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**BRIEFING NOTE: MAINTENANCE SYSTEM IN SOUTH AFRICA AND MAIN PORTFOLIO COMMITTEE AMENDMENTS TO THE MAINTENANCE AMENDMENT BILL [B16-2014]<sup>1</sup>**

**1. INTRODUCTION**

**The Maintenance Amendment Bill [B16-2014] seeks to bring about key improvements to the maintenance system pending the finalisation by the South African Law Reform Commission of the review of the Act in its entirety.**

The Bill seeks to regulate the lodging of complaints relating to maintenance and the jurisdiction of maintenance courts; the investigation of maintenance complaints; the securing of witnesses for purposes of a maintenance enquiry; the making of maintenance orders; the making of maintenance orders by consent; the circumstances in which maintenance orders may be granted by default; the granting of cost orders; the effect of a maintenance court order on that made by another court; the transfer of maintenance orders; 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 and the attachment of emoluments. Other proposed amendments seek to increase the penalties for certain offences; create certain new offences further regulate the conversion of criminal proceedings into maintenance enquiries; and provide for related matters.

This briefing note serves to provide (a) background information on the current South African maintenance system and (b) context to the amendments to the Maintenance Amendment Bill [B16-2014].

Key Portfolio Committee amendments to the Bill were effected to clauses 2, 4 and 11:

- Clause 2 (amending **section 7 of the Maintenance Act**) deals with the provision of information on the whereabouts of a maintenance defaulter and for the court to conduct a means test in order not to burden the complainant unfairly with such costs.
- Clause 4 (amending **section 10 of the Maintenance Act**) places a duty on a maintenance court to conclude maintenance enquiries speedily and gives the court a discretion to postpone an enquiry and make an interim order for maintenance on "sufficient grounds", pending the finalisation of the matter.
- Clause 11 (amending **section 23 of the Maintenance Act**) deals with the blacklisting of maintenance defaulters. The clause was amended to provide that the details of the defaulter can only be submitted to the credit bureau after the court has granted a maintenance order.

<sup>1</sup> This is an adaptation of the paper 'Briefing Note: Reflections On The Maintenance System In South Africa' (dated 9 November 2014) prepared by M Dano and G Nesbitt.



The paper also includes the summary of two relevant court cases that illustrate some of the challenges that have emerged in the interpretation of the Maintenance Act's provision for the enforcement of maintenance orders.

- The Constitutional Court judgment in *Bannatyne v Bannatyne*<sup>2</sup> highlighted logistical difficulties in Maintenance Courts that result in the system not functioning effectively, as well as the gendered nature of the maintenance system. Women mostly carry the burden of caring for children after divorce and must make tremendous sacrifices, while fathers are able to continue working for example. Thus, the enforcement of maintenance payments not only secures the rights of children; but also upholds the dignity of women and promotes the foundational values of equality and non-sexism. Effective mechanisms for the enforcement of maintenance obligations are thus essential for the simultaneous achievement of the rights of the child and the promotion of gender equality.
- In the 2014 case of *M v the Minister of Justice and Constitutional Development and others*, for example, the court held that the respondents had to pay the plaintiff's claim for arrear maintenance in the amount of R 24 500 plus interest, due to the failure by maintenance officials to enforce the plaintiff's maintenance order against her ex-husband.

The facts of the cases and discussion of relevant provisions are elaborated in more detail under heading 6 below.

## 2. BACKGROUND

Maintenance law aims to secure the rights of vulnerable groups, especially women and children. The South African maintenance system rests, on the one hand on the judicial maintenance system which is based on the legal duty to support one's dependants. The Maintenance Act 99 of 1998, was intended to address some of the challenges prevalent in the Maintenance Act 23 of 1963, particularly its enforcement mechanisms that were regarded as ineffective. The Maintenance Act of 1998 was enacted in order to provide a speedy and effective remedy at minimum costs for the enforcement of parents' obligations to maintain their children.

## 3. INTERNATIONAL INSTRUMENTS AND LEGAL FRAMEWORK

The ratification by South Africa of the Convention of the Rights of the Child and the constitutionalisation of children's rights (which include the right to maintenance) has implications for the State's obligation to provide the legal and administrative structure to achieve the realisation of children's rights under the Constitution.

The enactment of the Maintenance Act 99 of 1998 was aimed at ensuring that South Africa complies with its obligations enshrined in the Constitution and international conventions, which the country has ratified in line with its international commitments.

