

*A Critical analysis of the implementation of the Maintenance Act 99 of 1998:
Difficulties experienced by the unrepresented public in the Maintenance Court as a
result of the poor implementation of the Act*

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ABSTRACT

Maintenance law in South Africa is based on the existence of the common law concept of the duty of support between dependant parties. As a result of this duty of support, parents are obliged to support their children whilst they are unable to support themselves. This is a right of all children. There has been a constant evolution of the scope of the common law concept of duty of support through both case law, and legislation, culminating in the Maintenance Act 99 of 1998. However, due to structural and procedural issues tied to the implementation of the Act, children's rights often go unprotected, particularly in cases where members of the public enter and engage in the maintenance system unrepresented.

This dissertation aims to identify and address many of the problems encountered by maintenance court users on a daily basis. Specific reference is made to the experiences of the unrepresented public in the Eastern Cape Province, where research was conducted.

The study begins with a historical overview of origins of maintenance law. This is followed by an overview of Act 23 of 1963 and the innovations which it brought about. Next, Act 99 of 1998 is reviewed, accompanied by an explanation of innovations and amendments, and criticisms. The research results are discussed on a comparative basis with already documented studies on the maintenance system as identified through an analysis of available literature on the subject. Further criticisms are identified through quantitative research, undertaken in the form of a survey conducted amongst Maintenance court users within 7 magistrate's courts in the Eastern Cape Province.

This dissertation continues to document suggested solutions to the problems highlighted, including corrections to the 1998 Act itself, as well as solutions and recommendations related to its implementation. The conclusion of this study is that one of the primary means of overcoming the short falls in the maintenance system is education of court users in their rights and responsibilities, as well as procedures to follow, with regards to the Maintenance Court.

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LIST OF ACRONYMS

ATM	Automated Teller Machine
CCJ	Centre For Criminal Justice
DOJCD	Department Of Justice and Constitutional Development
EAO	Emoluments Attachment Order
EFT	Electronic Funds Transfer
JAW	Justice For Women
JDAS	Justice Deposits Account System
LLB	Bachelor Of Laws
NGO	Non-Governmental Organisation
PAYE	Pay As You Earn
SALC	South African Law Commission
SAPS	South African Police Service
TLAC	Tshwaranang Legal Advocacy Centre
UK	United Kingdom
USA	United States Of America
JJS	Journal for Juridical Science
SACJ	South African Criminal Journal
THRHR	Tydskrif Vir Hedendaagse Romein-Hollandse Reg
SALJ	South African Law Journal
SAJHR	South African Journal Of Human Rights
TSAR	Tydskrif Vir Die Suid-Afrikaanse Reg (Journal of South African Law)

1 Chapter 1: Introduction

“...children of every class in every country require maintenance both regularly and expeditiously. Therefore the challenge to be met by any system of maintenance is the need to take proper cognizance of all...factors while ensuring that the process is cheap, simple and short”.

Adrian Grieves¹

1.1 The South African Maintenance System

1.1.1 The public maintenance system (grant system)

The South African maintenance system rests on two pillars, namely a public grant system and a private judicial system.

The public maintenance system is intended to act as a safeguard in supporting children and dependent persons where the judicial system fails to do so². This system is primarily grant based, with the South African child support grant having been introduced in 1998. The grant system is administered by the Department of Social Development to any person who cares for a child under the age of 14 years, subject to certain financial restrictions³. It has become widely acknowledged that, owing to the disarray of the judicial system, an increasing number of people who find no assistance in the maintenance court are turning to the state maintenance grant for relief, thus placing an unbearable strain on South Africa's welfare resources (*"the private maintenance system functions so poorly that many women turn early to the state for the support of themselves and their children"*)⁴.

¹A Grieve *et al* 'Defining the Functions of Maintenance Investigators and setting out Proposals for their Remuneration (2005) Part B *Cornerstone* 67,

²B Clarke 'The New Maintenance Bill - Some incremental reform to judicial maintenance procedure' (1998) *De Rebus* 63; B Clarke 'The South African Child's Right to Maintenance - A Constitutionally Enforceable Socio-Economic Right?' available at <http://www.staidenshomeschool.com>, accessed on 13 January 2012); D Budlender & B Moyo (ed) *'What about the children?: The Silent Voices in Maintenance'* (2004) 72.

³Ibid 490.

⁴SA Law Commission Issue Paper 5 *Review of the maintenance system* (1997) 13, 14, 39; Lund Committee on Child and Family Support *Report of the Lund Committee on Child and Family Support* (1996) 5, 43, 44; Budlender & Moyo (note 2 above) 72.

The public grant system however will not be discussed further herein as same does not fall within the scope of this dissertation.

1.1.2 The private judicial maintenance system

The private judicial maintenance system, based on the legal duty to support one's dependents⁵, and judicial determination in the event of a dispute, forms the focus of this dissertation.

This system specifically relates, *inter alia*, to the support parents are legally obliged to provide for their children in terms of accommodation, food, clothing, medical expenses and the other necessities of life. It is essential, in order for one to exercise one's right to maintenance effectively, that laws and mechanisms should be in place with the aim of ensuring that custodial parents receive the support required for the rearing of their children⁶. Provision of these laws specifically includes the necessity of a competent and functioning maintenance court system. There is general agreement amongst academic writers that the problems facing the maintenance system currently are predominantly administrative as opposed to legislative⁷.

*"The primary responsibility for the support of children should lie with parents, and this responsibility should continue whether or not the relationship between the parties survives. South Africa's legal vehicle for such support if the parental relationship breaks down is the judicial maintenance system. The central problems with this system are administrative, rather than there being defects in the law. It works so poorly that the government is sending the wrong signals about parental responsibility and, in particular, about the financial responsibility of fathers"*⁸.

This judicial maintenance system shifts the maintenance responsibility away from the state and towards parents. However, the basis of this system is an

⁵Ibid.

⁶D Singh, K Naidoo and L Mokolobate "Coming to court for child support – the policy, the practice and reality. A case study of black women in the maintenance system at the Johannesburg Family Court (2002 – 2004) (2004) 17 *Acta Criminologica* 143.

⁷Lund Committee on Child and Family Support (note 4 above) 3.

⁸Ibid 6.

incorrect assumption that all parents and guardians have sufficient access to resources enabling them to fulfil their duty of support towards their children. There is also a further assumption that the private maintenance system is effective in furthering the interests of the child⁹. In South African society neither of these assumptions is wholly true.

This dissertation specifically relates to the maintenance obligation of a parent to a child, and shall only deal with aspects of the current maintenance law and system implementation pertinent to this point.

1.1.3 What is maintenance?

In order for one to achieve a proper understanding of what constitutes "maintenance" a consideration of the original Roman-Dutch authorities on the subject is necessary prior to canvassing the more modern interpretation. Thereafter a consideration of the common law amended by application through case law, and the codification of same in the Maintenance Act 99 of 1998 shall be reviewed. The concept of maintenance shall be addressed under two sub-headings, namely 1) the duty of support and 2) the extent of the duty of support.

The duty of support

The primary basis of maintenance law is the existence of a duty of support between parties. Despite the fact that the term "duty of support" has itself not been clearly defined in our law, there has been a constant evolution of the scope of the common law concept of duty of support through both case law, and legislation.

Traditionally maintenance has been viewed as "a mother's claim on behalf of her child against the father of the child for support"¹⁰. This essential right of the child is grounded in common-law¹¹.

⁹Budlender & Moyo (note 2 above) 73.

¹⁰The concept of maintenance also extends to spousal maintenance. However for the purposes of this dissertation only child maintenance shall be of relevance.

¹¹Maintenance law is built upon Roman-Dutch legal foundations, known as common law.

Voet conveys the earliest definition of the scope of a duty of support between parent and child, stating that "*even where children are not under paternal control, they must be supported by their parents*"¹². Voet was clear that this rule extended to a mother of illegitimate parents¹³.

Nathan confirms Voet's position in writing that "*the principal object of marriage is procreation of children. On their birth they are to be nourished and brought up in accordance with the dictates of natural reason...Both those born during the subsistence of a marriage, and those born after divorce or after death of the father...are to be recognised as children and supported*"¹⁴. Nathan highlights the early existence in our law of a parent's duty to support a child. It is clear that in the early 1900's the primary duty to support such children fell to the father. Only in the circumstance where the father was too poor to support his children was the mother called to do so if she had the available means¹⁵. In the event that it was uncertain who the father of a particular woman's child was the duty to support such child would fall solely on the mother¹⁶.

Despite the early interpretation of the existence of such duty, the duty of support has never been clearly set out in our law, resulting in a maintenance system that does not have a clear and unambiguous definition of the parameters of the duty of support¹⁷.

Currently a duty of support (*ex lege*) can only exist where the following three prerequisites are present¹⁸:-

- (a) a duty of support;
- (b) a need on the part of the person to be supported; and

¹² S.P Scott *The Civil Law* (undated) Vol 5 40.

¹³ *Ibid*

¹⁴ M Nathan *The Common Law of South Africa: A Treatise based on Voet's commentaries on the pandects* 2ed (1913) Vol 1 115; Scott (note 12 above) 38.

¹⁵ *Ibid* 118.

¹⁶ *Ibid*.

¹⁷ Department of Justice and Constitutional Development "*Maintenance Guidelines: Approaches to the determination and allocation of children's costs*" (undated) 11; The Maintenance Act 99 of 1998 does not create the duty of support, rather it provides mechanisms for the enforcement of such duty.

¹⁸ *Ibid* 1.

- (c) adequate resources on the part of the person who is called upon to provide support

The duty of support between parent and child comes into existence from birth, alternatively in the case of adopted children, upon finalisation of adoption, by operation of law (*ex lege*). The duty of support between a parent and child only comes to an end once the child is self-supporting¹⁹, irrespective of whether or not the child has reached the age of majority. Common law also provides that one's obligation to support one's children ceases generally when one is so indigent as to be unable to support oneself²⁰.

The 1998 Act codifies the common law principles and covers the *ex lege* duty of support between parties while further extending this duty to a contractual duty of support between unrelated persons in specific instances²¹. Section 15 of the 1998 Act sets out the duty of support as follows:-

(1) ...a maintenance order for the maintenance of a child is directed at the enforcement of the common law duty of the child's parents to support that child, as the duty in question exists at the time of the issue of the maintenance order and is expected to continue.

(2) ...

(3) (a) ...the maintenance court shall, in determining the amount to be paid as maintenance in respect of a child, take into consideration-

(i) that the duty of supporting a child is an obligation which the parents have incurred jointly;

¹⁹The duty is also reciprocal in nature however the duty of the child to maintain his or her parents is not relevant for the purposes of this dissertation. Department of Justice and Constitutional Development (note 17 above) 16 - 17; L Van Zyl *Handbook of the South African Law of Maintenance* 3ed (2010) 4, 11; A Skelton (ed) *Family Law in South Africa* (2010) 148; PJ Visser & JM Potgieter *Introduction to Family Law* 2 ed (1998) 210 - 212; J Heaton *South African Family Law* 3 ed (2010) 328-329; Nathan (note 14 above) 120-121; CG Hall *Maasdorp's Institutes of South African Law* 7 ed (1947) 292.

²⁰Nathan (note 14 above) 121; Maasdorp (note 19 above) 293.

²¹Heaton (note 19 above) 52; Skelton (note 19 above) 322; Act 99 of 1998 Section 2(1): 'The provisions of this Act shall apply in respect of the legal duty of any person to maintain any other person, irrespective of the nature of the relationship between those persons giving rise to that duty'.

- (ii) *that the parent's respective shares of such obligation are apportioned between them according to their respective means, and:*
- (iii) *that the duty exists, irrespective of whether a child is born in or out of wedlock or is born of a first or subsequent marriage*
- (3) (b) *Any amount so determined shall be such amount as the maintenance court may consider fair in all the circumstances of the case.*

Extent of the duty of support

When considering the parameters of the duty of support, Voet writes: "*There falls moreover here under the heading of maintenance which is to be made good in virtue of family duty and the requirements of law not only provisions ... in accord with the class and position of the persons to be maintained and of those who afford the maintenance, but also a right of dwelling, since without such things the human frame cannot be maintained. Medicines also come in which are employed with a view to the care of health; and so also does instruction in the art of reading and writing and in the first principles of the Christian religion*"²².

Spiro²³ defines maintenance as follows: "*At the present time maintenance does not only embrace the necessities of life, such as food, clothing and shelter, but also extends to education and care in sickness, and the child must be provided with all those things that are required for its proper upbringing*".

Nathan confirms the aforesaid in stating that where support is due by reason of that natural affection which parents owe to children, much is left to the discretion of the Judge as regards the mode of support. Maintenance in this regard is said to include "*not only food and clothing, in accordance with the means and position of the persons to be supported, but residence (i.e. the shelter of a roof), medicine for the cure of diseases, (and instruction in the art of reading and writing, and the first principles of religion). General education*

²²Ibid.

²³T Boezaart (Ed) *Child Law in South Africa* (2009) 39; HR Hahlo *The South African Law of Husband and Wife* 5 ed (1985) 408.

*must be left to the discretion of parents; while guardians ought to supply from the patrimony of their wards the means of educating the latter in accordance with the requirements of their station*²⁴".

More recently Van Zyl²⁵ writes that "*while food, clothing and shelter are always mentioned in any discussion of maintenance, the concept extends to more than these necessities. It includes also medical care and, in respect of children, education.*"

In terms of the common law concept of "maintenance", the duty of support extends to the provision of food, clothing, housing, medical expenses and education, by one person to another, as determined by a legal obligation. In addition the quantification of such duty is dependent upon the economic position (capital, income and expenses) of the parties concerned. The duty of support can extend beyond necessities²⁶.

Voet makes known the importance of this duty by clearly stating that should one should refuse to provide the support required by law, the matter would be referred to the judges who were required to determine the amount to be furnished by he who was obliged to support in proportion to his means. Voet writes further that should one still fail to provide such support, he would be compelled to comply with a judgment setting out the precise nature and scope of the duty by the taking of his property into execution and the selling of same²⁷. In a similar vein a judge too was granted a discretion to determine whether a relative or a father has any good reason for refusing to support his children²⁸.

In the past an order for maintenance was generally made by the court for the payment of maintenance for the minor children after the dissolution of a marriage. In this instance the general rule applied was that both spouses are, after a divorce, liable to contribute to the maintenance of the children born of

²⁴ Nathan (note 14 above) 115-116.

²⁵ B Clark (ed) *Family Law Service* (1998) 1.

²⁶ MP Mamashela "The implementation of the Maintenance Act 99 of 1998: two NGO's throw down the Gauntlet - a model for the country: notes and comments" (2005) 21 *SAJHR* 490; Singh (note 6 above) 143; PJ Visser and JM Potgieter *Introduction to Family Law* 2 ed (1998) 209; Boezaart (note 10 above) 43.

²⁷ Scott (note 12 above) 41.

²⁸ *Ibid.*

the marriage in proportion to their means, the mode or style of maintenance being left to the discretion of the Court²⁹.

In terms of the more recent application of common law, the duty of a party to support another is dependent on the circumstances of every case. A case by case consideration of factors such as the child's intellectual capacity; the family's standing and financial resources; the child's needs, age and state of health as well as the means and social status of the person liable for maintenance³⁰, are taken into account when determining the scope of the duty of support.

Section 15 of the 1998 Act defines the scope of the duty of support as follows:-

(2) The duty extends to such support as a child reasonably requires for his or her proper living and upbringing, and includes provision of food, clothing accommodation, medical care and education.

When determining the scope of the duty of support, the departure point for the court is to determine the reasonable needs of the child in question, thereafter allocating the costs thereof between the parents according to their financial ability (in terms of common law parents must support their children proportionately according to their means³¹). However no common law guidelines on calculating the "reasonable needs" of the child in question exist, resulting in a vast range of application and interpretation of such calculation throughout the South African maintenance court system.

In recent legislative developments the concept of parental rights and responsibilities as set out in the Children's Act³² includes a contribution to the maintenance of a child, as set out hereunder:-

"a parent's maintenance duty towards the child is part of parental responsibilities and rights, but is not limited to it. The maintenance duty exists even if the parent has no parental responsibilities and rights over the child" -

²⁹ Maasdorp (note 19 above) 126.

³⁰ J Heaton (note 19 above) 324.

³¹ Van Zyl (note 19 above) 4; Department of Justice and Constitutional (note 17 above) 17.

³² The Children's Act 38 of 2005.

*Section 1*³³: *Care in relation to a child include, inter alia:-*

- (a) *provision of the necessities of life;*
 - (i) *shelter;*
 - (ii) *food and clothing;*
 - (iii) *medical care;*
- (b) *the education of the child, including religious and cultural education and upbringing, and*
- (c) *other rights and duties*

Once a duty of support is identified, the needs of the child or children in question must be established. Thereafter the amount of the liable person's maintenance contribution must be calculated, taking into account the person's means³⁴.

What constitutes a "**reasonable need**" is case dependent, in terms whereof the circumstances of each individual case are to be determined. It is for this reason that courts have avoided providing a definitive explanation of what constitutes reasonable needs or costs.

When calculating the needs of a child it is necessary to note the differentiation between "actual" and "reasonable" costs. Reasonable costs constitute those costs that should be incurred in order to ensure that a child's reasonable needs are met, whilst actual costs refer to the exact amount of money being spent on the child, regardless of whether or not the child's needs are being met³⁵. The costs of a child should not be limited to actual costs only, as this is not in line with the common law concept of the duty of support³⁶.

In calculating the needs of a child, the court must make an estimate (based on intelligent assessment) of what the reasonable needs of children in the particular social stratum and situation of the child concerned may be³⁷.

³³The Children's Act (2005).

³⁴Heaton (note 19 above) 325.

³⁵Department of Justice and Constitutional Development (note 17 above) 20-21.

³⁶Ibid.

³⁷*Cullen v Haupt* (1998) 4 All SA (C) 538.

"A child is entitled to reasonable needs for housing, clothing, medical, dental and health care, and for education and training and, when applicable, recreation. What is reasonable depends on such circumstances as the position of the family, the child's health and, as regards education and training, the child's aptitude and how well he or she has done in his or her studies. The standard of living, taken together with factors such as aptitude and interest, for example, determines whether expenses for recreation, non-vocational training and vocational training at secondary and tertiary level will be awarded³⁸"

Once established, the costs of the reasonable needs of the children or child concerned are to be allocated between the parents according to their respective financial means or ability, and the **ability to pay** such costs is considered³⁹. Costs should be equitably distributed according to the ability of each parent to afford such costs. There is however no clear indication from the Roman-Dutch writers or case law as to how this allocation should take place. It therefore follows that the "guiding" principle in terms of ability to pay is that the parent earning the greater income shall contribute to the larger portion of the child's reasonable needs⁴⁰.

It is common for courts to use the concept of ratios to calculate what would be equitable in the circumstances of any case by employing a comparative of the financial ability of the father with that of the mother. This broad approach is favoured and falls in line with the common law maintenance principles⁴¹.

In conclusion, the overall principles pertaining to the duty of support and the extent thereof should be *"rooted in principles of fairness, equality and sensitivity"*⁴². In addition the recent Constitutional Court decision in *Bannatyne v Bannatyne*⁴³ indicates a shift away from the traditional interpretation of maintenance as a parental obligation, rather defining it as a

³⁸Van Zyl (note 19 above) 6; Skelton (note 19 above) 148.

³⁹Clarke (note 2 above) 2.

⁴⁰Department of Justice and Constitutional Development (note 17 above) 28.

⁴¹Ibid.

⁴²Clarke (note 2 above) 6.

⁴³*Bannatyne v Bannatyne* 2003(2) BCLR 11 (CC).

children's rights issue, and therefore a clear and distinct criterion that gives substance to the "best interests of the child" principle⁴⁴.

1.1.4 Basic overview of the existing maintenance process

1.1.4.1 Laying a complaint

The process of laying a maintenance complaint is set out in the 1998 Act. A complainant may approach the maintenance court clerks in order to lodge a complaint to the effect that *"any person legally liable to maintain any other person falls to maintain the latter person; or that good cause exists for the substitution or discharge of a maintenance order"*⁴⁵. Ordinarily first time court users are given application forms to complete on their own. Once completed, the forms are processed and the complaint lodged⁴⁶. Once the complaint has been lodged in the prescribed manner, the maintenance officer shall investigate the complaint with a view to proceeding with the matter.

Upon completion of the investigation, the maintenance officer may institute an enquiry in the maintenance court with a view to enquiring into the provision of maintenance for the person requiring same⁴⁷. The maintenance officer may issue subpoenas to have the relevant persons appear before the magistrate at the maintenance enquiry⁴⁸.

1.1.4.2 Investigation of a complaint

The maintenance officer is empowered to investigate any complaint relating to maintenance (with the assistance of the maintenance investigator⁴⁹) as follows⁵⁰:-

⁴⁴Department of Justice and Constitutional Development (note 17 above) 2; Clarke (note 2 above) 2.

⁴⁵The Maintenance Act 99 of 1998 Section 6 (1)(a) & (b).

⁴⁶Budlender & Moyo (note 2 above) 42.

⁴⁷The Maintenance Act (1998) Section 6(2).

⁴⁸Author unspecified "Improvements in the Maintenance System" *Justice Today* (2009) Vol 1; 27-28.

⁴⁹The Maintenance Act (1998) Section 7; The maintenance investigator shall be discussed in detail in Chapter 5.

⁵⁰The Maintenance Act (1998) Section 7(1)(a)-(d).

"... a maintenance officer may:-

- a) obtain statements under oath or affirmation from persons who may be able to give relevant information concerning the subject of such complaint;
- b) gather information concerning the identification or whereabouts of any person who is legally liable to maintain the person mentioned in such complaint or who is allegedly so liable;
- c) the financial position of any person affected by such liability; or
- (d) the financial position of any person affected by such liability; or
- (e) any other matter which may be relevant concerning the subject of such complaint.

1.1.4.3

The enquiry

Upon completion of the investigation an enquiry is held should the parties concerned not be able to agree on a reasonable settlement of the matter. The matter is then referred to court for hearing before a Magistrate.

Maintenance enquiries are *sui generis*⁵¹ in nature, and are neither wholly a civil action nor a criminal prosecution. However the law of evidence applicable to civil proceedings in the Magistrate's Court applies⁵². The proceedings are inquisitorial in format, and no party is considered *dominus litis*. The responsibility to produce evidence rests on all parties to the proceedings, including the court officials (both the maintenance officer and the judicial officer are required to play an active role in the proceedings). As the interests of a child are at stake in maintenance proceedings which follow the ordinary course, the finalisation of the enquiry expeditiously is of utmost importance, and

⁵¹Meaning the only one of its kind.

⁵²Van Zyl (note 19 above) 68; The Maintenance Act (1998) Section 10(5).

the maintenance officer should make every effort to ensure that each matter is dealt with timeously⁵³.

It is required that full financial disclosure be made by both parties to the proceedings and that *"both parties can and should be questioned about their assets, earnings and expenses and, when relevant, about their needs and those of their children and can be compelled to lay documentary proof of these matters before court"*⁵⁴. Based on the aforementioned financial disclosure and consideration thereof the court may make a just and equitable maintenance order⁵⁵.

In South Africa there exist no formulaic guidelines for presiding officers to use in order to determine quantum in maintenance cases. Decisions are based on discretion, and the much publicized failings of South African maintenance courts raise the question as to whether or not the introductions of a more structured or formulaic approach would improve the efficiency or effectiveness of the process⁵⁶. A consideration of the formulaic approach is addressed in chapter 6 of this dissertation.

1.1.5 Dissertation focus: Private law in relation to child maintenance

This dissertation specifically relates to the provision of maintenance in respect of parent and child only and does not extend to support between spouses, or any other contractually determined duty of support.

1.1.6 Legislature

Prior to the 1998 Act, the Maintenance Act 23 of 1963 (hereinafter referred to as the "1963 Act") governed maintenance legislation in South Africa. In the discussion in Chapter 3 hereunder this dissertation shall set out a brief

⁵³Ibid 69.

⁵⁴Ibid.

⁵⁵Author unspecified (note 48 above).

⁵⁶Ibid 5.

overview of the provisions of the 1963 Act as well as its early innovations. The criticisms of this Act and a discussion relating thereto are dealt with in Chapter 4 of this dissertation as many of the concerns raised in response to the implementation of the 1963 Act are still current concerns flowing from the 1998 Act.

Chapter 4 shall address the current 1998 Act, with particular regard to the innovations introduced therein, such as the appointment of maintenance investigators and the inclusion of the availability of many additional court order options to be utilised in the enforcement of maintenance. This chapter will include an in-depth discussion on the criticisms of the Act as well as an identification of the inherent problems found in the application and implementation thereof.

1.1.7 Constitutional and International Law obligations

"...it is imperative that the system of child maintenance be effective in ensuring that parents fulfil their maintenance obligations, and that there is a safety net for those children whose parents are unable to provide properly for them."

Adrian Grieves⁵⁷

The current approach to maintenance deals only with the obligations of the parents towards their children and completely ignores the obligations of the state. It is evident that the government too has obligations to ensure that the basic needs of the children are met if they are orphaned or abandoned; if their parents are unable to provide for their constitutionally guaranteed rights; or in the event that their parents fail to meet their obligations⁵⁸.

The "*best interests of the child*" principle has formed part of South African law since the case of *Fletcher v Fletcher*⁵⁹ and its importance in maintenance matters cannot be overlooked. This concept has been developed through the

⁵⁷Grieves (note 1 above) 7.

⁵⁸Ibid 46.

⁵⁹1948 (1) SA 130 (A).

High Courts and is currently embodied in Sections 6, 7 and 9 of the Children's Act 38 of 2005.

Section 6 of the Children's Act 38 of 2005 establishes a child-centred approach in all legislation, proceedings and state measures regarding children. The "best interests of the child" principle is set out in Section 7, wherein the legislature lists 14 factors⁶⁰ to be taken into account when determining the best interests of the child. Section 9 requires that the standard of the best interests of the child be of paramount importance in all matters concerning a child's care, protection and well-being⁶¹.

-
- ⁶⁰ a) the nature of the personal relationship between:-
 i) the child and the parents, or any specific parent; and
 ii) the child and any other care-giver or person relevant in those circumstances;
 b) the attitude of the parents, or any specific parent, towards:-
 i) the child; and
 ii) the exercise of parental responsibilities and rights in respect of the child;
 c) the capacity of the parents, or any specific parent, or of any other care-giver or person, to provide for the needs of the child, including emotional and intellectual needs;
 d) the likely effect on the child of any change in the child's circumstances, including the likely effect on the child of any separation from:-
 i) both or either of the parents; or
 ii) any brother or sister or other child, or any other care-giver or person, with whom the child has been living;
 e) the practical difficulty and expense of a child having contact with the parents, or any specific parent, and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with the parents, or any specific parent, on a regular basis;
 f) the need for the child:-
 i) to remain in the care of his or her parent, family and extended family; and
 ii) to maintain a connection with his or her family, extended family, culture or tradition;
 g) the child's:-
 i) age, maturity and stage of development;
 ii) gender;
 iii) background; and
 iv) any other relevant characteristics of the child;
 h) the child's physical and emotional security and his or her intellectual, emotional, social and cultural development;
 i) any disability that a child may have;
 j) any chronic illness from which a child may suffer;
 k) the need for a child to be brought up within a stable family environment and, where this is not possible, in an environment resembling as closely as possible a caring family environment;
 l) the need to protect the child from any physical or psychological harm that may be caused by:-
 i) subjecting the child to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to violence or exploitation or other harmful behaviour; or
 ii) exposing the child to maltreatment, abuse, degradation, ill-treatment, violence or harmful behaviour towards another person;
 m) any family violence involving the child or a family member of the child; and
 n) which action or decision would avoid or minimise further legal or administrative proceedings in relation to the child.

⁶¹J Heaton 'An individualised, contextualized and child-centered determination of child's best interests, and the implications of such on an approach in the South African context' (2009) *JJS* 2, 3.

Children of every class in every country require maintenance both regularly and expeditiously. It is for this reason that any challenges to be met by any system of maintenance need to take cognizance of the following factors⁶² :-

1. need of the child;
2. ability of the custodian parent to support the child;
3. ability of the non-custodian parent to support the child;
4. the division of maintenance responsibility between a custodian and non-custodian parent;
5. what payment is required by a non-custodian parent in order to realize that division of responsibility.

These factors must be considered in addition to ensuring a maintenance process that is cheap and cost effective⁶³.

The Constitution⁶⁴, in Section 28, makes a child's right to maintenance a "constitutional imperative". Section 28(1) guarantees certain basic rights for children including the basic right to nutrition, shelter, basic health care services and basic education⁶⁵.

In addition the enforcement of maintenance payments is considered, not only as a measure to secure the rights of children, but also as one to uphold the rights of women and to promote the foundational value of achieving equality and non-sexism⁶⁶. This dissertation however focuses only on the rights of the child in relation to maintenance law.

In term of common law, the obligation to pay maintenance is placed on the parents in the first instance. However should the parents be unable to meet the

⁶²Ibid 3-5.

⁶³Ibid 5.

⁶⁴The Constitution of the Republic of South Africa Act 108 of 1996; M Carnelley & S Hoctor 'Maintenance Defaulters: Aiding the Process and Process-In-Aid' (2003) *Obiter* 506 -507.

⁶⁵1996 Constitution; Wamhoff & Burman 'Parental Maintenance for Children: How the Private Maintenance System might be Improved' (2002) *Social Dynamics* 146; Skelton (note 19 above) 240.

⁶⁶M Sigwadi 'Pension-Fund Benefits and Child Maintenance: The Attachment of a Pension-Fund Benefit for Purposes of Securing Payment of Future Maintenance for a Child' (2005) SA Merc LJ 340; M Carnelley 'A review of the criminal prosecution and sentencing of maintenance defaulters in South Africa, with commentary on sentencing strategies' p3.

child's basic needs as envisaged in Section 28(1) of the Constitution, the obligation falls to the State to maintenance the child(ren) as follows⁶⁷:-

1. the provision of basic education and social services where parents unable to provide same;
2. the provision of basic education and social services in respect of orphaned or abandoned children;
3. where parents are unable to fulfil a child's rights, the State is required to step in to fulfil the child's constitutionally guaranteed rights.

In the case of *The Government of the republic of South Africa and others v Grootboom and other*⁶⁸(hereinafter referred to as Grootboom) the Constitutional Court created the impression that State is not required to step in while the children are cared for by their parents. It is submitted that this approach is flawed in that it nullifies the constitutional guarantee of children's rights to those children with economically disadvantaged and poverty-stricken parents. It is clear that many of the Section 28 Constitutional guarantees are government specific, including the right to social services and basic health care services. The Constitution therefore places an obligation on the State to ensure that the proper mechanisms are in place to assist parents in fulfilling their obligations to the extent that to which they are able.

In line with the aforesaid obligation it is imperative that the system governing child maintenance in this country be effective in ensuring that parents fulfil their maintenance obligations and that a safety net be provided for children whose parents are unable to provide properly for them⁶⁹.

In addition to the Constitutional obligation placed on the State, it is important to note that South Africa is a signatory to the United Nations Convention on the Rights of the Child, 1989, in terms whereof the member states are required to ensure that their children are well-maintained, reaffirming the common-law duty of support between a parent and child. This places a further requirement

⁶⁷Grieve (note 1 above) 6.

⁶⁸2001 (1) SA (CC) 46.

⁶⁹Grieve (note 1 above) 7; Carnelley (note 66 above) 15.

upon signatory states to take appropriate legislative and other measures to recover maintenance on behalf of the child⁷⁰.

Our Constitution⁷¹ reaffirms sentiments expressed by the United Nations in respect of children's rights (inclusive of maintenance rights) as follows⁷²:-

10. *Human Dignity – Everyone has inherent dignity and the right to have their dignity respected and protected.*

11. *Life – Everyone has the right to life.*

27. *Health care, food, water and social security –*

(1) Everyone has the right to have access to –

a) health care services;

b) sufficient food and water;

c) social security, including, if they unable to support themselves and their dependants, appropriate social assistance.

2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights.

28. *Children – (1) Every child has the right –*

(b) to family care, or to appropriate alternative care when removed from the family environment

(c) to basic nutrition, shelter, basic health care services and social services

(2) A child's best interests are of paramount importance in every matter concerning the child.

