B16-2014_1

ABSA

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16 January 2015

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Mr V Ramaano
Portfolio Committee on Justice and Correctional Service
3rd Floor, 90 Plein Street
Cape Town
8000
Per email: vramaano@parliament.gov.za

Dear Mr. Ramaano

MAINTENANCE AMENDMENT BILL [B 16-2014]

Thank you for giving us the opportunity, to comment on the Maintenance Amendment Bill. Kindly find attached the Absa Bank Limited submission on the above Bill.

Please do not hesitate to contact Shenaaz Meer, should you require any further information or clarification and we would be most willing to engage further with you on any of the issues raised in our submission.

Kind regards

Shenaaz Meer
Senior Legal Counsel
Office of the General Counsel Legal

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1. We welcome the introduction of the Maintenance Amendment Bill in order to improve the maintenance system in South Africa.
2. We highlight some of the clauses proposed by the Maintenance Amendment Bill and juxtapose these clauses with provisions of proposed amendments to the regulations to the National Credit Act.
3. We then consider some of the problematic implications of the proposed amendments and provide practical solutions that would ease the administrative burden on Courts and Banks, in order to achieve the intention of the Maintenance Amendment Bill.
4. Clause 11 and clause 13 of the Maintenance Amendment Bill which we shall focus on is the following:

    a. Clause 11 – Amendment of Section 26 of Act 99 of 1998

        On receipt of an application contemplated in subsection (2), the maintenance officer shall, notwithstanding anything to the contrary contained in any law, in the prescribed circumstances and in the prescribed manner, furnish the particulars of the person against whom a maintenance order has been made and a certified copy of the relevant order, to any business which has as its object the granting of credit or is involved in the credit rating of persons.

    b. Clause 13 – Amendment of Section 31 of Act 99 of 1998

        Subject to the provisions of subsection (2), any person who fails to make any particular payment in accordance with a maintenance order shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding **[one year]** three years or to such imprisonment without the option of a fine."; and if a person has been convicted of an offence under this section, the maintenance officer **[may]** shall, notwithstanding anything to the contrary contained in any law, in the prescribed circumstances and in the prescribed manner, furnish that person's personal particulars to any business which has as its object the granting of credit or is involved in the credit rating of persons.

As standalone amendments, in isolation of other pieces of legislation, the impact of the abovementioned clauses do not on the surface appear to have such a broad impact, however, when combined and read in

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context to proposed amendments to the Regulations to the National Credit Act, the impact and practical considerations have a far reaching effect.

5. The specific proposed amendments to the Regulations of the National Credit Act are as follows:
    a. Regulation 1 – Definitions
        i. "allocatable income" means gross income less statutory deductions such as income tax, unemployment insurance and maintenance payments, less Necessary Expenses as defined herein below;
        ii. "discretionary income" means Gross Income less statutory deductions such as income tax, unemployment insurance fund, maintenance payments and less Necessary Expenses (at a minimum as defined herein); less all other committed payment obligations including such as may appear from the credit applicant's credit records as held by any Credit Bureau which income is the amount available to fund the proposed credit instalment;

    b. Regulation 17 - Retention periods for credit bureau information
        i. 17.8 - 5 years or earlier or until the order is rescinded by a court or maintenance is no longer required where the minor has attained the age of majority

    c. Regulation 23A – Criteria to conduct Affordability Assessment
        i. When conducting the affordability assessment, a credit provider must: calculate the consumer's allocatable and discretionary income; take into account all debts, including monthly debt repayment obligations in terms of credit agreements as reflected on the consumer's credit profile held by a registered credit bureau; and take into account maintenance obligations arising from statutory deductions or necessary expense.
        ii. A credit provider is required to take practicable steps to validate gross income by referring to: - (a) recent three (3) months consumer's pay slips; (b) recent three (3) months bank statements; or (c) any other similar credible confirmation.
        iii. When conducting the affordability assessment, a credit provider must: (a) calculate the consumer's allocatable and discretionary income; (b) take into account all debts, including monthly debt repayment obligations in terms of credit agreements as reflected on the consumer's credit profile held by a registered credit bureau; and (c) <u>take into account maintenance obligations arising from statutory deductions or necessary expense.</u>

    d. The above regulations require maintenance orders to be taken into account for affordability assessments, and the onus has been placed on the credit provider to validate gross income

(maintenance income) and expenses by way of obtaining credible confirmation. Read with the Maintenance Amendment Bill it appears that all credit providers will receive copies of maintenance orders and therefore the credit provider would have access to maintenance orders and would not solely be reliant upon information received from the customer.

e. By way of the proposed amendments of the Maintenance Bill, these maintenance orders must be made use of in order to properly assess the income and expenses of prospective credit application consumers and as such would require Credit Providers to implement a process to receive the orders, record the orders in such a way that it would allow easy access for credit officers to conduct affordability assessment and storage of these orders for an indefinite period

6. Problematic practical implications and proposed solutions to the amendments of the Maintenance Amendment Bill:

   a. Delivery Method of Maintenance Orders

      i. The Amendment Bill does not specify how and where these orders will be delivered. The Amendment Bill also does not give clear guidelines on who may receive the orders. Large Credit Providers may find it difficult to consolidate receipt of these orders across the country and secondly to keep up to date with the receipts of such orders on real time credit applications.

      ii. Credit providers are in effect given the onus of keeping a register of all maintenance orders received.

         1. Detailed consideration must be given to the length of time between the order made and delivery of the order to the credit provider.
         2. No details have been provided as to whether orders will be delivered to the local branches or at the registered or principal address of the credit provider.
         3. Record retention requirements for the credit providers must be considered, as the consequence is that these Maintenance orders would be kept by individual credit providers in perpetuity.

      iii. Credit providers would have to create a manual system to ensure immediate day one compliance, including accessing required information for affordability assessment and the obligation to keep records of each maintenance order received in perpetuity.

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iv. Delivery processes are described vaguely; more detail will need to be provided to ensure compliant processes are put in place in the credit provider's litigation and credit departments. For example, consideration must be given to how frequently would credit providers receive copies of the orders?

v. The current proposal will be an administrative burden both on Courts and credit providers. The Courts would have to send detailed information such as personal details of the person against whom the Maintenance order has been made, a certified copy of the order and any information as prescribed by regulation. This burden would be relieved, should the State enlist maintenance order details on a single bureau such as TransUnion or Experian, which all credit providers have access to and can comply with. The administrative burden for creating processes on the part of the credit provider is lifted, whilst the onus of delivery and proof thereof on the State is also lifted. This would favourably mitigate credit risk and safeguard personal information. In the alternative, the State must endeavour to deliver all orders to the registered address of the credit provider, however this would not alleviate the real time credit application versus the receipt time of such documentation.

vi. Clarity needs to be provided for the following concepts in the proposed amendments *"prescribed manner"* and *"prescribed circumstances"* to ensure that all vagueness is clarified and suitable processes put in place.

b. Privacy Concerns

i. Maintenance Orders will provide Identity Numbers of the persons included thereon. The person whose details appear on the maintenance order will be subject to risk in that personal and private details are being sent to a number of different credit providers and any other forms of businesses involved in the rating of credit. These are not companies or firms with whom the person will already have an established relationship with which consent has been given for specific forms of processing of personal information.

ii. In terms of Data Privacy in the National Credit Act and its proposed amendments, as well as the Protection of Personal Information Act, appropriate consent or relevant justification must be considered for the purposes of processing.

Thank you for your kind consideration

Commission for Gender Equality
A society free from gender oppression and inequality

SUBMISSION TO THE PORTFOLIO COMMITTEE ON JUSTICE AND CORRECTIONAL SERVICES ON THE MAINTENANCE AMENDMENT BILL [B16-2014]

5 JANUARY 2015

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1. INTRODUCTION

The Commission for Gender Equality (CGE) is a Chapter 9 Institution and in terms of Section 11(1) (d) of its empowering provisions obliged to evaluate and make recommendations to any authority on the adoption of new legislation which would promote gender equality and the status of women.

Accordingly, the CGE takes this opportunity to propose amendments to the proposed Maintenance Amendment Bill that will address gender quality rights.

2. COMMENTS

2.1 DEFINITIONS

The CGE recommends the insertion of a definition relating to the alleged maintenance defaulter as follows :

Alleged maintenance defaulter means – any person who is liable for the maintenance, upkeep and welfare of any person in terms of any relationship, court order, agreement, law or legitimate expectation and where such liability has not been fulfilled for any period of time.

2.1 CLAUSE 1

The CGE welcomes the proposed amendment contained herein because it seeks to expand jurisdiction in respect of maintenance matters brought before any court. Furthermore, the CGE supports the intention to allow maintenance officers to investigate complaints which have not been made an *order of court*. This step will reduce the prejudice experienced by complainants.

2.2 CLAUSE 2

The CGE has received numerous complaints where persons in default of maintenance obligations have avoided their obligations by wilfully avoiding detection. Therefore, the proposed amendment which seeks to solicit the assistance of electronic service providers in detecting the whereabouts of persons who are affected by maintenance orders is supported.

Notwithstanding the above the concern of the CGE is that although clause 2 is framed broadly to apply both to complainants and persons liable for maintenance the reality is that this clause will be relied upon by complainants in most instances. Therefore, in order to provide adequate protection to complaints Clause 2 should be revised with the following insertions :

2.2.1 Subsection 7(3)(h) of the Principal Act - Costs for Providing Information

The CGE does not support the proposed amendment requiring complainants in maintenance claims to bear the costs in respect of information provided by electronic communication service providers. The reason for the CGE position is that complainants in maintenance claims are usually facing financial difficulties and this requirement places an additional burden on such complainants.

The CGE recommends that the proposed clause be revised to allow the electronic service provider to levy a charge on the relevant customer. Alternatively, the costs must be borne by the electronic communication service provider.

2.2.2 Broader Application of Amendments to Section 7 of Act 99 of 1998

It has been observed by the CGE that in many cases where a maintenance order has been granted against a father then his default is usually condoned by family members. In order to address this problem the CGE recommends an insertion to Clause 2 as follows :

An amendment to Section 7(3)(b) as follows :

....(a), the court may issue a direction in the prescribed form, directing one or more electronic communications service providers as well as any family member ....

2.3 CLAUSE 3 : Proposed Amendment to Section 9 of Act 99 of 1998.

The CGE supports the proposed amendment because it is framed broadly to cover any person that is affected by a maintenance order. An important benefit of such a provision is that it will allow the maintenance officer to subpoena the employer of a person legally liable to maintain another person. However, the format of the proposed amendment suggests that the legislature intends to protect a person who already has a maintenance order in his or her favour and the person liable for maintenance seeks to discharge or lower the maintenance payable in terms of the order.

This is a favourable development of the law but it will only be effective if a penalty clause is inserted. Accordingly, the CGE recommends the insertion of a penalty clause to ensure compliance herein.

