays in the finalization of the case. Even though documents served to the defendant indicate as to what must be brought to court on the day of the hearing, they still chose to ignore the request and claim that they did not have the documents such as payslips, list of expenses, and other incomes thereby forcing the case to be postponed. On the next date of the hearing, the defendant can dispute the paternity of the child, and that also will necessitate blood tests to prove paternity. As such, the process of postponing can take months for the case to be finalized and children will continue to live without maintenance from the other party who is delaying the case.

6.14. Poor public administration and poor administration of documents

A shared complainant in all the plaintiffs is the staff's slowness regarding the filing of documents that disappear without a trace in the system. The parties will have to return at different times to check if the file was found.

6.15. Multiple families and children often involved

The defendant's status on multiple families is often ignored by the courts. A defendant may have more than one child with different women and that is not taken into cognisance when the defendant argues his status in court. If the situation is considered, it will reduce the amount of financial accountability responsible for each child due to that all the children are reliance on the defendant.

6.16. Failure of magistrates to issue warrants enforcing perjury

Despite the Maintenance Act having a provision on enforcement procedures for defaulters, it has been difficult to execute such orders by magistrates. Magistrates usually fail to enforce such orders to blacklist defaulters and execute warrants of arrest.

6.17. Poor division of labour and segregation of responsibilities

There is no segregation of duties in the offices of the maintenance offices hence the same

employee is attending to inquiries and investigations at the same time. One officer attends to the public and still arranges a hearing with the prosecutor due to insufficient staff at the maintenance offices.

6.18. Administration of transport costs on maintenance cases

There is no cash allowance for complainants to attend maintenance cases such as criminal proceedings in a criminal case. Therefore, women are forced to utilize their funds to attend maintenance cases with the hope that their access to the child maintenance will be finalized on the same day, unfortunately, they are often forced to postponements the case for a long time with no guarantee of a positive outcome of the case in the long run.

6.19. Warrant of execution

Section 27 makes provision for a “warrant of execution against the property of the defaulter” but does not decide for payment of that order. The magistrate may sign for an execution order to the defaulter against his property for maintenance owed and for future payment. The challenge against this order is that the complainant must bear the costs of the order because “the Maintenance Act does not make provision for” such payments. According to Mamashela, there is further frustration that may be caused by the defaulter as to the rightful ownership of the property to be attached thus making it impossible to attach the property.²⁰ The defaulter may deliberately confuse the execution order by not cooperating with the process.

6.20. Emoluments attachment orders

Section 28 of the Maintenance Act can be used to attach any emolument of a father owing money for maintenance. This order authorises the employer to make payment on behalf of the defendant until such monies are paid in full. Courts are obliged to make an order for the instruction to the employer to pay from the defendant’s salary. This system is sanctioned to enable proper payments to the claimant without delays as it is deducted from the employer to the relevant recipient. However, the implementation of the Emoluments Attachment Order is ineffective in some instances where the defendants do not give correct details of where they are employed.

Also, Sigwadi highlights the challenges faced with the implementation of the Emolument Attachment Orders as the inability of employers to cooperate with the system to an extent of dismissing employees for such orders.²¹

7. Conclusion

Despite all the criticisms, there are still maintenance officers who are committed to providing a good public service administration that is coherent and fair to members of the community. They give hope to their clientele in the maintenance arena to build that professionalism entrusted in the Constitution. According to chapter ten of the Constitution, section 195 makes provision for a public service administration that is governed by democratic values and principles that promotes accountability and a high standard of professionalism. It is of great significance when executing duties in the public service to adhere to all relevant provisions that will assist service delivery at the magistrate offices to improve the quality of service in dealing with maintenance cases. The principle of “Batho Pele as outlined in the White Paper on the Transformation of Service Delivery in the Public

²⁰ See Mamashela, M. (2006). Some hurdles in the implementation of the Maintenance Act 99 of 1988: <https://journals.co.za/doi/pdf/10.10520/EJC85197>.

²¹ See Sigwadi, M. (2005). Pension-Fund Benefits and Child Maintenance: The Attachment of a Pension for Purpose of Securing Payment of Future Maintenance for a child. http://www.pensionlawyers.co.za/wp-content/uploads/2018/10/Muthundinne_Sigwadi-Presentation-2012.pdf.

Service” is applied positively by maintenance officers helping in the application of the Maintenance Act. As a result of many people living in abject poverty, it becomes difficult to implement maintenance orders as the same people who are liable for maintenance are unable to pay for their children. This creates challenges for magistrate courts to impose sanctions for defaulters as sending them to jail will not improve the situation but will create more problems in the future.

The paper has emphasized the role that maintenance officers play to achieve “the best interests of children” in their upbringing. Lack of adequate budgetary allocation in the department’s budget’s planning has a major role in the implementation of service delivery on maintenance cases. The research study has emphasized the importance of the Constitution in the new dispensation of acknowledging “the rights for children as enshrined in chapter two of the Bill of Rights”. The main recommendation of this study is to influence good governance in public administration and to maintain a fair maintenance system that will provide citizens with an equitable, effective, and efficient maintenance system.

The research findings have exposed an inherent poor administration in the functioning of maintenance cases in the judicial maintenance system. As a result of challenges experienced in the Maintenance Act of 1998. The Constitution guarantees social values that promote and protect human dignity and the achievement of equality in all respect, therefore it is extremely important to achieve these identified values by implementing good governance in the maintenance courts. Maintenance courts should promote the dignity of each person when maintenance inquiries are being executed without humiliating and undermining those who are intended to be served. When people are treated with dignity, they will feel at ease to visit and seek help in our courts and their privacy would then be respected and upheld during maintenance inquiries

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