29. *Education – (1) Everyone has the right –*

⁷⁰Mamashela (note 26 above) 492.

⁷¹1996 Constitution.

⁷²1996 Constitution; Van Zyl (note 19 above) 57.

(a) to a basic education, including adult basic education;
and

(b) to further education, which the state, through reasonable measures, must make progressively available and accessible.

In the ground-breaking decision of the Constitutional Court in *Bannatyne v Bannatyne*⁷³ (hereinafter referred to as *Bannatyne*) the court identified the constitutional duty of all courts to develop mechanisms of ensuring that the constitutional rights of all parties are honoured, and that there exists a particular responsibility by courts to forge new tools and develop innovative remedies to achieve effective relief and remedies for the parties concerned. This is of particular importance in the area of our existing maintenance law. This view was reiterated by Ackerman J, in *Fose v Minister of Safety and Security*:-

*“I have no doubt that this Court has a particular duty to ensure that, within the bounds of the Constitution, effective relief be granted for the infringement of any of the rights entrenched in it. In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to “forge new tools” and shape innovative remedies, if needs be, to achieve this goal”*⁷⁴.

The focus of the court in *Bannatyne* was the "best interests of the child" principle and the court reiterated that an obligation rests on the State to create

⁷³*Bannatyne v Bannatyne* (note 43 above).

⁷⁴1997(3) SA (CC) 786 par 69; M Carnelley & S Hoxcor 'Maintenance Arrears and the Rights of the Child' (2007) TSAR 201.

the necessary framework within our law to ensure that all children are adequately cared for⁷⁵.

The decision in *Bannatyne*⁷⁶ draws specific attention to the best interests of the child in maintenance matters as set out in s28 of the Constitution⁷⁷. Section 28(2) provides that:

"A child's best interests are of paramount importance in every matter concerning the child."

Children have a right to proper parental care, and when considering international law it is clear that the right of a child to have his or needs considered above all others is universally recognised⁷⁸.

In *Bannatyne* Mokgoro J was clear in emphasising the role that the judiciary played in ensuring that maintenance orders are respected and protected. Section 28(2) of the Constitution⁷⁹ enshrines the "best interests of the child" principle and accordingly all courts must ensure that children's constitutional rights are adhered to and enforced⁸⁰. The court acknowledged the State's function as being the provision of a good legal framework and the placement of systems that will allow this framework to function. Maintenance courts and maintenance law are important mechanisms through which the rights of children are protected and *"failure to ensure their effective operation amounts to a failure to protect children against those who take advantage of the weaknesses of the system"*⁸¹.

It is therefore clear that, firstly, there is an obligation imposed on parents by the Constitution to ensure that their children are properly cared for, and secondly, that there is an additional obligation on the State to create the necessary environment for parents to do so⁸². The function of the State is

⁷⁵Clarke (note 2 above) 10; Carnelley & Hoctor (note 64 above) 508 - 509.

⁷⁶*Bannatyne v Bannatyne* (note 43 above); Clarke (note 2 above) 10.

⁷⁷1996 Constitution Section 28(1); Heaton (note 61 above) 1.

⁷⁸Carnelley & Hoctor (note 74 above) 205.

⁷⁹1996 Constitution.

⁸⁰M Mamashela 'Some Hurdles in the implementation of the Maintenance Act 99 of 1998: note' (2006) *Obiter* 597; Sigwadi (note 66 above) 344.

⁸¹*Bannatyne v Bannatyne* (note 43 above) 377.

⁸²*Ibid* 376A; Van Zyl (note 19 above) 58.

accordingly to create the procedural structure for the protection of children's rights as well as a system which ensures that such a structure operates effectively⁸³. This view was reiterated in *Grootboom*⁸⁴ where the court emphasized that the State was obligated to “provide the legal and administrative infrastructure necessary to ensure that the children are accorded the protection contemplated by s 28”. It follows that the courts therefore have a definite duty to protect vulnerable women and children by enforcing maintenance orders and to ensure that the justice system not discredited⁸⁵.

The Preamble of the 1998 Maintenance Act sets out the intention of the Act to give effect to the imperative contained in s 28 of the Constitution. The 1998 Act is a comprehensive piece of legislation designed to provide speedy and effective remedies at minimum cost for the enforcement of a parent's obligation to maintain their children⁸⁶.

Upon reflection of the current maintenance system it has become evident that the good intentions of the courts and the legislature have failed and that there is evidence of numerous logistical difficulties within the maintenance system and the courts which have resulted in the system not functioning effectively.

The court in *Bannatyne* recognises these difficulties and addresses same as follows:-

“Fatalistic acceptance of the insufficiencies of the maintenance system compounds the denial of rights involved. 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 equality⁸⁷... hardships experienced by maintenance complainants need to be addressed and the proper implementation of the provisions of the Act is a matter that calls for the urgent attention of the Department of Justice⁸⁸”

⁸³Clarke (note 2 above) 10; Sigwadi (note 66 above) 342.

⁸⁴*Government of the Republic of South Africa and Others v Grootboom and Others* (note 68 above) 78.

⁸⁵Mamashela (note 26 above) 490.

⁸⁶*Bannatyne v Bannatyne* (note 43 above) 376B-C.

⁸⁷*Ibid* 378 (30A-B).

⁸⁸*Ibid* 378(32H).

These difficulties referred to by the court include problems ranging from inadequately trained staff to insufficient facilities and resources⁸⁹, all of which impact dramatically on the functioning of the maintenance court and the implementation of the Act. These difficulties form the basis of my study and shall be addressed in Chapter 4 hereunder.

1.2 Problem statement

A Critical analysis of the implementation of the Maintenance Act 99 of 1998: Difficulties experienced by the unrepresented public in the Maintenance Court as a result of the poor implementation of the Act and the lack of service delivery by the Maintenance Court staff, specific to the Eastern Cape.

This dissertation seeks to identify the core problems experienced by the unrepresented public when entering and engaging in the maintenance system. Specific reference is made to the experiences of the unrepresented public in the Eastern Cape Province, where my research was conducted. The research results will be discussed on a comparative basis with already documented studies on the maintenance system as identified through an analysis of available literature on the subject.

It is my hypotheses that, owing to the lack of functioning of the maintenance courts throughout South Africa, parties to a maintenance matter are simply ill-advised and unassisted, and accordingly children's rights go unprotected. In a system where it is intended that parties are supposed to be able to cost effectively run their matter themselves, complainants find themselves floundering as a result of a lack of understanding of the system, and a poor implementation thereof. Further being uneducated, particularly in the area of law, many do not know their rights and are accordingly "bulldozed" by the system. This results in my opinion in a number of complainants seeking legal representation which they cannot afford in a hope that the process will be improved and "fast-tracked" as a result. However, the system delays are experienced regardless of whether or not a party is represented (although the explanation of rights and the process is covered), usually leaving parties with a massive legal bill at the end of the matter. As a direct result of the failing system, in

⁸⁹Ibid 377(A).

many instances complainants find themselves dissatisfied with the results, discouraged by the process and in many instances financially worse off than when they started as a result of necessary legal fees, transport costs and income lost while waiting at court. For many complainants the maintenance court system is more of a hindrance than a help and often costs more during the process than the actual gain at the end.

1.2.1 Maintenance in the South African context

Access to private maintenance for children should be seen within the broader context of poverty in South Africa. In South African society it is still predominantly women who care for children both inside and outside of marriage. Over a third of South African households are female headed, often by women who have no income or low-income employment (for instance employment as a domestic worker). These households are currently facing the highest risk of poverty in South Africa.⁹⁰

As a result of the extremely high levels of poverty in South Africa, child maintenance often supports many more people than just the intended beneficiary. In some cases this maintenance payment is the sole source of income for many families, especially those situated in the rural areas⁹¹.

Further, abuse of women and children in South Africa is a serious and widespread problem, and not only includes physical and emotional abuse, but economic abuse as well. Economic abuse of women and children is extremely devastating, and is commonly overlooked as a form of domestic violence. Failure to pay maintenance by respondents is an on-going form of such abuse. It is argued that the majority of male maintenance defaulters' refusal to pay maintenance condemns many women and children to absolute poverty and perpetuates the cycle of abuse, leaving women to "*eke out a hand-to-mouth existence*"⁹². Accordingly the failure to pay maintenance in many instances translates into dire economic circumstances for many women and children.

⁹⁰Budlender & Moyo (note 2 above) 28.

⁹¹M Magakwe "Operation Isondlo Bearing Fruit" *Justice Today* (2006) Vol 1; 3.

⁹²Budlender & Moyo (note 2 above) 10.

The failing system goes a long way to enforcing the prevalent attitudes that dominate South African society's view of maintenance, namely "*a belief that children are a woman's sole responsibility and an attitude of detachment from the responsibility of fatherhood on the part of men*"⁹³. There is a widespread culture of non-payment and negative attitudes by men and employers towards maintenance, compounding the problem substantially⁹⁴. A maintenance system which operates effectively would make an important contribution to the alleviation of women and children's poverty in South Africa⁹⁵.

With the introduction of the 1998 Act, it was thought that the lives of South African women and children would improve overall given the progressive nature of the Act. The Act however has made little effective improvement to the situation faced by women and children despite the stated intention of the legislature, namely to "*have a maintenance system that is user-friendly and provides a simple, one-stop maintenance service that meets the needs of the many thousands of (mainly) women and children that are entitled to maintenance but cannot afford legal representation*"⁹⁶.

As a result of insufficient funds allocated to the implementation of the 1998 Act and the running of the maintenance court problems have occurred such as, *inter alia*, management system flaws within the courts, insufficient staffing, lack of training of court personnel, poor qualifications and a "low" level of personnel dealing with maintenance, long queues and a lack of priority of maintenance matters. Accordingly there is room and need for substantial improvement within the system itself⁹⁷.

The 1998 Act envisaged a situation where laymen seeking maintenance would be able to approach the maintenance court without the assistance of an attorney. In light of the vast majority of generally poverty-stricken or low income-earning complainants, the legislature set out to design a manner in which these parties would obtain speedy, cheap and successful relief through

⁹³Ibid.

⁹⁴Ibid.

⁹⁵Ibid.

⁹⁶Ibid 18.

⁹⁷Ibid 21.

the maintenance court. The flaws in the Act, the implementation thereof and the poor functioning of the system have however left many complainants seeking the need for legal assistance.

In terms of maintenance law, there are very few options available for those seeking legal assistance outside of appointing an attorney at great expense. Legal Aid (a body designed to represent those with low/no income) does not come to the assistance of parties involved in a maintenance matter. Complainants and respondents in maintenance matters are therefore dependent upon NGO's (if available) and court staff to guide them. Often NGO's are not available in certain areas, and staff are over-worked, unqualified and in many instances disinterested. This is resultant in the majority of maintenance complainants having to represent themselves in their matters, with very little assistance, if any at all, always to the detriment of the children.

1.3 Dissertation format

This dissertation shall follow the following format:-

1.3.1 Chapter 2: Historical Overview

This chapter will provide a brief overview of the basic and early principles of South African maintenance law which have stemmed from both common law and case law. The case law is vast, and accordingly only the basic principles shall be touched upon.

In addition to common law and case law, the relevant legislation governing South African maintenance law prior to the Maintenance Act 23 of 1963 shall be highlighted.

1.3.2 Chapter 3: Act 23 of 1963

Prior to understanding the areas of innovation in the 1998 Act, it is necessary to consider its forerunner in order to identify the amendments and

improvements addressed when drafting the 1998 Act. Chapter 3 sets out an overview of the 1963 Act, including what were then seen to be the two primary innovations in the maintenance law in place at that time, namely a) the appointment of a maintenance investigator and b) the maintenance enquiry itself.

1.3.3 Chapter 4: Act 99 of 1998

Chapter 4 forms a substantial part of this dissertation is dedicated to an analysis the problems experienced in preceding legislation (the 1963 Act) as well as the 1998 Act. Problem analysis shall be dealt with per "topic" as set out hereunder:-

- 1.3.3.1 People
- 1.3.3.2 Application
- 1.3.3.3 Orders
- 1.3.3.4. Enforcement

1.3.4 Chapter 5: Additional criticisms highlighted through research and personal experience

Upon conclusion of my research it became clear that certain criticisms were raised by the interviewed public that had not been extensively dealt with in the available literature. This was also true of many problems that I personally encountered working as a Magistrate in the East London magistrate's court. These additional criticisms and problems are dealt with in Chapter 5.

1.3.5 Chapter 6: Solutions/recommendations

Chapter 6 provides an overview of the documented solutions and recommendations made in response to the criticisms and problems relating to the maintenance law system as identified in Chapter 4. It also includes undocumented suggestions for reform. In addition thereto I have identified

solutions that I believe would be the most effective if implemented properly. My recommendations include rigorous public education and empowerment as well as the encouragement of private "activists" such as Port Elizabeth based "Chequemate", who seek to improve the maintenance system' approach to maintenance payment enforcement.

1.4 Research objectives and design

1.4.1 Research methodology and statistical analysis

For the purposes of the research forming the basis of this dissertation, I conducted a study over 7 magistrate's courts in the Eastern Cape Province. Research was done by way of a questionnaire which was to be completed by court users at each of the selected magistrate's courts.

The courts selected by myself are as follows:-

- a) East London magistrate's court;
- b) Port Elizabeth magistrate's court;
- c) Grahamstown magistrate's court;
- d) Mthatha magistrate's court;
- e) Mdantsane magistrate's court;
- f) King Williams Town magistrate's court;
- g) Zwelitsha magistrate's court.

At each court permission was obtained from the court manager to randomly select 50 court users available in the maintenance waiting rooms to complete a structured questionnaire, a copy of which is annexed hereto marked **Annexure 1.1**.

The questionnaire includes both elements of quantitative and qualitative research methodology. Questions 1 through 3 attempt to gather quantitative results pertaining to the general demographics and the overall experience of the maintenance court system of court users, whilst question 4 is aimed at

gathering qualitative information about each court user's personal experience of the maintenance court.

My demographic findings, based on research, are as follows:-

1. of the 350 interviewees 88% were the complainant in the matter before court (refer to **Annexure 1.2** hereto);
2. of the 350 interviewees 84% were female (refer to **Annexure 1.3** hereto);
3. the majority of interviewees were aged between 25 and 44 (refer to **Annexure 1.4** hereto);
4. the majority of the interviewees (83%) were black (refer to **Annexure 1.5** hereto);
5. of the 350 interviewees 81% were Xhosa speaking (refer to **Annexure 1.6** hereto);
6. 73% of those at court had never been married (refer to **Annexure 1.7** hereto);
7. the average number of children per household in respect of which maintenance was claimed was between 1 and 2 (refer to **Annexure 1.8** hereto);
8. the majority of interviewees were parents of children requiring maintenance (refer to Annexure 1.9 hereto);
9. 61% of the interviewees were township dwellers (refer to **Annexure 1.10** hereto);
10. the majority of interviewees lived in a household with more than 4 people residing in it (refer to **Annexure 1.11** hereto);
11. on average the total household income was of between R1,500.00 and R3,500.00 (refer to **Annexure 1.12** hereto), which income was generated in the majority of cases by 1 individual only (refer to **Annexure 1.13** hereto).

1.4.2 Problems encountered during research

During the research process itself I encountered numerous problems which often made it difficult to collect the required information. In many of the courts in which my research was conducted there was often a general reluctance to participate in my study as well as an evident mistrust as to my intentions and what would be done with the information required. Many interviewees had to be assured over and over that the information collected was for my personal use and would not be provided to the opposing party in the court proceedings.

There tended to be a strong belief that information gathered by myself would be used against the party in the maintenance matter itself and further that the interviewee would be punished by the court staff for completing the questionnaire.

Despite having arranged for a translator to assist me in the collection of data (the majority of interviewees in my study were Xhosa speaking) there remained a communication barrier between myself and the interviewee. This inability to communicate with perfect understanding added to the feelings of fear and mistrust experienced by the interviewees towards myself.

It quickly became evident that the interviewees generally had a complete lack of understanding of the court process which hampered many participants ability to answer questions accurately. For instance numerous parties were unaware of whether or not they were the complainant or defendant, and also at what stage in the process they were at.

1.4.3 Literature overview and approaches to maintenance law

There is currently paucity in the available body of research pertaining to maintenance law, from the perspective of the complainant, particularly with regards to the implementation of and any proposed adaptations to the Maintenance Act 99 of 1998 (hereinafter referred to as “the 1998 Act”). From practice as a maintenance attorney I have noticed that there seems to be an inconsistent and, more often than not, very poor implementation of the 1998 Act, creating a culture where the 1998 Act does not meet the needs of the

communities relying upon it. Whether this is a result of the 1998 Act itself requiring certain amendments or whether it is simply the implementation that needs to be addressed is, at this stage, unclear. The body of research available is almost non-existent when looking specifically at the impact of the 1998 Act as a whole, and more specifically how the implementation of the 1998 Act by our courts affects particularly the impoverished communities in South Africa. The majority of literature available that deals with the implementation of the 1998 Act deals with the perspective of the court staff and/or legal representatives, leaving the complainants' voices unheard.

When considering the literature available in respect of South African maintenance law, one is met with what one can only describe as a "gaping hole" in the available body of knowledge. Very few maintenance related textbooks are available, and the few that are available (as listed in the bibliography hereunder) deal primarily with the law pertaining to maintenance as set out in the 1998 Act i.e. a discussion on basic the maintenance principles. The law and procedure is briefly touched upon in a very theoretical and impractical manner, and it is very seldom that one comes across any information regarding the actual manner in which the courts implement the aforesaid 1998 Act, let alone the plethora of problems faced daily by complainants seeking relief from the 1998 Act.

Again, when considering the vast amount of case law available on maintenance law, it is noted that the majority of cases reported deal with issues pertaining to basic maintenance principles as set out in the 1998 Act and the common law, and not with the inaptitude of our courts in applying the law, as well as the women (majority but not exclusively) and children that are prejudiced daily by the inadequacies of the 1998 Act and the seemingly failing court system. The majority of available case law on maintenance law procedure is mostly dated pre-1998 and will not be dealt with extensively within this dissertation.

Perhaps the most relevant information to be found regarding the implementation of 1998 Act is dealt with in journal articles, reports and commission studies, although this body of knowledge is not vastly extensive.

The following studies have proved most beneficial to my research and therefore form both the starting point and foundation of this dissertation:-

1.4.3.1

De Jong

Professor Madelene De Jong (De Jong) was instructed on a governmental level, to compile a 10 year review of the 1998 Maintenance Act⁹⁸.

De Jong's study employed a qualitative research methodology, obtaining data by sending out four question lists to different maintenance court officials⁹⁹.

The first questionnaire in De Jong's study was prepared for the regional heads of maintenance courts in each of the nine provinces of South Africa. The aim of the research directed at the regional heads was as follows¹⁰⁰:-

- to identify whether all the orders and other enforcement mechanisms provided for in the 1998 Maintenance Act are used across the board in South Africa;
- to ascertain the current situation with regard to manpower implementation across all regions;
- to identify the measure of success achieved through the appointment of maintenance investigators;
- to identify the measure of successes achieved through government initiatives, such as Operation Isondlo and JDAS;
- to identify any problems regarding the recovery of maintenance and enforcement of existing maintenance orders.

⁹⁸M De Jong 'Ten-year anniversary of the Maintenance Act 99 of 1998 - a time to reflect on improvements, shortcomings and the way forward' (2009) *SALJ* 590-591.

⁹⁹Ibid 598.

¹⁰⁰Ibid 599.

A copy of the first questionnaire is annexed hereto marked **Annexure 1.14**.

De Jong's second questionnaire was prepared for the accountants and EFT clerks in 45 maintenance courts across the country, which courts were identified by the aforesaid regional heads. The aim of the second questionnaire was to determine the following¹⁰¹:-

- whether or not the JDAS and EFT systems were being utilized in the 45 identified courts;
- to identify the benefits of JDAS;
- identification of what may be done to improve the implementation of JDAS;
- identification of the benefits of an EFT system;
- identification of what may be done to improve the implementation of an EFT system.

A copy of the second questionnaire is annexed hereto marked **Annexure 1.15**.

The third questionnaire in De Jong's study was prepared for completion by the maintenance officers in the 45 identified courts across the country¹⁰². The questionnaire set out to gather the following information:-

- the general location of maintenance courts within the magistrate's court buildings;
- the scope of the maintenance officer's qualification and training;
- the workload experienced by maintenance officers;
- whether or not the maintenance officers make optimal use of the maintenance investigators at their disposal;

¹⁰¹Ibid.

¹⁰²Ibid 599-600.

- whether or not the maintenance officers are familiar with the provisions of the 1998 Maintenance Act and the enforcement mechanisms it provides.

A copy of the third questionnaire is annexed hereto marked **Annexure 1.16**.

De Jong's fourth questionnaire was designed for completion by the appointed maintenance investigators in the 45 identified maintenance courts¹⁰³ and elicited information about the following:-

- the scope of the maintenance investigators qualifications and training;
- the workload experienced by maintenance investigators;
- the functions performed by maintenance investigators;
- the successes achieved by maintenance investigators;
- the obstacles encountered by maintenance investigators in fulfilling their functions
- what maintenance investigators felt could be done to improve matters.

A copy of the fourth questionnaire is annexed hereto marked **Annexure 1.17**.

The results of De Jong's research are incorporated in detail into Chapter 4 hereof. Based on such results De Jong proposes certain recommendations to the existing maintenance law system, which recommendations are included, again in detail, in Chapter 6 hereof.

1.4.3.2

Mamashela

Mamashela undertook a study in the Pietermaritzburg maintenance court, in terms whereof she identified the hurdles experienced in the

¹⁰³Ibid 600.

implementation of the 1998 Act. Upon drafting this dissertation I was unable to ascertain a copy of Mamashela's questionnaire upon which her study is based, and was also unable to obtain precise research results, as Mamashela had indicated that she was no longer in possession of same. The detailed parameters of Mamashela's study are therefore unknown.

The results of Mamashela's study are concisely published in her article entitled "*Some Hurdles in the Implementation of the Maintenance Act 99 of 1998*"¹⁰⁴, which results will be considered in Chapters 4 and 6 hereunder.

1.4.3.3 Maintenance Workshop Report¹⁰⁵

In 2009 the Law Society of South Africa, in conjunction with the Tshwaranang Legal Advocacy Centre¹⁰⁶ conducted maintenance workshops in nine provinces. The aim of these workshops was as follows¹⁰⁷:-

- to develop recommendations to address challenges faced within maintenance system;
- to ensure court accessibility;
- to improve the implementation of the 1998 Act;
- assess the impact of HIV AIDS on the maintenance system;
- to highlight the continued negative experience of women and children as they attempt to access justice through the maintenance court.

¹⁰⁴Mamashela (note 26 above) 490.

¹⁰⁵Law Society of South Africa *Maintenance Workshop Report* (2009).

¹⁰⁶An NGO that provides free legal advice on maintenance as well as being involved in research and advocacy initiatives to address problems with the current maintenance court system.

¹⁰⁷Law Society of South Africa (note 105 above) 3.

The workshops were conducted on a participatory basis, within an explorative framework. The objectives of the workshops were stated to be¹⁰⁸:-

- *"to build strategic alliances between NGOs, legal practitioners, government department and other institutions to further common interests of poor women and children";*
- *"to develop recommendations for campaigns, lobbying and advocacy around issues of maintenance".*

Participants to the workshops were selected from different stakeholders who deal with maintenance matters as their core business, including magistrates, legal practitioners and civil society organisations.

The workshop further focused on¹⁰⁹:-

- upholding the best interests of the child principle in maintenance courts;
- encouraging legal practitioners to play an active role in the proper implementation of the Act;
- changing the mind-set of the people working in the maintenance court through staff training.

These workshops highlighted the fact that maintenance is indeed a social issue, and that maintenance court service providers serve an important socio-economic function¹¹⁰. The issues and discussions dealt with during these workshops will be referred to in Chapters 4 and 6 respectively.

1.4.3.4

Singh

The aim of Singh's study was a "bird's eye view" of the problems and issues confronting magistrates and prosecutors working in selected

¹⁰⁸Ibid 4.

¹⁰⁹Ibid 3.

¹¹⁰Ibid 5-6.

maintenance courts" for the period 2002 to 2004, particularly in the Johannesburg Family Court¹¹¹.

The core parameters of Singh's study were as follows¹¹²:-

- to ascertain the perceptions of a selected group of court personnel with regards to the efficiency and perceptions of service delivery in terms of the 1998 Maintenance Act;
- to record the experiences of a selected group of black women with regard to the maintenance process;
- to identify obstacles in the implementation of the maintenance process;
- to identify remedies to overcome such obstacles.

The methodology applied by Singh in this study was a qualitative approach with information being obtained from interviews with participants. Face to face interviews were conducted with maintenance officers, prosecutors, 3 magistrates as well as 40 black women who were all present at court and in the process of applying for a maintenance order. The majority of the black women interviewed in this study were indigent and had no knowledge of the law¹¹³. Singh's interview process involved semi-structured, recorded interviews based on an interview schedule.

In terms of this study the court personnel were questioned on the following¹¹⁴:-

- their length of service in the maintenance court;
- whether they believed that the 1998 Act effectively protected women;
- the obstacles in the court system restraining proper implementation of the 1998 Act; and

¹¹¹Singh (note 6 above) 144.

¹¹²Ibid 143.

¹¹³Ibid 145-147.

¹¹⁴Ibid 145.

- suggested remedies to improve the situation and enhance efficacy of the implementation thereof.

The interviews with the 40 randomly selected black women focused on the following¹¹⁵:-

- how they found out about the court and their right to receive maintenance;
- whether they felt protected in the process of applying for maintenance;
- their experience of the maintenance process;
- suggestions for reform of the process.

The details of the results of Singh's study will be included in Chapters 4 and 6 hereunder. In conclusion of her Singh notes that the *“practice of the system is slow, inefficient and frustrating to applicants and service providers”*¹¹⁶.

1.4.3.5

Grieves

Grieves, in his article under consideration, does not deal with a detailed analysis of the failings of the South African maintenance courts, but rather *“an overview of the formulaic approach to maintenance as a solution to the existing problems in the system, with a view to building a formula modelling theory”*¹¹⁷ i.e. the derivation of a formula that may be applied to ALL South African maintenance law matters in an attempt to simplify the process and circumvent many of the problems experienced in the maintenance law system.

In order to develop a formula based theory that would be suitable to South African circumstances it is necessary to undergo a consideration

¹¹⁵Ibid.

¹¹⁶Ibid 152-153.

¹¹⁷Grieves (note 1 above) 6.

of the problems relating to the determination of maintenance payable by a non-custodian parent with specific reference to the following¹¹⁸:-

- a) the needs of the child;
- b) the ability of the custodian parent to support the child;
- c) the ability of the non-custodian parent to support the child;
- d) the division of maintenance responsibility between a custodian and non-custodian parent; and
- e) what payment is required by a non-custodian parent in order to realise that division of responsibility.

According to Grieves, South African statutory law attempts to set out the principles behind the determination of maintenance, more specifically in Section 15 of the 1998 Maintenance Act. The legislature however does so imperfectly and imprecisely, resulting, more often than not, in a reversion to the common law when calculating any maintenance claim¹¹⁹. This is a problematic approach, as the presiding officer in the maintenance court has a good deal of discretion when making a maintenance related decision, therefore elevating the general uncertainty surrounding the calculation of maintenance to the level of the presiding officer in any maintenance trial.

The information required in a maintenance enquiry is extensive and detailed, and the court's task is challenging and time-consuming. Should legal representatives be employed the process will, in addition to being complicated and lengthy, become expensive. A poor, illiterate person may find the challenge too great and the length of the time involved in the finalising of a maintenance matter too much. The length, complexity and cost of a maintenance matter has a direct impact on the welfare of the minor child concerned and in many instances the delay and cost are detrimental to the child. The expense of legal representation may also be prohibitive and a large portion of people

¹¹⁸Ibid 3.

¹¹⁹Ibid 8.

who apply to maintenance courts for relief are likely to have no legal assistance to overcome the challenge of providing proper information that will aid the court in its decision¹²⁰.

Grieves confirms that the State has an obligation to ensure that proper mechanisms are in place to ensure that parents do fulfil their maintenance obligations to the extent to which they are able.

Grieves is of the view that as the general concepts and terms used in the 1998 Act are undefined and imprecise, the consideration of the formulaic approach to maintenance calculations is preferable to the discretionary approach applied in South African law currently.

The obligation of the State is reiterated, in that the Constitution provides a guarantee of certain basic socio-economic rights for children, including the Section 28 rights to basic nutrition, shelter, basic health care services and social services as well as basic education¹²¹. It is argued that the discretionary approach applied by maintenance courts detracts from the enforcement of this basic constitutional right.

Grieves concludes that instead of addressing the problem of the calculation of maintenance per matter with, for example, the introduction of a standard formula, the legislature has erroneously chosen to alter the proceedings which inform the calculation - e.g. using an enquiry process instead of a trial; the provision of a maintenance officer to receive and manage complaints and run the enquiry, and the provision of a maintenance investigator to investigate cases and obtain documentation and information required for the enquiry¹²². Grieves argues that much of the procedure could be done away with by simply implementing a universal formula by which maintenance should be calculated.

¹²⁰Ibid 7.

¹²¹Ibid 6.

¹²²Ibid 16-17.

1.4.3.6

Mills

Mills conducted a study similar in nature to the study conducted by myself. In Mills' study court users were targeted, as opposed to court staff, in order to get a sense the demographics of court users overall as well as the common problems experienced by the users, particular to the Johannesburg area.

Mills conducted a survey of amongst 100 court users with demographics as follows¹²³:-

- 1) 87% of defendants were women;
- 2) 72% were either married or divorce;
- 3) 94% had children
- 4) 83% of users were African
- 5) 52% had a monthly household income of less than R500 per month;
- 6) 97% of court users were unrepresented.

The results of Mills' study are incorporated into chapter 4 hereto.

1.4.4

How does my research differ?

My research has the most in common with the Mills study, although there are a few additional similarities in the other studies. The studies conducted by De Jong, Mamashela, Singh and Mills all adopted a questionnaire based approach in order to gather quantitative data, similar to that of my study. In all the studies addressed hereinbefore similar issues were raised regarding the maintenance court system and the implementation of the existing maintenance law i.e. the focus of each and every study has been the identification of the problems facing the current maintenance law system and proposed resolutions thereto.

My research is however different to the studies of De Jong, the Law Society, Singh and Grieves in that my study is conducted by way of survey amongst

¹²³Budlender & Moyo (note 2 above) 40.

court users only and not amongst court staff, or officers of the court such as attorneys. My study has absolutely no staff input or comment. Mills' study, although having been conducted among court users, is different from my study in that a very small focus group was interviewed (the study is restricted to one magistrate's court) as opposed to the larger group interviewed by me.

Further, the studies hereinbefore deal with one or two courts in a specific area, with no studies reaching the Eastern Cape. My study covers 7 courts within the Eastern Cape region, being the only research of this kind in this province, as far as I am aware.

Prior to addressing my research and findings it is necessary to identify the origins of South African maintenance law. A basic historical overview will be addressed in Chapter 2 hereof.

2 Chapter 2: Historical Overview

2.1 Common law

Roman-Dutch writers, such as Voet, set out the very basis of our maintenance law, particularly the duty to support one's child. This is dealt with comprehensively in paragraph 1.1.3 above and, for the sake of brevity, shall therefore not be repeated herein. There reader is however referred thereto for a basic overview of the duty of support and the extent thereof.

In terms of common law (specifically the Roman-Dutch authorities), as confirmed in both case law and codified in maintenance legislation, the burden of supporting one's children is common to both parents and both parents must maintain their children "*according to their respective means*" or "*in proportion to the resources which lie to the hand of each spouse*"¹²⁴. The calculation of "means" is ultimately to be determined by the presiding court official.

Spiro highlights the common law difference between "bare necessities of life" and the further supply of maintenance according to the standing and circumstances of the parent and defines maintenance as follows: - "*at the present time maintenance does not only embrace the necessities of life, such as food, clothing and shelter, but also extends to education and care in sickness, and the child must be provided with all those things that are required for its proper upbringing*"¹²⁵.