A relevant penalty clause recommended is as follows :

Any person who wilfully fails to comply with a subpoena including person(s) who provides information that is incorrect shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding one year.

2.4 CLAUSE 4 : Proposed Amendment to Section 10 of Act 99 of 1998

The CGE does not support the proposed amendment in its current form because in many instances persons who defend maintenance claims appoint legal representatives who seek numerous and lengthy postponements which often frustrate complainants.

Therefore, in order to mitigate the prejudice suffered by complainants the CGE recommends the following revision to Clause 4 at Section 10 (6)(b)

(iii) In instances where a postponement is for a period of one month or more then the court must grant an interim order provided that the conditions in (i) and (ii) are fulfilled.

2.5 CLAUSE 5 : Proposed Amendment to Section 16 of Act 99 of 1998.

The CGE supports this amendment in its current form because it is in keeping with the *audi alteram partem* principle to the extent where it allows for ancillary parties such as employers and pension fund administrators to provide relevant information before order is made binding on the aforementioned parties.

2.6 CLAUSE 6 : Proposed Amendment to Section 17 of Act 99 of 1998.

The effect of this amendment is to allow the court to make an order in the absence of the Applicant(beneficiary in most cases) or the Respondent (person liable for maintenance in most cases) or even if both parties are absent. This is an innovative step which operates in the favour of many disadvantaged women when one considers the fact that many women who seek maintenance orders are usually poorly paid and have to forfeit a day's remuneration for each day that they have to attend court.

In terms of the above the CGE supports the proposed amendment because it seeks to protect any person who may be prejudiced by having to appear in the maintenance court on numerous days. The reason why the CGE supports this proposed amendment is that checks and balances are designed to ensure that the parties concerned are not voiceless and they are also fully informed of the outcome of the proceedings by being served in person with copies of the order made in their absence.

2.7 CLAUSE 7: Proposed Amendment to Section 18 of Act 99 of 1998.

The CGE observes that the proposed amendment in terms of Clause 7 seeks to extend protection to persons in whose favour an order was made (despite of the order so made.

The proposed amendment is designed to extend protection to both applicants and respondents where an order was made in their absence. Accordingly, the CGE supports this amendment in its current form.

2.8 CLAUSE 8 : Proposed Amendment to Section 20 of Act 99 of 1998.

The CGE does not support the proposed amendment in its current form because the costs of locating the whereabouts of persons liable for maintenance may be onerous on most complainants. This would prejudice complainants who may already face financial difficulties. Accordingly, the CGE recommends excision of the proposed amendment contained in paragraph (b).

2.9 CLAUSE 9 : Proposed Amendment to Section 22 of Act 99 of 1998.

The proposed amendment is supported in its current form because it aligns Section 22 of the principal Act with the judgement made in the matter of **Cohen v Cohen 2003(3) SA 337 (SCA).**

2.10 CLAUSE 10 : Proposed Amendment to Section 23(1) of Act 99 of 1998.

The CGE supports this amendment in its current form because it creates uniformity in the manner in which maintenance orders and files are transferred from one court to another. This issue has been a serious concern which resulted in confusion as well as delays in dealing with maintenance matters in instances where there was a change in domicile or residence of the parties concerned.

2.11 CLAUSE 11 : Proposed Amendment to Section 26 of Act 99 of 1998

This insertion to the principal act is aimed at ensuring that maintenance defaulters are treated in the same way that debtors are treated when in default of their contractual obligations.

The CGE welcomes this proposed amendment because maintenance default is more serious in comparison with default in respect of day to day contractual obligations. This amendment addresses the aforementioned problem because it prevents maintenance defaulters from continuing to receive credit while they remain in default with their maintenance obligations.

Accordingly, the CGE supports this amendment in its current form.

2.12 CLAUSE 12 : Proposed Amendment to Section 28 of Act 99 of 1998.

Section 28 of the existing Act is limited in application for the following reasons :

(i) It does not cover debts that may be due to the person against whom maintenance order exists.

(ii) It does not cover arrear maintenance

Accordingly, the CGE supports this proposed amendment in its current form because it extends the protection required by complainants.

2.13 CLAUSE 13 : Proposed Amendment to Section 31 of Act 99 of 1998

Although the CGE welcomes the increased penalty from one year to three years it does not support the proposed amendment in its current form because the existing provision has not been implemented effectively. Accordingly, the deterrence value of Section 31 of the principal Act has little or no significance.

In order to address the abovementioned shortcoming the CGE proposes that :

(i) Section 26 of the principal Act be amended to allow for a warrant of arrest to be issued and executed by way of the following proposed insertion :

Section 26(c) Where a person against whom an order for the payment of maintenance in terms of Section16 1(a) or 21 (3)(a) has been in default for a period of two consecutive months or more then the Clerk of the Court must immediately upon request by a complainant issue and execute a warrant for the arrest of the person concerned who may then be treated in terms of Sections 31 and 41 within forty eight hours of such arrest.

The above proposal will ensure greater compliance with maintenance orders and send a warning to maintenance defaulters that their conduct will not be condoned.

2.14 CLAUSE 14 : Proposed Amendment to Section 35 of Act 99 of 1998

The increase in the penalty proposed in the above clause is supported by the CGE.

2.15 CLAUSE 15 : Proposed Amendment to Section 38 of Act 99 of 1998

The CGE supports the proposed amendment as contained in Clause 15 in its current form because it increases the penalty from six months to two years.

2.16 CLAUSE 16 : Proposed Amendment to Section 39 of Act 99 of 1998

This amendment relates to an increase in the penalty for offences relating to a notice of change of address. The CGE supports an increase in penalty from six months to a year.

2.17 CLAUSE 17 : Proposed Amendment to Section 39 of Act 99 of 1998

There has been complaints of persons who impersonate or hold themselves to be maintenance officials. This is usually done to mislead or intimidate complainants. Accordingly, the insertion of this proposed provision will protect vulnerable individuals. Under the circumstances the CGE supports the proposed amendment to Section 39 of the principal Act by way of an insertion of 39A.

2.18 CLAUSE 18 : Proposed Amendment to Section 41 of Act 99 of 1998

The CGE does not support the proposed amendment in its current form because it does not pass constitutional muster. The reason for this is that proceedings in terms of Section 31 of the principal Act would involve the person against whom a maintenance order exists (Respondent) but no mention is made for the Respondent's voice to be heard. Although the court may make a decision to convert a criminal proceeding into a maintenance enquiry on its own accord or on application by a public prosecutor there is no guarantee that the interest or circumstances of the Respondent will be considered by a court given the construction of the proposed amendment. In other words the standards set out for accused or detained persons in terms of Section 35(3) have not been satisfied.

Accordingly, the CGE recommends the insertion of the following in order to align the proposed amendment to Section 35(3) of the constitution:

The court may, on its own accord or on consideration of the circumstances provided by the respondent or at the request of the public prosecutor, convert the proceedings into such enquiry.

3. IMPLEMENTATION OF THE MAINTENANCE ACT

In terms of Section 28 of the Constitution every child has a right basic nutrition, shelter, basic health care and to be protected from maltreatment , neglect or degradation. In instances where a maintenance defaults on his or her obligations then the right of a child to be protected against maltreatment and degradation is infringed. Furthermore, the construction of Section 28(d) of the Constitution places a positive duty on the state to ensure that the child is protected against maltreatment, neglect or degradation.

In terms of the Above the CGE proposes the establishment of procedures which will ensure that the right to maintenance is given the priority it deserves within the administrative and judicial structures. In other words the CGE recommends the creation of swift procedures along the lines of the Commission for Conciliation, Mediation and Arbitration which will deal exclusively with maintenance matters inclusive of collection and disbursement of maintenance payments. This will ensure that maintenance matters are dealt with swiftly as well as efficiently as envisaged in terms of the Constitution.

4. CONCLUSION

The Commission for Gender Equality (CGE) welcomes the Maintenance Amendment Bill [B 16-2014] and places on record its appreciation for the far reaching amendments that are proposed. The CGE is also grateful for the opportunity to comment on the proposed amendments and trusts that the recommendations herein will be considered favourably.

.....

HOD : Parliamentary and international Liaison

Cape Town

16 January 2015

Western Cape Government
Social Development

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Hon. M Motshekga, MP

The Chairperson

Portfolio Committee on Justice and Correctional Services

Attention: Mr V Ramaano

E-mail: vramaano@parliament.gov.za

COMMENTS ON THE MAINTENANCE AMENDMENT BILL [B16-2014]

1. We refer to the Maintenance Amendment Bill [B16-2014], (the Bill), and the request of the Portfolio Committee on Justice and Correctional Services for comment on the Bill by 16 January 2014. Kindly find the comments of the Western Cape Government on the Bill, attached for your consideration.

INTRODUCTION

2. The Bill proposes amendments to the Maintenance Act, 1998 (Act 99 of 1998), (the Act), to further regulate the following:

   2.1. the lodging of complaints relating to maintenance and the jurisdiction of maintenance courts;

   2.2. the investigation of maintenance complaints;

   2.3. the securing of witnesses for purposes of a maintenance enquiry;

   2.4. maintenance enquiries in order to make provision for the granting of interim maintenance orders;

   2.5. the making of maintenance orders;

   2.6. the making of maintenance orders by consent;

   2.7. the circumstances in which maintenance orders may be granted by default;

   2.8. the granting of cost orders;

2.9. the effect a maintenance order made by a maintenance court has on a maintenance order made by another court;

2.10. the transfer of maintenance orders;

2.11. the reporting of a maintenance defaulter to any business which has as its object the granting of credit or is involved in the credit rating of persons;

2.12. the attachment of emoluments;

2.13. the increase of penalties for certain offences;

2.14. the creation certain new offences; and

2.15. the conversion of criminal proceedings into maintenance enquiries.

GENERAL COMMENTS

3. The amendments proposed in the Bill are supported. It is however noted that the South African Law Reform Commission (SALRC) has published Issue Paper 28 in order to invite comment on the need for law reform in respect of the Maintenance Act, 1998 (Act 99 of 1998) and to identify possible solutions for problem areas. These solutions are not incorporated in the Bill. We are in support of the solutions identified by the SALRC and have submitted comments and additional solutions in respect thereof. We propose that these solutions should also be incorporated in the Amendment Bill so that a further review of the Act would not be necessary.

SPECIFIC COMMENTS

Clause 2

4. The phrase "have not borne fruit" may lead to interpretation difficulties as it is not specific. We propose that the phrase should be amended to refer to the specific failure which will give the maintenance officer the discretion to apply to the maintenance court for further relief. For instance in section 7(3)(a) the phrase should be replaced with "have failed to locate the whereabouts of the person".

Clauses 9

5. After the comma in line 21 on page 6 of the Bill, the sentence should start on a new line and it should be outdented.

Clauses 11 and 13

6. Clause 11 and 13 of the Bill proposes the amendment of sections 26 and 31(4) of the Act to compel a maintenance officer to furnish the particulars of a person who has defaulted on a maintenance order or who has been convicted of an offence in terms of the Act to any business who is involved in credit granting or rating. Subject to our comment below, we are in support of this amendment.