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<sup>2</sup> 2003 (2) SA 363 (CC)



### 3.1. International instruments

The *United Nations Convention on the Rights of the Child (CRC) (1989)* is instructive about the status to be accorded to maintenance issues by member states<sup>3</sup>. Article 18 of the CRC emphasises that the primary responsibility for the upbringing and development of children rests with the parents and/or legal guardians. Article 27 (4) of the CRC obliges State Parties to take all appropriate measures to secure the recovery of maintenance funds for children from their parents or other persons who have financial responsibility for those children.

Article 3 (1) of the CRC also requires that 'in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.' Similar provisions are also found in Article 4 (1) of the *African Charter on the Rights and Welfare of the Child, 1990*<sup>4</sup>.

The *United Nations Convention on the Elimination of Discrimination against Women*<sup>5</sup> (CEDAW) (1979), which does not specifically refer to maintenance issues, considers issues that are relevant to family support, and includes Articles that deal with discrimination against women in matters affecting marriage and the family. More importantly, Articles 16 (1) (c) and (d) implore State Parties to take appropriate measures to eliminate discrimination against women, and to accord them the same rights and responsibilities both during marriage and at its dissolution, and on matters affecting their children

### 3.2. The Constitution and Legal framework

Maintenance is an area of law that seeks to secure the rights of the most vulnerable groups in society: women and children unable to support themselves financially. This duty of support is not only premised on common law. It also has its source in legislation, which obliges parents to support their children, according to their means.

#### 3.2.1 Constitution

Section 27 of the Constitution of the Republic of South Africa, 1996 provides that everyone has the right to healthcare, food, water and social security. Section 28 provides that every child has the right to family care or parental care, and to basic nutrition, shelter, and basic health care services. The obligation to ensure that all children are properly cared for is one that the Constitution imposes in the first instance on the parents. The Constitution also places an obligation on the state to create the necessary environment for parents to do so.

In *Government of the Republic of South Africa v Grootboom and Others*<sup>6</sup> the Constitutional Court held that the state must provide the legal and administrative infrastructure necessary to ensure that children are accorded the protection contemplated in Section 28 of the Constitution.

#### 3.2.2. Legislation

The Maintenance Act 99 of 1998 (the Act) governs all the laws that relate to maintenance, and honours the ruling that both parents have a legal duty to support their children, and that, in some cases, a duty of support

<sup>3</sup> South Africa ratified the CRC on 16 June 1995

<sup>4</sup> South Africa ratified the African Children's Charter on 7 January 2000

<sup>5</sup> South Africa ratified CEDAW on 15 December 1995

<sup>6</sup> 2001 (1) SA 46 (CC)



exists between family members. It governs all the legal procedures used by Maintenance Courts, officers and investigators to ensure a sensitive and fair approach to the payment of maintenance.

#### **4. SNAPSHOT OF THE MAINTENANCE SYSTEM**

##### **4.1 MAINTENANCE COURTS, OFFICERS AND INVESTIGATORS**

There are special Maintenance Courts at every Magistrate's Court. Maintenance officers (helped by maintenance investigators) in these courts help people who want to apply for maintenance. They also deal with applications to get more or to pay less maintenance.

When investigating complaints, the maintenance officer and investigator have the right to the following:

- a) any relevant statements made under oath that concern the person being investigated
- b) any information on the financial position of the person being investigated
- c) any information about the identification or whereabouts of the person who is liable to pay maintenance.

Maintenance officers can request any person who has information that is relevant to the complaint to appear before the magistrate to provide this information. (This examination may be held in private.) Persons who appear as witnesses are entitled to an allowance for subsistence and travel.

If the inquiry finds that maintenance must be paid, then a maintenance order is issued, describing how much is to be paid, when it must be paid and where it should be paid. The Court may order that the money be paid by way of a stop order or to the Maintenance Court. In some cases, the money may be deducted directly from wages. In the case of a substitution (where a person applies to pay less or more maintenance) the Court may order that the maintenance amount be changed. In cases where there is no longer a duty to pay maintenance, the Court may order that an existing maintenance order be discharged.

##### **4.2 WHO CAN APPLY FOR OR ORDERED TO PAY MAINTENANCE?**

One parent can apply to the Maintenance Court for the other parent to pay support for their child/children (even if the child was born out of wedlock, or one parent has remarried or a person has been denied access to his or her child).