The basic principles of maintenance common law are reiterated and cemented in precedent and statute as set out in 2.2 and 2.3 hereunder. The common law has been largely regulated by the amended legislation and through application in case law.

¹²⁴Wamhoff & Burman (note 65 above) 2; *Farrell v Hankey 1921 TPD 590*; cross-reference paragraph 1.1.3 hereof.

¹²⁵Boezaart (note 23 above) 39.

2.2 Statute¹²⁶

The earliest South African statute dealing with maintenance of children was the **Colony of Natal's Deserted Wives and Child Protection Act 10 of 1896**, wherein provision was made to criminally punish a person for wilfully neglecting to support his family if he was able to do so.

Identical provincial statutes regarding this particular point followed, namely the **Deserted Wives and Children Protection Act 7 of 1895** (Cape); the **Deserted Wives and Children Protection Ordinance 51 of 1903** (Orange Free State) and the **Deserted Wives and Children Protection Ordinance 44 of 1903** (Transvaal).

The current primary legislation governing maintenance specifically is the **Maintenance Act 99 of 1998**. This Act repealed the **Maintenance Act 23 of 1963**. Both Acts shall be discussed in further detail in chapters 3 and 4 respectively.

In addition to specific legislation dealing with the maintenance of children, such as the respective Maintenance Acts, the question maintenance has been raised in additional legislation, usually when dealing with the protection of children and their welfare.

Examples of these Acts are as follows:-

The **Children's Act 33 of 1960**, wherein the preamble state's the purpose of the Act to be the provision "*for the care, protection, maintenance, welfare, training, education and rehabilitation of neglected or delinquent children in the Union territories*". This Act makes provision for the payment of a maintenance contribution in respect of a "neglected or delinquent child", who is sent to a children's home, a special school or placed under the care of a fit person by the competent authority, by a parent or other person liable to maintain the child¹²⁷.

The **Child Care Act 74 of 1963**, repealing the **Children's Act 33 of 1960**, makes provision for maintenance of children in instances pertaining to the welfare and protection of children, including those children who are adopted or institutionalised¹²⁸. Maintenance is addressed in the form of a contribution order, being an order made

¹²⁶M Carnelley & J Easthorpe 'Judicial discretion in the determination of post-divorce child support: A brief overview of the application of the South African Maintenance Act 99 of 1998 as compared to the Canadian Federal Child Support Guidelines of 1997' (2009) *Obiter* 371.

¹²⁷Children's Act 33 of 1960 Section 2

¹²⁸Child Care Act 74 of 1963.

against a parent or guardian (respondent) for the maintenance of a child. Such order was to have the same effect as a maintenance order granted in terms of the 1963 Act¹²⁹.

The **Divorce Act 70 of 1979** safeguards the interests of dependent and minor children, making provision for the court to make an order in respect of the maintenance of a dependent of minor child should the court deem fit¹³⁰.

The Constitution of the Republic of South Africa, Act 108 of 1996, makes provision for the best interests of the child, as well as the basic human rights to which a child should be entitled including but not limited to the right to be maintained. Maintenance and the impact of the Constitution thereon is discussed 1.1.7 above.

The **Socialist Assistance Act 13 of 2004** regulates the constitutional provision that everyone has a right to have access to social security, including if they are unable to support themselves or their dependents¹³¹. This Act makes provision for a child care grant, a foster child grant and a care dependency grant¹³² its objective, ensuring that the Government fulfils its duty of support under the Constitution in respect of those who cannot support themselves, particularly dependent and minor children.

The **Children's Act 28 of 2005** is the most recent act governing the best interests of the child and the care and protection of children. The application of this Act is dealt with more thoroughly in 1.1.7 herein.

2.3 Case Law

The common law rights of a child to maintenance, and how that maintenance is to be calculated, are recorded and set out in numerous reported cases. There is no single case which sets out the application of every principle, mostly case law deals with a very general overview of the common law¹³³. The basic common law principles of maintenance have been applied in case law, as **set out briefly hereunder**¹³⁴.

¹²⁹Child Care Act (1963).

¹³⁰Divorce Act 70 of 1979 Section 6.

¹³¹Socialist Assistance Act 13 of 2004.

¹³²Socialist Assistance Act Sections 3, 6-8.

¹³³Grieves (note 1 above) 9.

¹³⁴The common law concepts of duty of support, need and ability to pay are set out in more detail in 1.1.2 herein.

The general common law principles relating to the calculation of maintenance are comprehensively set out in *Herfst v Herfst*¹³⁵ :-

"The general principles are that a child of divorced parents is entitled to be maintained by them, and they are correspondingly obliged to provide it with everything that it reasonably requires for its proper living and upbringing according to their means, standard of living and station in life. The obligation attaches to both parents jointly, but, inter se, their respective shares of that obligation are apportioned according to the financial resources and circumstances of each of them".

In terms of the common law formula the "gross incomes of both parents are added together. The proportional division between the parties is determined pro rata according to their relative income. These proportions are applied to a calculation of the child's reasonable needs, which would include a portion of housing and other joint costs. Once these amounts have been calculated, there is an enquiry into the ability of the non-custodial parent to pay"¹³⁶.

Duty of support

The principles set out in paragraph 1.1.3 hereinbefore are reiterated in case law as follows:-

Both parents are required to support their children according to their means¹³⁷, with the quantum of the duty of support being determined in accordance with the requirements of the one to be supported and the ability of the one who must pay¹³⁸. Accordingly maintenance is provided in accordance with means and status of a party¹³⁹.

¹³⁵1964 (4) SA 127 (W) 130C; Grieves (note 1 above) 9; Van Zyl (note 19 above) 132.

¹³⁶Lund Committee on Child and Family Support (note 4 above) 48.

¹³⁷*Farrell v Hankey* (note 124 above) 5; *Hartman v Krogscheepers* [1950] 4 All SA 124 (W); *Dioniso v Dioniso* 1981 (3) SA 149 (ZA); *Lamb v Sack* 1974 (2) SA 670 (T); *Sager v Bezuidenhout* 1980 (3) SA 1005 (C); Van Zyl (note 19 above) 128, 131; 135,150.

¹³⁸*Barlow v Barlow* 1920 OPD 73; *Ibid* 123.

¹³⁹*Gliksman v Talekinsky* 1955 (4) All SA 306 (W); *Ibid* 130.

In order to fulfil maintenance obligations parents must use their income, and if necessary their capital¹⁴⁰, and a parent who has remarried is required to adjust their standard of living rather than allow children to be prejudiced¹⁴¹.

General maintenance principles include application to a child born out of wedlock¹⁴².

Calculation of maintenance

In deciding a reasonable amount to award as maintenance for a child the court has to consider various factors such as a child's needs, the parents' ability to pay and the parties' social status¹⁴³. A child is entitled to reasonable maintenance including housing, clothing, medical and dental care as well as education, training and recreation where applicable¹⁴⁴.

*Burse v Bursey*¹⁴⁵ (in confirming the position in *Buch v Buch*¹⁴⁶ and *Herfst v Herfst*¹⁴⁷) identifies the calculation of maintenance to be a "complex process", which is to be calculated on a case by case basis. The judicial officer is to do this by careful consideration of the needs of the child as well as the parents' ability to maintain their children within the circumstances and means of each of the parents¹⁴⁸. As a child grows older the cost of living increases¹⁴⁹ and accordingly affects both parents¹⁵⁰.

In calculating maintenance it is incorrect to first estimate what the liable parent can afford to contribute and then to adapt the child's needs accordingly¹⁵¹.

¹⁴⁰*Boulle v Boulle* (1966) 1 All SA 549 (D); *Harwood v Harwood* [1976] 4 All SA 465 (C); *Sikatele v Sikatele* [1996] 2 All SA 95 (Tk); Ibid 124, 151.

¹⁴¹*Scott v Scott* 1946 WLD 399; Ibid 151.

¹⁴²*Tate v Jurado* 1976 (4) SA 238 (W); Ibid 153.

¹⁴³*Gliksman v Talekinsky* (note 139 above) 306; *Douglas v Douglas* [1996] 2 All SA 1 (A); Ibid 128, 131.

¹⁴⁴*Hawthorne v Hawthorne* [1950] 1 All SA 87 (C); *Vedovato v Vedovato* 1980 (1) SA 772 (T); Ibid 132, 155.

¹⁴⁵*Burse v Bursey* 1999 3 SA 33 (SCA) 36c-d; Carnelley & Easthorpe (note 126 above) 370.

¹⁴⁶*Buch v Buch* 1967 3 SA 83 (T) 88.

¹⁴⁷*Herfst v Herfst* (note 135 above) 132.

¹⁴⁸*Farrel v Hankey* (note 124 above) 596H.

¹⁴⁹*Green v Green* [1976] 3 All SA 393 (RA); *Osman v Osman* 1992 (1) SA 751 (W); Van Zyl (note 19 above) 131, 139.

¹⁵⁰*Jacobs v Jacobs* 1955 (4) SA 211 (T); Ibid 133.

¹⁵¹*Mentz v Simpson* 1990 (4) SA 455 (A); Ibid 137.

Role of the court officials in the enquiry

During a maintenance enquiry the presiding officer must play an active role in the proceedings in order to ensure that necessary evidence is obtained to make a fair and just maintenance order, even when parties are represented¹⁵². The financial position of the parties should be fully disclosed to the court, even where parties are represented. The maintenance officer and presiding officer share with the parties the responsibility of gathering evidence in favour of the best interests of the child¹⁵³.

Therefore, a maintenance enquiry is not a purely civil or criminal procedure, but rather one that is *sui generis*¹⁵⁴, being a hybrid of the two¹⁵⁵. The enquiry is inquisitorial in nature¹⁵⁶, and presiding officers are obliged to stop the raising of irrelevant issues, lengthy cross-examination, prolix argument and vexatious matters¹⁵⁷ which may jeopardise the interests of the child.

Best interests of the child principle

The primary objective of the Act¹⁵⁸ is to ensure that minor children are properly supported by their parents¹⁵⁹. The best interests of the child are paramount¹⁶⁰ and the Constitutional Court has jurisdiction in every matter concerning the child. There is therefore a constitutional obligation to ensure that all children are properly cared for. Such duty rests firstly on the parents of the child, and then on the State, who is obliged to create the necessary environment for parents to do so.

Where the interests of children are at stake, every delay in proceedings prejudices those interests. Accordingly the duty rests on maintenance officers to make every effort to ensure that the enquiry is dealt with expeditiously¹⁶¹.

¹⁵²*Beukes v Beukes* 1995 (4) SA 429 (O); *Mgumane v Setemane* 1998 (2) SA 247 (Tk); Ibid 124, 137.

¹⁵³*Buch v Buch* (note 146 above) 154; Ibid 124.

¹⁵⁴*Johnson v Tiger* 1979 (1) SA 920 (NC); *Kruger v Ferreira* 1979 (01) SA 915 (C); Ibid 134, 135.

¹⁵⁵*Nodala v The Magistrate, Umtata* 1992 (1) SACR 786 (Tk); *Young v Young* 1985 (1) SA 782 (C); Ibid 139,156.

¹⁵⁶*Perumal v Naidoo* 1975 (3) SA 901 (N); Ibid 140.

¹⁵⁷*Reid v Reid* 1992 (1) SA 443 (E); Ibid 142.

¹⁵⁸The Maintenance Act (1998).

¹⁵⁹*S v Mentoore* 1998 (2) SACR 659 (C); Van Zyl (note 19 above) 146.

¹⁶⁰*Dionisio v Dionisio* (note 137 above) 149; *Bannatyne v Bannatyne* (note 43 above); Ibid 122.

¹⁶¹*Nguza v Nguza* 1995 (2) SA 954 (TkGD); Ibid 138.

Intention of the legislature

Saving costs and a speedy procedure are important objectives of the 1998 Act¹⁶².

Costs

A maintenance court is not empowered to order that the unsuccessful party pay the legal costs of the successful party¹⁶³.

There is a vast body of maintenance case law, very little however dealing with the implementation of the current Act, or even its forerunner. For this reason only the most important maintenance principles were referred to above.

To date the primary source of maintenance law is to be found in the Maintenance Acts of 1963 and 1998 respectively. Although application is influenced by common law and case law, this legislation will form the basis of this dissertation and shall be dealt with in detail in Chapters 3 and 4 in detail.

¹⁶² *De Witt v De Witt* (1995) 4 All SA 310 (T); Ibid 127.

¹⁶³ *Dreyer v Dreyer* 1984 (2) SA 483 (O).

3 Chapter 3: Act 23 of 1963

3.1 Overview of the 1963 Act

Briefly the 1963 Act:-

- a) confers jurisdiction on all South African magistrate's courts in respect of maintenance matters¹⁶⁴;
- b) introduces the position of a maintenance officer¹⁶⁵ and the concomitant duty of the maintenance officer to investigate complaints¹⁶⁶;
- c) introduces the maintenance enquiry (a trial hybrid) as well as the various options available to the court when granting a court order in a maintenance matter (i.e. a number of enforcement mechanisms)¹⁶⁷;
- d) allows the court to authorise payments of maintenance monies by an employer on behalf of their employees (i.e. an emoluments attachment order)¹⁶⁸;
- e) introduces the use of criminal proceedings in respect of any failure to comply with a maintenance order, as well as the conversion of same into an enquiry should same be deemed necessary¹⁶⁹;
- f) makes provision for certain costs orders, such as paternity testing and service of process¹⁷⁰;
- g) gives a maintenance order the same effect and standing as an order of the civil court¹⁷¹
- h) makes provision for penalties for failure to comply with maintenance order, for example civil execution; fine or imprisonment upon conviction in criminal court¹⁷².

¹⁶⁴The Maintenance Act (1963) Section 2.

¹⁶⁵The Maintenance Act (1963) Section 3(1) and 3(2).

¹⁶⁶The Maintenance Act (1963) Section 4(1); 4(2) and 4(3).

¹⁶⁷The Maintenance Act (1963) Section (5).

¹⁶⁸The Maintenance Act (1963) Section 12.

¹⁶⁹The Maintenance Act (1963) Section 13.

¹⁷⁰The Maintenance Act (1963) Section 14B.

¹⁷¹The Maintenance Act (1963) Section 14C.

¹⁷²The Maintenance Act (1963) Section 11.

3.2 Innovations of the 1963 Act

There are two primary innovations introduced in the 1963 Act which warrant specific mention:-

3.2.1 Maintenance Officer

Act 23 of 1963 makes provision for the appointment of a new court official, namely the Maintenance Officer¹⁷³. Maintenance Officers are specifically tasked with the investigation of a complainant's case. The primary duty of the Maintenance Officer is to ensure a duty of support exists between parties when a new application is launched, and further, upon the filing of an application for substitution or discharge of a maintenance order, that good cause to do so exists¹⁷⁴. The Maintenance Officer may institute an enquiry in a maintenance court and must assist with the conduct of the enquiry (i.e. it is the maintenance officer and not the complainant who must decide to do so)¹⁷⁵.

The position of the maintenance officer was carried over by the legislature in the 1998 Act, The duties and functions of the maintenance officer are accordingly discussed in more detail in chapter 4 hereunder.

3.2.2 Maintenance Enquiry

The concept of the maintenance enquiry was specifically created by the legislature with the intention of crystallizing a person's duty to maintain another person through certain procedural steps. The enquiry process is used to determine an order where no order exists or to substitute or discharge an existing order¹⁷⁶.

The enquiry is *sui generis*¹⁷⁷ and inquisitorial in nature, meaning that it follows neither the criminal nor civil trial procedure exactly. An important element of

¹⁷³The Maintenance Act (1963) Section 3(1) and 3(2).

¹⁷⁴SA Law Commission (note 4 above) 10, 11.

¹⁷⁵SA Law Commission (note 4 above) 11; *Govender v Amurthan* 1979 (3) SA 358 (SA); Van Zyl (note 19 above) 131.

¹⁷⁶The Maintenance Act (1963) Section 5; SA Law Commission (note 4 above) 11.

¹⁷⁷*Foster v De Klerk* 1993 (1) SA 596 (O); Van Zyl (note 19 above) 130.

this enquiry is a newly introduced concept which entails that during the enquiry the onus of placing evidence before the court rests not only on the parties to the proceedings but also on the maintenance officer and the presiding officer¹⁷⁸. The 1963 Act, through this modified procedure, creates an all-encompassing obligation on all parties involved in a maintenance enquiry to look after the interests of the children primarily. Again this enquiry process has been carried over to the 1998 Act.

The 1963 Act was not without criticism. There were many flaws within the 1963 Act itself, as well as with the implementation thereof. A large number of these criticisms are in fact similar to those levelled at the 1998 Act, and the core criticisms are identified as follows:-

- Untrained, unqualified court staff (see 3.2.1.2 hereunder);
- Insufficient courts, magistrates and maintenance officers (see 3.2.1.3 hereunder);
- Attitude of court staff towards maintenance matters and complainants and abuse of staff power (see 3.2.1.4 hereunder);
- Location of maintenance courts and court resources (see 3.2.2.4 hereunder);
- Inconsistent application of the law (see 3.2.2.5 hereunder);
- Long waiting hours and numerous postponements (see 3.2.2.9 hereunder);
- Poor file administration (see 3.2.2.10 hereunder);
- Poor division in responsibility and allocation of needs (see 3.2.3.4 hereunder);
- General problems in law enforcement (see 3.2.4.1 hereunder);
- Payments made into court (see 3.2.4.3 hereunder).

¹⁷⁸SA Law Commission (note 4 above) 12; *Buch v Buch* (note 146 above) 83.

In an attempt to address these shortcomings the 1963 Act was replaced with the 1998 Act. However, although the above criticisms were initially levelled at the 1963 Act, they have unfortunately not been resolved by the amendment of the legislation and have carried over to the 1998 Act. Accordingly they shall be dealt with in more detail and within the context of the 1998 Act in Chapter 4.

4 **Chapter 4: Act 99 of 1998**

“In many instances women and children find it very challenging to access maintenance services. The Maintenance Act 1998 (Act No.99 of 1998) provides relief in this regard. It is clear from the provisions of the Act that it aimed at, amongst other things, to have a maintenance system that is simple and user-friendly and understandable to a lay person, meeting the needs of many thousands of women and children who are entitled to maintenance but cannot afford legal representation, private tracing agents and/or payment of sheriff’s fees for execution of court processes for maintenance”¹⁷⁹.

Justice Today

The 1963 Act was highly criticized in many respects¹⁸⁰. It was accordingly repealed and replaced with the 1998 Act¹⁸¹ which came into operation on 26 November 1999, with the exception of sections 5, 7(1)(d); 7(2)(a); 7(2)(b) and 7(2)(c) which came into operation with effect from 1 November 2006¹⁸². The 1998 Act, which shall be dealt with extensively hereunder, sought to rectify the defects identified in its forerunner, with a view to reforming the entire South African maintenance system, placing emphasis on the importance of a sensitive and fair approach to the determination and recovery of maintenance¹⁸³.

The most common complaints documented during operation of the 1963 Act were 1) the ill-treatment of complainants; 2) the attitudes of the staff towards both complainants and the system and 3) the poor facilities provided at maintenance courts. These key complaints were coupled with a system which appeared to allow maintenance debtors to evade their legal duty to maintain their children with impunity¹⁸⁴. It therefore became necessary to revise the system, thus leading to the implementation of the 1998 Act.

¹⁷⁹P Mthimunya “Improved Access to the Maintenance System” *Justice Today* (2005) Vol 1; 21-22.

¹⁸⁰*Bannatyne v Bannatyne* (note 43 above) 376C-D.

¹⁸¹The Maintenance Act (1998).

¹⁸² Author unknown "Note on the amendment bill" 2011 (unpublished).

¹⁸³The Maintenance Act (1998).

¹⁸⁴De Jong (note 98 above) 590.

The 1998 Act was deemed to be a fairly progressive piece of legislation with new features¹⁸⁵, in particular the provision for an order by default, the emoluments attachment order and the attachment of a debt in the form of a garnishee order¹⁸⁶.

4.1 Innovations

"The innovations to the Act (Act 99 of 1998) were introduced in acknowledgment of the fact that accessing maintenance has historically proven to be an uphill battle for many complainants".

Bhekinkosi Moyo¹⁸⁷

The 1998 Act has revised the repealed Act of 1963, and includes a number of innovations and significant amendments to existing provisions. The core concepts of the 1998 Act will be discussed hereunder.

4.1.1 Maintenance Officer

The maintenance officer is potentially the key role player in each and every maintenance enquiry, regardless of whether or not either party to the proceedings is legally represented, and whether or not the party goes to court. For this reason the correct and thorough implementation of the provisions of the legislature relating to the scope of the maintenance officer's powers and functions is necessary.

In terms of the Section 3(1) and (2) of the 1963 Act, provision was made for the appointment of maintenance officers by the Minister for the purpose of fulfilling certain duties as set out in the Act. This provision included the appointment of public prosecutors as maintenance officers. The appointment of

¹⁸⁵Budlender & Moyo (note 2 above) 56.

¹⁸⁶Ibid 69.

¹⁸⁷Ibid 51.

maintenance officers has carried over to the 1998 Act and is expounded upon in Chapter 2, section 4(1)(a) thereof¹⁸⁸.

In addition to the appointment of maintenance officers, both independently and from the ranks of prosecutors, the 1998 Act places a legislative onus on the National Director of Public Prosecution to issue policy directives "*establishing uniform norms and standards to be observed by public prosecutors in the performance of their functions as maintenance officers and building a more dedicated and experienced pool of trained and specialised maintenance officers*"¹⁸⁹. The intention of the legislature in creating this onus is to ensure the consistent and uniform functioning of maintenance officers throughout South Africa in carrying out their duties.

Chapter 3 of the 1998 Act sets out the functions and powers of the maintenance officer in the investigation of maintenance complaints and thereafter the institution a maintenance enquiry¹⁹⁰.

Upon the complainant approaching the maintenance court in order to lay a complaint, the maintenance officer is charged with the duty of investigating such complaint¹⁹¹.

Such investigation includes the obtaining of statements under oath from persons with information regarding the complainant¹⁹²; investigating the identity and whereabouts of the alleged defaulter¹⁹³; and gathering other information that is relevant for the purposes of an enquiry¹⁹⁴. Upon completion of the investigation of the complaint the maintenance officer may institute an enquiry in the maintenance court should he or she deem fit¹⁹⁵. The maintenance officer is empowered to enlist the assistance of a maintenance

¹⁸⁸Maintenance Act (1998) Chapter 2; Van Zyl (note 19 above) 63.

¹⁸⁹Maintenance Act (1998) Section 4(1)(b)(i) and (ii).

¹⁹⁰Maintenance Act (1998) Section 6 and 7; L Pretorius 'Step-by-step maintenance applications in the maintenance court' (2004) *De Rebus* 36; Powers and functions of the maintenance officer were initially set out in Section 4 of the 1963 Act.

¹⁹¹Maintenance Act (1998) Section 6(a) and (b).

¹⁹²Maintenance Act (1998) Section 7(1)(a).

¹⁹³Maintenance Act (1998) Section 7(1)(b)(i).

¹⁹⁴Maintenance Act (1998) Section 6 and 7.

¹⁹⁵Maintenance Act (1998) Section 6(2).

investigator¹⁹⁶. The powers and functions of the maintenance investigator shall be discussed in 4.1.3 hereunder.

In addition to the receipt and management of inquiries the maintenance officer does all the work usually done by a party's legal representative, including the offer of guidance to both parties when unrepresented¹⁹⁷. The maintenance officer therefore carries a heavy burden in each maintenance matter before him or her; including the onus to represent the best interests of the child.

4.1.2 The Enquiry

Upon the completion of an investigation, the maintenance officer may institute an enquiry in the maintenance court as set out in section 6(2) of the 1998 Act¹⁹⁸. Such enquiry shall take place before a judicial officer. The maintenance officer is entitled to subpoena any witnesses to give evidence during the enquiry and/or to produce documentary evidence relating to the financial position of the parties¹⁹⁹. The maintenance officer is further required to lead evidence on behalf of the complainant when unrepresented.

It is important to note that in terms of South African law maintenance court proceedings deviate substantially from the ordinary criminal or civil proceedings²⁰⁰. An enquiry process is used in place of the trial process. The presiding officer therefore plays an active role in the proceedings, and is able to may subpoena documents, call witnesses as well as question witnesses. This approach allows the court to make up for any difficulties experienced by unrepresented parties in the presentation of their case, and further allows the

¹⁹⁶Maintenance Act (1998) Section 7 (2).

¹⁹⁷Grieves (note 1 above) 17.

¹⁹⁸In most instances, although not prescribed by the 1998 Act, parties attend an informal enquiry before the maintenance officer. During this enquiry the maintenance officer interviews both parties and considers the financial position of the parties in relation to the complainant's claim. The maintenance officer attempts to negotiate settlement of the matter between the parties. In instances where settlement cannot be reached the maintenance officer sets the matter down for a formal enquiry.

¹⁹⁹Maintenance Act (1998) Section 9(1); Van Zyl (note 19 above) 68 -73; Pretorius (note 190 above) 38. The enquiry procedure prior to that set out in Sections 9 to 14 of the 1998 Act can be found in Section 5 of the 1963 Act.

²⁰⁰Grieves (note 1 above) 7.

court to act in the best interests of the child, particularly where such interests may be clouded in a dispute where each parent has their own agenda.

An explanation of the enquiry process is set out in more detail in 1.1.4.1.3 above.

4.1.3 Maintenance Investigator

“Investigators are the “teeth” of the Act and the failure to appoint them renders the Act largely ineffective”.

Shereen W Mills²⁰¹

The 1998 Act introduced the office of the maintenance investigator, which was not to be found in its forerunner²⁰². The creation of this office appears to have had a *prima facie* positive impact on the existing maintenance system, ideally with the appointment of at least one maintenance investigator for each maintenance court. The introduction of this office is, however, too recent to fully judge the impact it has had on the maintenance system, particularly given that there was a substantial delay in implementing the appointment of maintenance investigators. Such delay resulted in no investigators being available from 1998 to 2002, leaving maintenance officers to carry out their own duties as well as those envisaged for the maintenance investigator²⁰³. However, since the appointment of maintenance investigators, it appears that some of the problems experienced by women and children in accessing basic human rights within courts have been greatly alleviated²⁰⁴.

The primary task of the maintenance investigator is to assist the complainant from the beginning to the end of a maintenance process by way of document analysis and collection of relevant information pertaining to the complainant's claim. The maintenance investigator is empowered to take statements from persons who may give relevant information concerning the maintenance

²⁰¹Budlender & Moyo (note 2 above) 36.

²⁰²Maintenance Act (1998) Section 5(1) and (2).

²⁰³M Mamashela 'The court's interpretation of Section 31 of the Maintenance Act 99 of 1998 and its predecessors' (2005) *SALJ* 236; Mthimunye (note 170 above).

²⁰⁴Mthimunye (note 179 above).

enquiry and is charged with gathering information on instruction from the maintenance officer about the identification, whereabouts, financial position and any other matters concerning the person liable to pay maintenance. The maintenance investigator is obligated to investigate all cases and obtain documentation and information required for the maintenance enquiry²⁰⁵. The maintenance investigator is therefore integral to the smooth running and finalisation of each and every maintenance enquiry.

The maintenance investigator's functions and powers are set out as follows²⁰⁶:-

- a) *locate the whereabouts of a person for reasons stipulated in the Act (including tracing of persons liable to pay maintenance and maintenance defaulters²⁰⁷);*
- b) *serve or execute the process of any maintenance court;*
- c) *serve subpoenas and summonses in respect of criminal proceedings for the failure to comply with a maintenance order;*
- d) *take statements under oath or affirmation from persons who may be able to give relevant information concerning the subject of any complaint relating to maintenance;*
- e) *gather information concerning the identification and whereabouts of any person legally liable to maintain the person mentioned in the complaint, the financial position of any person affected by such liability, or any other matter which may be relevant concerning the subject of the complaint;*
- f) *gather such information as may be relevant concerning a request relating to an investigation outside of the existing jurisdiction of the complainant.*

In light of the aforesaid powers and duties it is clear that the maintenance investigator has a pivotal role in assisting complainants in being prepared for an enquiry. Much hangs on the quality of the investigation completed by the investigator, and failure to adequately conduct the investigation could

²⁰⁵Maintenance Act (1998) Section 7; Grieves (note 1 above) 17.

²⁰⁶Maintenance Act (1998) Section 7 (2).

²⁰⁷Mthimunye (note 179 above).

jeopardise the enquiry and result in a negative outcome for the complainant and the minor children concerned.

4.1.4 Additional court orders

In terms of the 1963 Act, the following orders were available to the court when determining the outcome of a maintenance enquiry²⁰⁸:-

- a) in instances where there was no existing order in force:-
 - (i) an order for maintenance may be made against the person liable to maintain in respect of the person liable to be maintained, in a specified sum sounding in money;
 - (ii) an order requiring the party liable to pay maintenance to make payment to the mother of the child in respect of laying in and birthing expenses incurred in connection with the birth of the child to be maintained;
 - (iii) an order requiring the person liable to pay maintenance to make payment of medical expenses on behalf of the person liable to be maintenance, or to register the person liable to be maintained as a beneficiary on a medical aid.
- (b) where an existing order is in force:-
 - (i) may substitute the existing cash order;
 - (ii) may make an order substituting any existing order relating to the payment of medical expenses;
 - (iii) may discharge the existing order;
 - (iv) discharge the existing order.

In terms of the 1962 Act, the Maintenance Court was further empowered to make the following orders:-

²⁰⁸Maintenance Act (1963) Section 5 and 12.

- (i) make no order;
- (ii) grant an order by consent;
- (iii) make provision for an Emoluments Attachment Order);
- (iv) make a discretionary order relating to the costs of service of process;
- (v) an order directing the parties, in the event that paternity is disputed, to submit themselves and the child concerned for blood tests in order to determine paternity of the child in question.

It is evident that the 1963 Act, unlike the 1998 Act, made no provision for default orders.

The 1998 Act makes provision for the amplification of the orders set out above; as well as introducing the order by default and civil execution.

The existing orders available to the court in terms of the 1998 are:-

- a) where no maintenance order is in force:
 - (i) the court may make an order against any person proved legally liable to maintain any other person in a sum sounding in money. In addition the court may extend this order to make compulsory a "stop-order" or similar method of payment on the part of the maintenance debtor's banking or financial institution. Such order extends to the payment of medical expenses and registration as a dependant on the maintenance debtor's medical aid;
 - (ii) an order requiring the party liable to pay maintenance to make payment to the mother of the child in respect of laying in and birthing expenses incurred in connection with the birth of the child to be maintained.
- b) where an existing order is in force:-
 - (i) may substitute the existing cash order;
 - (ii) may discharge such maintenance order;
 - (iii) may make no order.

In addition the Maintenance Court, in terms of the 1998 Act may make the following orders:-

- (a) may bind a third party, such as a pension fund scheme, to make periodical maintenance payments on behalf of the party against whom a maintenance order has been made. This may be done only after hearing such evidence in support thereof, and in the event that it is not impracticable in the circumstances of the case;
- (b) may grant orders by consent²⁰⁹;
- (c) may grant a default order in instances where there is sufficient proof that the subpoena has been served on the defendant personally, and such defendant has failed to attend court²¹⁰;
- (d) may vary and set aside certain existing orders²¹¹;
- (e) may make orders as to the costs of service of process²¹²;
- (f) may make an order pertaining to the paternity testing of a child to be maintained²¹³;
- (g) may authorise a warrant of execution²¹⁴;
- (h) and may issue an Emoluments Attachment Order²¹⁵.

4.1.5 Extension of contractual duty

The 1998 Act specifically makes provision for the application thereof in respect of the legal duty of any person to maintain any other person, irrespective of the nature of the relationship between those persons giving rise to that duty²¹⁶.

²⁰⁹Maintenance Act (1963) Section (d) above; Maintenance Act (1998) Section 17.

²¹⁰Maintenance Act (1998) Section 18.

²¹¹Maintenance Act (1998) Section 19.

²¹²Maintenance Act (1963) Section (f) above; Maintenance Act (1998) Section 20.

²¹³Maintenance Act (1963) (g) above; Maintenance Act (1998) Section 21.