7. It should be noted that a person does not become a maintenance defaulter if a maintenance order is made against such a person. If possible the particulars of a person against whom a maintenance order is granted should be available to credit agencies once the maintenance order is granted.

8. When the maintenance payer defaults on an order this should also be reported to the credit agencies as proposed by the amendment. A default judgement should then be obtained from the maintenance court. It should also be reported to the credit agency when a maintenance defaulter has paid up. When a defaulter in a "normal" credit agreement (cell phone, Edgars account etc.) has paid up the debt or catches up in his/her payments, the credit provider (Vodacom, Edgars) is obliged to report this to the credit agency so that the person's credit score can be improved. They do this because it is in their own interest to ensure that consumers' credit records are as accurate as possible. However, in an acrimonious relationship between two individuals, we cannot rely on one party to honestly report when a maintenance defaulter has paid up. Therefore we have to rely on the maintenance court to rescind the default judgement in order for such judgement to be removed from the credit record, unless of course the child reaches majority. Procedures should be provided for such steps.

9. The format of maintenance judgments needs to be amended to move the details of the minor from page 1 to page 2 of the judgment; so that the credit agency can scan and upload the front page of the judgments to their systems without having to access the confidential details of the minors. The details of the defaulter need to be on page 1. This is critical because without this amendment the judgments cannot be accessed.

Adv. Albert Fritz
Provincial Minister of Social Development,
Western Cape
Date: 14/01/2015

MEMORANDUM

RE: COMMENTS ON MAINTENANCE AMENDMENT BILL

THE CHAIRPERSON
The Portfolio Committee on Justice and Correctional Services

Maintenance Amendment Bill

1. The proposed amendments to section 6 of the Act achieve the purpose of expanding on the jurisdiction of a maintenance court. Although the obligation now imposed on a maintenance officer to institute an enquiry where good cause exists for the substitution or discharge of a verbal or written agreement had previously fallen within the scope of section 6(1)(a), the new category will ensure that a de novo enquiry need not be held, which has an effect on the onus resting on the applicant. The expansion of a maintenance court's jurisdiction to the area where the maintenance beneficiary works or carries on business will bring relief to many applicants previously disadvantaged in practice when their area of residence differed from their area of employment.

2. The proposed amendment to section 7 of the Act is to be commended as it ensures that the respondent can be brought to court so that a maintenance enquiry can proceed. Once again this will assist many applicants who had previously been disadvantaged when a maintenance officer had not been able to locate the whereabouts of the person who may be affected by an order made pursuant to a complaint being lodged. The mechanism created regarding the payment of the costs involved and the possible recovery thereof in terms of the proposed amendment to section 20 of the Act seems to be the most feasible.

3. It is considered that the proposed amendment to section 9 of the Act achieves the goal of creating certainty that a maintenance beneficiary may also be subpoenaed (and not only the respondent). This will create uniformity in the practices of the various maintenance courts.

4. Although the proposed amendment to section 10 of the Act is to be commended as it now places a duty on a maintenance court to conclude maintenance enquiries speedily, it is doubtful that there will be any changes effected in practice. It is suggested that time limits be set. Expanding a maintenance court's jurisdiction to make an interim order for maintenance will, however, go a long way to ameliorating the effects of a long drawn-out maintenance enquiry. In addition this amendment ameliorates the fact that a maintenance court cannot make orders with retrospective effect as an interim order can be substituted with a different order at a later stage.

5. It is considered that the proposed amendments to section 16 of the Act do bring the section in line with various different judgments of the High Court.

6. The proposed amendment to section 17(1) of the Act will be of considerable assistance to all parties in practice as neither one of them will need to be at court when an order by agreement is granted. This proposed amendment is aimed at

further regulating the maintenance enquiry as is the proposed amendments to section 18 of the Act, which will likely assist to ensure that maintenance enquiries can be concluded as speedily as possible in accordance with the proposed amendment to section 10 of the Act.

7. It is considered that the proposed amendment to section 22(b) does bring the section in line with the SCA authority.

8. The proposed inclusion of a new section 26(2A) ensures that maintenance debtors are now treated similarly to a debtor in default in a civil case.

9. It is, however, not considered that the proposed amendment to section 28(1) of the Act achieves its goal of expanding the instances where the court may order the attachment of emoluments. In its present form the inclusion of sub-paragraph (d) appears to increase the burden of proof for the applicant in respect of the instances set out in sub-sections (a) and (b). It is suggested that sub-sections (c) and (d) be combined as sub-section (c).

10. The proposed amendments to the Act as set out in Clauses 13 to 17, which increase the prescribed penalties for certain offences and creates new offences will assist in regulating the maintenance enquiry to the benefit of the maintenance beneficiary.

11. It is considered that the proposed amendment to section 41 now allows a court the discretion to convert a criminal trial into a maintenance enquiry and makes it possible that the court may do so mero motu (and not only when the prosecutor so requests). The inclusion of the words "on good cause shown" ensures that the discretion will be exercised only once it is evident from the facts that it is desirable that a maintenance enquiry be held.

ADV JULIA ANDERSSEN

on behalf of the

CAPE BAR
PARLIAMENTARY COMMITTEE OF THE GCB

27 January 2015

MAINTENANCE ACT

RECOMMENDATION

My name is Theresa Meyer and I am writing this letter hopeful that it will be read. I am also willing to come and tell my story and my reason to whoever is interested to hear.

Both my husband and myself were married before, so both of us are subjects of maintenance matters.

At the moment the maintenance act says that we are liable for maintenance for children until the age of 18. The maintenance is to be paid into the mothers account or account provided by the legal guardian of the minor child.

also my husband's divorce agreement says that we must pay the mother maintenance until she dies, remarry etc.(I know that he entered into that agreement and that we need to go to court again to undo the agreement).

I want to state my case and pardon me for the long version but it is the only way I can do it:

My husband and I got married in 2006 with my husband divorce agreement saying that he must pay for each child till the age of 21.

Also he must pay the mother maintenance till the day she dies or remarry etc.

From 2006 we had no contact with his children as they refused to even contact us, therefore we had no contact at all from any of them'.

We were "molested" by the mother and her friends and family via sms's and I have applied for a court interdict as we were threatened and assaulted verbally. They even called our unborn daughter a whore. The interdict was handed down in 2006 and since then they have refused to have any contact with us at all, BUT we still have to pay maintenance.

We did not skip one single payment but after 10 years you kind of get fed-up in paying for a ex wife and you see that they go on camping trips, boat trips, deep see fishing trips and you just have to pay.

She never applied for an increase in maintenance and I believe that was because she was scared that we would give all this evidence to the court and her maintenance would be revoked.

While we were paying maintenance for 2 children, we found out that the older of the 2 are already working and have his own medical aid etc without informing us.

We needed again to go to a lawyer to write him a letter for his dishonest behaviour. Again we received a gruelling sms. (it cost us money)

In 2012 the younger of the 2 turned 18 and we waited to find out what his plans were but nothing happened so we stopped paying the maintenance into the mothers account. We got summoned to court in February 2014 because apparently the son is studying. After some investigation we find out

that he is already qualified and is only studying part time, but he refuses to go and find a job even though he is studying towards becoming a qualified electrician.

I have submitted all the documentation that states our case but because our bank statements reflects a certain sum of money coming in we had to pay in maintenance again.

I have a problem with that.

1. The court granted his attorneys and the maintenance officer permission to draw our statements which resulted in us having to pay for that costs.
2. It is humiliating to get a letter from your bank where you are being summoned for maintenance.
3. Our financial position is in jeopardy because the mother now has insight into our private business.
4. I feel that our constitutional right has been violated because our private information has now been thrown open to other people.
5. We have a interdict against them because we were threatened but yet the order was granted to have access to our bank statements
6. We have to live a "lie" in order for no one to know our whereabouts because we are scared that the harassment will start again.
7. Even though we had to pay a lawyer thousands of rand to defend my husband in the maintenance case we still had to pay maintenance. Nobody wanted to listen that he is actually qualified to start working. It was just that he is still studying and therefore we need to pay.
8. We then found out that while we are paying maintenance towards him again, he goes on fishing trips every weekend. As well as hunting trips.

No you tell me how fair is that. the one parent pays maintenance while the person who needs the maintenance for education or clothing or whatever goes on fishing and hunting trips. Why do you pay maintenance then.

Is maintenance there to pay for camping trips or for clothing, education, food etc.

My recommendations are as follows please and I want to ask you to read the above before you make any decisions.

1. I want you to do away with the part in the act that the ex wife need to be paid maintenance when she is working, able to work or independent.
   I know that some ex wife's were housewives and therefore got no income and that they need to be helped to get on their feet, I have no problem with that but can they put a time frame on that for example 1 year or so.
2. When summoned for maintenance if the applicant application is denied, let the applicant pay the respondents legal fees.
3. The granting of court orders for bank statements must be denied and all relevant documentation must be done via summons directly to the respondent in the case and there must be a more lenient way for the judges to decide maintenance matters. They must look

at all the documentation and then decide if this is a legal case or not without resulting in the respondent have to pay thousands of rands towards legal representation.

This is all I can think of right now, if I can think of more issues I will sent them to you.

I am sorry again for the lengthy letter but I feel I need to state why I am sending this requests.

Kind regards

Theresa Meyer

0824429992

From: To:0866405106 11/12/

the doj & cd

Department:
Justice and Constitutional Development
REPUBLIC OF SOUTH AFRICA

MAGISTRATE BIZANA:
Private Bag x 507 Bizana 4800
Tel: 039 251 0210-Fax 086 640 5106
E-mail:SMolwana.sh@gmail.com or SMolwana@justice.gov.za

FAX COVER SHEET

ROOM NO: 81

TO:	Mr V Ramaano		
ORGANISATION:	Parliament South Africa		
FAX:	086 565 9219		
YOUR REFERENCE			
FROM	Mr Molwana S.H		
OUR REFERENCE		DATE	11th of December 2014
NO. PAGES:	04 pages including a fax cover sheet.		
SUBJECT:	The Maintenance Amendment Bill		
MESSAGE	Kindly receive it as per your legal instructions.		

SIGNATURE: _____

MAINTENANCE INVESTIGATOR

BIZANA MAGISTRATE COURT

EASTERN CAPE PROVINCE

Access to Justice for All

THE MAINTENANCE AMENDMENT BILL

AMENDMENT OF THE MAINTENANCE ACT NO 99 OF 1998 (TABLED AT PARLIAMENT)

* Maintenance is the legal obligation to provide another person with housing, food, clothing, education, basic medical care and/or other necessary essentials. In terms of the Maintenance Act No 99/1998, persons who can be supported include minor children, spouses and any other person legally entitled to maintenance in terms of Section 15 of the Act.