If the children are not living with either parent, the person who is looking after them can apply for maintenance from the parents. (For example, if a child is living with the grandparents, the grandparents can apply to get maintenance from the father and the mother of the child.)

Any person, irrespective of his or her age, can ask for support or maintenance from any other family member if he or she is unable to support him or herself and if the family member can afford to pay the maintenance claimed.

If a person already pays maintenance, but his circumstances changed (e.g. earn less), he or she can apply to pay less maintenance – called a substitution or variation.



### 4.3 ENFORCING MAINTENANCE ORDERS

A person may appeal against a maintenance order, but must pay maintenance until the case has been heard. If maintenance payments are late, the person to whom money is owed may apply for a warrant of execution or order of enforcement at the Maintenance Court in the area where the defaulting person lives.

A person may have a maintenance order enforced against them if he fails to pay maintenance within 10 days from the payment due date; and he may be ordered to pay interest on the outstanding maintenance. A person who fails to pay maintenance can be criminally charged and be fined or sentenced for up to six months imprisonment.

The Maintenance Court can make one of the following orders:

1. Execution against the person's property - the defaulter's property is sold and the proceeds of the sale are used to pay the maintenance.
2. Emoluments attachment order - the outstanding amount is paid directly by the defaulter's employer.
3. Attachment of any debt. In this case, any person or company that owes the defaulter money will be ordered to pay maintenance directly to the person to whom money is owed.
4. The maintenance defaulter's pensions, gratuities and similar benefits may also be attached to settle to debt, and the name of the defaulting parent included in the Credit Bureau's blacklist.

### 4.4 WHAT HAPPENS IF A PERSON CANNOT PAY MAINTENANCE?

Even if the defaulting person is unemployed, he or she is still legally obliged to pay maintenance. However, the amount can be adjusted according to his or her means. If a person proves that he or she has no means to pay maintenance and that it is not due to unwillingness to work or wrongdoing on their behalf, then a court will not enforce a maintenance order. Similarly, if a maintenance order was suspended by an appeal against the order, then the order will not be enforced.

### 5. CHALLENGES WITHIN THE CURRENT MAINTENANCE SYSTEM

Before 1998 a number of reports, discussions and articles criticised the state of the maintenance system at the time, viz.:

- Report of the Lund Committee on Child and Family Support 1996 (Chapter 5: The Private Maintenance System).
- South African Law Commission (as it then was): Review of the Maintenance System (Project 11, Issue Paper 5, 1997)
- Clark: The new Maintenance Bill - some incremental reform to judicial maintenance procedure, *De Rebus* (Dec 1998) 63

The Maintenance Act, 1998 was subsequently introduced to address systemic failures of the maintenance system, especially the recovery of maintenance. It also introduced a number of innovations, which included the introduction of maintenance investigators to assist with the gathering of relevant information in maintenance proceedings.



However, there were early teething problems that necessitated a study that was commissioned by the Department of Justice & Constitutional Development in 2002, to correct some of the systemic deficiencies in the maintenance system<sup>7</sup>. The study listed some of the current problems within the system as the following:

- Inadequately trained staff
- Inadequate numbers of staff
- Low priority given to maintenance cases
- An incoherent division of labour within the system
- Lack of tracing defaulters
- Delays in service of process
- Failure to serve process
- Lack of adequate information within the system
- Inadequate court facilities
- Inadequate technology and resources.

## 6. THE CONSTITUTIONAL COURT JUDGMENT IN *BANNATYNE V BANNATYNE*

### 6.1. The facts

The parties were formerly married to one another but were divorced in 1999. At the time the marriage was dissolved the court made an order by consent that required Laurie Bannatyne, *inter alia*, to pay maintenance for the respondent and their minor children, to retain them on his medical aid scheme, and to bear certain medical costs. The consent order recorded that, notwithstanding their agreement, both parties regarded the amounts of maintenance to be inappropriate (naturally for opposing reasons) and that in the circumstances either party would be entitled to approach the maintenance court for the amounts to be re-evaluated.

Soon after the order was made Mr Bannatyne applied to the maintenance court for the amounts to be reduced which the court granted in 2000. Thereafter the appellant fell into arrears. He also withdrew the children from his medical aid scheme and failed to pay certain of their medical costs due to "a deterioration in his financial circumstances".