²¹⁴Maintenance Act (1998) Section 27.

²¹⁵Maintenance Act (1963) Section (e) above; Maintenance Act (1998) Section 28.

²¹⁶Van Zyl (note 19 above) 61.

This extension of a contractual obligation to support another is directed at the common law duty of parent to maintain child, extending to such support as a child reasonably requires for his or her proper living and upbringing, and includes provision of food, clothing, accommodation, medical care and education²¹⁷.

4.1.6 Civil execution

In terms of section 27 of the 1998 Act, a civil execution is no longer dependent on a criminal conviction, as per section 11 of the 1963 Act.

An order for civil execution in respect of arrear maintenance shall be enforceable against any person against whom a maintenance order has been made. Judgment shall be given for the amount outstanding plus interest thereon. Execution may be against property or the attachment of emoluments or attachment of any debt owed to the maintenance defaulter, which debt has remained unsatisfied for a period of ten days from the day on which the relevant amount became due²¹⁸.

Despite the aforesaid amendments and innovations and the best intentions of the legislature there is still “*evidence that women continue to struggle to access maintenance due to the inefficiencies in the system and lack of adequate resources and capacitation.*”²¹⁹ The logistical difficulties in maintenance courts mean that the maintenance system does not function effectively, and a fatalistic acceptance of flaws in the system compounds denial of rights to women and children²²⁰. There is a dire need for solutions addressing the problems inherent in the system. Prior however to suggesting methods for reform, it is necessary to canvas and understand the obstacles inherent in such system. Accordingly the deficiencies in the existing Act are addressed in more detail hereunder.

²¹⁷Ibid.

²¹⁸Maintenance Act (1998) Section 27.

²¹⁹De Jong (note 98 above) 596.

²²⁰Van Zyl (note 19 above) 60.

4.2 Criticisms

“The Maintenance Act has been operational for 10 years yet, on a daily basis, women and children continue to experience problems accessing justice through the maintenance court system”²²¹. De Jong²²² writes that “the aim of the (Maintenance) Act (1998)²²³ was to create a procedure by means of which an aggrieved party could obtain and/or enforce a maintenance order quickly and cheaply. Regrettably, the Act, and more specifically its enforcement mechanisms, proved to be ineffective. Complaints about the system ranged from the treatment, attitudes and facilities encountered at maintenance courts by complainants, to the seeming impunity with which maintenance debtors manage to evade their legal duty to maintain their dependents, even where maintenance orders were in force.”

It is evident from a literature analysis and research conducted by the writer, that the Maintenance Act 99 of 1998 has not met the values enshrined in its preamble, namely *“to establish a society based on democratic values, social and economic justice, equality and fundamental human rights and to improve the quality of life of all citizens and to free the potential of all persons by every means possible, including, amongst others, by the establishment of a fair and equitable maintenance system”²²⁴*. What is evident from the literature available is that the system is in fact failing those seeking its assistance and that there is extensive room for improvement in almost every aspect of the system, despite the 1998 Act being an improvement on its forerunner.

Singh *et al* states that by 1994 *“South Africa was confronted with an inefficient, ineffective, fragmented and racially divided maintenance system that required urgent attention. South Africa accepted all international Covenants protecting the rights and interests of the child, which required the State to ensure that children enjoyed an adequate standard of living”²²⁵*.

²²¹Law Society of South Africa (note 105 above) 3.

²²²De Jong (note 98 above) 590.

²²³Maintenance Act (1998).

²²⁴Maintenance Act (1998)

²²⁵UN convention on the Rights of the Child; World Declaration on the Survival, Protection and Development of Children; Singh (note 6 above) 143.143

With the introduction of the Constitution into South African law, an international and constitutional onus pertaining to the protection of the best interests of the child was created²²⁶, in terms whereof various obligations fall on the state for fulfilment. These new obligations, when considered in terms of the existing maintenance law, were not being met by the legislation in place²²⁷.

The criticisms of the 1963 Maintenance Act were addressed by the amended 1998 Act, enacted with the objective of restating and amending certain laws relating to maintenance with the view to providing more effective mechanisms for enforcement of orders²²⁸.

The 1998 Act aims to bring about a fair, equitable and sensitive maintenance service in which the rights of children to maintenance are made a priority²²⁹. The main objectives thereof being: - a) a need to simplify maintenance procedures, b) to make these procedures speedier and cheaper and c) to improve the effectiveness of the enforcement machinery²³⁰.

The 1998 Act was introduced into our law as an interim measure while the South African Law Reform Commission continues to look into the revision of the entire South African maintenance system²³¹.

The 1998 Act introduced a number of new or revised concepts²³², including the introduction of the maintenance investigator (tracers)²³³; additions to the type of orders to be made²³⁴ (including the granting of default orders); a shift in the onus of proof from accused to prosecutor in a criminal matter²³⁵, the extension of the application of the Act to a contractual duty outside of blood relation or marriage²³⁶

²²⁶Ibid 143; Carnelley & Hoctor (note 74 above) 199.

²²⁷Lund Committee on Child and Family Support (note 4 above) 5.

²²⁸De Jong (note 98 above) 592; Van Zyl (note 19 above) 60.

²²⁹Ibid 592.

²³⁰Mamashela (note 26 above) 491; Clarke (note 2 above) 9; Carnelley & Hoctor (note 74 above) 199; Mamashela (note 80 above) 217.

²³¹Van Zyl (note 19 above) 60.

²³²Singh (note 6 above) 144; Clarke "(note 2 above) 9; Wamhoff & Burman (note 65 above)151.

²³³*Bannatyne v Bannatyne* (note 43 above) 376C-D; De Jong (note 98 above) 592.

²³⁴Ibid 592.

²³⁵Ibid.

²³⁶Ibid.

and the automatic deduction of payments from wages through emoluments attachment orders²³⁷. Same are discussed in more detail in 4.1 above.

The current Act provides important mechanisms to give effect to the rights of children in terms of Section 28 of the Constitution. A failure to ensure the effective operation of the law amounts to a failure to protect children against those who attempt to benefit from the deficiencies in the operation of the Act, such as defaulting parents²³⁸.

Despite the best intentions of the legislature however, the maintenance system remains in disarray. It continues to be slow and ineffective and a fairly unproductive means of enforcing rights²³⁹.

Wamhoff and Burman offer confirmation thereof in concluding that “*maintenance is not a glamorous or profitable branch of law, however crucial. Anyone who must negotiate it becomes aware that the buildings and facilities of the courts are inadequate, that the staff is overworked and sometimes undertrained, and that more resources are needed for the machinery to work well*”²⁴⁰.

It is the continual poor functioning of the maintenance courts, despite amended legislation, that has drawn many writers to review and analyse the existing problems in the maintenance court. The maintenance court remains the victim of a poorly functioning, disregarded system despite its constitutional importance.

It is for this reason that this study seeks to identify the current problems in the system, as compared to those found to be evident under the old legislation. Upon identification and analysis of the core problems, it is proposed that one would then be in a better position to propose amendments and advocate change.

The following criticisms and/or problems have been highlighted in research conducted throughout various South African maintenance courts and have been well documented by legal academics. Each criticism shall be addressed briefly hereunder, and where applicable a comparison or verification to the research conducted by myself will be added.

²³⁷Singh (note 6 above) 144.

²³⁸Clarke (note 2 above) 10.

²³⁹Carnelley & Hoctor (note 64 above) 11.

²⁴⁰Wamhoff & Burman (note 65 above) 148.

4.2.1 People

4.2.1.1 Appointment of the Maintenance Investigator

As stated hereinbefore, it is the duty of maintenance investigator to gather information concerning the identification, whereabouts, financial position and other matters relating to any person against whom a complaint has been made and who is liable to pay maintenance. The primary aim of this investigation is to assist the complainant from beginning to end of the process.

However, the efficacy of this new office is severely hampered as a result of the *“major and current problem with the implementation of the new Act, being the lack of funds to employ the investigators who are supposed to trace and locate defaulters and investigate their bank accounts and assets, take statements from persons who may give relevant information about the maintenance enquiry and gather information about the identification, whereabouts, financial position and any other matter concerning the person liable to pay maintenance²⁴¹”*. It is evident that there are simply no additional resources available from the State to firstly, appoint a sufficient number of maintenance investigators per court, and secondly, to provide them with adequate tools, such as motor vehicles and computers, to carry out their tasks.

The impact of the recent introduction of maintenance investigators is further reduced by fact that maintenance officers, who issue instructions to the maintenance investigators, have insufficient legal knowledge to guide such an investigation²⁴². Without this guidance maintenance investigators are unable to constructively collect information essentially making the investigation process futile.

The lack of available maintenance investigators has a knock-on effect throughout the maintenance court, affecting each and every staff

²⁴¹Mamashela (note 26 above) 490 - 591; Maintenance Act (1998) Section 7(2).

²⁴²Grieves (note 1 above) 17-20.

member and complainant. Certain implications thereof are specifically addressed in paragraphs 4.2.1.3; 4.2.1.8; 4.2.2.1 and 4.2.2.2. hereunder.

4.2.1.2

Untrained and under qualified court staff²⁴³

Upon the institution of an enquiry it falls to the maintenance officer to collect all relevant information from the complainant in respect of an enquiry, and where the complainant is unrepresented, to represent the complainant before the Magistrate.

Although sound in theory, it has become evident that there is a glaring problem with implementation of maintenance officers as "legal" representatives. Maintenance officers are not legally trained prosecutors and as a result may inadvertently leave out vital information during the investigation or enquiry stage, which could result in an unsuccessful claim on the complainant's behalf.

Further, should the defendant be represented by an attorney, the untrained and unskilled maintenance officer may be intimidated and outclassed in court thus leaving the rights and interests of the complainant and the minor child unprotected. The majority of maintenance officers are ill-equipped to present a maintenance matter properly before court²⁴⁴.

It is well-documented that maintenance officers remain untrained and unqualified²⁴⁵, with an insufficient knowledge of the 1998 Act. There further are no uniform or standard qualifications when it comes to the training of both the maintenance officers and the maintenance investigators, leaving each office bearer to implement his or her role in whichever manner he or she pleases²⁴⁶.

²⁴³Law Society of South Africa (note 105 above) 8-10; Singh (note 6 above) 144 -145; Ibid 17-20; Budlender & Moyo (note 2 above) 45.

²⁴⁴Ibid 17-20.

²⁴⁵Wamhoff & Burman (note 65 above) 149; Law Society of South Africa (note 105 above) 8-10.

²⁴⁶De Jong (note 98 above) 602 - 604; 607.

It appears that in many instances complaints are not being referred to the maintenance investigators by the maintenance officers for investigation²⁴⁷. This problem is compounded by the shortage of maintenance investigators who are already overburdened and overworked, as well as a shortage of resources such as vehicles. Maintenance investigators often need to work after hours and are sometimes threatened by defendants, which threats can jeopardize the investigation.

Unfortunately the 1998 Act is not sufficiently specific when dealing with the appointment of maintenance offices and investigators, particularly in that the Act stipulates that maintenance officers and investigators should be trained but fails to stipulate the required necessary training and the time frames in which training is to be done²⁴⁸.

The qualitative aspect of my research identified related problems with specific reference to a) prosecutors not doing their jobs; b) a lack of education amongst staff and a desire to c) "consult and expert" when attending maintenance court (refer to annexure 4.2 hereof²⁴⁹).

4.2.1.3 Insufficient courts, magistrates and maintenance officers available²⁵⁰

Compounding the problem of poorly qualified staff is the fact that insufficient staff have been appointed to fill the roles of maintenance officer and maintenance investigators²⁵¹. This added burden on the untrained and unqualified staff has led to the general demotivation of the existing staff compliment at maintenance courts throughout South Africa²⁵². It is evident that the new appointments envisaged by the 1998 Act are not being made as a result of governmental budgetary

²⁴⁷Law Society of South Africa (note 96 above) 16.

²⁴⁸De Jong (note 98 above) 590.

²⁴⁹Items 4.2.79; 4.2.80.

²⁵⁰Law Society of South Africa (note 105 above) 8-10; Singh (note 6 above) 144 -145; Budlender & Moyo (note 2 above) 45; 97.

²⁵¹De Jong (note 98 above) 590.

²⁵²Grievances (note 1 above) 17-20.

constraints, to the detriment of the functioning of the maintenance courts. This has a knock-on effect resulting in a deterioration of services provided to complainants by maintenance court staff.

Complainants are required to wait long waiting hours for their matters to be heard and often are subject to many postponements as a result of the excessive workload experienced by maintenance courts²⁵³. Parties have to wait long hours to see the officers, and in some cases staff took private phone calls while women waited outside. Parties would then be told to go home without assistance, only to be told to return the following day²⁵⁴. Also evident is an overall dissatisfaction with the court staff based on a perceived lack of consideration by staff towards parties to the maintenance proceedings. These long delays in processing maintenance cases result in severe implications for the families in need of maintenance. The postponements themselves create hardships for families in need, and, in those instances where the parties are represented, inconvenience attorneys and clients who are paying attorney's fees.

There is further a perception amongst court staff, particularly the prosecuting body that maintenance matters are less favourable and of lesser importance, and it is well known that prosecutors would rather not deal with maintenance cases as they find other work, such as criminal prosecution, preferable²⁵⁵. This view results in inconsistent and varying degrees of effort on the part of a maintenance clerks and prosecutors dealing with a maintenance claim.

Further analysis of the literature shows that both the maintenance officers and the maintenance investigators are not making use of the scope of their responsibilities and power as per the 1998 Act. The added human resource restraints (i.e. insufficient appointment of maintenance investigators) results in the passing of the maintenance

²⁵³Wamhoff & Burman (note 65 above) 150.

²⁵⁴Singh (note 6 above) 149.

²⁵⁵Wamhoff & Burman (note 65 above) 150.

officers and maintenance investigators obligation to investigate and manage one's own complaint onto the complainant, who in turn is even less skilled in maintenance law than the appointed court staff.

Maintenance officers are appointed from the ranks of clerks who have no legal training. Further no legal qualification on the part of the appointed maintenance officers is required. Complainants have no understanding of the law and are reliant on the court staff to assist them in protecting their rights. This in effect leads to a case of the blind leading the blind. The complainants' rights shall be prejudiced should a poorly trained or untrained maintenance officer represent a complainant, particularly when up against a qualified attorney or advocate. As is evident from a review of current literature it is clear that the parties to maintenance proceedings generally felt that they received inadequate or poor treatment from the maintenance officers at the court.

It is suggested that all maintenance court staff undergo continual in-house training, and that a court supervisor be appointed to perform an "oversight function", supervising each court's overall caseload.

There is a concurrent problem in the maintenance courts, namely not enough judicial staff to deal with maintenance matters. This generally results in an "ad hoc" rotation of magistrate's between maintenance and other courts. Studies show that that magistrate's working in maintenance and family law courts felt that colleagues regarded family law as inferior. In addition to this, family law magistrate's felt that they worked under difficult conditions, coupled with the stressful nature of their work, leaving them feeling isolated and marginalised²⁵⁶.

²⁵⁶Budlender & Moyo (note 2 above) 35.

4.2.1.4

Attitudes of court staff towards maintenance matters and complainants and abuse of staff power²⁵⁷

Maintenance matters appear to carry a stigma of "insignificance amongst court staff, including prosecutors and magistrates, and are generally not given the same status and attention as other magistrate court matters such as civil and criminal matters²⁵⁸.

A core complaint experienced by complainants and defendants in the maintenance court is the general overall attitude with which the staff address and treats the parties to the proceedings. The literature documents that complainants generally felt that they are often treated disrespectfully, and that staff were uncivilised and rude to them, resulting in the complainant feeling helpless and worthless, the staff being completely oblivious to the pain and suffering experienced by the complainants²⁵⁹. These feelings are further compounded by the fact that the staff often fail to explain the process to those waiting in the waiting-room. Complainants and defendants are left feeling undermined by staff and magistrates, and completely in the dark regarding their rights²⁶⁰.

This is confirmed in my study where complainants and defendants were of the view generally that the court staff either favours the male or female in an application (there is evidence of both parties feeling prejudiced against in their matter)²⁶¹. Study results further show that complainants felt that there was a degree of corruption amongst court staff and that the outcome of a person's matter was dependant on "who you know" at court (Refer to **Annexure 4.2**).

Despite the aforesaid, when asked by myself whether or not the staff assisting parties at court were helpful, 70% of the interviewees to complete my questionnaire felt that they were, while 28% felt they

²⁵⁷Law Society of South Africa (note 105 above) 8-10.

²⁵⁸Budlender & Moyo (note 2 above) 35.

²⁵⁹Ibid 89.

²⁶⁰Law Society of South Africa (note 105 above) 8-10.

²⁶¹Refer to annexure 4.2.1.

were not, and 2% believed the "helpfulness" of the staff to be mood dependant²⁶² (refer to **Annexure 4.1(a)** hereto).

The following concerns were identified by the interviewees in the qualitative portion of my survey study (refer to **Annexure 4.2** hereto²⁶³):-

- a) a complete lack of support, compassion and care from court staff;
- b) parties are stressed by the procedure itself, this stress being compounded by rude and unhelpful staff;
- c) the staff are disinterested, rude and fail to help the complainants;
- d) the maintenance court was described as "a circus", with no access to court staff, who are "behind locked doors";
- e) maintenance officers do not allow parties to the proceedings to adequately express themselves;
- f) in the Mdantsane maintenance specifically numerous female complainants singled out the mistreatment and abuse by a particular staff member (the maintenance prosecutor) who evidently made the maintenance process as difficult and uncomfortable as possible for female complainants.

4.2.1.5

Absence of tracers and investigators

One of the obvious obstacles to the thorough implementation of the 1998 Act is the lack of maintenance investigators and tracers available to the maintenance court²⁶⁴. Maintenance investigators and tracers fulfill the roll of locating defendants and gathering financial information to the benefit of the complainant. The non-compliance with the appointment provisions in the 1998 Act have placed an added

²⁶²Of the 350 interviewees to complete the questionnaire 53 of the 350 were unable or unwilling to answer the question. The percentage application is therefore in respect of the 297 interviewees to answer the question.

²⁶³items 4.2.10; 4.2.20; 4.2.22; 4.2.26; 4.2.87; 4.2.89; 4.2.97; 4.2.98; 4.2.100; 4.2.103; 4.2.113; 4.2.118; 4.2.121;4.1.125.

²⁶⁴Singh (note 6 above) 146.

burden on maintenance officers who have to complete the tasks of the tracers and maintenance investigators themselves.

Interviewees confirmed this view, advising that investigations are "just not done by investigators", resulting in postponements. Investigators also fail to trace defendants (refer to **Annexure 4.2** hereto²⁶⁵).

4.2.1.6

Overall lack of resources, including poor salaries²⁶⁶

The working conditions within the South African maintenance courts are generally poor. Staff receive insufficient salaries and are expected to perform under bad working conditions. There is a lack of infrastructural support within the courts, for example no computers in many of the offices, no access to computer software or relevant programmes, and a lack of other fundamental resources, such as office space and furniture²⁶⁷. These working conditions, compounded with a heavy workload, decrease staff morale thus directly impacting on the service provided by court staff to maintenance complainants.

The courts are generally under-resourced and understaffed. There are further no resources to provide temporary staff and there is a severe lack of basic resources such as paper, pens, forms and photocopying facilities. Overall the working environment of the maintenance staff in general is often such where offices have no external windows, only entrance/exit filled with a continual stream of people waiting services²⁶⁸.

²⁶⁵Items 4.2.10; 4.2.12; 4.2.51.

²⁶⁶Budlender & Moyo (note 2 above) 45.

²⁶⁷Singh (note 6 above) 146.

²⁶⁸Budlender & Moyo (note 2 above) 91.

4.2.2 Application

4.2.2.1 Shift of the burden of proof

The impact of the shift of the burden of proof of lack of means from the accused to the prosecution in a maintenance matter is that, should the accused in a criminal maintenance application plead lack of means as a defence to non-compliance with an existing maintenance order, the complainant is now reliant upon the maintenance investigator to establish whether the accused is in fact telling the truth and has a valid defence. This places additional strain on the already overworked maintenance investigator, again reducing the likelihood of a quality and thorough investigation in favour of the complainant²⁶⁹.

4.2.2.2 Conversion of criminal procedure into an arrears enquiry²⁷⁰

The ability of a maintenance court to convert criminal maintenance proceedings into an arrears enquiry in terms of Section 40(2) of the 1998 Act allows the court to look into the accused's changed circumstances (financial or otherwise) in order to verify the accused's defence. There is however widespread abuse of this change in proceedings and therefore weighty reliance is once more placed upon the maintenance investigator to investigate the matter. This is problematic in that difficulties are experienced in the tracing, locating, arresting of the defendant as well as and arranging a date for the accused to appear before court. These issues tend to draw the process out over several months to the detriment of the complainant and the minor children.

²⁶⁹Ibid.

²⁷⁰Maintenance Act (1998) Section 40(2).

4.2.2.3 Documentation to be completed

Upon laying a complaint for maintenance complainants are required to complete lengthy documentation. All the forms to be completed are written in English and Afrikaans²⁷¹. No forms are available in any African language²⁷². Singh, in a study specific to the Pietermaritzburg area, highlighted the fact that the majority of women seeking maintenance relief cannot read or write either English or Afrikaans and no accommodation is made for illiterate users²⁷³. Forms are often so complex that even educated court users have difficulty completing and understanding them. This finding is consistent with the results of my study conducted in the Eastern Cape where the majority of complainants and defendants were Xhosa speaking.

Even for those able to speak and read English and Afrikaans the forms are cumbersome, complicated and have repeated requests for the same information. Of the 350 interviewees who completed my questionnaire approximately 223 interviewees had completed some form of documentation relating to their matter. Of these, approximately 55% had been assisted by court staff as they were unable to complete the documentation themselves (refer to **Annexures 4.1(b)** and **4.1(c)** hereto).

These findings confirm Singh's view that as a result of the language barrier complainants cannot adequately complete the necessary documentation on their own and it is necessary for maintenance court clerks and officers to assist each complainant in completing the forms, which is time consuming and a waste of resources that should be applied elsewhere²⁷⁴.

It therefore is imperative that it be incumbent upon government to redraft forms in indigenous languages so as to lift the burden of

²⁷¹Budlender & Moyo (note 2 above) 91.

²⁷²Ibid 41.

²⁷³Mamashela (note 26 above) 600 - 603; Singh (note 6 above) 144 -145; Ibid 41.

²⁷⁴Ibid 144 -145; Ibid 41; 91.

completion of the required documentation from the court staff and onto the complainant²⁷⁵.

Interviewees confirmed that they a) had no idea what documentation to fill out and how to fill it out; b) that they were given no clear instructions regarding the documentation and c) that their forms are misplaced with the file and have to be completed over and over again (refer to **Annexure 4.2** hereto²⁷⁶).

4.2.2.4 Location of maintenance courts and court resources

The maintenance court tends not to be given priority and is often located in secluded parts of the court building, making the court itself inaccessible to the public²⁷⁷. Further the courts generally have insufficient waiting and consulting rooms, which are crowded²⁷⁸.

In my study however it is clear that the majority of parties to maintenance proceedings be they complainants or defendants were able to locate the maintenance court with ease.

In response to the question "where you easily able to locate the maintenance court?" of the 280 interviewees to respond, 85% thereof felt that they were able to locate the maintenance court with ease (refer to **Annexure 4.1(d)** hereto).

In addition to being inaccessible, De Jong's study found that the court waiting rooms to uncomfortably equipped or furnished²⁷⁹.

4.2.2.5 Inconsistent application of the law²⁸⁰

As there are no regulations or guidelines available as to the correct application of maintenance law those dealing with a maintenance

²⁷⁵Ibid 144 - 145.

²⁷⁶Items 4.2.26 and 4.2.126

²⁷⁷De Jong (note 98 above) 605.

²⁷⁸Budlender & Moyo (note 2 above) 65.

²⁷⁹De Jong (note 98 above) 605.

²⁸⁰Law Society of South Africa (note 105 above) 8-10.

matter, particularly the maintenance officers and presiding officers, exercise a discretion in respect of the application of the law. As a result the law is inconsistently applied throughout maintenance courts around the country²⁸¹. On the part of an attorney assisting either party in a maintenance matter, the unpredictability of proceedings makes it difficult to give one's clients a clear indication of the expected outcome in their matter.

4.2.2.6 Necessity and affordability of a legal representative

*"...justice is only available to the rich...the court experience is disempowering to women and the quality of relief granted is often compromised. The absence of quality legal assistance negates women's access to justice."*²⁸²

Shereen W Mills

As a result of the plethora of problems addressed herein, from the inability to understand and complete forms, to the attitudes of the staff towards complainants and maintenance matters, as well as the numerous postponements, many complainants feel the need to appoint a legal representative to assist them with the maintenance process despite the fact that in most instances they cannot afford an attorney's fees²⁸³. Legal Aid further does not assist in maintenance matters leaving complainants with very few options when seeking legal guidance in a maintenance claim²⁸⁴.

Of the 346 interviewees that answered the question "are you self-represented?" approximately 75% were unrepresented, while 25% had legal assistance of some sort. 92% of all parties interviewed advised that they could not in fact afford the assistance of an attorney, even in instances where they had obtained the services of an attorney. 72% of

²⁸¹Grieves (note 1 above) 17-20.

²⁸²Budlender & Moyo (note 2 above) 48; 49.

²⁸³Law Society of South Africa (note 105 above) 8-10.

²⁸⁴Budlender & Moyo (note 2 above) 66.

those answering the questionnaire had either heard of or applied to legal aid for assistance (refer to **Annexures 4.1(e); 4.1(f) and 4.1(g)** hereto).

When asked whether or not the interviewees felt that their overall maintenance experience would be improved by the assistance of an attorney 85% of the interviewees felt that the experience would be greatly improved with an attorney by their side (refer to **Annexure 4.1(h)** hereto).

Interviewees raised the issue of being unable to afford an attorney at all despite being extremely unhappy with the service itself and also the ongoing postponements and delays (refer to annexure 4.2 hereto²⁸⁵).

4.2.2.7 Best interests of the child principle

As a result of the general lack of status afforded to maintenance matters and the problems fraught therein, the best interests of the child are often overlooked by court staff that are simply "going through the motions". This lack of "priority" given to children's rights is in direct contravention of the constitutional obligation created in Section 28 thereof, and needs to be urgently redressed²⁸⁶.

Many female interviewees felt that women and children are not assisted properly and that the existing system does not work in favour of the children. Many complained that the process was in fact about "who you know" at court, often resulting in many women giving up the fight for maintenance (refer to **Annexure 4.2** hereto²⁸⁷).

4.2.2.8 Subpoenas not served by sheriffs and police

A common problem throughout the South African maintenance courts is that more often than not subpoenas for the defendant to appear in

²⁸⁵Item 4.2.8.

²⁸⁶Singh (note 6 above) 146.

²⁸⁷Items 4.2.18; 4.2.45 and 4.2.51

court are not served on time.²⁸⁸ This is a result of two issues, namely a shortage of appointed sheriffs, and secondly, problems encountered with police and sheriff support when it comes to the service of subpoenas. Both the sheriff's offices and the South African Police Service have their own logistical and operational problems when it comes to service of subpoenas, including staff shortages²⁸⁹.

Research shows that the majority of the complainants who need assistance in service of the subpoenas from the police specifically felt that they were not protected in the process of claiming maintenance. The regularity of non-attendance of men at court gave the complainants the impression that the police did not treat serving subpoenas as an important aspect of policing, and as a result many complainants believe the criminal justice system has failed them and they experience a loss of faith in the system²⁹⁰. This is compounded by the evident corruption found in the many police stations where the police officers tasked with the duty of service of subpoenas befriend the defendant and accordingly refuse to serve the subpoena.

In many instances both the police officers and sheriffs are unable to locate the defendant. It is further difficult to trace defendants over provincial boundaries and in rural areas often making subpoena service impossible²⁹¹. The sheriff's service has been documented to be slow while the rates of service are poor, resulting in a number of returns of non-service or false returns of service²⁹².

The additional complaints were raised by interviewees in the qualitative research area of my study (refer to **Annexure 4.2** hereto²⁹³): -

- a) it proved very difficult to get a defendant to court;

²⁸⁸Law Society of South Africa (note 105 above) 17; Singh (note 6 above) 146; Budlender & Moyo (note 2 above) 98.

²⁸⁹Grieves (note 1 above) 20.

²⁹⁰Singh (note 6 above) 147-149.

²⁹¹De Jong (note 98 above) 602 - 604.

²⁹²Budlender & Moyo (note 2 above) 20.

²⁹³Items 4.2.4; 4.2.5; 4.2.9; 4.2.12; 4.2.88; 4.2.95; 4.2.131; 4.2.132 and 4.2.133.

- b) when a defendant lives out of town they often do not come, using the excuse that the service of the subpoenas was on too short notice;
- c) defendants are hard to trace when living in a different city;
- d) defendants are simply "unavailable" and are granted numerous postponements;
- e) sheriffs and police are often unable to deliver subpoenas on defendants as defendants are notoriously difficult to trace in rural areas and informal settlements, particularly where no one offers assistance regarding knowledge of the defendant's whereabouts to the police and sheriffs;
- f) the non-service of subpoenas results in complainants having to start process over and over.

4.2.2.9

Long waiting hours at court and numerous postponements

There appears to be a tendency for parties (in many instances both the complainant and the defendant) to not attend court on the date set for the enquiry, without providing any reason for the non-attendance, resulting in either the postponement of the matter, or in the case where neither party is present, the matter being struck from the roll (this may, in many instances be due to the non-service of subpoenas as discussed in 4.2.2.10 above)²⁹⁴. In this instance the complainant is required to approach the maintenance court to start the process afresh, thus delaying the matter substantially, and wasting valuable staff resources²⁹⁵. These delays have a very real and detrimental impact on the children and families needing maintenance.

²⁹⁴Budlender & Moyo (note 2 above) 98.

²⁹⁵Law Society of South Africa (note 105 above) 8-10; Singh (note 6 above) 149.

Further, it often occurs that the defendant to the proceedings uses delaying tactics, for instance denying paternity of the children, thus necessitating a postponement so that the parties may undergo a paternity test. In these instances complainants often feel that they keep returning to court without obtaining any sort of relief²⁹⁶.

Studies show that cases in the maintenance court on average take over a year to be finalised. A contributing factor to the delays is the difficulty experienced by the maintenance officers and investigators in obtaining the necessary documentation for the finalisation of the matter. Often parties simply fail to bring documentation to court, thus necessitating a further postponement until either such documentation is provided, alternatively until the maintenance investigator can complete an investigation in respect thereof²⁹⁷. There is no provision made for the costs of a postponement in the 1998 Act, which costs order would normally provide a constructive "punishment" or "deterrent" against the party causing the delay. As a result parties are able to draw out maintenance matters unfettered, creating extreme hardships for the complainants and children concerned.

The result of postponements on women and children is often a reduction of annual leave days owed to the female complainant, a reduction of chances to advance career-wise as a result of regular monthly absenteeism; a reduction of income if annual leave has been exhausted and in some instances termination of employment by an employer as work is regularly missed in order to attend court²⁹⁸.

In the study conducted by myself it was confirmed that complainants experienced extremely lengthy waiting times before even being assisted at court. These delays resulted in parties to the proceedings being late for work, alternatively not being able to attend work at all on the day they would attend court, thus losing valuable income. Parties

²⁹⁶Budlender & Moyo (note 2 above) 69.

²⁹⁷Grieves (note 1 above) 17-20; De Jong (note 98 above) 602-604.

²⁹⁸Budlender & Moyo (note 2 above) 101.

complained that court never starts on time and if their matter is not seen to during the day they are simply told to return to court the following day. Complainants further raised the issue that it was months before a trial date is allocated, leaving the complainant without any relief in the interim.

My study found that of those interviewed 61% (210 interviewees) advised that they were attending court for a subsequent attendance i.e. this was not their first attendance at maintenance court. 15% of those 210 interviewees advised that they were attending the court for the 8th time or more, 37% were on their second attendance; while 48% found themselves between the 2nd and 7th court appearance (refer to **Annexures 4.1(i)** and **4.1(j)** hereto).