– When the Complainant lodge a complaint in Court or in the Maintenance Court Office, in terms of Section 6(1)(a) Act No 99/1998, the Maintenance Officer must investigate the Complaint lodged by the Complainant.

– Whenever a Complaint to the effect that any person legally liable to maintain any other person fails to maintain, the latter person or 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 the Maintenance Act No 99/1998.

* In order to investigate any complaint relating to maintenance, a maintenance Officer may in terms of Section 7(1)(a) obtain statement under Oath or ~~affoum~~ 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 the complaint form (J101) 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 (Jurisdiction) 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 Investigating Officer of the Maintenance Court concerned to perform such other functions as may be necessary or expedient to achieve the objects of this Act NO 99/1998.

* Section 10 provide that the maintenance Court holding an enquiry may at any time during the enquiry cause any person to be subpoenaed as a witness (Witness can be a Complainant or any other person in this nature) or examine any other person at the enquiry, although he or she was not subpoenaed as a witness and may recall and re-examine any person already examined.

* Section 8(1) A Magistrate may, prior to or during a maintenance enquiry and at the request of a Maintenance Officer, require the appearance before the Magistrate or before any other Magistrate, for examination by the Maintenance Officer of any person who is likely to give relevant information concerning :-

(a) the identification of the place of residence or employment any other person affected by this legal liability.

(b) financial position of any person affected by such liability.

* Rule 43 of the High Court rules provides a comparatively inexpensive and speedy remedy where the following are sought:

(1) Maintenance pendente lite (pending the suit)

(2) A Contribution towards costs of a pending matrimonial action pendente lite (pending the suit).

It was held in De Wet v De Wet that the maintenance Court could grant an interim order for maintenance pending a divorce, there being no reason why only the High Court could do so. Nor was there any reason for the Maintenance Courts not being able to replace or discharge an interim order it had made or to replace or discharge a High Court order for interim maintenance order. Nevertheless it was held in Thompson v Thompson that although an order in terms of Rule 43 fell four-square within the ordinary meaning of a maintenance order in term of the then Maintenance Act, Maintenance Courts should guard against changing Rule 43 orders too lightly and that such a step is indicated only when circumstances have changed.

NB Other submissions will be presented in Parliament in person should I receive the invitation to appear before it, there is still more to come up!

Good day

I am so glad to have come across this

There are many aspects I wish to advise and have addressed and changed in the maintenance bill

As a mother who divorced my ex when my son was 7 months old and struggled with the maintenance bill to get maintenance I have a lot to say on the matter

The magistrates need to be able to apply the act per case and have some discretion

The problems I experienced was every time I needed to take him back to court for maintenance they insisted I have to supply my bank statement and income and expenditure and disclose my work details and salary slip

This should be done away with

Maybe later in the application call for it but not as the founding application as a lot of maintenance matters the mothers also have domestic violence matters against the dads as I did because of the abuse and was scared to divulge information out of fear that he will stalk at work and harass which he has always done

Therefore I say let the matter come to court and ask for the remainder on the need to know bases

The divorce order stipulates the maintenance and the understanding is the magistrates court is cheaper alternative to deal with the issues however how Can 3 DIFFERENCE magistrates look and interpret the act differently

There needs to be consistency in interpretation and understanding

By this I make example of my experience, my ex got fired on his own account and the magistrate suspended the maintenance order instead of getting his parents to honour his obligation to maintain the child as I requested

Instead he was off doing what he wanted and after I managed to go back to court after a months of the matter being adjourned I managed to get the magistrate to finally subpoena his bank accounts and found out he was getting big amounts coming in monthly yet he claimed to be unemployed and without funds

So even after I brought this to the attention of the court they failed to act in the best interest of the child and no one could interpret whether the suspended order means an order exist or cancelled

And I got so fed up with wasting time at court month in and month out I just scarified luxuries and kept to living to bear minimally so I can prove for my son

Yet my ex flew every month to cape town to date his girlfriend and even when I told the court he has to put the child 1st before a women they refused to listen and made me carry the full burden of financially supporting our son myself

There should be an immediate emoluments attachment order on the salary of the father as he will deduct his own cost before paying over and jeopardising the mothers maintenance from him for the child

Thank you for the opportunity to comment on the proposed amendment of the Maintenance Act.

The amendments seek will most certainly assist maintenance complainants but will not, in my humble view, make a substantial impact.

The South African maintenance law requires drastic changes.

I suggest the following:

1. Fix the maintenance payable by using a sliding scale which is drawn up by a panel of financial experts.

2. The maintenance payable is (initially) set according to that scale.

3. Any party to the maintenance order may approach the maintenance court for a variation of the (initial) order, for which the approaching party must proof compelling circumstances.

4. The sliding scale must have certain input factors, such as:

    - If the person against whom the order is made owns immovable property the scale is determined by the municipal value of the property (A);
    - If a person owns a vehicle the scale is determined by the value of the vehicle (B);
    - If A and B returns different values, then the higher amount is applicable.
    - The scale could also allow for different occupations. For instance if the person against whom the order is made is employed at a certain post level, then a certain amount would be payable.

5. The aforementioned will in practice work as follows:

    - The applicant will approach the maintenance court and request an order and submit information to allow the maintenance officer to make a determination in terms of the scale.
    - The maintenance officer then advises the maintenance court who then issue an *interim* maintenance order.
    - The respondent is called upon to advance reasons on the return date why the *interim* should not be made final.
    - The onus will be on the respondent to show compelling circumstances.

- The applicant shall also have the right to apply for an amount higher than the scale, in which case she will have the onus to show compelling circumstances why the maintenance should be higher than the scale.

6. The net result will be that women (who are the majority of claimants) will spend less time at court and get immediate relief. Men on the other hand will now have to approach court and convince court why the order should not be made final. Men will thus be forced to accept responsibility for their actions.

7. Women should also be allowed to approach courts even during their pregnancy. The order (on the same basis as above) should then be granted with effect from the date on which the child is born.

The aforementioned is a short summary of my proposal.

I will gladly elaborate or explain it, if required.

Danie Schutte

KARIEN SCHUTTE PROKUREURS

Jochem van Bruggenstraat 9

Posbus 382 Middelburg 1050

Tel: 013 243 2022

Faks: 013 243 2001

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Dear Sir
From my experience as an Attorney I have experienced the following difficulties in maintenance matters:
One of the parent refuses to allow interim custody to the other on the grounds that:

a. The child is sick;
b. The child is not happy to see the parent
c. The parent has not paid maintenance.
d. He /she is seeing another man/woman or is married.

May I suggest that a speedy remedy be provided for overcoming such difficulties by the appointment of a custodian who will meet the parties, preferably on neutral ground, to provide easy and unhindered access to the child. The normal course would be to go to Court involving protracted time and costs by the time when the school holidays may be over.
The Maintenance Court Act should provide for standing Custodians who must act speedily and available 24 hours a day. They should be male and female as I have found female social workers to be generally sympathetic of women. The Custodian could be appointed by the Courts or written consent of both Parties.
The issue to access should not be any one of the above reasons where the child is used as a football to get at the other spouse. The parent or custodian should be given immediate access to see the child and to come to a reasonable conclusion and if necessary to provide medical services.
However if in the opinion of the Custodian , either one of the parent is not in a fit and proper condition to have access and interim custody to the child, on that particular day, then access should be denied. The custodian should have the authority to remove the child from the guardianship of a neglecting parent for a few days or a week pending an urgent enquiry. The child should be consulted and those who are going to take her in interim custody, be it one of the parents, family members , friends or a day care center.

The other contention is that some parent's use maintenance on themselves as they don't work and also increasing the child's medical bills by unnecessary doctor's visits and buy medicines and other luxuries for themselves.

Many Thanks
Somar Sitlu
somargkr@telkomsa.net
072 327 7861

SONKE GENDER JUSTICE
HIV/AIDS • GENDER EQUALITY • HUMAN RIGHTS

Reg. No: 2006/023739/08

to:	**Mr V Ramaano**
email:	**vramaano@parliament.gov.za**
from:	Sonke Gender Justice
date:	16 January 2015

SUBMISSION ON THE MAINTENANCE ACT AMENDMENT BILL

1. INTRODUCTION

1.1. Sonke Gender Justice ("**Sonke**") welcomes the opportunity to make a submission to the Portfolio Committee on Justice and Correctional Services ("**DOJCS**") on proposed amendments to the Maintenance Act, 99 of 1988 (the "**Act**"). We would like to make an oral submission and would be grateful if you could advise when the hearing will take place.

1.2. Sonke is a non-profit, human rights and social justice organisation that strives to achieve gender equality, prevent gender based violence and reduce the spread and impact of HIV and AIDS, including and focusing on the involvement of men and boys for gender equality.

2. CONTEXT

2.1. This submission is made by Sonke, but includes the perspective of the MenCare global fatherhood campaign [1] (the "**MenCare Campaign**") that is coordinated by Sonke. The MenCare Campaign is aimed at promoting men's involvement as equitable, non-violent fathers and caregivers in order to achieve family well-being and gender equality. Globally, a body of evidence confirms that engaged, responsive fatherhood and men's participation in their children's lives, that goes beyond just financial contribution, has positive effects for women, children and men themselves. A global review of interventions commissioned by the World Health Organization in 2007 [2] affirms that the involvement of men in their children's

[1] Please see the global campaign website: www.men-care.org.
[2] Barker, G., C. Ricardo and M. Nascimento. (2007). Engaging Men and Boys in Changing Gender-based Inequity in Health: Evidence from Programme Intervention. Geneva: World Health Organization.

lives is generally positive in terms of physical and mental health, cognitive and social development, and for developing more gender equitable attitudes. This positive impact shows up both in the short-term and in the long-term in cases where longitudinal data exists.

2.2. Research conducted by Sonke in 2013 suggests that one father out of two is absent from their child's life in South Africa. [3] Within this context, there has been growing emphasis in South Africa and around the world on increasing father's involvement with their families. However, legislative initiatives in this area seem to focus on augmenting father's financial support of their children. [4] Without disputing that measures aimed at enforcing parent's financial support are worthwhile, it is important to acknowledge that responsive parenting should go beyond simple financial contribution and include day-to-day emotional support and non-violent physical contact.

2.3. In preparing this submission, we have taken the view that unduly punitive measures designed to enforce financial support can sometimes have negative and discordant affects. Harsh penalties for child support non-payment unduly and disproportionately affect low-income debtors who may not have the capacity to meet their maintenance obligations. [5] In particular, the penalty of incarceration not only has a direct impact on existing child support obligations, it also impacts more generally on debt and on the lives and families of defaulters. The consequences of incarceration are far reaching and, in our view, do not meet the overall goals of child support,

3. ENDORSEMENT OF PROPOSED AMENDMENTS TO THE PRINCIPAL ACT

We wish to note our overall endorsement of the Maintenance Act Amendment Bill (the "**Bill**"). Subject to the comments and recommendations detailed below, we think that the majority of provisions positively extend the powers and scope of maintenance courts and maintenance officers and could therefore enhance the administration of maintenance in South Africa. Naturally, successful administration of maintenance depends not just on empowering legislation but also on effectual handling of maintenance cases by courts and officers and we hope that implementation of the new provisions will be a seamless and effective process.