The applicant invoked certain of the mechanisms provided for in the Maintenance Act, 1998 to enforce the order that was made by the maintenance court but to no avail. She then approached the High Court for an order committing the appellant to prison for contempt of the original order, suspended on certain conditions. When the sitting judge's attention was drawn to the fact that the High Court order had been substituted in 2000 by an order of the maintenance court, he granted the appellant leave to appeal. On appeal to the Supreme Court of Appeal (SCA), the contempt order was set aside. Ms Bannatyne then approached the Constitutional Court for relief.

### 6.2. The judgment

The unanimous judgment of the Constitutional Court (CC) acknowledged that children have a right to proper parental care, and the obligation in that regard is placed by the Constitution, in the first instance, on the parents. The state is obliged to create the necessary environment for parents to do so by providing a legal and administrative infrastructure necessary to ensure that children are accorded the protection contemplated in Section 28 of the Constitution.

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<sup>7</sup> Cornerstone Economic Research: A baseline cost study on the appointment of maintenance investigators in terms of the Maintenance Act, 1998, Report 1 (2 July 2002)



The Maintenance Act provides the legal infrastructure to give effect to constitutional imperatives in Section 28. The Maintenance Act was well-intentioned and came with some innovations. **However, evidence brought to the Court suggested logistical difficulties in maintenance courts that resulted in the system not functioning effectively. Problems ranged from inadequately trained staff to insufficient facilities and resources.**

Maintenance courts and the laws they implement are important mechanisms to give effect to the rights of children protected under Section 28 of the Constitution. Failure to ensure their effective operation amounts to a failure to protect children against those who take advantage of the weaknesses in the system

**The CC also made reference to the gendered nature of the maintenance system which compounds the logistical difficulties already alluded to:**

[O]n the breakdown of a marriage or a similar relationship, it is almost always mothers who become the custodial parent and who have to take care of the children. This places an additional financial burden on them and inhibits their ability to obtain remunerative employment. Divorced or separated mothers accordingly face the double disadvantage of being overburdened in terms of responsibilities and under-resourced in terms of means. Fathers, on the other hand, remain actively employed and generally become economically enriched. Maintenance payments are therefore essential to relieve this financial burden.<sup>8</sup>

**These disparities undermine the achievement of gender equality, which is a founding value of the Constitution. The enforcement of maintenance payments not only secures the rights of children; it upholds the dignity of women and promotes the foundational values of equality and non-sexism. Effective mechanisms for the enforcement of maintenance obligations are thus essential for the simultaneous achievement of the rights of the child and the promotion of gender equality.**

**Courts need to be alive to recalcitrant maintenance defaulters who use legal processes to side-step their obligations towards children. Evidence showed this happens frequently in maintenance courts.**

Hardships experienced by maintenance complainants need to be addressed and the proper implementation of the provisions of the Act required the urgent attention of the Department of Justice.

**7. M V MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT AND OTHERS (61876/2012) [2014] ZAGPPHC 510 (26 MAY 2014)**

The facts of the case are as follows:

- i. The plaintiff, a divorced mother of two minor children, secured a maintenance order based on the divorce settlement.
- ii. In 2014 she sued the Minister of Justice and the NPA (1<sup>st</sup> and 2<sup>nd</sup> respondents) on the basis that the maintenance officers at the Mdotjana Magistrates' Court negligently and unlawfully omitted to take appropriate steps in terms of the Maintenance Act, 1998 to enforce the payment of arrear maintenance

<sup>8</sup> At paragraph 29 on page 19 of the judgment



owed by her ex-husband. The claim was for an amount of R24 500 accumulated over a period of three years between 2006 and 2009.

- iii. The ex-husband had been in default since 2006 and the plaintiff had reported the non-payment to several clerks at the maintenance court. She also approached the senior magistrate in an effort to attach her husband's pension benefits due to him after he resigned as a teacher. Maintenance officers failed to take steps to have the pension benefits attached despite several requests from the plaintiff.
- iv. R237 248 in pension benefits was paid to the ex-husband in 2006. Following this he paid some of the arrear maintenance. When he again defaulted on his maintenance payments, criminal charges were reinstated.
- v. He was convicted on 28 October 2009 for failing to pay maintenance between 2006 and 2009 amounting to R24 500. He was sentenced to a fine of R2 000 or two years' imprisonment. The sentence was suspended for five years on condition that he was not found guilty of contravention of s 31 of the Maintenance Act during the period of suspension. The magistrate, without providing any reasons, ordered that the arrears of R24 500 be 'written off', whereas the Maintenance Act does not provide for such an order.
- vi. The state did not take any steps to appeal against this ruling or to have it reviewed or set aside, despite its duty to do so.
- vii. The plaintiff's matter came before the North Gauteng High Court that handed down judgment on 26 May 2014.<sup>9</sup>