My results confirm that parties are enduring long waiting hours while waiting for assistance in the maintenance courts. Interviewees were recorded to have waited from anywhere between 2 and 8 hours per attendance. The majority of interviewees seem to have waited on average between 1 and 4 hours per attendance (refer to **Annexure 4(k)** hereto). It appears from my study that in order to secure only the first order in favour of a complainant the majority of complainants had to attend court anywhere between 2 and 4 occasions (refer to **Annexures 4.1(l)** hereto).

Further my results indicate that of the 350 interviewees only 125 were gainfully employed. In respect of the employed interviewees the majority indicated that they would miss between 1 and 7 hours of work per attendance, for which they would most likely not be compensated (refer to **Annexures 4.1(m)** and **4.1(n)** hereto).

Interviewees identified the following areas of concern when asked to comment on the service provided by the maintenance court (refer to **Annexure 4.2** hereto²⁹⁹):-

- a) waiting is an on-going problem, particularly whilst missing work which results in a loss of income while one sits at court;
- b) waiting hours are extremely long;
- c) the procedure is painstakingly slow;
- d) there are numerous postponements and delays;
- e) it takes months to be allocated a trial date;
- f) the court never starts on time;
- g) one is often required to return day after day, sometimes ending up spending a whole week at court.

4.2.2.10

Poor file administration

A common complaint amongst complainants and defendants is the general court staff tardiness with regard to document and file maintenance and security. Often files are lost in the administration system without any proper explanation from the maintenance officers resulting in parties continuously returning to court to see if their file has been found. There are also many instances wherein complainants find that despite the file being available nothing has been done in their file and they are required to keep coming back to court until something is done³⁰⁰.

Interviewees in my study confirmed that files are frequently lost and missing (refer to **Annexure 4.2** hereof³⁰¹).

²⁹⁹Items 4.22; 4.2.3; 4.2.7; 4.2.8; 4.2.9; 4.2.10; 4.2.12; 4.2.16; 4.2.17; 4.2.33; 4.2.35; 4.2.36; 4.2.47; 4.2.50; 4.2.51; 4.2.55; 4.2.55; 4.2.58; 4.2.60; 4.2.75; 4.2.78; 4.2.82; 4.2.84; 4.2.85; 4.2.86; 4.2.94; 4.2.98; 4.2.115; 4.2.120; 4.2.129 and 4.2.130.

³⁰⁰Law Society of South Africa (note 105 above) 8-10; Singh (note 6 above) 147-149; Budlender & Moyo (note 2 above) 44; 97.

³⁰¹Items 4.2.25; 4.2.26 and 4.2.107

4.2.2.11

Feeling by complainants of non-protection of the law

A recurrent problem identified in my research was an absolute lack of awareness on the part of both the complainant and the defendant of any aspect of the maintenance process, procedure and their rights. It was clear that the parties that I interviewed were generally of the view that the court had not adequately assisted them in informing them of their rights. Complainants and defendants felt left "in the dark" and completely at the mercy of the court staff. It is for this reason that many complainants and defendants employ attorneys even though they cannot afford same³⁰².

In addition Khunou³⁰³ argues that there is a feeling amongst male parties to maintenance proceedings that the law favours women, and many men raise arguments regarding equality when faced with a maintenance claim. Many men misunderstand the ratio division of maintenance, particularly with regard to what they believe to be an equal distribution of maintenance expenses regardless of either parties earning capacity and income³⁰⁴.

Interviewees raised the following concerns relating to their feeling of protection by the law, and those that implement it in the maintenance courts (refer to **Annexure 4.2** hereto³⁰⁵):-

- a) interviewees felt that they required an explanation of their rights and the court procedure;
- b) interviewees indicated an overall lack of understanding of the whole maintenance process;
- c) they felt entirely left in the dark and very confused;

³⁰²Wamhoff & Burman (note 65 above) 160.

³⁰³Budlender & Moyo (note 2 above) 81.

³⁰⁴Ibid.

³⁰⁵Items 4.2.9; 4.2.10; 4.2.19; 4.2.24; 4.2.25; 2.2.26; 4.2.30; 4.2.36; 4.2.49; 4.2.51; 4.2.52; 4.2.55; 4.2.57; 4.2.64; 4.2.97; 4.2.114; 4.2.115; 4.2.118 and 4.2.130.

- d) there are discrepancies between the procedure that is explained to the court users and the procedure actually followed by the court staff;
- e) male interviewees regularly raised complaints that they felt particularly prejudiced and victimised in maintenance court, and as if they are being punished by the female court staff;
- f) many court users felt undermined by staff and magistrates.

4.2.2.12 Multiple families and children often involved

When calculating what constitutes a reasonable maintenance claim it has been noted that in many instances there are multifamily households involved in a claim. For example, a defendant may have more than one child with more than one complainant. This situation will dramatically change the amount or value of resources available to each child for whom maintenance is claimed. The concept of multiple families is often ignored by the court, to the detriment of the defendant and any additional children he may have who are not before court³⁰⁶.

4.2.3 Orders

4.2.3.1 Provisions for future maintenance not applied

Perhaps one of the most concerning areas of neglect by the maintenance court is that despite case law confirming the existence and application of same, very few officers of the court make provisions for future maintenance when addressing a complaint's claim. It is suggested that a court order payment into the Guardians Fund in respect of future maintenance. Although theoretically this seems a novel and practical way to address the issue of future maintenance, the master's

³⁰⁶Grieves (note 1 above) 17-20.

office is faced with challenges of its own including a lack of resources and is not wholly equipped to deal with maintenance³⁰⁷.

A further point of concern is that even without making use of the Guardian Fund route, the courts are failing to use other enforcement mechanisms available to the court to ensure future maintenance must be paid.

4.2.3.2 Failure by magistrates to issue orders for increase, or warrants enforcing perjury

Despite the law providing enforcement procedure against troublesome and non-paying defendants, magistrates often fail to make use of such mechanisms. The most common enforcement mechanisms that are ignored by magistrates appear to be the laws enforcing perjury, the granting of warrants of execution and blacklisting of the maintenance defaulter³⁰⁸.

4.2.3.3 Access to loan funding ignored

The option of loan funding by the defendant in order to make payment of maintenance is available to the court when considering an order for maintenance but is often ignored, most likely as it is difficult for a court to calculate the amount of loan funding a particular individual could reasonably support³⁰⁹.

4.2.3.4 Poor division in responsibility and allocation of needs

When making an order there is the danger of the court approaching the matter on the basis that the custodian parent should be paid what is needed to “come out at the end of the month”. This is an incorrect

³⁰⁷Law Society of South Africa (note 105 above) 13-14.

³⁰⁸Ibid 8-10; Budlender & Moyo (note 2 above) 98.

³⁰⁹Grieves (note 1 above) 17-20.

approach usually resulting in the income of the custodian parent being diminished entirely before the non-custodian parent is required to contribute to the maintenance of a child. The correct approach to follow is to firstly identify the needs of the child and then to divide those needs between the parents according to their means. Further the period for which the non-custodian parent takes care of the children, for instance on access weekends and holidays, is often disregarded in a maintenance enquiry and is not given the weight it should be given³¹⁰.

A problem faced by the courts is that often, as a result of both parties being poverty stricken, there is no way of fairly dividing responsibility between parents who simply do not have the means to support a child.

In instances where the needs of a child exceed the means of the parents, the custodian parent will bear a disproportionate share of the maintenance responsibility by virtue of the fact that the minor child resides with him or her. This is unfortunate but often not preventable. Where a court finds that the non-custodian parent has insufficient income to allow an order to be made against him or her, the entire obligation is placed on the custodian parent by default and there is no division of responsibility³¹¹.

Another incorrect approach that courts have applied is a preference of the defendants' debts over the obligation of the defendant to pay maintenance. This view ensures that women's and children's rights are not adequately enforced by the court as maintenance itself should be a preferent claim, embodying the child's best interests³¹².

³¹⁰Ibid 17-20.

³¹¹Ibid.

³¹²Ibid.

4.2.3.5 Transport costs

In a maintenance enquiry a defendant may request payment of transport costs as an order, to be paid by the state. This option is not available to the complainants³¹³.

4.2.4 Enforcement

4.2.4.1 General problems manifest in order enforcement

As a result of high levels of poverty among most of the South African population it is regularly found that a substantial proportion of those obliged to pay maintenance are impecunious thus rendering any maintenance order against them ineffective³¹⁴. As a result there are many difficulties inherent in imposing an appropriate punishment for maintenance defaulters.

A criminal sanction of imprisonment is available where a maintenance defaulter (accused) has failed to pay in terms of an existing order. This mechanism however is rife with its own consequences. The court is charged with the duty of finding an appropriate sentence that punishes the accused for non-payment without at the same time "*killing the goose that lays the golden egg*" for the dependants. There is a fine line between punishment of the accused and the diminution of the earning capacity of the accused that inevitably accompanies imprisonment³¹⁵. A fine is an alternative option for enforcement; however the accused should not be fined to the extent that the ability to make maintenance payments is lost as a result thereof. It is clear that criminal sanctions, although punishing the maintenance defaulter, often "punish" the complainants and children in need of maintenance. Further it is documented that criminal convictions of defaulters is low, whilst

³¹³Budlender & Moyo (note 2 above) 98.

³¹⁴Grieves (note 1 above) 20.

³¹⁵Carnelley & Hoctor (note 74 above) 203; *S v Magagula* 2001 2 SACR 123 (T) 82.

arrears claims remain high³¹⁶, thus indicating the reluctance of the courts to criminally sanction maintenance defaulters.

Courts may order the enforcement of a maintenance order by way of an emoluments attachment order. This enforcement mechanism however becomes difficult to implement as there is widespread reluctance by employers generally to comply with such order as the order imposes on them additional administration by staff members as well as certain costs³¹⁷.

Further it appears from the orders that are currently being granted in South African maintenance courts that many maintenance officers and magistrates have little idea how to determine quantum (i.e. what is reasonable in the circumstances) when it comes to maintenance. Often very little consideration is given to a proper calculation of an amount to be paid by the defendant to the complainant. Maintenance orders are often granted based on the defendant's ability to pay, and not the actual needs of the child. It appears that the theoretical principles of maintenance law enforcement in South Africa have little application outside of the High Court³¹⁸.

My qualitative research results (refer to **Annexure 4.2** hereto³¹⁹) confirm that problems relating to enforcement regularly arise, and that there are problems with both the enforcement of an order and the need to hold defendants accountable for their non-payment.

4.2.4.2

Warrants of execution

A court may order that an attachment may be made of the defaulting parties' property in respect of arrear and future maintenance. The problem with this remedy however is that the attachment and storage costs incurred herein are borne by complainant. In most instances the

³¹⁶Law Society of South Africa (note 105 above) 8-10; Grieves (note 1 above) 17-20.

³¹⁷Mamashela (note 26 above) 603 - 604.

³¹⁸Grieves (note 1 above) 20.

³¹⁹Items 4.2.38 and 4.2.47.

complainant is living hand to mouth and has no additional income to cover the costs of execution.

A further difficulty in proceeding with an execution of the defendant's goods is that often there is confusion as to ownership of the property under attachment and often the defendant does all that is possible to deliberately frustrate the attachment of property³²⁰.

4.2.4.3 Payments made into court

Payment of maintenance monies into court by the defendant for collection by the complainant has created its own difficulties. In general capturing the payment information takes too long and is often tedious and full of mistakes. Once the capturing has been done, there is a clearance period of 14 days before the complainant can collect the maintenance payment. This is detrimental to the complainant who is relying on the maintenance money as a source of income, and ultimately prejudices the child³²¹.

4.2.4.4 Emoluments Attachment Orders

In terms of the 1998 Act a court can issue an order that instructs the employer of the defaulting debtor to pay maintenance on his behalf from the employee's salary³²². Despite this being an innovative approach to arrear maintenance collection, the Act has not substantially improved the situation of women and children as anticipated³²³. The implementation of the Emoluments Attachment Order (EAO) is poor and there is much confusion surrounding the orders themselves as well as the implementation thereof³²⁴.

³²⁰Mamashela (note 80 above) 605.

³²¹Law Society of South Africa (note 105 above) 8-10.

³²²Budlender & Moyo (note 2 above) 57; Maintenance Act (1998) Section 26.

³²³Ibid 57.

³²⁴Ibid 52.

The basis of payment by way of emoluments is that the order takes first priority for the employer over any order of court requiring payments to be made from the emoluments due to the person against whom that maintenance order was made. Accordingly failure to make payment in terms of a maintenance order is therefore to be enforced against the employer³²⁵.

EAO's are failing as a remedy as a result of lack of co-operation from employers of maintenance defaulters in implementing the orders. Many employers delay the implementation of salary deductions, and usually charge administration charges to the beneficiary, not the employee, thus diminishing the complaints claim³²⁶. It is argued that the administration costs should be for the debtors account.

There have been recorded instances where employees have been dismissed by an employer as a result of an EAO against them, leaving the debtor with no means of paying maintenance at all, resulting in the family reliant on maintenance income being in a worse off position than before. It has also become common amongst employers to change a debtor's employment status from employee to "contracted worker" and on that basis refuse to enforce the EAO. Debtors further have been known to resign from employment with the specific intention of avoiding the payment of maintenance³²⁷.

Employers who have more than one emoluments attachment to fulfil, such as institutions like the South African Police Services, make lump sum payments into court in respect of all outstanding orders, and usually without the correct references, creating additional administration for the court staff capturing the payments. This results in a delay in the payment reaching the complainant concerned³²⁸.

³²⁵Ibid 56; Maintenance Act (1998) Section 29(3) and 29(4).

³²⁶De Jong (note 105 above) 602 - 604.

³²⁷Sigwadi (note 66 above) 340.

³²⁸Budlender & Moyo (note 2 above) 62.

There is a tendency for employers upon whom EAOs have been served to fail to appear in court when requested, resulting in further delays and postponements of maintenance matters.

A critical factor which determines whether an EAO is used is whether the defendant is formally employed or not³²⁹. Additional drawbacks are experienced by the court and the complainant in implementing an EAO in instances where the debtor is self-employed. It is then fairly difficult to firstly ascertain his actual earnings and secondly to overcome the reluctance of the defendant to enforce a garnishee against him or herself³³⁰. In these instances it is generally preferred by the court to make use of other enforcement avenues such as warrants of arrest, summons or subpoenas³³¹.

Missing information relating to the defendant, such as identity numbers and work and residential addresses further determine whether or not an EAO can in fact be issued³³². Further additional reasons for the EAO not reaching the defendant's employ include change of employer by the defendant, retirement, dismissal, contract work and resignation, as well as the orders becoming "lost" when served at the office of the employer³³³.

The courts do currently make use of EAOs but do so to a limited extent, thus making such order a rarer instrument in enforcement³³⁴.

4.2.4.5 Troublesome debtors/defendants³³⁵

Regardless of the order made by any maintenance court, often the court and complainants are faced with a "troublesome defendant". Often the

³²⁹Ibid.

³³⁰Sigwadi (note 66 above) 340.

³³¹Budlender & Moyo (note 2 above) 62.

³³²Ibid 63.

³³³Ibid.

³³⁴Ibid 62.

³³⁵De Jong (note 98 above) 602-604; Grieves (note 1 above) 20.

court staff are faced with a degree of resistance from the defendant which makes the implementation of any maintenance order difficult.

Further given the lack of formal employment amongst a large majority of South Africans³³⁶, problems, such as unemployment of the defendant and the defendant failing to own any valuable assets available for attachment, hamper the enforcement process. In many instances the court is faced with a defendant who has poorly managed the income he or she has received and in many cases is over-indebted. In these instances very little can be done to secure and enforce the complainant's claim for maintenance.

Literature indicates that in the case of many male defendants it is not necessarily the opposition to the obligation of looking after the child that creates difficulties when it comes to maintenance payments. Generally it is rather the opposition to the fact that maintenance matters are resolved through the courts in a way that involves the female complainant obtaining control over the defendant's money and the imposition of such duties without corresponding rights over the children and women³³⁷. In many instances in the African culture, and specifically in the Xhosa culture in the Eastern Cape, women who take their maintenance matters to court are seen as being disrespectful and demeaning of cultural ways³³⁸. Interviewees in my study remarked that where a defendant is self-employed it is impossible to "catch" him or her (refer **Annexure 4.2** hereof³³⁹).

4.3 Conclusion

Despite the aforesaid criticisms a surprisingly high number of interviewees in my study found the service provided in the maintenance courts satisfactory (refer to **Annexure 4.1(o)** hereto). It seems that all is not lost for the maintenance court system and that there are staff members within the system that are endeavouring to provide the best service they can give the circumstances.

³³⁶Ibid 17-20.

³³⁷Budlender & Moyo (note 2 above) 80.

³³⁸Ibid 81.

³³⁹Item 4.2.70.

However, many of the problems raised in literature were confirmed by my study and a suitable solution to these problems is imperative. Further concerns experienced in my personal capacity are addressed in Chapter 5 hereunder. Potential solutions to the problems identified in this chapter and Chapter 5 are dealt with in Chapter 6.

5 Chapter 5: Additional criticisms highlighted through research (and personal experience)

Upon evaluation of my research it became clear that certain issues were raised by the interviewees as problematic, and although these issues may have overlapped with a few of the issues raised in the literature, deserve reiteration. In addition thereto, during my period as acting magistrate in the East London magistrate's court, certain difficulties came to my attention whilst presiding over the maintenance court. These issues and difficulties are set out hereunder:-

5.1 Additional problems experienced by complainants and defendants as identified by research:-

5.1.1 No assistance in enforcement of orders or Emoluments Attachment Orders

It was felt by certain interviewees that the court staff generally didn't encourage emoluments attachment orders in respect of maintenance defaulters and failed to use the remedies available to them in terms of the 1998 Act to help enforce existing orders (refer to 4.2.37 of **Annexure 4.2** and paragraph 4.2.4.4.).

5.1.2 Warrants of arrest not enforced

Many interviewees complained that subpoenas issued and warrants of arrest authorised against a defendant who is "out of town" are never implemented. The sheriffs regularly fail to serve the subpoena and similarly the defendants are seldom arrested (refer to 4.2.37 and 4.2.44 of **Annexure 4.2** and paragraphs 4.2.2.8 and 4.2.4).

5.1.3 Maintenance investigations not completed

There is a general feeling of dissatisfaction from all parties regarding the office of the maintenance investigator. Certain interviewees felt that maintenance investigators are simply not doing their job and maintenance investigations are not being completed or in some case even started (refer to 4.2.70 and 4.2.12 of **Annexure 4.2** and paragraphs 4.2.1.1 and 4.2.1.5).

5.1.4 Poor court facilities

In every court that I conducted my survey common and recurring complaints were made about the location, appearance, comfort and facilities of the waiting area, offices and courts dedicated to maintenance. The complaints raised were as set out hereunder:-

- 1) no accessible clean toilets or places to change nappies (many mothers are forced to wait long hours with their children) (refer to 4.2.32 of **Annexure 4.2**);
- 2) no food available, no vending machines or a kiosk (parties are left waiting for hours with no food or drink) (refer to 4.2.12; 4.2.13 and 4.2.15 of **Annexure 4.2**);
- 3) no system of name calling leaving parties too scared to go to the toilet in case their name is called and they are not there (refer to 4.2.12 of **Annexure 4.2**);
- 4) complainants find it difficult and stressful to sit for hours in the same waiting area as defendant (refer to 4.2.12 of **Annexure 4.2**);
- 5) the waiting areas themselves are uncomfortable and in some instances they are outside where it is really cold in winter or very hot in summer (refer to 4.2.113; 4.2.116; 4.2.117;4.2.53, 4.2.60 and 4.2.29 of **Annexure 4.2**);
- 6) in some instances interviewees indicated that the maintenance court was difficult to locate within the building and the waiting area was not easily found (refer to 4.2.72 of **Annexure 4.2**);
- 7) the waiting areas were uncomfortable and dirty (refer to 4.2.129 and 4.2.130 of **Annexure 4.2**).

5.1.5 No privacy when discussing your matter

Concern was raised by the interviewees that no private area was made available to discuss the matter with the maintenance officer or investigator. The majority of offices are open plan, or have more than one clerk per office and many people are listening and coming in and out while a matter is being discussed. Parties to proceedings felt that this was undignified and embarrassing and found it difficult to discuss a sensitive matter with everyone listening (refer to 4.2.61 and 4.2.80 of **Annexure 4.2.**).

The Mills study briefly highlights the fact that court users felt that they had little privacy when dealing with their matters and were subject to further interruptions as staff members came in and out of the office whilst their matter was being dealt with. Some courts users felt that they were pressured to settle their matters or were threatened to do so³⁴⁰.

5.1.6 Cash hall payments

Many criticisms regarding the cash hall (for collection of maintenance monies) were raised, namely that the cash halls are filthy dirty and that the staff are overall very lazy and unhelpful (refer to 4.2.54 of **Annexure 4.2.**).

Complaints included late payments; non-payment and an overall rude and despondent staff who offer a poor service, if any (refer to 4.2.102; 4.2.104 and 4.2.106 of **Annexure 4.2.**). Staff have been known to lie about computers being "down" and therefore they are unable to attend to or access any payments, telling women who have travelled some distance to court to go home and come again on another day (refer to 4.2.127 of **Annexure 4.2.**).

Interviewees complained that they would only receive a cash payment from the court after the 15th of the month even though the payment had been deducted from the defendant's salary on the 1st of each month (refer to **Annexure 4.2.** hereof³⁴¹).

³⁴⁰Budlender & Moyo (note 2 above) 42.

³⁴¹Items 4.2.73 and 4.2.83

5.1.7 Overall feeling that the maintenance "service" provided was dissatisfactory

Some interviewees were of the opinion that there was in fact no point in commenting on the court system as "nothing ever changes" (refer to 4.2.40 of **Annexure 4.2**). Further interviewees adopted a subservient approach advising that you need to "go with the flow" as there is nothing else you can do (refer to 4.2.46; 4.2.92; 4.2.96; 4.2.99 and 4.2.112 of **Annexure 4.2**). It appears from my research that overall a generally dissatisfied and despondent public sits waiting daily for assistance of some sort in the maintenance court.

5.2 Additional problems experienced by me identified during an acting position as magistrate in the East London Magistrate's Court:-

For a period of 3 months in 2012 I acted as an acting civil magistrate in the East London Magistrate's court. During this time I attended to the overflow of maintenance matters on a daily basis. My experience was hampered by the following obstacles I encountered, which issues had a direct impact on the services that I was able to provide in my capacity as magistrate.

5.2.1 No working plug point in office or available computer

The office allocated to myself had no working plug point; therefore I was unable to plug in my laptop. I further was not provided access to the existing computer in the office as I was not permanent staff. Despite reporting the issues weekly not once during my 3 month appointment was my request even acknowledged, let alone attended to. I managed to run an extension cord from my courtroom to my office and was then able to use my laptop to write judgments.

5.2.2 No lights in courtroom

For the duration of my acting appointment the court in which I presided had no lighting whatsoever, making note taking and reading very difficult.

5.2.3 No available stenographers to hear maintenance matters despite having an available court and magistrate

In an attempt to relieve the pressure in the maintenance court, both the senior civil magistrate and I made ourselves and our court available for the maintenance overflow. When we approached the court manager to request that the overflow in the maintenance court be directed to our court, the court manager refused this request on the basis that although we were available there were not sufficient court stenographers available to record the proceedings. The senior civil magistrate and I simply became a "wasted resource" which if employed would have made a significant difference in substantially alleviating the number of matters on the maintenance roll daily.

5.2.4 Postponements for lack of service

In many maintenance matters before me, specifically on the first court date, it became clear that the sheriff regularly fails to serve subpoenas on time and in many instances, where there is service, the service is not "personal" resulting in the need to reserve the subpoena. The postponements relating from no or improper service were regular, inconvenient and costly.

5.2.5 Maintenance officers untrained to present matters at court

During formal maintenance enquiries it was evident that the maintenance officers had limited skills in presenting the matter to the court and also in leading evidence and cross examination. The quality of evidence led and cross-examination has a direct impact on the information placed before the court, and therefore on the judgment ultimately made by the presiding officer. It is clear that the maintenance officers in the East London magistrate's court need extensive training in this area.

5.2.6 Maintenance officers failing to use available remedies when negotiating a consent

When parties who had entered into a consent order in respect of maintenance began regularly appearing before me it became evident that the maintenance officers guiding the parties in settlement employed very limited application of the law available to the parties. The standard order that would come before me, regardless of income, employment, financial stability or the children's needs, was a monthly cash sum of "x" plus a purchase of clothing in December and June respectively. There was little or no variety to any of the orders being suggested by the maintenance officers, and specific items such as medical aid or education were seldom mentioned. Garnishees and escalation clauses were ignored altogether. These "weak" and "generic" orders result in the complainant returning yearly to amend the order and claim an increase. In my opinion should the maintenance officers be trained to negotiate an order more suited to the circumstances of each party and with the intention of the order being long term, there would be a reduction in returns to the maintenance court, thus lightening the load of the court.

The aforesaid identified problems and complainants, as well as the complainants and problems set out in chapter 4 hereinbefore indicate a need for change in almost all areas of the maintenance court. In chapter 6 below I shall consider solutions and recommendations for change in an attempt to identify a way forward.

6 Chapter 6: Solutions/Recommendations

“Koloji ya basadi ga e duma e a tsamay – women’s issues are being recognised and given a priority – women brought down the apartheid system and same will apply to maintenance defaulters”³⁴²

Ms Winnie Madikizela-Mandela

6.1 Documented solutions/recommendations

As expounded upon in this dissertation both the 1963 and 1998 Act are laden with its own flaws and hurdles regarding the implementation and application thereof, the content of which is set out in chapters 3 and 4 hereinbefore.

6.1.1 Reforms suggested prior to the enactment of the 1998 Act

As a result of the difficulties and problems identified in the 1963 Act, prior to the enactment of the 1998 Act, certain suggestions for reform of the then existing maintenance law were made, as set out in more detail hereunder.

6.1.1.1 Replacement of the judicial system with an administrative or other system

Whilst in place the 1963 Act was reviewed in consideration of comparative international law, with particular consideration being made to the possible replacement of the existing judicial procedure applied in maintenance courts³⁴³ with an administrative or other system³⁴⁴.

There was (and still is) universal acknowledgment that there is a failure to ensure proper functioning of the maintenance courts in South Africa and that low awards and uncertainty in predicting maintenance amounts are inherent to a system where the determination of such amounts are left to the discretion of the courts. The cumbersome court processes, poor court administration and inaccessibility of these processes are common to judicial procedures worldwide³⁴⁵.

³⁴²M Nendauni “Bringing Justice to the Communities” *Justice Today* (2006) Vol 3; 12-13.

³⁴³SA Law Commission (note 4 above) 23 - 30.

³⁴⁴This suggestion has been considered following the enactment of the 1998 Act as well.

³⁴⁵SA Law Commission (note 4 above) 27.

Australia's "Child Support Scheme" was considered an alternative to the South African judicial maintenance system. This particular scheme provides for:-

- a) a procedure which allows the determination of the extent of person's liability to pay child support;
- b) an avenue for collection and dissemination of child support payments to custodian parents through the Australian Department of Social Security.

Payments are collected in the same manner as one would collect tax and are disbursed to custodial parents accordingly.

Unlike the South African system, in this system there is no room for the court in respect of the determination of payments. The court can only enter the procedure in order to review the assessment of a parent's duty of support on "special grounds". The aim of this system is to relieve the burden placed in custodial parents to follow the judicial procedures³⁴⁶.

The United Kingdom's 1991 Child Support Act was also taken into consideration when reviewing the 1963 Act. This UK Act makes provision for an administrative procedure to determine maintenance payments by means of an assessment, which assessment is to be done by child support officers, outside of the court system. The courts are precluded from making, varying or reviving any maintenance order. Collection of payment is made by the Secretary of State who is empowered, if necessary, to apply to the appropriate court for certain "liability" orders as circumstances permit³⁴⁷

The core problem with the removal of judicial discretion (taking maintenance out of the hands of the courts) is that matters will no longer remain individualized and be determined on the merit of each case. The danger of the application of a "general formula" to all matters is that such formula cannot provide for every contingency. The flipside

³⁴⁶Ibid 23 – 26; Clarke (note 25 above) 3.

³⁴⁷Ibid 26; Ibid 3.

however is that individual consideration of each matter by judicial authorities does not always ensure the adequate or reasonable reward amount. In order to implement such a system in South Africa, it would seem that it would be necessary to design a formula for determination based on the unique circumstances of South African society³⁴⁸ and not to simply adopt formulae utilized by other countries. "*Various countries have experimented with ways of using formulae to determine the level of maintenance. South Africa has much to learn from the experience of other countries, but their formulae are not optimal for the situation here of relatively low education of both clients and maintenance staff, and poor information sources*"³⁴⁹.

An administrative collection system similar to our South African revenue service, has been suggested for consideration and implementation. The benefit of such system is that the burden of enforcing a duty to pay maintenance is removed from the person entitled to receive payments and the obligation is placed on a body such as the state, making the success rate of received maintenance payments by the claimant much higher³⁵⁰.

The possibility of "Dad-Tax"³⁵¹, as implemented in the United Kingdom was raised as a potential alternative to the forum of the South African judicial system. "Dad-Tax" proposes that a tax levy be imposed on all non-custodial parents, which funds would be used to pay a form of grant to custodial parents. This deduction however makes no provision for one's duty to maintain other dependents (dependents other than children) and is very rigid in structure. Further, no provision is made for agreed maintenance payments or for individually determined amounts to suit specific circumstances and individuals.

The application of the "Dad-Tax" concept would however result in an increase in the tax burden on large portion of South African society,

³⁴⁸Ibid 27.

³⁴⁹Lund Committee on Child and Family Support (note 4 above) 48.

³⁵⁰SA Law Commission (note 4 above) 27 - 28.

³⁵¹Ibid 28.

many of whom are struggling to survive financially with the current tax deductions. Establishment and administration of the "Dad-Tax" system would further place a heavy burden on government resources and will more than likely become a target for evasion. Further the amounts to be paid out to custodial parents, plus the amounts to be spent on the administration of the system, will in all likelihood exceed the amounts received through the system by non-custodial parents³⁵². For these reasons such a system is found to be lacking in terms of potential implementation in South Africa.

6.1.1.2

Re-assessment of available human resources

It is evident from the literature that during the operation of the 1963 Act there were not enough appointed staff around South Africa to deal with all the complaints presented at maintenance courts daily (i.e. insufficient staff to deal with high volumes of cases). This problem continues whilst the 1998 Act is in operation. During the operation of the 1963 Act a core problem relating to the implementation of the Act was that Department of Justice did not have the financial resources at its disposal to increase the staff numbers in the maintenance courts. Public prosecutors were used to fill the role of the newly appointed maintenance officer in most courts. Owing to the rotation of prosecutors throughout the magistrate's court system a higher personnel turnover at maintenance courts was created, resulting in a consequent loss of continuity in maintenance matters, as many different staff members would handle a single matter throughout its duration.

As a result it became necessary to separate the office of prosecutor and maintenance officer in order to create a better motivated and more dedicated compliment of maintenance officers, as opposed to a rotating

³⁵²Clarke (note 2 above) 3.

body of prosecutors who are simply "doing time" in the maintenance court³⁵³.

6.1.1.3 Training and awareness

During the operation of the 1963 Act, it was common that, as the majority of those applying for maintenance could rarely afford legal representation, the majority of maintenance matters were handled by maintenance clerks and maintenance officers and complainants are reliant on them for the best possible management and outcome of their matter³⁵⁴. The unrepresented public were (and still are) therefore dependent on the expertise of the maintenance clerks and officers³⁵⁵.

Theoretically maintenance officers should be trained prosecutors while maintenance clerks form solely an administrative function. In reality however maintenance clerks country-wide are performing both functions as a result of staff shortages to the detriment of the parties concerned. In addition, the clerks are severely overworked and are untrained, specifically regarding legislative provisions, thus reducing their effectiveness and productivity substantially³⁵⁶.

Training in respect of court staff such as maintenance officers is problematic and ineffective as a result of the following:-

- a) out of date course notes;
- b) maintenance itself constitutes a small part of the overall staff training syllabus;
- c) teaching staff are inexperienced in the area of maintenance law, and;

³⁵³Grieves (note 1 above) 18.