4. COMMENTS AND RECOMMENDATIONS

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[3] Mazembo Mavungu Eddy, Hayley Thomson-de Boor, and Karabo Mphaka "So we are ATM Fathers?" published by Sonke Gender Justice, the Centre for Social Development in Africa, the University of Johannesburg and MenCare in 2013.

[4] May, Rebecca and Roulet, Marguerite. 2005. "*A Look at Arrests of Low-income Fathers for Child Support Non Payment*" published by the Centre for Family Policy and Practice.

[5] May, Rebecca and Roulet, Marguerite. 2005. "*A Look at Arrests of Low-income Fathers for Child Support Non Payment*" published by the Centre for Family Policy and Practice.

While we welcome the overall import of the Bill, we wish to note our concern over those provisions allowing for and extending the timeframes for imprisonment in instances of non-compliance. We do not believe that detention is an appropriate sanction for non-compliance and, moreover, in their current form we think that the provisions are so overbroad so as to compromise the overall goals of child support.

4.1. **The Incarceration Provisions**

Clauses 13, 14, 15, 16 and 17 of the Bill (the "**Incarceration Provisions**") seek to amend sections 31, 38, 39 and the new section 39A of the principal act and contemplate imprisonment for certain offences. If the Bill is passed in its current form, these provisions, if relied upon, could see defaulters being incarcerated for periods of up to three years. The Incarceration Provisions also provide for imprisonment of pension fund administrators, employers and others for periods of up to two years. In our view, these timeframes are extreme, go beyond what is globally acceptable and are not underpinned by a clear rationale.

4.2. **Incarceration Is An Inappropriate Sanction**

4.2.1. There is a strong body of literature suggesting that imprisonment is an inappropriate means by which to enforce maintenance payments. [6] As suggested above, where a maintenance debtor is imprisoned for defaulting on their obligations, the consequence will be that such person will be rendered unable to work and this could render them unable to meet their existing and future maintenance obligations. Similarly, the Incarceration Provisions could result in absent parenthood because the debtor will have limited visitation rights and little ability to provide emotional and day-to-day support to their children.

4.2.2. In our view, the rationale for the Incarceration Provisions is unclear. We submit that the Incarceration Provisions will serve only to secure payment from those debtors who are able but unwilling to pay but will have a devastating affect on those debtors who do not have the financial capacity to meet their obligations.

4.2.3. Across jurisdictions, a range of alterative penalties are stipulated and we believe that these alternatives would be better suited within the context of maintenance enforcement. Alternative penalties might include, for example, the withholding, revocation or suspension of passports, visa's, drivers and other licenses and/or affecting membership of professional bodies. In relation to membership of professional bodies, it is worth noting that last year Sonke submitted a complaint to the Magistrates Commission concerning the alleged non-payment of maintenance by a sitting magistrate in the Pietermaritzburg Magistrates Court.

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[6] May, Rebecca and Roulet, Marguerite. 2005. "*A Look at Arrests of Low-income Fathers for Child Support Non Payment*" published by the Centre for Family Policy and Practice.

We learnt of this default during the magistrate's interview before the Judicial Services Commission in an application for promotion to become a judge of the High Court. Without getting into the merits of our complaint, we wish simply to note that non compliance with maintenance orders should be considered reasonable grounds for the revocation of membership to certain professional bodies and especially those professional bodies which demand the utmost integrity of their members.

4.3. **The Incarceration Provisions are Overbroad**

4.3.1. The above notwithstanding, we recognise that detention is deemed an acceptable means for enforcing maintenance obligations around the world. [7] For that reason, we foresee that the Incarceration Provisions contained in the Bill are likely to be retained. The paragraphs below all assume retention of the Incarceration Provisions but suggest ways in which their severity and scope need to be curtailed so as not to compromise the overall objectives of child support.

4.3.2. In jurisdictions where detention is allowed, we note that it is generally restricted in terms of duration and to limited instances and extraordinary cases. Typically, it also carries the alternative sentence of a fine and, where imposed, is subject to strict procedural guarantees. Often, it is subject to a probationary period or requires an additional court process before being applied, thus making it more of an "indirect" penalty of last resort.

4.3.3. In relation to duration, the Incarceration Provisions contained in the Bill allow for imprisonment of up to three years. This goes beyond what is set as the maximum duration in Sweden (three months), Canada (no more than 90 days) and the United States of America (up to two years).

4.3.4. As regards application, instances of detention pursuant to maintenance default tend to be ring-fenced such that they are relied upon only infrequently and as a last resort. Clause 13 of the Bill makes no attempt to restrict instances in which imprisonment could be applied. We submit that the Incarceration Provisions of the Bill should apply only in narrowly prescribed instances. For example, in the USA reliance on similar incarceration provisions is limited to instances in which default exceeds a particular amount within a particular timeframe.

4.3.5. Provisions allowing for incarceration in instances of breach of maintenance laws in other jurisdictions largely contemplate the option of a fine payable in the

[7] For the purposes of preparing this submission, we considered enforcement of maintenance in Sweden, the United Kingdom, the United States of America and Canada.

alternative. Clause 13 (a) and clause 14 of the Bill are particularly problematic in this respect, as they both contemplate the option of imprisonment without a fine. Imprisonment without the option of a fine is a serious infringement on the right to freedom and we believe it should be clearly justified and narrowly restricted.

4.3.6. Provisions allowing for incarceration to force compliance with maintenance obligations typically set out clear procedural guarantees and safeguards. [8] This is because detention constitutes a deprivation of personal freedom but in stipulating such safeguards, there is an added benefit in that parents will not unnecessarily be forced into absent and disengaged parenthood. We believe that an appropriate safeguard would be to prescribe that all sentences be subject to a period of suspension in order to allow defaulters an opportunity to remedy the breach.

Unless substantially amended, we do not believe that the Incarceration Provisions provide an appropriate or justifiable means for enforcing maintenance obligations. We submit that they be reconsidered in line with what has been suggested above and in line with international best practice for enforcing maintenance.

5. CONCLUSION

We wish to note our overall endorsement of the Bill, which we believe could enhance the administration of maintenance in South Africa. However, our endorsement is subject to comments

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[8] See, in this regard, chapter 2, section 16 of the Swedish Enforcement Code (1981:774) (the "**Code**") which allows for the imprisonment of a debtor or third party who fails to comply with an order to provide information about assets for a maximum period of three months subject to a number of procedural guarantees and only if "extraordinary reasons" exist. Detention pursuant to section 16 of the Code is subject to ongoing judicial review at intervals of not more than 2 weeks, for purposes of determining whether detention is still necessary and limitations on rights of freedom and rights to privacy and property are, in terms of the Code, only permissible to satisfy a purpose acceptable in a democratic society and can never go beyond what is reasonably necessary to achieve such purpose (chapter 2, article 21) Similarly, in the United States of America, where a defaulters liberty is at stake, most courts strictly require legal representation (with notable exceptions being the courts in Virginia and South Carolina) that is sometimes payable by the state. Moreover, common practice in the USA is for states to suspend sentences and impose a probationary period during which payments must be made. In terms of the Canadian Family Maintenance Enforcement Act RSBC 1996 (the "**FMEA**"), a debtor cannot be imprisoned for consecutive periods that total 90 days and procedures safeguards pertaining to the Committal Hearing are set out in article 23 of the FMEA.

relating to the Incarceration Provisions proposed by the Bill, which we deem to be extreme and not justified.

6. CONTACT

Please do not hesitate to contact us should you require clarity or further information regarding our submission.

Yours sincerely

Wessel van den Berg

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Manager

Child Rights and Positive Parenting Portfolio

Sonke Gender Justice

Co-Coordinator of the MenCare Global Fatherhood Campaign

Vuyiseka Dubula

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Policy Development and Advocacy

Sonke Gender Justice

15 January 2015

Hon. M. Motshekga, MP

Chairperson: PC on Justice and Correctional Services

For attention: Mr V Ramaano

Per email: vramaano@parliament.gov.za

Dear Hon. M. Motshekga

WRITTEN SUBMISSIONS ON THE MAINTENANCE AMENDMENT BILL, 2014

I, Nicolaas Albertus Jacobus van Niekerk, am a magistrate currently performing my official duties at the Tembisa Magistrate's Office. I have had 15 years' experience as a presiding officer in maintenance enquiries which was preceded by 4 years' experience as a maintenance officer at the Scottburgh Magistrate's office. I am making these submissions in my capacity as presiding officer of the maintenance court.

My contact details are as follows:

Business address:	Tembisa Magistrate's Office
	Private Bag X7
	Tembisa
	1632
Physical address:	Tembisa Magistrate's Office
	234/5 Igqagqa Section
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E-mail:	jvanniekerk@justice.gov.za

SUBMISSIONS

1. Amendment of section 6

The proposed introduction of subsection (c) of section 6(1) is welcomed. However, if this subsection is left in its current form then, in my respectful view, it would open the door for abuse, especially by those who wish to avoid their maintenance obligations.

(i) Simplified procedure to be introduced

A simplified remedy and / or procedure should be created to enable such verbal or written agreements to be made an order of court. Currently, where parties have reached agreement pertaining to maintenance contributions, the only way to have that made an order of court, is to follow the present cumbersome process.

It is, however, a well known fact that most people prefer to arrange their lives without involving the courts, alternatively, that some South African's are not aware of the right or duty to approach a court concerning maintenance matters. Thus, while a remedy should be created for those who have managed to come to some form of agreement to be able to have the certainty of formalizing their agreement by means of an order of court, this remedy should by no means shut the door on those who either do not wish to involve the courts or who is not knowledgeable about the remedy.

(ii) Status of agreements vis-à-vis court orders

This constitute my major concern. The legislature should provide clarity on the interaction between agreements reached between the parties and maintenance orders made, i.e. what effect does a verbal/written agreement have on an existing maintenance order.

During proceedings in which the variation of an existing maintenance order is sought or, more frequently, during proceedings for the enforcement of a maintenance order, evidence is frequently tendered that the parties reached an agreement which is in conflict with the existing maintenance order.

One of the purposes of a maintenance order is to provide certainty by delineating the extent of one person's responsibility to maintain another. A maintenance order exists due to the powers of a court to intervene in such a situation. It is trite that a court order's existence depends on the terms of the order or upon the court's termination, substitution or variation thereof. While this holds true for maintenance orders in the main, there are cases in terms whereof courts have permitted maintenance orders to be terminated automatically without the terms of the order or a pronunciation of the court to terminate it.