- **The court held that the maintenance officers had disregarded the following remedies available for the enforcement of maintenance orders and that their failure to take effective steps had spoken of gross incompetence and dereliction of duties:**

- Section 26(1) and (2) of the Maintenance Act provides that:

'such order shall be enforceable in respect of any amount which that person has to failed to pay, together with any interest thereon...(i) by execution against property...;(ii) by the attachment of emoluments...or...(iii) by the attachment of any debt.... If any maintenance order...has remained unsatisfied for a period of ten days from the day on which the relevant amount became payable...the person in whose favour any such order was made may apply to the maintenance court where that person is resident...for authorisation of the issue of a warrant of execution...for an order for the attachment of emoluments...[or] for an order for the attachment of any [unpaid] debt.'

- Section 26(4) provides that '...any pension, annuity, gratuity or compassionate allowance or other similar benefit shall be liable to be attached or subjected to execution under any warrant of execution or any order issued or made under this Chapter in order to satisfy a maintenance order.'
- Sections 40 and 41 of the Act also contained effective processes that the maintenance court should have followed upon conviction to recover arrear maintenance.
- Section 40 allows for the issuing of a warrant of execution against the movable or immovable property

<sup>9</sup> M v Minister of Justice and Constitutional Development and Others (61876/2012) [2014] ZAGPPHC 510 (26 May 2014).





of the convicted person in order to satisfy such order, including any pension, annuity, gratuity or compassionate allowance or other similar benefit shall be liable to be attached or subjected to execution under an order granted under this section.

- In terms of section 41 the criminal proceedings against the ex-husband could have been converted into a maintenance enquiry if it appeared desirable to the court or on request of the public prosecutor.
- **The loss that the plaintiff suffered is the amount of arrear maintenance that the maintenance officers could and should have secured through an attachment of her husband's pension benefit. This amount was irretrievably lost when the magistrate ordered in 2009 that the arrears be written off.**
- The first, second and third respondents were ordered to pay to the plaintiff the sum of R24 500 jointly and severally, the one paying the others to be absolved, plus interest on the said sum at the rate of 15,5% per annum from the date of summons.

## **8. DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT (DOJCD) INTERVENTIONS**

The DOJCD initiated various interventions to ensure compliance with the Act. First, around 2005 the DOJCD initiated a project dubbed "Operation Isondlo". Some of the planned activities of the project were to decrease the backlog of maintenance cases, enforcement of the provisions of the Act, capacity building in courts, public education and awareness raising, and building relationships with communities and stakeholders.

The Department's commitment to deal decisively with maintenance issues is illustrated in its Strategic Plan for the years 2011 to 2016 (tabled in Parliament on 6 June 2011) wherein it outlined its plan on maintenance issues. The Strategic Plan outlines the following project-related activities to be undertaken:

- Investigating Saturday courts for maintenance and other family related matters.
- Introducing mediation services for maintenance matters.
- Facilitating skills training for maintenance line managers and front line staff on maintenance norms and standards and the Maintenance Act.
- Appointing additional maintenance investigators over 3 years.
- Facilitating the appointment of maintenance complaints managers to fast track maintenance complaints received from the Presidential hotline and other sources.
- Launching an improved media and awareness campaign.
- Launching maintenance guidelines for the judiciary.
- Introducing initiatives to address delays in the service of maintenance process documents.
- Facilitating proposals to urgently amend the Maintenance Act to make provision for future maintenance, role clarification of maintenance officers and maintenance prosecutors[,] and a more effective way of enforcing maintenance orders

For the last three years the Department has been implementing a Maintenance Turnaround Project focusing on frontline services. Various policies and training interventions have been developed to improve service delivery overall: A national defaulters strategy was produced to guide courts on how to uniformly deal with defaulters and is being implemented; and a maintenance complaints management training module is intended to equip maintenance complaints managers with the appropriate skills. In addition, a pilot lean management programme has been rolled out at nine pilot sites.