³⁵⁴This is still the case in maintenance courts throughout the country to date.

³⁵⁵Lund Committee on Child and Family Support (note 4 above) 46 - 47.

³⁵⁶Ibid 47.

- d) staff do not have training in accounting or gender sensitivity³⁵⁷, being key elements of every maintenance claim.

Training of maintenance officers is crucial in ensuring maintenance money reaches the women who form the overwhelming majority of complainants. Maintenance officers are usually the first people whom complainants encounter in the maintenance court and therefore should be made knowledgeable about the law and should be encouraged to be passionate about their work³⁵⁸.

6.1.1.4

Appointment of a maintenance investigator

Act 23 of 1963 made provision for the appointment of a maintenance officer³⁵⁹, who was tasked with carrying out the investigation in respect of each maintenance matter that came before him or her. The maintenance officer was often over-burdened by the sheer volume of matters and was unable to adequately investigate each claim. A solution, as implemented in the 1998 Act, was the suggested appointment of a maintenance investigator to conduct such investigations as no provision was made for this role under the 1963 Act.

The manner in which any maintenance investigation was done under the 1963 Act was largely at the discretion of the particular court official conducting the matter with there being no appointed, designated individual to thoroughly conduct such investigation. As the investigation of a complaint has a direct bearing on the determination of the amount awarded as a periodical maintenance payment, it became evident that investigations should be regulated to ensure conformity across the board, and should be done thoroughly so as to ensure the interests of the parties are protected.

³⁵⁷Ibid 47.

³⁵⁸Budlender & Moyo (note 2 above) 65.

³⁵⁹Clarke (note 2 above) 2.

A proposed solution to the lack of regulation of maintenance investigations by the 1963 Act was to prescribe the steps to be taken in the course of an investigation in the primary maintenance act itself or secondary legislation. It was suggested that the investigation should be given as wide a scope as possible, to include provisions for locating defendants and gaining access to all necessary records. In terms of the 1963 Act the investigation procedure was not standardised³⁶⁰. As it stood the maintenance officer held a wide discretion to decide whether or not, without an investigation, a particular complaint may merit an enquiry, which discretion could have grave implications for complainants concerned. It was argued that there should be a mandatory enquiry after the receipt of a complaint, where the maintenance officer is obligated to investigate the complaint. It was believed that a removal of the discretion to institute a complaint in its entirety should be applicable until such time as the body of maintenance officers is adequately trained so as to safeguard the interests of the complainants and children³⁶¹.

It was further proposed that the 1963 Act be amended to make provision for the institution of an enquiry where no agreement between the parties can be reached. This would however result in a substantial increase in caseload.

6.1.1.5

Broader jurisdiction and discretion in respect of granting of court orders

Under the 1963 Act the court was unable to make a number of ancillary orders (which are currently available under the 1998 Act) to ensure compliance with the principal order. As a result of the high number of maintenance defaulters and inability by the court to ensure compliance

³⁶⁰Ibid 4.
³⁶¹Ibid 4.

of the existing orders the following suggestions for reform were made³⁶²:-

1. the implementation of a emoluments attachment order, applicable to a non-specific employer, with the resultant effect being that same shall remain in effect each time the defendant changes employment³⁶³;
2. the implementation of a system such as a method of deducting the relevant amount from the defendant's income, similar to PAYE or SITE tax payments;
3. the use of deputy-sheriff's and tracing agents for service of maintenance process and orders in an attempt to increase their effectiveness;
4. where a defendant refuses to attend court proceedings that an order for payment be made in the absence of the defendant, by default, subject to the court being satisfied that the defendant was duly notified of the enquiry;
5. the definition of "maintenance order" be revised to include expenses which are not of a recurring nature, e.g. expenses related to education, training and medical expenses³⁶⁴;
6. at different stages of the maintenance procedure various court staff exercise enormous discretion in application of the common law formula of burden proportionate to the income of the parents³⁶⁵. It is documented that there is generally a low award of maintenance, and further, great variation between South African courts as to the monthly amount which is awarded. Creation and use of a specific formula was suggested to address this issue and regulate the application of the law.

³⁶²A number of these suggestions were implemented in the 1998 Act.

³⁶³Clarke (note 2 above) 4.

³⁶⁴Ibid 3.

³⁶⁵Lund Committee on Child and Family Support (note 4 above) 47.

6.1.1.6 Broader jurisdiction and discretion with regards to the enforcement of maintenance orders³⁶⁶

Criminal law has proved in many instances to be an unsuccessful medium for the enforcement of maintenance orders, with the provision for enforcement under the 1963 Act being only for sentencing and fines, and periodical imprisonment as prescribed by the Criminal Procedure Act 51 of 1977³⁶⁷. Criminal sanctions could only apply where the defendant had been convicted of the failure to pay maintenance, and if the court was satisfied that such failure is not due to a lack of means. It was suggested that the criminal sanctions available in criminal maintenance matters be broadened as follows:-

1. periodical imprisonment as an enforcement mechanism is a possible option for maintenance defaulters as long as the balance between the need for prevention through deterrence and the preservation of productivity and family life of an offender is maintained. This type of imprisonment will have less of an impact on the earning power of a person who is under a duty to maintain other persons. It is further an option that costs the state less to implement than ordinary imprisonment and spares the offender the negative prison environment.
2. correctional supervision would provide a suitable option, as offenders may be subjected to monitoring as well as control over their financial affairs in order to ensure compliance with the existing maintenance order. Whilst under correctional supervision the offender may be subjected to educational programmes, for example money management, to help improve the offender's management of resources. The aforesaid option is not frequently used by the courts, and it was argued that court officials should be trained to promote the use of the aforesaid measures;

³⁶⁶Ibid 47.

³⁶⁷Criminal Procedure Act 51 Of 1977 Section 285.

3. limitation of the courts discretion to suspend or postpone sentences in respect of maintenance defaulters, although it is not always desirable to restrict the sentencing options of the court;
4. the separate execution of maintenance orders from criminal proceedings, where such orders are not dependent upon the conviction of the defaulter to whom the order applies. Such order may be statutorily accorded the effect of a civil judgment for the payment of an amount in instalments and may be executed in the same manner as a civil judgment. However, drawbacks of such an order include:-
 - increased costs;
 - the difficulty of applying such order, and;
 - a need to enforce a periodical payment of maintenance as an ongoing obligation (as opposed to a once-off judgment debt).

The core problem with this method of maintenance enforcement lies in the fact that the debt continues to exist after execution of a warrant;

5. an alternative to 4 above, would be to allow for *ex parte* applications for attachment and execution of a maintenance debt, granted on a similar basis to a *rule nisi* application. This approach would allow the court to retain judicial control over the issue of warrants, creating a quicker, more dependable mechanism for the enforcement of maintenance orders that are already in place;
6. that the complainant be able to sue for a warrant of execution out of the office of the clerk of the maintenance court. It is suggested that the complainant be able to approach the clerk of the maintenance court and have a warrant issued, whereafter the defendant will be entitled to approach the maintenance court with an application for a stay of execution if necessary. This

alternative shall offer a faster mechanism of obtaining relief as the complainant does not have to go through the procedure of bringing the matter before court;

7. revision of computer systems, as the courts at this stage all had differing degrees of technology³⁶⁸ with regards to capturing and accessing of maintenance records. A regulated, uniform national system was required.

6.1.2 Reforms suggested post the 1998 Act enactment

Upon drafting the 1998 Act, the legislature addressed and incorporated a few of the aforementioned recommendations into the current Act and its regulations so as to improve and smooth the application and implementation thereof. However, despite the best intentions of the legislature our maintenance system remains flawed, and the current implementation and application requires further amendment and reform.

6.1.2.1 Manpower

6.1.2.1.1 Increased appointment of maintenance investigators and maintenance officers³⁶⁹

Despite the appointment of maintenance investigators it remains that there is a dire need for training of the maintenance court staff country-wide. It is evident from a study of the available literature that court staffs, specifically maintenance officers and investigators require ongoing training, preferably in the form of a legal qualification or degree; alternatively attend regular skills development and capacity building workshops. At this stage the majority of appointed South African maintenance officers have no training or qualifications whatsoever. In order to improve the system, it is necessary to hire competent and skilled

³⁶⁸Lund Committee on Child and Family Support (note 4 above) 45.

³⁶⁹Singh (note 6 above)150 -151; B Ntlatleng “Maintenance Turnaround Strategy” *Justice Today* (2012) Vol 3; 5-6

individuals³⁷⁰, which is not always the case in staff appointments in the maintenance court. As with maintenance officers, it is suggested that maintenance investigators should also participate in a standardized training programme.

According to De Jong there is currently a wide gap between the manpower stipulations in the 1998 Act (i.e. the required number of maintenance investigators and officers envisaged by the legislature during the drafting of the Act) and the actual number of appointed maintenance officers and investigators (insufficient staffing)³⁷¹. De Jong argues that an increased appointment of maintenance investigators will immediately result in an increase in the enforcement of maintenance orders generally. The same is applicable in respect of the appointment of maintenance officers. Currently all categories of maintenance court officials are totally overburdened, and there is an urgent need to address the manpower limitations experienced in maintenance courts country-wide.

6.1.2.1.2

Appointment of a commissioner or maintenance control officer

The possible appointment of a control maintenance officer in each maintenance court is suggested, with their single function being the oversight of all maintenance matters in their court with the main objective being the protection of the best interests of the child³⁷². This appointment would encompass the duty by such officer or commissioner to ensure a professional work ethic, equitable distribution of work and improved morale amongst all maintenance officers and investigators³⁷³.

³⁷⁰Ibid.

³⁷¹De Jong (note 98 above) 601, 609-614.

³⁷²Singh (note 6 above) 150 -151.

³⁷³Ibid 152.

6.1.2.1.3 Promulgation of clear regulations establishing the role and purpose of the maintenance investigator

The South African Law Commission (SALC) has suggested that prior to effecting any changes to the existing maintenance laws, it is necessary to solicit the views of personnel involved in the maintenance system regarding the application of the 1998 Act and its regulations so as to obtain a better understanding of what reform is in fact needed within the maintenance court system and exactly where the difficulties lie. The view of the SALC is to consult properly with the role-players in the maintenance court (i.e. maintenance officers, investigators and clerks) and obtain this information before simply creating and introducing policies, rules and regulations that have not been properly researched³⁷⁴. Further the SALC has deemed it necessary to promulgate further regulations to the 1998 Act which clearly establish and regulate the role and purpose of the maintenance investigator specifically³⁷⁵.

6.1.2.1.4 Address overburdening of court staff³⁷⁶

It is imperative that the Department of Justice acknowledge the shortage of maintenance officers and investigators overall, and make a concerted effort to appoint more maintenance investigators in to reduce the excessive workload of the existing maintenance officers and investigators. These additional appointments are however dependent on governmental budgetary constraints.

³⁷⁴Ibid 150 -151.

³⁷⁵Ibid 152.

³⁷⁶Ibid 150 -151.

6.1.2.1.5

Reorganising personnel and rotation of positions

A proposed solution to the problem of the lack of qualified, trained and sufficient staff is two-fold, namely an attempt to reorganise personnel within the courts in a manner that maximises the potential of the existing available staff³⁷⁷, and secondly the continual rotation of certain staff members, such as magistrates³⁷⁸. It is hoped, for instance, that the rotation of magistrates throughout the family court would encourage interest and dedication among them towards maintenance matters specifically. The rotation of court clerks however may prove to be problematic as clerks who do not have proper training and skills will be unable to deal with the vast number of issues encountered.

As a result of the removal of prosecutors in maintenance enquiries and the replacement thereof by maintenance officers, many of the newly appointed maintenance officers do not have the necessary qualifications, experience and training to act as such or to carry out enquiries.

6.1.2.1.6

Appointment of paralegals

In order to lighten the load carried by both maintenance officers and investigators it has been suggested that paralegals be introduced into the body of maintenance court staff to generally assist the public with their matters. Paralegals would be in a position to offer more "in-depth" help to the public in filling out application forms in respect of a maintenance matter, simplifying the process, and offering basic advice to claimants regarding what they will need to prove, what can be reasonably

³⁷⁷Wamhoff & Burman (note 65 above) 154-160.

³⁷⁸Ibid 162.

claimed and could possibly even offer assistance at enquiry or trial stage³⁷⁹.

6.1.2.1.7

Help desk

The possibility of creating a helpdesk has been raised as an option to assist the public with their maintenance claims, However as with so many of the proposed solutions to improve the existing maintenance system, same is dependent upon financial support from the government. It is therefore unlikely that a permanent budget would be made available to run a helpdesk in each maintenance court.

6.1.2.1.8

Performance incentives

In an attempt to boost staff moral and enthusiasm towards their work, and to improve productivity and efficiency within the maintenance court it is suggested that performance incentives, such as pay rises and promotions, for those administering the system (including maintenance officers, police and sheriffs) be revised and implemented³⁸⁰.

6.1.2.2

Practices and procedure³⁸¹

6.1.2.2.1

Simplification of court forms

It is argued that if complainants were able to better understand the forms that are required to be completed for any maintenance claim the problem of congestion and clogging of the court roll would be resolved. It is proposed that an amendment of the regulations to the existing 1998 Act is made, with a

³⁷⁹Law Society of South African (note 105 above) 7; Wamhoff & Burman (note 65 above) 156.

³⁸⁰Wamhoff & Burman (note 65 above) 153; 156; 158.

³⁸¹De Jong (note 98 above) 609-614.

reconsideration and simplification of the documentation to be completed by complainant in mind³⁸².

6.1.2.2.2

Improvement of the filing system/ computerisation of files

Proper systematic and infrastructural support, such as computerization of files to minimize the problem of human error, negligence and lost files, would go a long way to the modernization and improvement of the efficiency of the existing maintenance system³⁸³.

6.1.2.2.3

System of telephonic communication

Ideally it would greatly relieve the burden on the court roll if there was a telephonic system available whereby parties to the maintenance proceedings were able to communicate with the court staff with a view to avoiding unnecessary court attendances and postponements³⁸⁴.

6.1.2.2.4

Revision of methods of payment of maintenance monies

The revision of the current methods of payment of maintenance money is also an option for consideration³⁸⁵. Payments should be made directly into the complainant's banking account in terms of Section 16(1)(a)³⁸⁶. This alternative would guarantee no delay of payment from the employer or defendant and ensures prompt service delivery. Further the staff that were previously required to process payment can now be used elsewhere in the system.

³⁸²Ibid.

³⁸³Singh (note 6 above) 150 -152.

³⁸⁴Ibid 152.

³⁸⁵Law Society of South Africa (note 105 above) 10.

³⁸⁶Maintenance Act (1998).

6.1.2.2.5

Mediation

There is very definitely room for the development of mediation services in the maintenance court³⁸⁷ as well as a dire need for Alternative Dispute Resolution (ADR). Enhancement of communication between the parties through mediation and negotiation will reduce the need to litigate every maintenance matter before court.

An amendment of the 1998 Act to allow attorneys and other suitably qualified persons to become maintenance facilitators has been suggested. This suggestion will entail that such persons perform the quasi-judicial powers of mediation similar to those bestowed upon Family Advocates in terms of the Children's Act³⁸⁸. In addition, counsellors and social workers could be made available at maintenance courts to assist complainants and defendants. However this addition would again be budget and resource dependent.

6.1.2.2.5.1

Concept of Public Mediation in the Maintenance Court

The South African maintenance court system is primarily an adversarial system and accordingly does little to resolve maintenance disputes in themselves. In fact, given the adversarial and inquisitorial nature of the proceedings, the system often heightens contentiousness and conflict between the parties, with the end result often being a *"greater misunderstanding, increased animosity and bitterness, exorbitant legal fees, overcrowded court and crammed court roles."*³⁸⁹

³⁸⁷Law Society of South Africa (note 105 above) 19 - 20.

³⁸⁸Children's Act (2005).

³⁸⁹De Jong 'The Newly Introduced Public Mediation Service in the Maintenance Court Environment: Does it make a difference in the short term?' (2009) *THRHR* 275.

The limitations of the legal system when applicable to family courts is well-documented, and there is evidence to support the overwhelming accusation that the current maintenance system escalates conflict between parties, resulting in parties incurring substantial costs in legal fees. The courtroom becomes a battleground, not a place of reconciliation and protection of the parties' best interests, leaving parties with bitterness and unresolved feelings, to the detriment of all minor children involved. Further, the formal complexity of the adversarial system can be very daunting, confusing and misleading to any lay person engaging with the system³⁹⁰.

Although the 1998 Act is silent on the implementation of mediation, there is always an informal maintenance enquiry held before the maintenance officer in an attempt to settle the maintenance dispute between the parties before proceeding to trial. Mediation at this stage, and at any stage during the maintenance operational chain before trial stage (formal enquiry) could facilitate in the speedy resolution of complaints and could lead to the minimisation of court backlogs³⁹¹

Mediation training of staff has been proposed as a solution to the adversarial nature of the system. This training would be aimed at teaching all court staff dealing with maintenance matters a form of dispute resolution and also general mediation skills. This would result in all officials in the maintenance court being able to address the negative impact of the adversarial system on parties and further alleviating the court's increasing caseload³⁹².

³⁹⁰Ibid 278.

³⁹¹Ntlatleng (note 370 above).

³⁹²De Jong (note 390 above) 275.

The implementation of mediation in the maintenance courts will help parties to negotiate agreements and renegotiate relationships in an adaptive way, all the while being assisted in their negotiations with each other by a neutral and independent third party³⁹³. Mediation should be informal and unstructured in nature, with the entire process being as simple and unthreatening as possible. Further mediation, unlike the adversarial court system, would be easily adaptable to the context of the dispute and the needs of the parties concerned, as well as to different cultural value systems or religious convictions. Because of the flexible nature of mediation, it is more suited to the sensitive and emotional issues surrounding maintenance and other family matters³⁹⁴.

Mediation is also future orientated, and when done properly, establishes principles for future behaviour between the parties. Through mediation parties can develop and resume workable relationships with one another, thus enhancing the adjustment of the children involved. If applied properly a mediation system cannot fail to cut litigation and court costs for both the parties and the judicial system³⁹⁵.

De Jong conducted a study on mediation in the maintenance court, her hypothesis being that mediation would be the preferred and more effective method of solving maintenance issues between family members or others obliged to maintain one another³⁹⁶, and that staff should be trained to conduct mediations accordingly. De Jong's findings show that mediation training of the staff

³⁹³Ibid 278.

³⁹⁴Ibid 279.

³⁹⁵Ibid 280.

³⁹⁶Ibid 283.

had a positive impact on all categories of court officials who received training, and that there is a definite need for future or ongoing mediation training for all court officials, not only maintenance officers³⁹⁷. It was clear that mediation is a preferred and more effective method of solving maintenance issues between family members, and what was particularly evident was that parties to the mediation were more satisfied with the agreements reached during mediation and also had more faith in their ability to resolve future maintenance disputes on their own without the intervention of the court³⁹⁸.

Results of De Jong's study may indicate that if mediation is employed it will lower the chance of repeat litigation and the heavy burden on the maintenance courts will become lighter. This would, at the same time, reduce the administrative work to be carried out by maintenance court officials, who may then use their expertise and time to work on more complex matters³⁹⁹.

One problematic aspect of the employment of mediation in the maintenance court system is staff availability. Even if mediation is employed, as a result of the staff constraints already experienced in the maintenance court, there will be limited mediation time per case, resulting in the unlikelihood of a staff member having the time to take the parties properly through all the stages of mediation required⁴⁰⁰.

Accordingly, mediation is a useful tool in avoiding litigation⁴⁰¹ as long as both parties agree to it and the

³⁹⁷Ibid 293.

³⁹⁸Ibid 293-294.

³⁹⁹Ibid 294.

⁴⁰⁰Ibid 295.

⁴⁰¹Wamhoff & Burman (note 65 above) 161-162.

mediator is well-trained in regulating any power imbalances between parties. However mediation in the maintenance courts is however dependent on governmental budget constraints.

6.1.2.2.6

Build report with the SAPS

When it comes to the service of documentation in a maintenance matter, specifically subpoenas and warrants of arrest, there is a need for the police in general to recognise their responsibility to protect women and children who are affected by a high incidence of unserved and disregarded documentation⁴⁰². Complainants should be in a position to accompany police to the defendant's residence in order to ensure service of subpoenas or warrants of arrest. In addition, it is suggested that training be done amongst the SAPS, educating them to conduct themselves in a more professional manner when it comes to maintenance related matters⁴⁰³.

6.1.2.2.7

Addition to maintenance instalment to cover administrative EAO costs

In order to improve the effectiveness of EAOs by employers, it is recommended that 10% of the maintenance instalment be added to that amount to cover the administration costs incurred by employers so that the complainant does not lose out on any portion of their maintenance claim. This however will require specific amendments to the regulations of the 1998 Act.

⁴⁰²Singh (note 6 above) 150 -151.

⁴⁰³Ibid 152.

6.1.2.2.8

Revision of inconsistencies in the 1998 Act

Various academics argue that the entire 1998 Act needs to be reviewed so as to identify and amend the inconsistencies within the Act itself. Particular regard is to be had to the process to be followed when enforcing a maintenance order. Maintenance officers and prosecutors lack civil experience and require training in civil enforcement procedure⁴⁰⁴.

6.1.2.2.9

Preference of maintenance orders

It is argued that maintenance orders should take preference over other debts. Currently there appears to be a widely acknowledged preference of SARS payments and mortgage bond payments above and before the payment of maintenance. This preference may not be in line with a child's constitutional right to maintenance in terms of Section 28 thereof. Furthermore the National Credit Act⁴⁰⁵ does not exclude maintenance payments from debt relief. It is proposed that debt review should not be applicable to maintenance and matters pertaining to children, thus making the payment of maintenance by any party a primary and compulsory obligation⁴⁰⁶.

6.1.2.2.10

Reducing delays

A major source of contention throughout the maintenance courts in South Africa is the number of delays and postponements incurred daily for various reasons, and the resultant financial and emotional costs to the parties. Each time a matter is postponed or delayed the complainant is requested to return to court which is a costly and time-consuming exercise, not to

⁴⁰⁴Law Society of South Africa (note 105 above) 12.

⁴⁰⁵Law Society of South Africa (note 105 above) 18.

⁴⁰⁶Ibid.

mention that a postponement means a further month or two without a maintenance payment⁴⁰⁷.

6.1.2.2.10.1

Service of subpoenas/warrants of arrest

There is currently no assurance that a subpoena will immediately be issued and often payment of the sheriff's service fee is a problem. The fee is to be paid by the State, and, as a result, attempts by court staff are made to bring parties to court without the issue of a subpoena in order to preserve limited resources. The result of this is usually non-attendance by either one or both parties, creating the need for postponement for subpoenaing the absent party⁴⁰⁸.

6.1.2.2.10.2

Payment of sheriff's fees

It is suggested that more funding be made available by government to pay sheriff's fees on behalf of the complainants, alternatively, that the sheriff's offices be approached to lower their fee to assist the maintenance complainants. However, these changes are not likely to materialise given the already tight budget available to the maintenance courts. Secondly, the sheriff's argue that the State is already charged a reduced fee for service, therefore making it unlikely that they shall lower their fee further⁴⁰⁹.

⁴⁰⁷Wamhoff & Burman (note 65 above) 152-154.

⁴⁰⁸Singh (note 6 above) 152.

⁴⁰⁹Mamashela (note 80 above) 604; Wamhoff & Burman (note 65 above) 152.

6.1.2.2.10.3

Incentives for service

A further suggestion to decrease delays and postponements in service of maintenance related documentation by the police and sheriff's is the introduction of an incentive based policy to encourage prompt service by members of the police and the sheriff's office. This however would entail the cooperation of both the SAPS and all sheriffs' offices, which administratively may be an enormous hurdle to overcome⁴¹⁰.

6.1.2.2.10.4

Speedier default orders

Upon granting of a default order there is usually a delay in the processing by the court clerks of the court order as well as the documents needed to claim the ordered amount. Courts need to address the process of issuing default orders and making same speedily available⁴¹¹

6.1.2.2.10.5

Production of documents for enquiry/trial

A major cause of delay in the finalisation of maintenance matters is the failure of one or both parties to submit documentation pertaining to their financial position to the court. It is imperative that the system be revised with a view to instituting better procedures to ensure that the proper documentation is produced from inception of the matter, reducing the number of postponements when parties do not bring the correct documents to court. A costs order for failure to bring the required documentation

⁴¹⁰Ibid.

⁴¹¹Ibid 153.

to court would go a long way to minimising maintenance postponements⁴¹².

6.1.2.2.10.6

Paternity tests

Paternity testing may cause a delay as a postponement for the test results is required. It is suggested that all blood tests are ordered in disputed paternity cases before the first court date itself. It is suggested that the original subpoena served on the defendant should indicate that if paternity is disputed a blood test must be arranged by the defendant and carried out before the allocated court date⁴¹³.

6.1.2.2.10.7

Appointment of legal representation

In many situations, postponements are required by a sudden need (usually at formal enquiry stage) by one or both parties to obtain legal representation. It is submitted that parties should be made aware of their right to legal representation prior to the first hearing or before the formal enquiry at least, so as to limit postponements. It is submitted that the possibility of an information hotline be set up, allowing parties to telephone for an explanation of their rights and the procedure, including the right to legal representation. As with many of the other proposed recommendations, this service would be dependent on available resources and budgetary constraints.

⁴¹²This is noted purely from personal experience in litigating in the maintenance court generally.

⁴¹³This is noted purely from personal experience in litigating in the maintenance court generally.

6.1.2.2.11

Providing guidelines for maintenance orders

There currently exists a large discrepancy between maintenance orders granted by different magistrates and different courts, particularly when it comes to the amounts ordered and the types of orders issued. This has resulted in removing the desired equality of treatment in the outcome of maintenance cases. Magistrates have very different attitudes towards maintenance orders and use their discretion to achieve very different results.

Most often magistrates base their orders on their own ideas of reasonableness, and often there is a gendered reflection of male ignorance in respect of what it takes to run a household, resulting in reduced maintenance orders on the part of male magistrates and maintenance officers⁴¹⁴.

It is argued that an introduction of a formula or guideline be implemented to introduce regularity and consistency to amounts ordered across the board. The formulaic system is fraught with flaws of its own, those of which are discussed in 6.1.2.5.6 herein.

6.1.2.2.12

Additional mechanisms by which to obtain maintenance payments⁴¹⁵

In order to address the problems experienced regarding payment of money to the complainant in respect of an existing order,⁴¹⁶ i.e. non-payment by the defendant or failure of employers to implement Emoluments Attachment Orders, the following suggestions have been made:-

⁴¹⁴Wamhoff & Burman (note 65 above) 159-160.

⁴¹⁵Ibid 163-164.

⁴¹⁶Law Society of South Africa (note 105 above) 12.

- a) a preferent sequences of certain orders is to be applied to a defaulter when considering a maintenance order, namely:-
- an emoluments attachment order;
 - attachment of outstanding debts owed to the defaulter by a third party;
 - attachment of movable property, and;
 - criminal proceedings as a last resort.
- b) an amendment to the 1998 Act is suggested, in terms whereof the maintenance courts should be authorised to order immediate payments to claimants in desperate need, based on the complainants' affidavits, similar to the Domestic Violence Act's provision for emergency monetary relief⁴¹⁷. Currently there is abuse of the domestic violence provisions for emergency monetary relief, as attorneys commonly use same to obtain an interim maintenance payment as the maintenance court system offers no immediate relief of a similar nature. There is further abuse of discretion by magistrates who issue emergency monetary relief orders for periods longer than the claimant needs if she is to go to the maintenance court to apply for a proper maintenance order. This issue would be resolved if a similar order could be introduced into the maintenance court.
- c) addressing the variability among courts as to how willing they are to grant an emoluments attachment order against a defendant. An

⁴¹⁷Domestic Violence Act 116 of 1998 Section 1(x).

emoluments attachment order requires action against an employer who additionally tends to deduct administration charges from the maintenance payment before paying same to the complainant thus reducing the complainant's maintenance benefit. This deduction often acts as an incentive by courts to avoid the order. Employers are inclined to change the defendant's employee status to one of a contracted worker so that the employer is no longer bound to enforce the emoluments attachment order against the defendant.

- d) criminal sanctions such as imprisonment are available. Criminal sanctions are mostly impractical as the defendant is required to work to earn money to pay maintenance, and cannot do so while imprisoned. It is therefore important that the punishment of the offender be weighed against the rights of the maintenance dependents who would be directly affected should the defendant be unable to earn an income⁴¹⁸. The result however is that ineffective sentencing practices create the impression of a "toothless" system⁴¹⁹. A preferred method of sentencing is imprisonment with a provision for parole in return for payment of the outstanding maintenance arrears, thus encouraging the defendant to find the necessary resources to make payment, alternatively a suspended sentence

⁴¹⁸Carnelley (note 74 above) 3.

⁴¹⁹Ibid.

where the threat of imprisonment hangs over defendant⁴²⁰, encouraging payment.

There is definitely room for more creative sentencing practices, for instance periodical sentencing which allows the offender the freedom to work during the week and remain in custody over weekends⁴²¹. Correctional supervision is a further example of a more practical sentencing option, where the offender lives outside of prison but is ordered to complete community service of some sort. These "out of the box" sentencing options ensure that the offender's ability to work and earn an income is not obstructed or hampered in any way.

Additional problems experienced with the application of criminal sanctions in maintenance matters are that warrants of arrest authorised by the court allow police officers the discretion as to whether or not they advise the defendant of a court date or whether they take the defendant to court. Further police execute warrants insofar as it is reasonable to do so, where there is a backlog in warrants to be executed, maintenance warrants are given lower priority. It is suggested that police are provided with clear incentives for the execution of warrants pertaining to maintenance matters as well as stricter guidelines for the execution process.

It seems that the only manner in which to regulate and optimise sentencing of maintenance

⁴²⁰Ibid 17.

⁴²¹Ibid 20.

offenders is to urgently attend to training the personnel dealing with the prosecution and sentencing of maintenance defaulters, to sensitise them to the hardships of the complainants, to reiterate their constitutional obligations, and to remind them of the effective sentencing options at their disposal⁴²².

- e) The courts could use the attachment of the defendant's property more frequently, as it appears that there is an overall reluctance amongst magistrates currently to authorize the issue of a warrant of execution. There is a need to train magistrates to effectively enforce arrear maintenance in terms of the civil execution route.
- f) An increased use of cession of debt would be beneficial to many complainants if implemented. The trouble is however that there is great difficulty in determining whether or not such debts exist. Greater use of the witness and document subpoenas before conducting a formal enquiry could help bring necessary information to light and make same available to the magistrate prior to him or her making an order. This however would place additional strain on the already overburdened maintenance investigator.

⁴²²Ibid 1.

6.1.2.3 Training⁴²³

Many of the proposed solutions to the problems currently facing the maintenance system involve the intensive training and re-training of existing staff members in the courts, the police service and the sheriff's office. The core training related proposals for reform are discussed hereunder:

6.1.2.3.1 Training of maintenance officers and hiring of competent staff

Currently the learning courses offered by the Justice College on maintenance fall short of addressing many challenges experienced by maintenance court staff⁴²⁴

It is proposed that all staff should be properly trained with regard to all aspects of the 1998 Act and that such training be conducted with a fundamental focus on service delivery by all staff members and empathetic client care⁴²⁵. This training should include continual "in house" training of all maintenance court staff.

6.1.2.3.2 Public education programmes and awareness campaigns⁴²⁶

In addition to staff training, it is also necessary to educate complainants and defendants of their rights and obligations pertaining to the maintenance law system. This may be achieved through governmental awareness campaigns⁴²⁷, where parties are advised of their rights, particularly with regards to the enforcement of maintenance payments and the relationship between maintenance and access to children.

⁴²³De Jong (note 98 above) 609-614; Budlender & Moyo (note 2 above) 35-36.

⁴²⁴Ntlatleng (note 370 above) 6.

⁴²⁵Singh (note 6 above) 152.

⁴²⁶Ibid 150 -151.

⁴²⁷Law Society of South Africa (note 105 above) 19 - 20.