To allow the wording of the proposed section 6(1)(c) to stand, unqualified, would allow for parties, especially defaulters of maintenance payments, to easily raise excuses of alleged verbal agreements to the contrary of an existing maintenance order. Once the simplified procedure, as pleaded for above becomes a reality, maintenance orders are elastic enough to incorporate verbal or written agreements

in variation or substitution thereof, even with retrospective effect (see *Strime v Strime* 1983 (4) SA 850 CPD at 854A). A maintenance order should have an inviolable existence, but still be flexible enough to be varied with relative ease, especially because it has been permitted to be questioned or ignored for whimsical or capricious reasons.

(iii) Interaction between grounds of complaint

Where it does happen that parties reach agreement pertaining to the payment of maintenance contrary to the terms of a maintenance order, a subsequent complaint in terms of section 6, as amended, may very well have to be based on both subsections (b) and (c) of section 6(1). In its proposed form, the three grounds are listed in the alternative only. This may result in unnecessary abortive complaints which may very well be turned away simply on the technical ground that an incorrect complaint was lodged.

(iv) Area of jurisdiction

I appreciate that the comment on this aspect possible will fall outside of the scope of the aim of these amendments, but I will nonetheless proceed with the comments.

It is my respectful view that the area of jurisdiction should, in similar terms to the Children's Act, be limited to the area where the person to be maintained is ordinarily resident. There is presently no measure or system in place whereby children placed in foster care can be cross referenced to maintenance payments being made for those same children where the foster care order and the maintenance order are made in different areas / provinces. On occasion evidence is tendered before me of maintenance monies being collected in one area, ostensibly for minor children, but that those same children have been placed in foster care elsewhere, often without the person who is paying the maintenance being aware of that. Sometimes further investigations reveal that the complainant is collecting the maintenance payments, under the auspice of maintenance for children, for her/his own maintenance or the person against whom the maintenance order was made was said to be unknown or untraceable at the children's court where the children were placed in foster care. Should the area of jurisdiction of maintenance and children's courts be aligned, it would be possible to verify this information and combat this unlawful duplication of payments for children.

2. Amendment of section 7

The proposed introduction of subsection (3) of section 7 is, in my view, unnecessary.

Subsection (3) clearly is borrowed from the powers given to a court in terms of the Protection against Harassment Act. These powers in the Harassment Act were introduced where the person/source of

the harassment is not known and these powers are utilized to trace the source. The proposed subsection (3) of section 7 is designed to trace the person who may be affected by an order.

The powers vested in the maintenance courts in terms of section 8 of the Maintenance Act are wide enough to obtain information even from electronic service providers. I have, on occasion, successfully utilized section 8 of the Maintenance Act to obtain contact details of a party, without cost. Ironically, it has only been government institutions (most predominantly Registrar of Deeds, Companies and Closed Corporations) that have refused to provide requested information without payment of a prescribed fee. If there is a need for the introduction of payment of these expenses, it should be inserted at section 8.

In the event of it being decided to keep the proposed subsection 3, I have the following comments:

(i) The requirement that these powers be invoked only as a last resort, should be scrapped. It is a national phenomenon that the tracing of a party who may be affected by a maintenance order is a serious problem. A maintenance officer will be well suited to decide which course of action will most likely bear fruit in tracing a party in a particular matter. To leave this possibility only as a last resort will place an unnecessary obstacle in the furtherance of maintenance complaints.

(ii) To provide for tariffs payable to electronic service providers to provide information may very well constitute discrimination. Electronic service providers would be the only category of persons that would be entitled to be paid fees for providing information in maintenance matters. Banks, provident/pension funds and employers (there are others as well), all persons from whom information are frequently sought and obtained, are not entitled to be paid fees. And, just like electronic service providers, these latter categories of persons do incur expenses in providing the requested information. Thus, I submit, the payment of fees should either be scrapped or expanded to cover all persons from whom information are sought.

3. Amendment of section 10

Subsection (b) of the proposed subsection (6)(b) is of concern here.

(i) *Prima facie* evidence

To require that *prima facie* evidence must exist before an interim order can be made is setting the bar too high. It frequently happen that, where a maintenance order or upward variation of a maintenance order is sought, the person against whom the maintenance order could be made is willing to make payment of a certain amount or, where a maintenance order is in force, of an increased amount, but that the offer is not acceptable by the complainant in that it is too low. The proposed subsection (6)(b) does not permit a court, under the circumstances set out above, to make an order in terms of the

offer albeit on an interim basis. Where such an order is made based on the offer to pay or pay an increased amount, quite often proves to be a sufficient contribution and, even where it is later proven that the offer is too low, such interim order goes a long way in addressing the urgent nature of maintenance matters as it provides some relief as opposed to no relief.

(ii) Undue hardship

The requirement of undue hardship is also, in my respectful view, an unnecessary requirement. Undue hardship is an inevitable consequence where a correct judicial pronunciation of a maintenance dispute is not in existence. To set as a requirement a reality that is in existence may, in interpreting the provision judicially, result in requiring a consideration of facts in addition to this reality of undue hardship. Such interpretation would likely nullify the good intentions of the legislature.

(iii) Hardship suffered by person to be maintained

Subsection (6)(b)(ii) operates only in favour of a person to be maintained. It frequently occur that, factually, one or more grounds that are required for the continued existence of an existing maintenance order is lacking, e.g. the person against whom a maintenance order was made has blamelessly lost her/his employment or receive a reduced income. The continued requirement to make payments in terms of the maintenance order may equally cause undue hardship to the person obliged to pay. This subsection should cater for that as well.

4. Amendment of section 16

(i) Amendment to section 16(2)(a)(i)

The deletion of the word "Any" from the wording of section 16 and replacing it with a reference to a closed list of courts is, in my respectful view, a step backward. The definition of "maintenance order" in section 1 of the Maintenance Act refers to 'any order...issued by any court' (underlining is mine). This very same wording was the basis for the High Court interpreting a provision in a decree of divorce to be capable of further determination in the maintenance court. This interpretation was a progressive step in the furtherance of securing maintenance payments that are due. The Maintenance Act provides effective remedies that are simplistic to follow and affordable for the majority of persons that require a forum to deal with maintenance. It obviate the need to go back to the expensive litigation of High Court, Divorce Court or Regional Court enforcement procedures.

The possibility exists that other statutes may be enacted in future that further provide for maintenance orders. With the intended amendment of section 16(2)(a), a maintenance order in terms of the Children's Act, the Domestic Violence Act and a maintenance order made as a condition of a

suspended sentence; as contemplated in the definition of "maintenance order" in section 1 of the Maintenance Act, are all excluded therefrom. I must point out here that the question of whether or not a maintenance order may be made in terms of the Domestic Violence Act is a contentious point amongst magistrates. A full explanation of the arguments for and against this issue does not fall within the intention of the proposed amendment, but suffice to say that I, together with a number of other magistrates, are of the view that a maintenance order may be made applying the provisions of the Domestic Violence Act.

The point that must be stressed here is this: the proposed deletion of the word "any" and substituting specified courts will detract from the progression of the enforcement of the duty to maintain by courts other than the ones listed in the proposed amendment.

(ii) Amendment to section 16(2)(a)(cc) and (dd)

The provisions set in section 16(2)(a)(aa) to (dd) are ignorant of the fact that evidence is not always adduced. The majority of maintenance orders are made by consent between the parties and the majority of convictions are based on a plea of guilty. The effect of subsections (aa) to (cc) of section 16(2)(a) have been to completely negate the "shall" intention of the legislature (the word "shall" appears immediately after subsection (iii) of section 16(2)), mainly due to the fact that there is no evidence adduced in the majority of the matters referred to here.

The power to make an order contemplated in this part of section 16(2) is a very important and highly useful tool. In practice, it is necessary to resort to this step in order to provide a measure of security to the beneficiary of the maintenance order. In the 15 years' experience as a presiding officer in maintenance cases, I have found that just over 95% of all matters in which a section 16(2) order was not made, the persons against whom the maintenance orders were made failed to comply with the maintenance order.

It is very important to provide an opportunity to all parties who may be affected by an order in terms of section 16(2) to be heard. The proposed insertion of subsection (dd) thus, in principle, is sound. However, in the nine years that I have been providing employers and other persons who are obliged under contract to pay monies on a periodical basis to the person against whom a maintenance order was or may be made with an opportunity to be heard, none has ever chosen to provide even a response thereto (and I make sure that proper notice was given), let alone provide evidence. Thus, in my respectful view, to set as a prerequisite for a section 16(2) order that evidence from these persons be heard, would have as result that no section 16(2) order would ever be made. Based on the statistics provided above, that will result in at least 95% of all matters where a maintenance order was made, that subsequent enforcement proceedings will have to be instituted. This is a result that should not be at the expense of the recipients of the maintenance payments, who predominantly are vulnerable women and children. In addition, the judicial and administrative capacity to cope with such unnecessary duplication of work is at present not available.

The legislature's caution by setting these additional sets of consideration was, I believe, so as to curtail the court's powers to make these orders. Some have even labelled these powers as draconian. Persons against whom a maintenance order may be made, and who are given an opportunity to be heard,

normally cites the negative impact that such a deduction from his/her salary will have on his/her credit rating. In my view, all these considerations are relevant, but statutory compulsion to effect deductions from a person's periodic remuneration is nothing new. Tax laws and Labour laws have this. Tax laws are there to protect the pocket of government and the applicable labour laws to provide unemployment insurance for the benefit of the person whose remuneration is attached. Neither government nor the person receiving a salary is in as vulnerable a position as the beneficiary of a maintenance order. From the perspective of vulnerable women and children, it offends one's sense of justice to provide these added measures of protection which favours the person who in any event has a duty to maintain to operate to the detriment of a much more vulnerable group.

Thus, my submission are:

- All parties that may be affected by an order in terms of section 16(2), i.e. the person *in whose favour* the maintenance order is, was or may be made, the person *against* whom the maintenance order is, was or may be made, as well as the person who is *obliged* under contract to pay any sum of money on a periodical basis to the person against whom the maintenance order has been or is made, must be provided with an opportunity to be heard on the feasibility and practicality of such an order;
- The opportunity to be heard should be in a prescribed format and served / notified in a prescribed manner;
- Should no evidence or information be provided to the court, the court should nonetheless be compelled to make an order in terms of section 16(2), subject to the above; and
- The requirement of the court actually hearing evidence as a prerequisite should be scrapped.

5. Insertion of section 26(2A)

(i) Information to be supplied

Not all applications made in terms of section 26(2) are granted. Often the reason for not receiving maintenance monies are due to the failure of an employer to pay over monies that were deducted from a Respondent's employer or the clerk of the court not paying over to an Applicant despite it having been paid by the Respondent. To require the maintenance officer to furnish the intended information upon receipt of a section 26(2) application, is certainly premature. Information of a failure to comply with the maintenance order should only be provided once the court has made an order against the Respondent.