## 9. THE SOUTH AFRICAN LAW REFORM COMMISSION PROCESS (SALRC)

In April 1998 an interim report on an investigation into a review of the Maintenance Act 23 of 1963, was approved by the South African Law Reform Commission (the Commission). This report made various recommendations for the Department to consider when amending the Maintenance Act of 1963. Some of these recommendations were incorporated by the Department into the Maintenance Act 99 of 1998.

**Notably, Act 99 of 1998 was only ever intended to be an interim measure pending further research on the entire maintenance system.** This is illustrated in the Preamble to the Act, which reads as follows:

AND WHEREAS the South African Law Commission is investigating, in addition to the recovery of maintenance for children, *the reform of the entire South African maintenance system.*

AND WHEREAS it is considered necessary that pending the implementation of the said Law Commission's recommendations, certain amendments be effected in the interim to the existing laws relating to maintenance and that, as a first step in the reform of the entire South African maintenance system. Certain of those laws be restated with the view to emphasizing the importance of a sensitive and fair approach to the determination and recovery of maintenance.

In 2009 a review of the Act noted that successes were evident in the following areas: the regular use of default orders; the use of civil and criminal enforcement mechanisms; the positive role that maintenance investigators play in the maintenance system; and positive spinoffs achieved due to interventions introduced by the Department. Despite the improvements introduced by the Act, however, areas in the maintenance system that were identified as requiring improvement included: manpower, practices and procedures, training, infrastructure, attitudes, and the dynamics between different court officials.<sup>10</sup>

Despite the interim nature of the 1998 Act, for reasons that are not explained, it was only on 1 February 2011 that the South African Law Reform Commission (the Commission) received a request from the then Justice Minister to include in its law reform programme an investigation into the Maintenance Act 99 of 1998. The Minister requested that this investigation and review should receive priority attention.

The Commission published an Issue Paper (Review of the Maintenance Act 99 of 1998), three years later on 9 September 2014.<sup>11</sup> An issue paper is prepared to provide the basis for the Commission's deliberations and to provide persons and bodies wishing to comment or to make suggestions for the reform of this particular branch of the law with sufficient background information to enable them to place focused submissions before the Commission.<sup>12</sup>

Submissions on the issue paper, coupled with the results of further intensive research, will form the basis for a subsequent discussion paper. The discussion paper will contain the Commission's preliminary proposals for law reform, the results of comparative studies, and draft legislation. Submissions on the discussion paper will in turn form the basis for preparing a report. The report will contain the Commission's final recommendations, including the Commission's final proposals and draft legislation (where applicable).

<sup>10</sup> De Jongh M, 'Ten year Anniversary of the Maintenance Act 99 of 1998 – a time to reflect on improvements, shortcomings and the way forward', 2009 South African Law Journal at 590.

<sup>11</sup> SALRC Issue Paper 28 – Review of the Maintenance Act 99 of 1998 – Project 100 (9 September 2014)

<sup>12</sup> Closing date for comments is 30 November 2014.



The Commission observes that the challenges relating to the effectiveness of the maintenance system relate more to the implementation of the Act rather than the provisions of the Act itself.<sup>13</sup> The challenges around the implementation of the Act were also highlighted by the Constitutional Court in the *Bannatyne* judgment.

Areas that have been identified and approved by the Commission for possible law reform are:<sup>14</sup>

- future maintenance;
- locus standi<sup>15</sup> (should child beneficiaries have locus standi);
- appointment of maintenance officers (should maintenance officers be appointed by either the Department or the NPA or by both);
- the power of arrest by maintenance investigators;
- civil execution of maintenance orders (should the Act indicate what types of movable property are susceptible to execution; should rules govern the execution process);
- holding a financial enquiry;
- trusts; and
- cost orders (should these be awarded in maintenance matters) and choice of remedy (should the Act be specific).

The Commission also proposes the following areas may be ripe for law reform:<sup>16</sup>