Claimants generally do not know their rights and do not expect the system to work in their favour. It is common for many claimants to "give up", after continually attending court, as it seems that in many instances even after receiving an order they never succeed in collecting maintenance because they do not know their rights⁴²⁸. Many complainants do not know their rights relating to the procedure followed at court and do not realise that the maintenance officer's enquiry is not a formal court appearance. Many parties are ignorant of the process and often sign settlements before the maintenance officer thinking that they have no choice but to sign. It is argued that the system would be greatly improved through education of the public, particularly those residing in rural and township communities.

At the East London Magistrate's Court copies of maintenance pamphlets produced by the Department of Justice and Constitutional Development are available for those waiting in the waiting room. Copies of the pamphlets available are annexed hereto marked **Annexures 6.1** and **6.2** respectively.

Pamphlet 6.1:

Pamphlet 6.1 entitled "*How do I claim maintenance?: What I need to know!*" provides a very brief overview of the application process. It provides the reader with the court times, as well as a list of documentary items required to be brought to court. Unfortunately the first time many readers will be aware of this pamphlet and the documentary requirements for court will be on their first appearance, and many of the documents will have been left at home. Immediately the party is delayed as a result. This is also true of the information provided on how to go about starting a maintenance claim.

⁴²⁸Wamhoff & Burman (note 65 above) 168.

The pamphlet advises parties to always phone the court first before arriving. From personal experience as an attorney I am aware of the fact that phoning the maintenance office in East London inevitably leaves you waiting for someone to answer the phone, usually with no success. I doubt very much that many court users will ever receive constructive telephonic advice from telephoning the court.

One's "rights to maintenance" are briefly identified, however the language is sophisticated and in many instances illiterate or semi-literate court users are attempting understand and rely on this information. Further, areas of spousal maintenance and future maintenance, as well as maintenance in respect of grandparents, are not addressed at all.

The factors to be considered when determining the expense of a child are generally listed. This is a very broad and brief list, and, for those who are unaware of their rights, it may prove to be limiting in terms of what expenditure they feel they may claim.

The pamphlet further highlights very briefly the following areas of concern:-

- why a court date is necessary;
- why both parties should attend court;
- an explanation of the use of reference numbers;
- anticipated length of time until a court order is granted;
- collection of maintenance money;
- reasons for possible delay in payment of maintenance money;
- guidelines for the maintenance debtor on how to pay maintenance.

Although this pamphlet offers a basic outline, in many instances I believe that the limited and brief information offered makes very little difference overall to those attempting to assist themselves in a maintenance matter.

Pamphlet 6.2:

Pamphlet 6.2 entitled "*Maintenance: Frequently asked questions*" provides an extremely brief attempt to answer 16 of the most common questions frequently asked by complainants in maintenance court, as set out hereunder:-

- Who should pay maintenance?
- Can one claim maintenance from grandparents?
- Is maintenance a responsibility of biological parents only?
- Why must one pay maintenance?
- Is it compulsory to pay maintenance?
- Where is one supposed to lodge a complaint for maintenance?
- Can one go to any magistrates' court in the country to lodge maintenance?
- How often should maintenance be paid?
- How much money should be paid for maintenance?
- At what age should one stop paying maintenance?
- What happens when the person responsible for paying child maintenance dies?
- What happens if the child reaches the age of 18 and she/he is still not self-supporting?

- Can one increase/decrease the maintenance amount after the order has been granted?
- What documents does one need to lodge a maintenance claim?
- Can one claim maintenance while living together with the father/mother of the child?
- What will happen to one if one unjustifiably defaults or stop paying maintenance?

As with pamphlet 6.1, this information is also extremely simplistic and, in my opinion, of very little use to those attempting to run their matter without the assistance of an attorney.

6.1.2.3.3

Gender sensitization

It is important that the court officials operating in the maintenance court undergo gender sensitization training, to be applicable particularly in the area of postponements, where it is important for staff to consider and acknowledge the emotional and financial impact of the postponement on the complainant and the children⁴²⁹.

6.1.2.4

Infrastructure⁴³⁰

6.1.2.4.1

Lack of resources in maintenance courts

The general lack of resources in the maintenance courts including insufficient equipment and staff, add to the ineffective

⁴²⁹Law Society of South Africa (note 105 above) 9.

⁴³⁰De Jong (note 98 above) 609-614.

running of maintenance matters⁴³¹. Simple changes in infrastructure, including the introduction of more interpreters, stenographers, dedicated magistrate's, the provision of practice notes and a set of uniform rules and practice directives for all provinces would greatly improve the service provided by the maintenance court to the public.

6.1.2.4.2

"One-stop" maintenance centre

It has been proposed that a maintenance "one-stop" centre be developed by government, housing all staff and role players (i.e. paralegals, maintenance officers, mediators) necessary to proceed with a maintenance claim, with the view to removing as much of the procedure as possible from the courts.

The establishment of the Johannesburg Family Court pilot project attempted to implement this idea in developing a blue print of a "specialist court" dealing with a wide range of family law issues, including maintenance⁴³².

The suggested criteria for the creation of a "specialised court" were the following⁴³³:-

- a social support component, including counselling, conciliation and mediation as a first step;
- a legal component with legal adjudication before a presiding officer as a last resort;
- the provision of all family-related services under one roof to prevent repetition (integration of services);
- creation of a separate court with an informal, cheerful atmosphere and where child care facilities are available;

⁴³¹Law Society of South Africa (note 105 above) 14-16.

⁴³²Budlender & Moyo (note 2 above) 29.

⁴³³Ibid 30.

- selection of court personnel based on personality and thereafter under specific training;
- an accessible and affordable centre, with a specific view to catering for poor, disadvantaged families and communities, who would not be able to afford legal representation otherwise.

Unfortunately, there have been numerous obstacles in the process of realising the objectives of the Johannesburg Family Court, many of which are similar to those faced daily in the maintenance courts around the country, and again, the core problem being budgetary constraints⁴³⁴. For this reason this project has not fully got off the ground.

6.1.2.4.3

Private offices

The provision of private offices for maintenance officers is a necessity so as to allow parties to discuss matters in private. It is necessary to reduce the stigma surrounding maintenance and the fear of embarrassment, while parties discuss their personal and financial circumstances with the necessary court official.

6.1.2.4.4

Legislative amendments

It is suggested that an amendment be made to the Sheriff's Act, allowing sheriff's to trace maintenance defaulters. A further suggestion is an amendment to the 1998 Act to include service of maintenance related process by registered mail as service is currently only valid if same was personal, which is problematic as the sheriff often fails to achieve personal service on the defendant.⁴³⁵

⁴³⁴Ibid 32.

⁴³⁵Law Society of South Africa (note 105 above) 17.

6.1.2.4.5 Court location to be given priority⁴³⁶

As documented herein it is clear that the maintenance court is often difficult to find and is "stuck away" in the court building. It is necessary to make the maintenance court easily accessible and user friendly, particularly since maintenance matters are regarded as "low priority" in comparison to other matters in the Magistrate's Court. The inaccessibility of the courts, and the poor facilities available in them only add to the low status 'stigma' already received by matters relating to maintenance.

With the application of Operation Isondlo (dealt with in 6.1.2.5.2 herein) it is noted that there has been an improvement with regards to signage at various courts, allowing maintenance clients to more easily identify an office or court when visiting the court buildings⁴³⁷.

6.1.2.5 Increased access to justice and legal representation

6.1.2.5.1 Legal Insurance

It is common for many legal insurances as well as Legal Aid to exclude maintenance matters from policies, thus forcing complainants to represent themselves. An inclusion of coverage for maintenance litigation by insurance companies in their policies would be of great assistance to those needing legal representation.

6.1.2.5.2 Pro Bono

It is argued that there would be a vast improvement in the system should local attorneys be encouraged to take on *pro bono* work, or attend court for a week in order to assist with full

⁴³⁶De Jong (note 98 above) 609-614.

⁴³⁷Ntlatleng (note 370 above).

maintenance court rolls. There is also room for the use of candidate attorneys or law students who may be sent out to courts and rural areas under supervision to educate the public regarding their rights. Law students and candidate attorneys may also assist parties at court in completing the necessary documentation so as to alleviate some of the burden experienced by maintenance officers.

6.1.2.5.3

LLB Curriculum

There is a need for universities to revise the LLB curriculum so as to include the study of maintenance law as this field of law is mostly untouched through university education. If educated properly it may also be possible to use unemployed graduates for in-service training at the courts.

6.1.2.5.4

Legal Representation

Provision should also be made for the facilitating of formal representation to parties⁴³⁸. A complainant faces further obstacles and expenses owing to court procedure and structure, of which they know very little about, and as a result are forced to employ legal representation that they can seldom afford. Maintenance courts run all day, daily, and there is no way to know when a matter may be heard. Often complainants pay legal representation to wait for hours and waiting time is charged to client. Allowing attorneys to avoid waiting time will reduce fees to be paid by the complainant, however the courts cannot grant special privileges to claimants with attorneys. This results in most claimants firing attorneys and continuing to represent themselves as they cannot afford the wasted fees on "waiting time".

⁴³⁸Wamhoff & Burman (note 65 above) 160-161.

Unfortunately represented complainants are forced to move through all levels of the court procedure even though the procedure is designed for the unrepresented. Attorneys and complainants often wish to go straight to court and the complainant is required to pay needlessly for the process, thus making the ability to retain an attorney for assistance even harder.

6.1.2.5.5

Magistrates

As there is an acute shortage of maintenance magistrates throughout the courts it is important that maintenance officers should attempt to settle as many matters as possible to avoid unnecessary trials.

6.1.2.5.6

Costs orders⁴³⁹

Currently no cost orders are available to the court in a maintenance matter. For those who are represented it is often the case that legal fees are driven up as defendants are able to cause endless postponements without any sanction. It is argued that maintenance courts should be allowed the discretion to issue a costs order against the defaulting party or postponing as per the rules of the civil court. This order for costs will immediately bring endless postponements to a halt, thus lifting a heavy burden from the court system in all areas.

⁴³⁹ This is noted purely from personal experience in litigating in the maintenance court generally

6.1.2.5.7 Development of a call centre⁴⁴⁰

The implementation of a "call centre" or a complainant's office where parties using the system can lodge complaints and grievances relating to maintenance matters in an attempt to enhance the confidence of the public in the maintenance system is suggested. This solution like numerous others mentioned hereinbefore is dependent on budgetary constraints, and as a result will not likely be pursued.

6.1.2.5.8 Improved IT infrastructure to trace defendants, monitor payments and manage file administration

The development by the Department of Justice of a proper system of maintaining and evaluating courts⁴⁴¹, so as to regulate and control the service provided, is required. The implementation of an IT programme that can trace defendants, track file rotation, calculate arrear maintenance and electronically capture of files would go a long way to improving the quality of service provided by the maintenance courts. Again budgetary constraints will in all likelihood not allow for this.

6.1.2.6 Staff attitudes

The attitude of the maintenance staff towards the public using the system greatly affects how the parties perceive the process and how they evaluate the service provided by the court. It is therefore imperative that the attitude of the staff be addressed and adjusted accordingly, particularly in respect of corruption within the court system. Staff should be held accountable for their attitudes and should

⁴⁴⁰Singh (note 6 above) 152.

⁴⁴¹Law Society of South Africa (note 105 above) 16.

be encouraged to be responsible for the manner in which they deal with the day to day running of the maintenance courts⁴⁴².

6.1.2.7 Current innovations in support of change

Currently there are certain government campaigns that have been put in place, as well as the operation of certain NGO's and private organisations that are dedicated to the improvement of the maintenance system.

6.1.2.7.1 Transunion ITC information⁴⁴³

In 2004 the Transunion ITC support service was established. This is a support service provided to maintenance investigators which allow the investigators to conduct the *"effective and efficient tracing of maintenance defaulters by providing electronic information on property ownership and the value of properties, credit profiles, Home Affairs particulars of individuals, company directorship of certain individuals, vehicle ownership and the financial status of maintenance debtors"*⁴⁴⁴. This system is decentralised to all maintenance investigators appointed across the country and each investigator has electronic access to the system from his/or her office.

Access to ITC information has allowed for an increased in tracing of maintenance defaulters, and has proved a valuable tool to maintenance investigators⁴⁴⁵.

⁴⁴²Singh (note 6 above) 150 -151.

⁴⁴³De Jong (note 98 above) 596-598.

⁴⁴⁴De Jong (note 98 above) 596.

⁴⁴⁵Mthimunye (note 179 above) 22.

6.1.2.7.2

Operation Isondlo⁴⁴⁶

Improving the maintenance system to relieve the pressure on the maintenance courts has become a key objective for the Department of Justice and Constitutional Development (DoJCD). This objective “*goes hand in hand with catering for the needs of vulnerable groups, improving the standard of service delivery and broadening access to justice*”⁴⁴⁷.

In terms of Clause 27 of the Convention on Rights of the Child signed by South Africa in 1989, State parties are required to “*take all appropriate measures in order to secure the recovery of maintenance for the child from the parent or other person having financial responsibility for the child*”⁴⁴⁸ It is evident that despite the innovative amendments introduced by the 1998 Act, “*women continue to struggle to access maintenance due to inefficiencies in the system ad lack of adequate resources and human capacity*”⁴⁴⁹

The Operation Isondlo campaign is essentially an initiative by the DoJCD to bring maintenance defaulters to book and to encourage parents to regularly pay maintenance for their children. This campaign is based on the principle of “*batha pele*” (putting people first). The department is partnering with the police with the primary aim of clamping down on maintenance defaulters⁴⁵⁰. Further, at present, records show that the courts have various amounts of unclaimed maintenance monies which have not been collected by beneficiaries, parents or guardians. An additional objective of this campaign is to

⁴⁴⁶De Jong (note 98 above) 596-598; H Augustyn “Maintenance Beneficiaries Overjoyed in the Western Cape” *Justice Today* (2006) Vol 1; 5.26; Ntlatleng (note 370 above);

⁴⁴⁷Author unspecified (note 48 above).

⁴⁴⁸*Ibid.*

⁴⁴⁹*Ibid.*

⁴⁵⁰Ntlatleng (note 370 above)

ensure that all beneficiaries receive their maintenance monies due to them⁴⁵¹.

The campaign includes an identification of the strengths and weaknesses in maintenance system, with a view to the implementation of stricter enforcement of 1998 Act's provisions. The aim is to decrease the maintenance court backlog and to introduce public education and awareness campaigns throughout the South African maintenance court system⁴⁵².

There is a need to change the negative public perception about the maintenance system and the department aims to do this through the following series of interventions⁴⁵³:-

- Capacity building at maintenance sections of courts;
- Enforcement of the 1998 Act in particular civil enforcement;
- Decrease the backlog of maintenance cases;
- Improvement of maintenance processes;
- Reduction in poverty;
- Consultative meetings with stakeholders; and
- Public education and awareness campaigns.

The view is that this campaign will allow complainants to have a better understanding of the 1998 Maintenance Act and the court procedure followed. It is evident that since the implementation of the campaign in 2005 there has been an increase in women approaching the court and demanding what they are entitled to, as well as increased success in complainants securing maintenance as well as future maintenance. It is

⁴⁵¹Ibid.

⁴⁵²De Jong (note 98 above) 601.

⁴⁵³Author unspecified (note 48 above); Augustyn (note 447 above).

documented that the overall turnaround time for maintenance cases has decreased and that there has been an improvement in the public trust and confidence in maintenance court, as well as improvements in the system.

6.1.2.7.3

EFT systems and JDAS⁴⁵⁴

JDAS (Justice Deposits Account System) is a new electronic system utilized to administer bail, fines and maintenance monies received by magistrate's courts. This system replaces the manual card system, making information on case history and maintenance payments to beneficiaries readily accessible⁴⁵⁵.

The introduction of an EFT (electronic funds transfer) system in regard to maintenance payments has created a substantial reduction in queuing time by parties at court, money spent on travelling, absenteeism from work and has included the benefits of the flexibility and convenience of an ATM, where complainants may collect their maintenance. This system allows maintenance beneficiaries to receive their monies directly into their banking accounts, therefore dramatically increasing the efficiency and security of the system as well as staff productivity.

6.1.2.7.4

Centre for Criminal Justice (NGO) (Pietermaritzburg)

Mamashela argues that non-governmental organisations (NGO's) can play a pivotal role in the implementation of the 1998 Act⁴⁵⁶. NGO's are able to educate women about maintenance legislation that affects them, and assist them to enforce their legal rights through the courts or mediation. These

⁴⁵⁴De Jong (note 98 above) 602 - 603.

⁴⁵⁵Ibid 598; Ntlatleng (note 370 above).

⁴⁵⁶Mamashela (note 26 above) 493.

organisations should aim to disseminate information about the maintenance system to rural and poor communities, assist in the translation and completion of forms to be completed by complainants, trace defendants and essentially “*put a human face to a complicated and user-unfriendly legal process*”⁴⁵⁷.

The Centre for Criminal Justice (CCJ)⁴⁵⁸ is one such organisation. The CCJ aims to effect change through outreach and address the needs of disadvantaged communities. The CCJ is responsible for the education of legal rights, outreach programmes and regular workshops based in rural areas/villages.

The centre's core focus is the creation of outreach centres dealing with maintenance, domestic violence, rape, social welfare, labour, child abuse and other criminal/civil wrongs pertaining to women and children.

The centre's role in the implementation of the 1998 Act is evident in that the centre supports the justice system primarily by doing the work which should be done by the maintenance officer in terms of Section 7 of the Act⁴⁵⁹. The centre further regularly holds workshops in order to educate the public about the Act, circulating pamphlets and information where possible.

NGO's such as the CCJ may operate as a facilitator in mediation between parties in an attempt to reach amicable solutions without entering court proceedings, as well as attempting reconciliation between and education of the parties concerned. Should an amicable solution not be reached during an attempted mediation, the NGO is then equipped to advise the complainant of the procedure for lodging a complaint with the maintenance court. Unfortunately however the CCJ does assist any parties

⁴⁵⁷Ibid 500.

⁴⁵⁸Ibid 493.

⁴⁵⁹Ibid 494-6.

further than this step, leaving the complainant to face the court system alone.

6.1.2.7.5

Justice for Women (JAW) (Pietermaritzburg)⁴⁶⁰

"We worked from the premise that courts will never have sufficient staff resources to meet the demand in urban areas for maintenance services...the majority of women will go to court with no legal representation and will be reliant on overworked maintenance officers and prosecutors, who do not have sufficient time to provide the quality of legal support needed...women need to act for themselves if they were to access maintenance services at court effectively."

Bell⁴⁶¹

Justice for Women (JAW) is a project of the Family and Marriage Society of South Africa (FAMSA) and the Black Sash. The primary function of this organisation is to educate women in respect of human rights and relevant legislation such as the 1998 Maintenance Act. This body continually monitors legislation that affects women and makes regular recommendations to the Justice Department in respect of the improvement of existing legislation.

JAW aims to educate people about maintenance legislation and a process, assist people with maintenance applications, and in addition lobbies for changes in the maintenance system⁴⁶².

JAW runs a group-based education programme at court (in Pietermaritzburg) where the staff assist women in understanding the legal terms that they will encounter during the course of a maintenance enquiry. In addition they aim to give women a

⁴⁶⁰Ibid 496-499.

⁴⁶¹Budlender & Moyo (note 2 above) 92.

⁴⁶²Ibid 22.

clear overview of the different stages of the maintenance process, assist them in understanding the roles of the court officials and familiarise them with language and conceptual tools as well as the completion of forms. In some instances the staff even assist with calculation of income and expenditure and assist the complainant to develop strategies to track defendants⁴⁶³.

As with the CCJ, JAW further makes courts accessible to women with maintenance and domestic violence problems by assisting with the translating and completing of necessary documentation.

As the maintenance documentation is provided in English only (whereas many South African's use a native language as their mother tongue), and as many South African rural women are semi-literate, and then even so, only in their native language, translation of the court documentation is imperative.

JAW provides mediation between the complainant and the court staff and personnel. The role played by JAW in the implementation of the 1998 Act is primarily the assistance of the complainant in tracing the defendant, educating the complainant on maintenance law, assisting the complaint with the completion and translation of documents and helping the complainant take the claim through the whole court process.

Although this organisation is designed to take the complainant from the beginning through to the end of the maintenance process, the process is time consuming and only a few people can adequately be helped at a time. For instance, translation and completion of documentation can take up to two (2) hours per complainant. The length of the forms and the details required make the work difficult and time-consuming. The downside of

⁴⁶³Ibid 93.

this is that fewer people may be assisted. Therefore, although the complainant's personal experience may be dramatically improved the overall impact on the system may be a mere "ripple".

6.1.2.7.5.1

Suggested replication of these models⁴⁶⁴

Mamashela suggests that the aforesaid models, namely the CCJ and JAW should be replicated in other provinces throughout South Africa in an attempt to assist the courts in the management of maintenance matter is actually heard in court is far greater than anticipated and is too much for one individual, namely a single maintenance officer. Maintenance courts and the maintenance process are notorious for congestion, delays and backlogs. It is argued that the congestion and delays would be circumvented should NGO's such as those discussed hereinbefore be of assistance to parties in a maintenance matter.

Despite the suggestion that JAW and CCJ open replica branches throughout the country, the likelihood of this occurring may not be feasible given funding constraints⁴⁶⁵. The proposed alternative is that the CCJ and JAW visit other provinces in an attempt to showcase their work to other NGO's with similar aims, with the intention of converting the additional NGO's to fulfilling the same or similar function. Mamashela argues that government can no longer act alone in the administration of the justice system and should outsource some of the

⁴⁶⁴Mamashela (note 26 above) 498 - 499.

⁴⁶⁵Ibid 499.

tedious and time-consuming paperwork to NGO's that deal with maintenance issues⁴⁶⁶.

6.1.2.7.6

Introduction of a formula-based approach

In an attempt to avoid a the implementation of a time consuming personalised solution to each complex set of circumstances various countries around the globe have introduced a formula in order to standardise maintenance calculations⁴⁶⁷.

In the United States of America (USA) the law requires each State to devise its own set of child maintenance guidelines in determining the quantum of child maintenance due in each matter. This is done by way of the application of formulae. The specific formula used varies from state to state and the guidelines to the formulae have to be reviewed every four years⁴⁶⁸. The USA adopts an objective approach to the calculation of maintenance, effectively removing the uncertainty from the formula by applying objective, research-based averages instead of attempting to cater to each individual's subjective circumstances⁴⁶⁹.

The United Kingdom (UK) applies a very simple formula as maintenance is collected and distributed by the Child Support Agency and there is a fairly sophisticated grant system⁴⁷⁰. The UK model makes no attempt to convert the reality of the needs of the child into a monetary value; rather, maintenance is approached in the same manner as a levy or tax and is related solely to the income of the non-custodian parent. This approach is "policy based" as opposed to "reality based" and aims to

⁴⁶⁶Ibid 500.

⁴⁶⁷Grievs (note 1 above) 21.

⁴⁶⁸Ibid.

⁴⁶⁹Ibid 36-37.

⁴⁷⁰Ibid 29-30.

create a generic maintenance order which is a reflection of the policies of the state⁴⁷¹. Models used in Australia and New Zealand are fairly similar to the UK approach⁴⁷².

The South African approach to the calculation of maintenance is broadly discretionary and requires a subjective look at each individual case. A court applies a very basic formula to each individual matter⁴⁷³. The problem in South African law is not the formula as such but rather that the figures applied to the formula are subjectively calculated by a presiding officer and are based on each individual case. The aim of the South African formula is to *"create a unique maintenance order, tailored precisely, to the needs of the family under consideration"*⁴⁷⁴.

It appears that a subjective approach such as that used in South Africa can only be effective if resolved in a court as the complex decisions required to be made in terms of this approach leave much room for uncertainty and are based on judicial discretion⁴⁷⁵.

6.1.2.7.6.1

Suitable model for South Africa

As stated hereinbefore, the current South African legislative principles are subjective in nature and application and the process of creating a tailor-made maintenance order is expensive, time-consuming and too complex to be properly applied in maintenance courts. Any application before court will always be influenced by

⁴⁷¹Ibid 36.

⁴⁷²Ibid 34.

⁴⁷³Maintenance (non-custodian) = Needs of children x Available means (non-custodian)/Available means (total family).

⁴⁷⁴Grieves (note 1 above) 6.

⁴⁷⁵Ibid 39.

the background, experience and world view of the presiding officer⁴⁷⁶.

Grievés submits that the problems inherent in South African maintenance courts will not all be altogether solved by a formula-based approach, however it would represent a significant improvement to the current subjective approach to determining maintenance⁴⁷⁷, and accordingly he makes the following suggestions:-

- a formulaic approach would be likely to reduce uncertainty, length and cost of maintenance proceedings, with it further resulting in a reduction of pressure on court rolls and the improvement of the quality of proceedings;
- as there is a high level of poverty in South Africa, accompanied by a poorly developed social welfare system, a formulaic approach would take into account both the needs of the child as well as the income of the family;
- the number of inputs required to determine maintenance can easily be reduced to no more than income, number of children and parenting time per year;
- the measure of inputs would be objectively defined in "rand" terms rather than subjectively defined such as "standard of living", thus reducing inconsistencies and confusion;
- the lack of a fully developed welfare system requires that deviations from the formula be allowed in certain circumstances;

⁴⁷⁶Ibid 40.

⁴⁷⁷Ibid 42-43.

- the discretionary approach should remain available at higher income levels. Parties should not be allowed to reduce the child's total maintenance level below that required at the highest income bracket associated with the formula;
- even non-custodian parents living below the poverty line should be required to make some contribution to the maintenance of their children.

Grieves submits that a holistic approach should be applied in South African courts as an application of a strict formulaic approach will not address other challenges such as the existing weaknesses in maintenance courts and the state's co-existing constitutional responsibility to ensure the fulfilment of children's rights⁴⁷⁸.

6.1.2.7.7

Department of Justice and Constitutional Development (DoJCD) initiatives⁴⁷⁹

As a result of the challenges facing the existing maintenance system, the DoJCD have put in place a number of projects and initiatives to facilitate the creation of a maintenance system in line with the legislature⁴⁸⁰:-

a) appointment of contract maintenance investigators

In 2003 the DoJCD employed 60 contract maintenance investigators to assist in courts pending the permanent appointment of maintenance investigators in terms of section 5 of Act 1999. These investigators were required to attend to the

⁴⁷⁸ Ibid 45.

⁴⁷⁹ Budlender & Moyo (note 2 above) 115-124.

⁴⁸⁰ Ibid 115.

maintenance court backlog in 59 maintenance courts spread across 9 provinces⁴⁸¹.

b) appointment of maintenance investigators in terms of section 5 of the 1998 Act

The appointment of permanent investigators was completed by March 2004⁴⁸². This was a specialist appointment based on the candidates' analytic and investigative skills. Appointees required training in order to complete the daily tasks required of maintenance investigators and the DoJCD provided intensive training to contract maintenance investigators.

c) appointment of maintenance prosecutors

In 2001 the DoJCD appointed 70 maintenance prosecutors country wide to deal specifically with maintenance cases and work hand-in-hand with maintenance investigators, particularly with regard to the handling of the civil execution of maintenance orders; the criminal prosecutions of maintenance defaulters, maintenance enquiries and other more complex maintenance matters⁴⁸³.

d) a base-line study on the appointment of maintenance investigators

In 2002 the DoJCD implemented a study with the aim of identifying the cost of the appointment of maintenance officers. Identified in this study were many of the challenges facing the

⁴⁸¹ Ibid 118.

⁴⁸² Ibid 119.

⁴⁸³ Ibid.

maintenance courts which challenges needed the DoJCD's urgent attention⁴⁸⁴.

e) training of service providers

The DoJCD identified target courts wherein training programmes would be held in order to sensitise magistrates, maintenance prosecutors, maintenance officers, assistant maintenance officers, contract maintenance investigators and clerks working in the maintenance courts in the area of family law⁴⁸⁵.

f) education and awareness campaigns aimed at women, children, men and employers of defendants

The DoJCD has launched various education and awareness campaigns, distributed booklets and information relating to maintenance to communities and schools⁴⁸⁶.

g) simplification of maintenance forms

The problem relating to the complexity of the maintenance forms to be completed by complainants was addressed in a DoJCD workshop held in 2003, identifying that there is a need for simplification of maintenance forms in order to make the maintenance process more user-friendly⁴⁸⁷.

⁴⁸⁴ Ibid 120.

⁴⁸⁵ Ibid.

⁴⁸⁶ Ibid.

⁴⁸⁷ Ibid.

h) simplification of civil execution procedures

The DoJCD has conducted an investigation into the possibility of promulgating regulations in order to simplify and fast-track civil execution procedures against maintenance defaulters, identifying "blockages" within the system and considering remedies for the civil execution procedure⁴⁸⁸.

In addition to the general aforesaid considerations the DoJCD has put in place specific projects and programmes in response to difficulties experienced by court users⁴⁸⁹:-

a) envisaged automation project

The DoJCD began mapping workflow procedures, researching the standardisation of work procedures and forms in an attempt to streamline the administrative process. The department is further also considering a formula based approach for the calculation of maintenance amounts with the view to ensuring a reduction in discrepancies in courts⁴⁹⁰.

b) proposed amendment of certain sections of the Act

The Department has a view to considering urgent legislative amendments to the 1998 Act in order to rectify the current inefficiencies within the maintenance system⁴⁹¹.

c) monitoring of the Act

The DoCJD encourages the continued receipt of complaints about the maintenance system and the experiences of users

⁴⁸⁸ Ibid.

⁴⁸⁹ Ibid 115.

⁴⁹⁰ Ibid 121.

⁴⁹¹ Ibid.

at court in order to allow the DoJCD to address shortcomings within the Act⁴⁹².

d) implementation of a blueprint for family courts

The department envisages a one-stop service centre (similar to the Johannesburg Family Court discussed in paragraph 6.1.2.4.2 hereinbefore) for family law matters such as maintenance, domestic violence, divorce and children's court matters⁴⁹³.

6.1.2.7.8

Proposed amendments to the 1998 Act⁴⁹⁴

The South African Law Commission conducted an investigation on the current 1998 Act as an inclusion in its law reform programme in October 2011.

The basis of this investigation was potential proposed amendments to the 1998 Act, the intention being to address the practical and technical issues experienced within the maintenance courts. The outcome of this study was the proposed Maintenance Amendment Bill ("the Bill").

The purpose of the Maintenance Amendment Bill is to amend the existing 1998 Act with a view to reforming the entire maintenance system.

The amendment bill constitutes the following changes/improvements to the 1998 Act:-

⁴⁹² Ibid.

⁴⁹³ Ibid.

⁴⁹⁴ Maintenance Amendment Bill (note 182 above) 2.

Clause 1⁴⁹⁵:

Section 15 of the 1998 Act requires parents to maintain their children until they are "self-supporting". In practice this section raises much cause for confusion and there is often uncertainty as to when a parent's liability in respect of child maintenance comes to an end. Additional confusion has been created by the lowering of the age of majority by the Children's Act⁴⁹⁶ from the age of 21 to the age of 18.

Section 6 of the 1998 Act deals with lodging of maintenance complaints. In this regard the primary problems occur in practice when a) a person wants to apply for the substitution or discharge of a verbal or written agreement in respect of maintenance obligations, which agreement has not been made an order of any court, and b) the application must be made where the complainant resides, which is not always practical depending on where the complainant works, which may be different to where the minor child resides.

Clause 1 of the Bill seeks to clarify the position relating to the age of majority where children are concerned. The Bill proposes an express statement that that a person's maintenance liability in respect of a child ceases upon age of majority (18 years) or once the child has become self-supporting.

The Bill proposes an additional amendment, adding that the maintenance officer is obliged to investigate a matter with a view to an enquiry, where good cause for the substitution or discharge of a maintenance obligation exists, in cases where a verbal or written agreement which has never been made an order of any court exists.

⁴⁹⁵ Ibid 2-3.

⁴⁹⁶ Children's Act (2005).

Clause 1 will, in addition, make provision for extended jurisdiction, on a similar basis to section 28(1)(a) of the Magistrate's Court Act, 1944; namely that jurisdiction in a maintenance matter not be restricted to residence only, but shall be extended to place of employment or conducting of business of the complainant.

Clause 2⁴⁹⁷:

There has been a strong call to place statutory obligations on mobile phone companies to provide maintenance courts with the contact particulars of maintenance defaulters for the purposes of locating the defaulter. The Bill therefore seeks to amend section 7 of the 1998 Act accordingly.