The reference to "relevant order" in the proposed section 26(2A) is susceptible to different interpretations, including that the maintenance officer should provide a copy of the maintenance order. That should not be the case. The maintenance officer should be required to provide a copy of the enforcement order (which is not a maintenance order) and not the maintenance order itself. The fact that a maintenance order is or has been made is not necessarily indicative of a person who poses

a credit risk. Maintenance orders are frequently made in accordance with the offer of the person against whom the order was made and often it is found that the offer being made is the same as what that person has been contributing all along.

In civil matters, the clerk of the court is required to furnish this information after judgment has been entered. If the proposed section 26(2A) is left in its present wording, then it would be akin to requiring the clerk in a civil matter to furnish information upon issuing of a summons.

(ii) Involvement of maintenance officer

The proposed section 26(2A) obviously assumes that complaints in terms of section 26(2) are submitted to the maintenance officer. There is no such requirement in the Maintenance Act, i.e. that the complaint must be submitted to the maintenance officer. It is only in respect of section 6 complaints that the Act requires the complaints to be submitted to the maintenance officer. Section 26 requires an applicant to approach the court.

While it makes sense that, given the present structure of the Maintenance Act, that maintenance officers should be as actively involved in enforcement proceedings as they are in respect of section 10 enquiries, because of the wording of section 26, as pointed out in the preceding paragraph, maintenance officers (more particularly prosecutors) are of the view that they are not at all involved in the enforcement process. To thus place a duty on maintenance officers to provide the specified information *'upon receipt of a complaint'* may very well result in tasking a ghost to supply this information. Respectfully, I fail to see why this function cannot be performed by the clerk of the court, as is the case in civil matters.

6. Amendment of section 28(1)

The requirement that evidence of an employer must be heard before an order in terms of section 28(1) can be made will negate the powers of the court to enforce a maintenance order, in light of the non-responsiveness of employers in this regard. This issue has been dealt with above under my numbered paragraph 4(ii). Employers should not be compelled to be hauled to court because of what essentially is an employee's private financial issue.

7. Insertion of section 39A

Subsection (2) bears reference. Sometimes a maintenance investigator is assisted in the execution of some of his/her duties, which are more administrative in nature, by the clerk of the court, e.g. the

faxing and posting of notices i.t.o. sections 16(3) and 29(1) in accordance with Regulation 26(2)(b). Such assistance by the clerk of the court should not be criminalised.

THE END

vodacom

2 December 2014

Dr Mathole Motshekga
Chairperson: Parliamentary Portfolio Committee of Justice and Correctional Services
Parliament of the Republic of South Africa
P O Box 15
Cape Town
8000

Attention: Vhonani Ramaano

Per e-mail: vramaano@parliament.gov.za

Dear Mr Ramaano

Maintenance Amendment Bill

Vodacom would like to provide written comments on the Maintenance Amendment Bill published on the 29th October 2014 in Government Gazette No. 38138 [B16-2014] ("Amendment Bill"). We are cognisant that the Amendment Bill is still deliberated in Parliament and has not been published for public comment. We however believe that the suggestions proposed in this submission are necessary in order to ensure that it is practical and possible for electronic communications service providers ("ECSP") to comply with the relevant sections of the Amendment Bill.

We set out below our comments in this regard;

1. **Amendment of section 7 of Act 99 of 1998**

1.1 Vodacom notes that 7(3)(b) of the Amendment Bill requires an ECSP to furnish the court with the prescribed contact information of its customer who is a party to a maintenance inquiry. The Amendment Bill however fails to define what constitute prescribed 'contact information' and leaves to each ECSP to speculate what this prescribed information entail. Currently Vodacom stores information relating to the name and surname, physical address, Mobile Station International Subscriber Directory Number ("MSISDN") and alternative contact details of its customers. It is not clear what type of information should be made available for purposes of

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complying with the direction issued by a court. In this regard Vodacom propose that it is critical for the Portfolio Committee to define, with certainty, what constitutes prescribed contact information in order to ensure certainty and consistency.

1.2 Section 7(3)(d) of the Amendment Bill requires that the prescribed customer information be provided to the maintenance court within the time period set out by the court in the direction issued to the ECSP. Vodacom is cognisant of the fact that an extension can be applied for and granted in terms of section 7(3)(e) of the Amendment Bill and that it is within the court's discretion to grant or refuse such an application As such, there is a real possibility that Vodacom may not be able to comply with the requirements of section 7(3)(d)of the Amendment Bill where the maintenance court prescribes an unreasonable time period and refuses to grant an extension when requested to do so. It is therefore our respectful submission that section 7(3)(d) should prescribe a time period that will allow ECSPs the opportunity to search for, retrieve and furnish the court with the requested information.

1.3 In order to ensure that an ECSP is able to speedily respond to a direction from the court Vodacom propose that the direction issued by the court in terms of section 7(3)(b) should relate to identifiable data records and a specific time period with a profile on the MSISDN number in order to allow an ECSP to ascertain with certainty when last the number was used.

1.4 The information contemplated in section 7(3)(d) can only be provided to the court if it is available at the time when the direction is issued. To this end we propose that section 7(3)(d) be amended as follows:

"(d) the information referred to in paragraph (b) shall be provided to the maintenance court within ***30 days of receiving the notice when the information is available"***

1.5 The Portfolio Committee should be cognisant that there might be instances where the actual user is not the registered customer on our database. This happens in instances where a juristic person concludes post-paid contracts on behalf of its employees. In these instances the information of the juristic person is recorded and stored in our database and not the information of the respondent who is the user of the MSISDN in question. The information of the user will be in the database of the juristic person meaning that the juristic person will be the only person who is privy to the user's information. To this end, Vodacom recommends that provision be made for the transfer of the request to a juristic person in instances where our database has recorded a juristic person as the primary contractor.

1.6 Section 7(3)(h) of the Amendment Bill provides that the costs for the provision of prescribed contact information by the person lodging the complaint with the maintenance officer. Vodacom believes that this provision creates problems for the company which is currently experiencing difficulties in recovering unpaid bills from respondents for the provision of information. To this

end Vodacom propose that prior to directing ECSP's to provide the prescribed contact information the Maintenance Court should ensure that the complainant has paid the prescribed fee in full.

2. Amendment of section 9 of Act 99 of 1998

The Amendment to section 9 of the Amendment Bill provides that a maintenance officer who has instituted an enquiry under the Maintenance Act may cause "any person" to appear to appear before the maintenance court and give evidence or produce a book, document or statement. By definition the word "any person" includes a juristic person. Vodacom is of the view that ECSP's should be excluded from the ambit of this section if we have fully complied with the provision of the prescribed contact information as contemplated in section 7(3)(b) of the Amendment Bill.

We trust that you will find this in order.

Yours sincerely

Dr Andrew Barendse
Managing Executive: Regulatory Affairs

In terms of the Maintenance Act Regulations specifically on serving of subpoena, notices to employer, there is a restricted manner in which this services have to be rendered, e.g sheriff of the court, maintenance investigator or police officer have to physically serve the documents as stipulated in the regulations. My challenge with this standardized procedure is that we are living in a modern world where technology plays a major role. I think we should also allow the **Electronic Service e.g email,fax etc,** because it is faster and cost effective. This kind of service will work more effectively on the implementation of Maintenance orders to avoid unnecessary delays and arrears on part of the defendant, for example when you have issued an order for a SAPS member you have to send documents to Pretoria for implementation, imagine this documents being sent from Cape town or Port Elizabeth for that matter, how long will it take for the maintenance order to be implemented. This manual method also contribute to the abuse of a child in a way. Regulation 3 empowers the Maintenance Officer to call the parties in a manner he sees fit but which manner to be precise because the DOJ has followed the same procedure of executing the subpoena. Children Act provides that any matter involving the minor must resolved within 90 days, imagine you are in Kimberley and you have to send a Directive or subpoena to a person in Giyani don't you think 90 days will lapse before the actual hearing date? The maintenance act needs to be flexible to go with modern times in order for it to achieve its main objective and putting the interests of the child at heart. One last thing is to check whether our Courts, Maintenance Officers and Investigators are well resourced to execute their mandate effectively. I thank you.

Warm Regards

R.Moilwa

Concerned Citizen

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Dr Kgabane Moloto Inc

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16/02/2015

Honorary Mathole Motshekga , MP

Chairperson

Portfolio Committee on Justice & Correctional Services

Parliament of RSA

C/O Mr V. Ramaano

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Dear Sirs

RE: MAINTENANCE AMENDMENT BILL (B16-2014)

Aforementioned matter and newspaper advert of 01/02/2014 refer.

Please accept my apology for heeding request for submissions without first reading the Bill.

It has been a burning desire to make representations to the SA Law Commission regarding the need to set standards of jurisprudence in maintenance litigation, consequent to harrowing experience in the Rustenburg Maintenance Court. Issues canvassed in this submission might navigate unchartered waters that go beyond the dozen stipulated objectives of the amendment Bill.

AD JOINDER

1. Rule 10 of the Uniform Rules of the High Court of RSA regulates joinder of parties in litigation in the event of non joinder of putative father. Same is the prerogative of Respondent in maintenance litigation in exercising their rights to defend litigation where the Respondent is confident about his knowledge of the minor child's biological father.

2. Both Magistrates Court and Maintenance Acts are silent on joinder, hence reliance on Uniform Rules of the High Court as senior court with jurisdiction to hear appeal and review of all specialized Courts' orders including interalia Maintenance Court

3. In Case 108/14 Rustenburg Maintenance Court the Presiding Magistrate found that the Respondent has no right to adjoin another putative father and that Plaintiff can sue any other men she believes might have impregnated her in the event paternity test are "negative".

AD PARTIES' RIGHT TO RETAIN EXPERT WITNESSES AND TO CONDUCT CRONTROL TEST

4. The constitution guarantees parties in litigation the right to access justice and to court proceedings that are administratively just and fair. Same includes interalia the right to be presumed innocent until proven guilty.

5. Defendant has the right to conduct defense of action in maintenance litigation through means and strategies including interalia retaining the services of suitably qualified Pathologists and /or Molecular Genetics Practitioners to advice on objectivity of paternity test methodology and results, and to conduct paternity test rsults .

6. Defendant's independent expert witnesses alluded to above have the right to collect genetic samples for analysis and/or genetic paternity tests from all parties in litigation, subpoenaed witnesses and/or first degree relatives of the second putative father.

7. In Case 108/14 previously alluded to , Court found that the Defendant does not have the right to conduct parallel paternity tests by expert witnesses he retains . Defendant argued that control tests are scientifically accepted to minimize confounding factors in scientific tests , experiments , investigations and inquiries.

8. Control tests by the second Pathologist, NHLS Universitas Laboratories were consequently not even considered as evidence despite Defendant's previous queries about the faxed paternity test report being inadmissible and noncompliant in the multiple instances with the law of evidence , the Maintenance Officer neglected to subpoena the second Pathologist and Defendant's exploration of objectivity of the faxed paternity test results during cross examination of Pathologist from Lancet Pathologists was proscribed by Court.