- Use of mediation processes: Should this be explored and considered for inclusion in the Act. Should the Act make provision for referring maintenance cases for mediation before they are referred to court for a formal inquiry?
- Determination of maintenance awards: The consequence of the discretionary determination of maintenance is that the custodial parent (who is claiming maintenance) does not receive an award that is appropriate and adequate for the maintenance of the child or children for whom maintenance is claimed. Should the Act allow or prescribe a formula-based system for determining maintenance awards, instead of the current discretionary system? Should the Act provide for the development of separate guidelines for calculating maintenance amounts?
- Additional forms of maintenance payments: The current Maintenance Act may not meet all the needs of communities based in rural settings. This is partly because the courts usually determine maintenance amounts in monetary terms, which might not be compatible with the way things are done in rural settings. In rural communities the wealth of a person is not determined or measured by his or her shares and annuities in companies or savings in pension funds, but by the livestock that person possesses.
- Consequences for defaulting: Various interventions have been explored to improve South Africa's maintenance system and bring maintenance defaulters to book. Should the Act provide for the handing over of details of maintenance defaulters to credit rating agencies immediately after a maintenance order is granted? In other words, should the conversion to criminal proceedings to get a conviction, before the particulars of the defaulter are handed over to credit grantors or credit rating agencies, be scrapped? Or is there a need for a process (criminal conviction) to precede the handing over of a defaulter's particulars to credit grantors and credit rating agencies?

<sup>13</sup> SALRC Issue Paper 28 p18

<sup>14</sup> SALRC Issue Paper 28 p4

<sup>15</sup> The right or capacity to bring an action or to appear in a court.

<sup>16</sup> Ibid p15



## **10. KEY PORTFOLIO COMMITTEE AMENDMENTS TO THE MAINTENANCE AMENDMENT BILL [B16-2014]**

The following clauses in the Maintenance Amendment Bill generated significant debate in the Portfolio Committee.

### **10.1 Clause 2 – section 7 of the Maintenance Act**

- This clause deals with the provision of information on the whereabouts of a maintenance defaulter. A court order may be issued to compel an electronic service provider to furnish the maintenance court with contact information.
- In the original clause these costs would be borne by the person lodging the complaint.
- The Portfolio Committee was of the view that it would be unfair to burden this person with additional costs.
- In response to these concerns amendments were introduced to provide for a means test.
- If the maintenance officer is of the opinion that the person lodging the complaint is unable to pay the costs involved in the furnishing of information, then he or she may request the court to hold an enquiry into – (i) the means of the complainant; and (ii) any other circumstances which the court believes should be taken into consideration.
- The court may then make any order it deems fit relating to the payment of the costs including an order directing the State to pay within its available resources.
- If the court does order the state to pay then it may (upon the application of the maintenance officer), order the person affected by the order to refund the costs to the state.

### **10.2 Clause 4 - section 10 of the Maintenance Act**

- This clause places a duty on a maintenance court to conclude maintenance enquiries speedily but also gives the court a discretion to postpone an enquiry and make an interim order for maintenance pending the finalisation of the matter.
- The original clause proposed that such an order could be made on the basis of 'prima facie evidence' that one of the parties was legally liable to maintain the child.
- The Department pointed out that whether the interim order would be granted or not, the court would grant an opportunity to the "would be father" to be heard. If the court, through its discretionary powers still granted an interim order based on the 'best interest of the child' principle, it would stand to provide interim relief until proven otherwise.
- After some discussion it was agreed that the requirement should be "sufficient grounds", rather than "prima facie evidence".

### **10.3 Clause 11 – section 23 of the Maintenance Act**

- This clause deals with the blacklisting of maintenance defaulters.
- The law currently provides that the names of debt defaulters against whom court orders have been granted to be registered with credit bureaus.
- A concern was that if maintenance orders are granted in the same manner in respect of outstanding maintenance, the law will be acting more harshly against persons owing normal debts than against maintenance defaulters. There is also the problem that people may choose to pay their normal debts rather than maintenance, because of the fear of being blacklisted for their normal debts. The clause would ensure that a defaulter did not continue to receive credit while owing on maintenance. The intention being to encourage defaulters to make good on their maintenance obligations or risk being blacklisted. The Committee eventually agreed that this was a necessary proposal, however, the



Department did amend the clause to provide that the submission of the details of the defaulter to the credit bureau is only done once the court has granted a maintenance order.

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#### Sources

1. Maintenance Act 99 of 1998
2. *Bannatyne v Bannatyne* 2003 (2) SA 363 (CC)
3. *Government of the Republic of South Africa v Grootboom and Others* 2001 (1) SA 46 (CC)
4. *M v the Minister of Justice and Constitutional Development and others* (61876/2012) [2014] ZAGPPHC 510 (26 May 2014)
5. Clarke, B: The South African child's right to maintenance-a constitutionally enforceable socio-economic right?
6. South African Law Reform Commission (SALRC) Issue Paper 28 – Review of the Maintenance Act 99 of 1998 – Project 100 (9 September 2014)