AD APPOINTMENT OF COURT ASSESSORS

9. Both Magistrates Court Act and Uniform Rules of the High Court make provisions for appointment of Assesors to assist Court with evaluation of technical evidence in highly specialised fields where such evidence comes to bear in litigation before Court (civil or criminal).

10. In Case 108/14, Defendant's notice for appointment of Assessors to advise Court on document security and molecular genetics was declined.

11. The Pathologist that Defendant was allowed to cross-examine conceded the fact that security of test machine during three days of testing and document security questions were beyond her expertise and that the relevant department at Lancet Pathologist would have to be approached in this regard.

12. The Pathologist further concurred that Assessors who are experts in molecular genetics are the only ones equipped to affirm or contradict any evidence she led in court.

13. The Pathologist was however defensive over the fact that private liaisons with Plaintiff and comments about one of LANCET Pathologists' reports being the report of Defendant compromises her independence as expert witness antagonizes Defendant, creates the impression that Defendant personally generated the report and is administratively unjust to one of LANCET Pathologist's client (viz Defendant), she furthermore vehemently denied that affirmation of the photocopy report that Plaintiff filed with Court as evidence was just an afterthought intended at benefitting Plaintiff as her private client, rather than objective evidence by an independent expert witness.

14. Despite the expert witness/ Pathologist's evidence having been shredded in cross examination on 12/09/2014, Court confirmed the rule nisi granted on 10/07/2014.

Ad Court Recusal

15. Despite Defendant having tendered points in limine that confirm overt bias and that go beyond demonstrating reasonable apprehension of bias that is the test for recusal of Presiding Officer as per precedent set in the SARFU case law, the Presiding Magistrate declined to recuse herself or to qualify how the notice of recusal does not satisfy reasons acceptable for recusal ; the Presiding Magistrate further declined to hold trial within trial to adjudicate review of court's declination to recuse itself.

16. The Presiding Magistrate subsequently declined to heed Notice in terms of Rule 53(1) issued in the NW High Court where application for review had been launched ; Case M429/14 has since been removed from the roll on account of the Presiding Magistrate's failure to avail the Maintenance Court file to the registrar ,failure to file explanatory affidavit , and failure to tender notice of intention to oppose in the event she so wishes.

17. The Maintenance Officer also concurred that reasons tendered by Defendant for Court's recusal were reasonable, he was however repressed and ordered to focus on the quantum of the provisional Order.

18. Both the Senior Public Prosecutor and Control Public Prosecutor are yet to heed Defendant's plea that the Maintenance Officer's right to apply and/or concur with either party's notice of recusal needs to be affirmed as same is in line with duty to advocate the minor child's best interests.

Ad Costs

19. In litigation, costs are to the cause, viz follow the outcomes.

20. However case law as per MB V NB 2010(3) SA 220(GSJ) has set precedent to the effect that failure to consider mediation may result in Court awarding punitive costs, even against successful parties.

21. Tis further common cause that the law does not concern itself with trivialities and that extrajudicial measures have to be exhausted avoid matters being brought prematurely before court.

22. Case number 108/14 was brought prematurely before court as plaintiff declined to privately undergo paternity test and both mediation at the level of families and tribal courts were yet to be considered.

23. Court determined that Maintenance Court has nothing to do with Tribal Courts. It was furthermore pronounced that Plaintiff would not be liable for costs of paternity tests even in the event the Defendant is absoluted from the instance of paternity as he (Defendant) is the one who required paternity and therefore has to bear the cost ; Mamabolic wisdom teaches us that cost of paternity test would not have been generated had Defendant agreed to maintain another man's child.

24. Despite Defendant's founding prayers in the counterclaim having stated the need for tests to be conducted by two pathology practices, and Plaintiff having expressed no objection to same . Plaintiff declined to have hers and the minor child's blood samples drawn by Pathologists retained by Defendant and court sought to make a punitive interim/provisional Maintenance Order alleging that Plaintiff did not decline to undergo test with the court appointed Pathologists

AD CHARACTER EVIDENCE

25. Character evidence bears on the Court's disposition to the parties as same confirms the attitudes that account for generation of facts of delict receiving the court's attention . Litigants should not approach the court with dirty hands.

26. In Case 108/14 plaintiff declined declined to undergo prejudicial paternity tests and subjected defendant to a barrage of profanities by text massage and face book

27. Court declined to accept such evidence and advised Plaintiff to approach the Domestic Violence Court should he wish to have such evidence considered . Plaintiff stalked Defendant and had the wisdom to disrupt proceedings of trial through inappropriate laughter ; tis ironical that character evidence of Plaintiff's prematurity again came to bear , although Court missed context of continuum of behaviors that were earlier declared the sole jurisdiction of the Domestic Violence Court '

AD CONCLUSION

28. The atmosphere in the maintenance court is repressive and Defendant's right to legal proceedings that are administratively just and fair as envisaged by constitution are not affirmed.

29. Defendants are often prejudiced by inability to afford legal fees ,legal aid not assisting indigent Defendants, and legal insurance excluding maintenance from litigation covered by various plans.

30. Principles in jurisprudence, law of evidence and forensic science are sacrificed at the altar of expedience. Innocent minor children are cursed rather than blessed by maintenance occasioned through inobjective presumption of paternity.

31. The status quo lends itself to domestic violence although the preamble to the prevention of Family /Domestic Violence Act does not recognize the fact that men are silent victims of domestic violence and perpetuate gender stereotypes that criminalise men-folk .The helping professions of psychiatry and psychology expose therapist to the harsh reality of this phenomenon without gender bias.

32. Objective appraisal of the Bill requires highly specialized skills in legislative drafting that is often the preserve of Solicitors and Politicians.

33. Harrowing experience s of ordinary litigants in Maintenance Courts can only be effectively documented through research and audit of cases to eliminate confounding factors that predispose to miscarriage of justice with the view to establishing sustainable quality assurance principles.

34. My personal experiences should resonate with law-abiding citizens interested in ensuring fairness of Maintenance Act and compliance with both spirit and provisions of the Constitution; upholding of principles of jurisprudence in Maintenance Court proceedings.

35. Analysis of requires legal minds with special interest and training in public law; these are accolades that a humble Shrink cannot lay claim to.

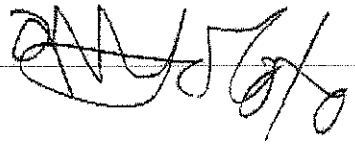
36. The Magistrates Commission is currently appraising their charges' misdemeanor in the matter in reference, and it is hoped that that their findings shall set standards and enrich the debate.

37. My punishing work schedule indisposes me to make oral submissions to the Parliamentary Standing Committee; however should it be absolutely unavoidable arrangements can be made for the love of Country.

Thank you in anticipation for finding our submission in order.

Sincerely

Dr K. Moloto



Submission by COSATU on the Maintenance Amendment Bill B16 2014

23 February 2015

COSATU

Submitted to the
Portfolio Committee on Justice and Correctional Services
National Assembly
Parliament

COSATU welcomes the proposed technical amendments which bring good intentions to the Maintenance Bill which was gazetted for comments in December 2014 up to January 15, 2015.

We are delighted in particular the acknowledgement of use of modern technology such as cell phones (retrieving information from ECSP); use of third parties like the employer as part of the tracking measures in tracking defaulters a to account.

We also commend the amendment related to imprisonment of defaulter. Indeed, imprisonment of defaulters just like blacklisting on credit bureau would not assist at all but would further punish the child including other siblings who depend on the defaulter's income.

The emphasis on speedy court rulings with limited postponements is also very laudable.

We however, dissent on some of the proposed amendments as listed in the subsequent section.

While our contributions to the amendment bill might not be very exhaustive, we however consider the following areas as fundamental:

Key areas for consideration as proposed by the Amendment Bill:

- Blacklisting on credit bureau (26.11, 12) – we view this as more of a punitive measure which not only affect the concerned child but siblings as well who are dependent on the defaulter.

- Complainant responsibility to pay for charges (R80) related to retrieving of information through ECSP (7.2) –this discourages women as the bill stipulates that the complainant is liable for the costs incurred. Our proposal is that a fund be put in place by Department of Justice to cover such financial costs.

- Maintenance payment by third parties (16 (2) these include employers, pension or provident funds. Noting that this depends on feasibility in terms of the payroll system, we believe that the flexibility and rights awarded to employers in this case might cause further delays. We however propose that

employers be encouraged to supply information and co-operate on maintenance cases of their employees as a kind of community service.

- Investigators and maintenance officers' judgements should be based on a fair judgement upon both sides.

- Verbal notification; (6. (1) (c).

- Discretion of the maintenance officer on transferring the files (6.1); it is necessary that the process is sifted at the point of inquiry and structured to make the transfer process homogenous.

Other areas (not mentioned as part of amendments but need attention):

- Gender bias; the Bill is silent about measures to be taken on complainant with regards to access to the child; we need to be cautious that we represent both sides and that responsibility should be both ways. The aim should not be punitive but to strike a balance between both parents.

- What strategy is the government going to use especially on men who do not renew their addresses?

- There is a great need to create synergies with other bodies e.g banks through stop orders as a means to recoup maintenance funds

- Emphasis on monitoring and evaluation of the Bill to ensure implementation and compliance.

- How do we deal will casual labour if stop orders are to be made or on the one hand if employer are to be involved as 3rd parties considering that unscrupulous defaulters might devise means to evade their responsibilities. On the other hand, some employers might 'fire' concerned employers or fail to renew their contracts in order to avoid such responsibilities.

- How do we draw in rural women's special needs in this act?

- Education and awareness programmes are essential and we recommend that the Department of Justice partners with communities to sensitise them on the bill and implications thereof.

- What are the preventative measures in place in relation to the bill? For instance, maintenance disputes are often accompanied by domestic violence

e.g. killing of spouse or children, witchcraft, etc. Thus there is need for proper implementation of the Domestic violence Bill.

- Age of majority; that is maintenance beyond the majority age in particular for disabled children; child maintenance should needs –based.

- The Bill needs to also consider spousal maintenance in divorce cases involving both heterosexual and homosexual relationships where a decree of divorce does not cover such.

- What is the role of the state and what does the government offer in terms of tracking of defaulters considering the fact that in most cases, women are the complainants and usually not working?

- In future the Bill should also take into consideration cases of unborn babies as beneficiaries of probably a deceased respondent's provident funds?. There is need for further research on this.

- Gender sensitisation of court personnel e.g. magistrates, maintenance officers, prosecutors etc.

- Need to consider unfairness and disparities between the rich and poor respondents. For instance, somebody earning R2000 might pay the same maintenance fees as somebody earning R50 000 because of flexibilities which prioritise respondent's personal expenditure bill is before a maintenance ruling is made. We thus, recommend that categories be created based on individual incomes other than expenditures.

Please let us know if we can be of any further assistance. Thank you.

Kind regards,

Matthew Parks
COSATU Parliamentary Office