This amendment shall be based upon section 4 of the Protection from Harassment Act, 2011⁴⁹⁸. This amendment will allow the court to issue an order in this respect if it is satisfied that all reasonable efforts to trace the defaulter have failed. This statutory obligation will be initiated by a judicial officer only, who has taken into account the circumstances of each case, including a consideration of the "best interests of the child" principle.

Clause 4⁴⁹⁹:

Clause 4 of the Bill seeks to amend section 10 of the 1998 Act, in order to ensure the expeditious conclusion of maintenance enquiries. Clause 4 confers on the maintenance court the discretion to make an interim maintenance order, pending finalisation of the matter, if a postponement is necessary.

⁴⁹⁷ Maintenance Amendment Bill (note 182 above) 4 – 6.

⁴⁹⁸ Harassment Act 17 of 2011.

⁴⁹⁹ Maintenance Amendment Bill (note 182 above) 6 – 7.

Currently an order may only be made on an interim basis should the respondent agree to same.

This amendment would go a long way to preventing respondents from dragging out the matter. It is widely known that matters are currently dragged out by respondents indefinitely and persons in favour of whom the order may be made suffer financially, particularly where no order is in existence. It is hoped that Clause 4 will improve service delivery and access to justice within the maintenance courts.

Clause 5⁵⁰⁰:

Section 16(2) of the 1998 Act allows for the payment of maintenance by a third party or institution who is obliged in terms of contract to pay any sums of money on a periodical basis to a person who has a maintenance order in place, for example a provident fund, or the attachment of a salary, without hearing evidence from that third party or institution.

Clause 5 seeks to amend the existing position by inserting a provision which requires the court to hear the views of the third party or institution who is obliged to make payments on behalf of a person against whom a maintenance order has been made prior to making an order against the third party or institution. Clause 11⁵⁰¹ reiterates this view.

Clause 6⁵⁰²:

Currently section 17 of the 1998 Act allows for the court to make maintenance orders by consent, with the respondent to be present even where there is consensus. This is often problematic

⁵⁰⁰Ibid 7 – 8.

⁵⁰¹Ibid 11.

⁵⁰²Ibid 8 – 9.

in practice as parties may not reside in the same town, or in the same magisterial jurisdiction.

Clause 6 aims to make provision for the granting of a maintenance order in the absence of one or both parties, if there is consent to the order in writing, which is handed in by the maintenance office at the enquiry.

Clause 7⁵⁰³:

Section 18 of the 1998 Act provides a mechanism granting of a default order against the defendant if the court is satisfied that the respondent has ignored the subpoena.

Clause 7 of the Bill wishes to extend the scope of this order to any person in favour of whom a maintenance order has been made, when subpoenaed to appear before court where there has been an application for a substitution or discharge of the existing order.

Clause 8⁵⁰⁴:

Clause 8 seeks to codify the principle in *Cohen v Cohen*⁵⁰⁵ which states that the effect of a maintenance court order replaces any former order, including those made by the High Court or Regional Court in terms of divorce proceedings, only insofar as the maintenance court order expressly replaces the terms.

⁵⁰³Ibid 9.

⁵⁰⁴Ibid 9–10.

⁵⁰⁵2003 (3) SA 337 (SCA).

Clause 9⁵⁰⁶:

Clause 9 proposes a uniform manner for the transfer of maintenance files from one court to another, removing any discretion of the maintenance officer to move files, thus reducing confusion and losing of files.

Clause 10⁵⁰⁷:

Clause 10 envisages a sanction increase for maintenance defaulters. Immediately upon a complaint laying a complaint for non-payment of maintenance (not unlike the provision of enforcement of a default judgment in a civil court) the defaulter's details will be submitted to a business which has, as its object, the granting of credit or is involved in the credit ratings of persons (e.g. blacklisting of defaulters). Currently this can only be done once the maintenance defaulter has been criminally convicted. The aim of this provision is to stop defaulters obtaining credit, thus ensuring the payment of maintenance as a priority.

Clause 12 to 15⁵⁰⁸:

Clauses 12 through 15 seek to increase the maximum penalties prescribed in the existing 1998 Act in order to lend more weight to the seriousness of offences such as failure to make payment in respect of a maintenance order⁵⁰⁹.

⁵⁰⁶Ibid 10.

⁵⁰⁷Ibid.

⁵⁰⁸Ibid 11- 12.

⁵⁰⁹Maintenance Act (1998) Section 31(1).

Clause 16⁵¹⁰:

Clause 16 seeks to make it an offence for a person to wilfully hinder or obstruct a maintenance investigator in the exercise of his powers and/or performance of his duties. It further aims to make it an offence to fail or refuse to submit two photographs as required in Section 43 of Act 1998⁵¹¹.

Clause 17⁵¹²:

Clause 17 codifies the view in *S v Magagula*⁵¹³ in that a trial court, on its own initiative, may order that criminal proceedings be converted into a maintenance enquiry if it appears to the court desirable that a maintenance enquiry should be held.

6.1.2.7.9

Sanctions

There is room within the system for private individuals seeking enforcement and implementation of a maintenance order to make a difference in the system without relying on government funding. An example of such attempt is "Chequemate".

6.1.2.7.9.1

Chequemate

A Port Elizabeth based couple, Richard and Rosemary Tarr, have both personally experienced the difficulties inherent in the maintenance court system in trying to use the court system themselves, without any form of legal representation. I met with them in order to learn more about and understand their brainchild, the "Chequemate" concept.

⁵¹⁰Maintenance Amendment Bill (note 182 above)12.

⁵¹¹Ibid 12.

⁵¹²Ibid.

⁵¹³Ibid.

The frustration experienced by the couple in the maintenance court, particularly when trying to enforce a maintenance order against a defaulter, led them to develop Chequemate. Originally the couple sought to implement this initiative in the Durban area, however they have relocated to Port Elizabeth and are looking at developing this initiative in the Eastern Cape region.

Chequemate sets out to register maintenance defaulters on a central database and enforce blacklisting of those who do not comply with existing maintenance orders against them. The idea is to encourage those who are not receiving maintenance in terms of an order to enlist the maintenance defaulter on a database, where such information will be available to creditors, maintenance investigators, home affairs etc. The administration, listing and the running and maintenance of the database shall be handled by Chequemate and shall be independent of government funding, although governmental departments will be given access to the information on the database. An overview of the concept is provided in an article printed in the Port Elizabeth Herald newspaper, a copy of which is annexed hereto marked **Annexure 6.3**.

The Tarrs hope that the registration of maintenance defaulters will create a stigma surrounding and a nuisance to the maintenance defaulter, creating a need to settle any outstanding maintenance amounts urgently. It is hoped that the "blacklisting" will extend beyond simply credit applications, and into areas such as ability to book flights and travel, particularly any overseas travel and applications for job interviews.

Chequemate envisions an accessible and simple listing procedure where maintenance creditors complete a

declaration, accompanied by the defaulters' details and a court order, which information is captured and loaded onto the database.

Owing to the sensitive nature of the information gathered on the database, same will have to be run and maintained in strict compliance with privacy laws, and such information shall only be accessible by certain parties and bodies. The Tarrs feel strongly that if one can be blacklisted for an unpaid cellular telephone account, so should one be blacklisted for unpaid maintenance.

The Tarrs' long term goal for Chequemate is to bring about a change in legislation, making it compulsory for all companies in South Africa to access the database to determine the creditworthiness of a person, as well as their maintenance payment status.

The Tarrs attempted to launch a Chequemate pilot project in the Kwa-Zulu Natal maintenance courts in 2003 in Natal, with the intention of working with NGO's and the Department of Justice, however the Department of Justice withdrew their support, lending to the collapse of the initiative and the shelving of the concept.

The Tarrs are adamant that this project succeed and are looking into re-establishing same in Port Elizabeth. It is hoped that once the general database and blacklisting system is up and running that Chequemate will be able to offer additional services to the public at minimal fee, for instance additional counselling to parties who are unsupported in maintenance matters and who are in financial distress as a result of maintenance defaulters. It is also hoped that eventually Chequemate will also be able to provide subsidised legal assistance and representation

to those in need of it, as well as on-line assistance and advice.

Those making use of Chequemate will be required to pay a minimal administration fee, potentially on a scale depending on the particular party's income, with a maximum fee anticipated to be approximately R125.00 once-off.

During the initial launching of the project the Tarrs were contacted by many interested parties including court staff, attorneys, debt collectors and members of the public who are battling with the court system. With the use of social media, such as Facebook, the concept has gained a huge amount of support.

In addition to assisting the public this initiative is in governmental interests as the efficient collection of maintenance will relieve the pressure on the social grant system substantially.

The Tarrs are currently developing business plan in conjunction with a business advisor and are investigating the possibility of "partners" and financial backing in order to get this initiative up and running once more.

6.1.2.8 Careful correctional implementation of existing policy vs. the plausibility of radical reform

In a country like South Africa, where governmental resources are stretched, it is necessary to consider the plausibility of the radical reform of any court system, including the maintenance system⁵¹⁴. As there are numerous problems inherent in the maintenance system resulting in the continual need to close loopholes and enhance

⁵¹⁴Wamhoff & Burman (note 65 above) 168-169.

mechanisms, a radical reform of the system, such as an introduction of a formulaic approach or "taxing" system, appears attractive and numerous alternatives to the existing system have been raised herein. International research has shown that only in very few countries do maintenance systems work efficiently, and this is usually in instances where countries are wealthy welfare states with a range of available state benefits. Usually in these countries the population is well documented and enforcement systems are so efficient that valuable benefits would be forfeited in cases of maintenance default. South Africa however does not have these resources, nor is the population well documented and the enforcement mechanisms are failing drastically.

It is therefore argued that a tax-based system, for instance, is unsuited to a country where wages are low, the rate of unemployment is high, people are difficult to trace and the social grant system cannot afford to bankroll a large maintenance deficit, is not the route to go in the foreseeable future.

Instead it is argued that the South African system requires ongoing correctional measures which continue to bring about improvements in the current system. Education and training of both the court staff and public are one such method which would bring about substantial improvement to the system.

6.2 Proposed solutions based on research results

Upon consideration of:- a) the problems inherent in the maintenance system; b) the research conducted by myself; and c) the numerous proposed solutions and recommendations, it is my firm belief that the fastest and most effective manner in which to offer some relief to those who find themselves at the mercy of the maintenance system is education.

It is repeatedly documented (as is evident throughout this dissertation) that the government simply does not have the funding and resources to drastically amend the

implementation and loopholes in the 1998 Act or to place additional staff in the court system. I therefore am of the opinion that the only manner in which to improve the system at this stage is education of the procedure and the 1998 Act to both the staff and the public. Education, although not an all-encompassing solution will go a long way to addressing a large majority of the problems identified in this study.

It is certainly my view that the only way complainants are going to be able to make the most of the system is to find some manner of educating themselves, as the government cannot be relied upon to do so.

I believe further that comprehensive and ongoing training needs to be provided to all staff working within the maintenance courts. In my opinion I think that an education on the current problems facing the maintenance court as dealt with in Chapter 4 hereinbefore would vastly improve the staff's view of the process and their attitude towards the people seeking relief from it.

I propose two areas of training be carried out, namely the training of court officials and, secondly, the training and education of the public using the system. The training of court staff has been dealt with substantially herein, therefore only the training and education of the public shall be discussed hereunder.

In my opinion the system would become that much more effective should the people using it be aware firstly of their rights and secondly, of the process necessary to enforce them.

While conducting my research I was astounded by how little the people in the court waiting rooms knew about their rights. The majority of these people were completely at the mercy of the court staff. It was also clear that the posters and pamphlets supplied by the government briefly outlining some rights and a basic procedure were completely inadequate in assisting these people.

I am of the view that the complainants need to become proactive about their education of maintenance law and the procedure to be followed. My proposal is the drafting of a basic guide which outlines properly the rights of maintenance and also the procedure to be followed. This guide should then be made available to people at community centres, courts, NGO offices. It is argued that the government use its budget in this manner, as opposed to employing additional staff in the maintenance court, who

simply herd the people in maintenance waiting rooms around like they are cattle. It is further my suggestion that a facilitator be briefed in terms of the content of the guide, and workshops be regularly held in communities and courts to assist the public in better understanding the guide and consequently their rights and the procedure.

It is submitted that a properly educated public will speed up the maintenance process substantially in that:-

- a) the correct documentation will be completed and submitted on the first court appearance;
- b) parties will have a more realistic approach to bargaining and maintenance settlements;
- c) the public will be in a position to protect themselves against bullying and ill-advice from maintenance court staff;
- d) parties will not be forced to employ a legal representative to understand the process, thus avoiding costly legal fees;
- e) form completion will become simpler, allowing the court staff to attend to court users more quickly and efficiently

I have drafted a rough and very basic guide to maintenance law as an illustrative example, marked **Annexure 6.4** hereto. It is my intention to explore this concept and the impact (and hopeful improvement) that it may have on court users more thoroughly at PhD level.

It is suggested that the facilitation of such a guide would be hugely beneficial to the public. A further possibility regarding such facilitation would be the employment of law students to assist with both guide facilitation and also with completion of court documents at court. Law students are an untapped resource which could be used to alleviate much of the burden carried by court staff. As part of any university programme law students could be compelled to spend a certain number of hours doing "community service" within the maintenance courts. Law students would be in a position to explain basic maintenance rights to court users and assist them with understanding the process and completing the necessary documentation.

It is evident that many of the problems facing the maintenance court system can only truly be resolved through an injection of resources from the government. Given the budgetary constraints experienced by the government however, this is unlikely in the near future.

It is my submission that as the system is unlikely to change dramatically in the near future, the only manner in which court users are going to make the existing system work for them, is for them to educate themselves about the system and about their rights. The public need to literally "take the law into their own hands" and ensure that they are equipped as best they can be when entering the maintenance court process.

7 **Chapter 7: Conclusion**

As is evident from this dissertation there are numerous challenges faced by the maintenance system, whether it be relating to the content of the maintenance law itself, or simply the poor implementation of the law in the courts. An in-depth examination of the flaws found throughout the system highlights the fact that courts overall are user-unfriendly and the process of obtaining or enforcing maintenance is a long one filled with endless “administrative and legal potholes”(Annexure 7 hereto⁵¹⁵).

The administration of the law is the biggest hurdle to achieving change in the system with maintenance courts being hugely under resourced in terms of staff and infrastructure. The key to improvement of the maintenance system at this stage is simply an increase in government funding and resources. However, due to a lack thereof it is doubtful that the system is going to improve dramatically any time soon.

In my humble opinion the most constructive alternative to government funding, which is unlikely to materialise, is the urgent and thorough education of the public making use of the maintenance system as to how to use the system to their best advantage. During my experience in practice as an attorney and from the perspective of being on the bench I have identified a dire need for the public to help themselves where the court fails them. People engaging in the system need to educate themselves in a manner with which to circumvent the frustration of navigating the system alone.

For this reason it is my view that an initiative such as community education is imperative. The focus on public education would be useful if directed through the use of a guide similar to that prepared by myself in Chapter 6 hereof.

Those using the maintenance court system are sadly going to continue to suffer at the hands of a failing court system until such time as they take the initiative and find a way to familiarise themselves with the system and their rights. It is my hope that in future a cost effective method of education be devised by interested parties, such as myself, in order to ease the burden of the impoverished and unrepresented who haunt the maintenance court passages almost daily.

⁵¹⁵T Beaver 'Mending Maintenance' *The Witness* 7 May 2013 at 7.

8 **Annexures**8.1 **Annexure 1.1****Maintenance Act: Implementation Survey**

Questionnaire No: _____

Magistrate's Court: _____

I confirm that the basis for this study has been explained to me by the interviewee, in a language that I understand, and that I have provided the interviewer with informed consent to conduct such research. I confirm that I understand that I may withdraw my participation at any time, should I so wish and that my participation in the study is completely voluntary. I understand that although the results of this study may be publicized, my personal particulars shall remain confidential.

Date: _____

Signature: _____

1. Personal Particulars:

1.1 Party to proceedings:

Applicant	Respondent
-----------	------------

1.2. Sex:

Male	Female
------	--------

1.3. Age:

Under 18	18 - 24	25 - 34	35 - 44	45 - 54	Over 55
----------	---------	---------	---------	---------	---------

1.4. Race:

Black	White	Coloured	Indian	Other
-------	-------	----------	--------	-------

1.5 Home language:

English	Afrikaans	Xhosa	Other
---------	-----------	-------	-------

1.6 Where do you live (suburb)?

1.7 Marital Status:

Married to the opposing party in the proceedings	Divorced from the opposing party in the proceedings	Widowed	Never married
--	---	---------	---------------

1.8 Number of children in respect of whom the maintenance application relates:

1	2	3	4	Over 4
---	---	---	---	--------

1.9 Relationship of party to this/these child(ren):

Parent	Grandparent	Self	Sibling	Other
--------	-------------	------	---------	-------

2. Household and Income Particulars:

2.1 Nature of your residence:

Urban	Township	Rural	Other
-------	----------	-------	-------

2.2 Total number of people living in your household:

1	2	3	4	Over 4
---	---	---	---	--------

2.3 Number of income generating people in your household:

1	2	3	4	Over 4
---	---	---	---	--------

2.4 Average monthly household income:

R0 – R1,500	R1,500 – R3,500	R3,500 – R5,500	R5,500 – R7,500	Over R7,500
-------------	-----------------	-----------------	-----------------	-------------

3. Maintenance Matter Related Information:

3.1 Are you self-represented?

Yes	No
-----	----

3.2 (a) Are you able to afford the services of an attorney?

Yes	No
-----	----

3.2(b) If no, do you qualify for the assistance of Legal Aid?

Yes	No
-----	----

3.3(a) Is this your first attendance at maintenance court?

Yes	No
-----	----

3.3(b) If not, on how many other occasions have you attended maintenance court?

1-2	2-4	4-6	6-8	Over 8
-----	-----	-----	-----	--------

3.4 On average per attendance how many hours have you spent at court before being assisted?

1-2	2-4	4-6	6-8	Over 8
-----	-----	-----	-----	--------

3.5 In respect of your matter is there an existing maintenance order in place?

Yes	No
-----	----

3.6 If yes, how many attendances were necessary to secure the order?

1-2	2-4	4-6	6-8	Over 8
-----	-----	-----	-----	--------

3.7 If yes, has the order been complied with (are you receiving maintenance)?

Yes	No
-----	----

3.8 If no, has the court been of assistance in ensuring the compliance of the order?

Yes	No
-----	----

3.9 Upon attending the court were you able to easily locate the maintenance court?

Yes	No
-----	----

3.10 Was the maintenance court procedure explained to you when you arrived?

Yes	No
-----	----

3.11 Were you able to understand and complete the required documentation?

Yes	No
-----	----

3.12 Did the court staff assist you in completing the necessary documentation?

Yes	No
-----	----

3.13 Was the court staff friendly and helpful?

Yes	No
-----	----

3.14 Do you think you would have been better assisted/ achieved a better outcome if you had an attorney or Legal Aid?

Yes	No
-----	----

3.15 On a scale of 1 – 5 below mark the degree of satisfaction you would associate with your experience of the maintenance court?

1	2	3	4	5
Highly dissatisfactory	Dissatisfactory	Average	Satisfactory	Highly satisfactory

3.16 How many hours of work do you miss/expect to miss whilst attending maintenance court?

1-3	4-7	8-12	13-15	Over 15
-----	-----	------	-------	---------

3.17 Are you paid/compensated for those hours?

Yes	No
-----	----

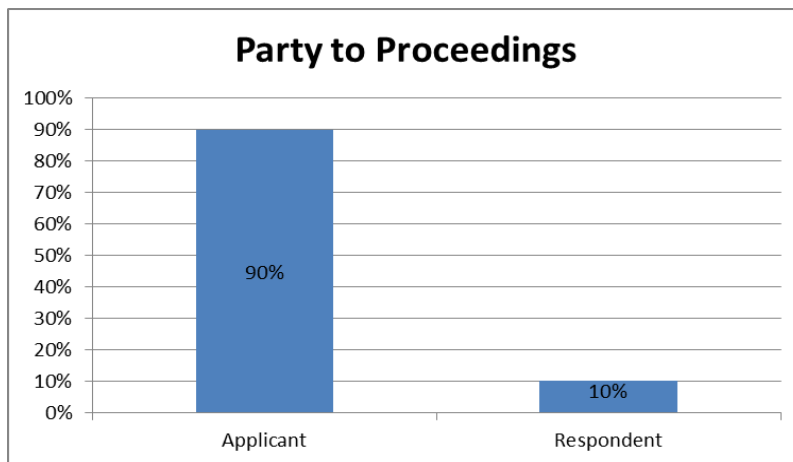
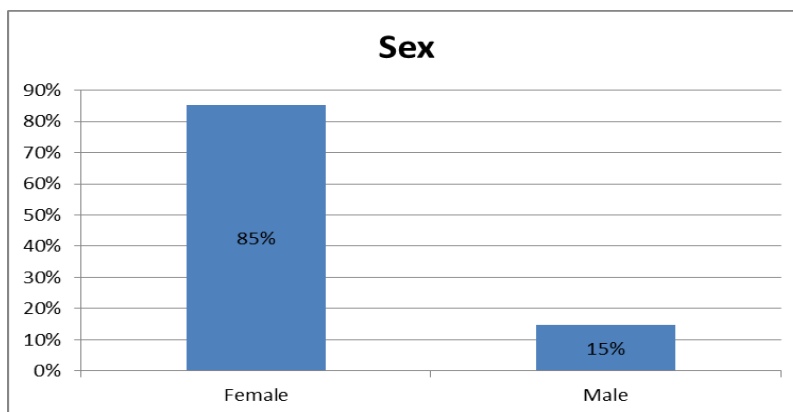
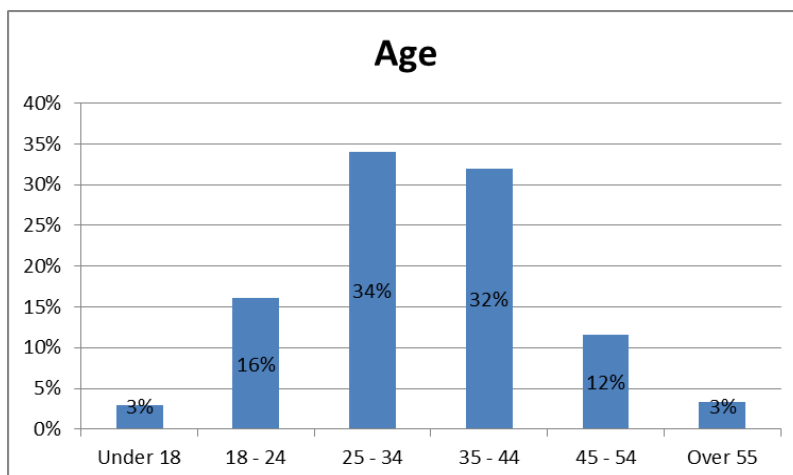
3.18 How did you travel to court?

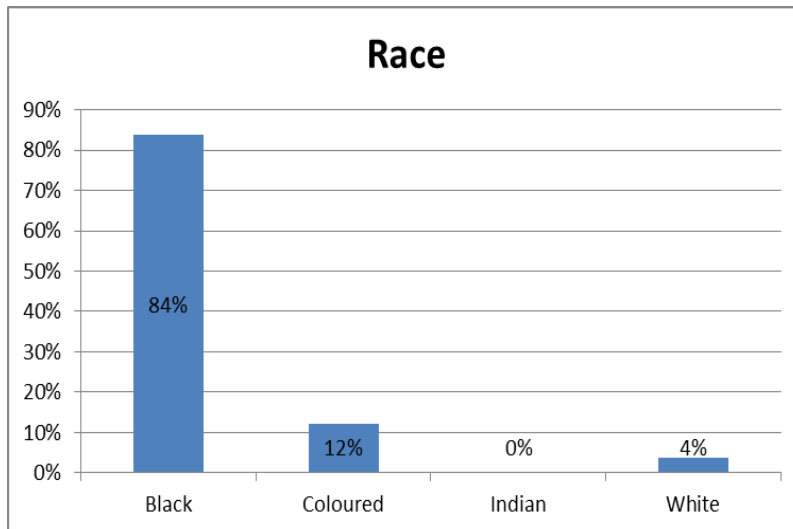
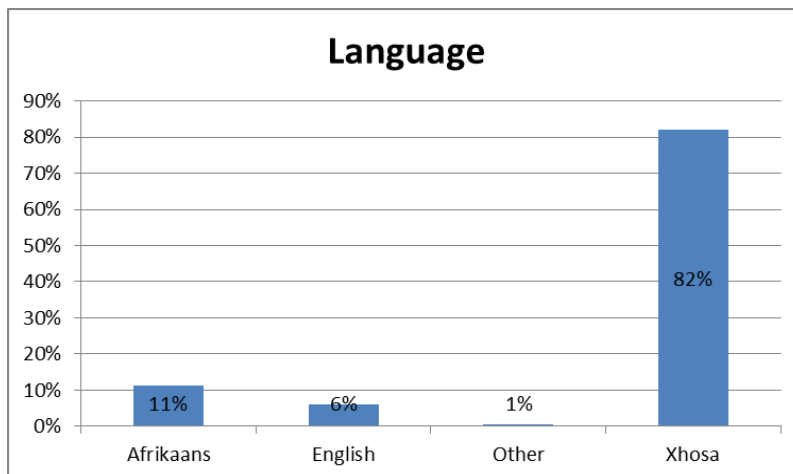
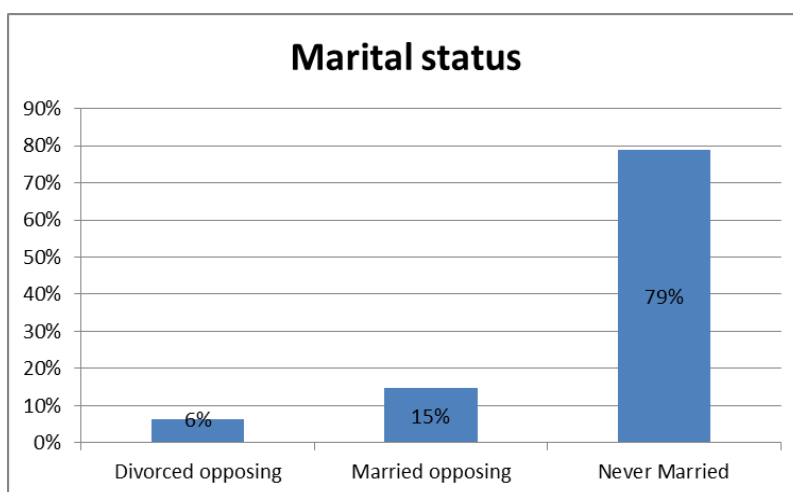
Walk	Car	Taxi	Bus	Over 8
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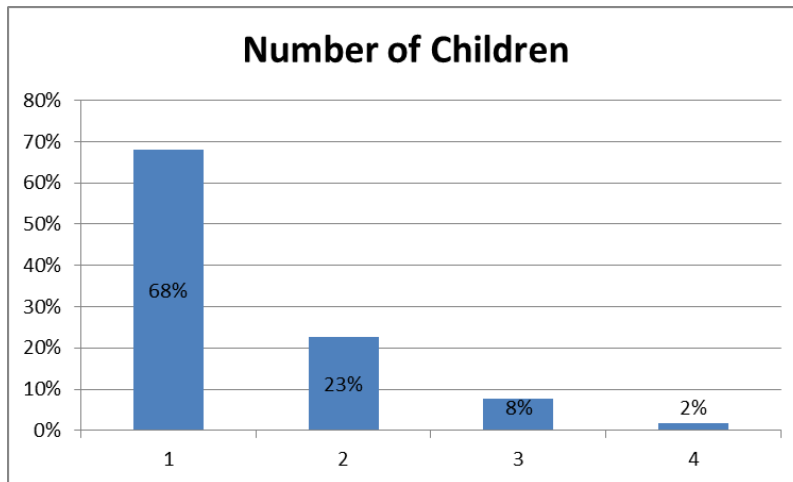
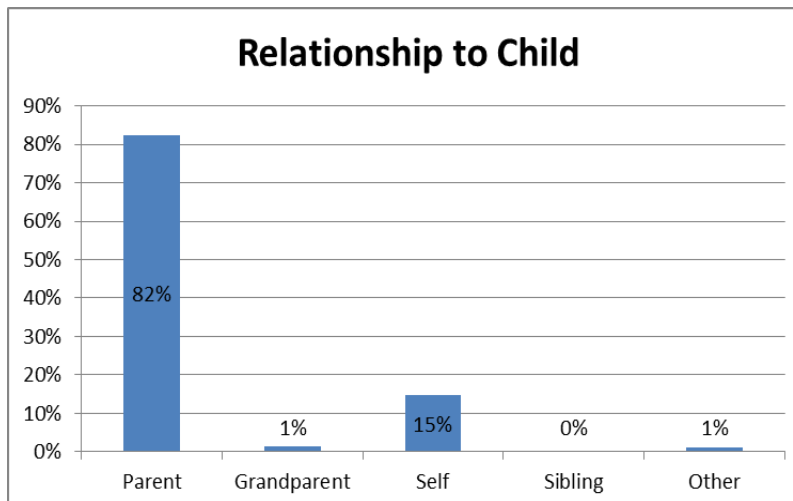
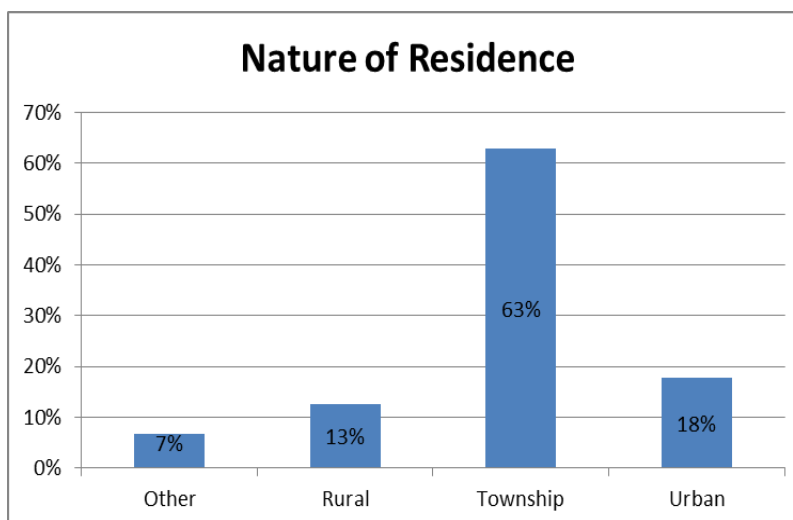
3.19 What will transport to and from court cost you?

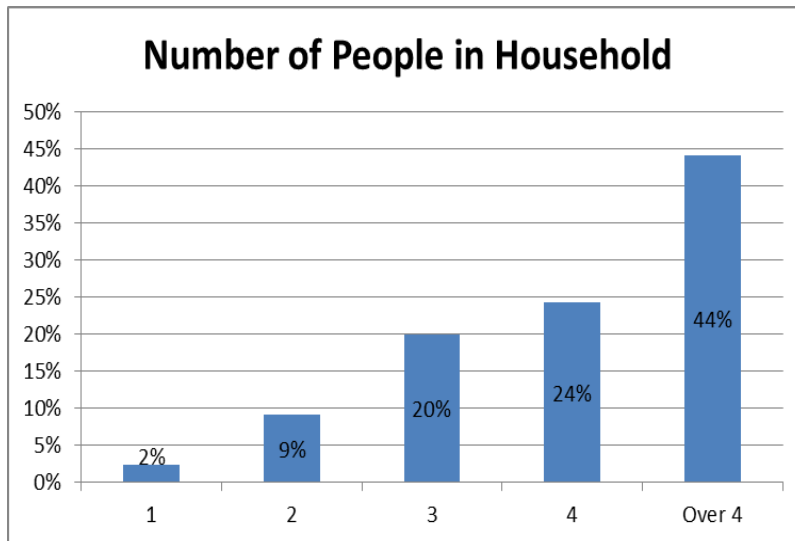
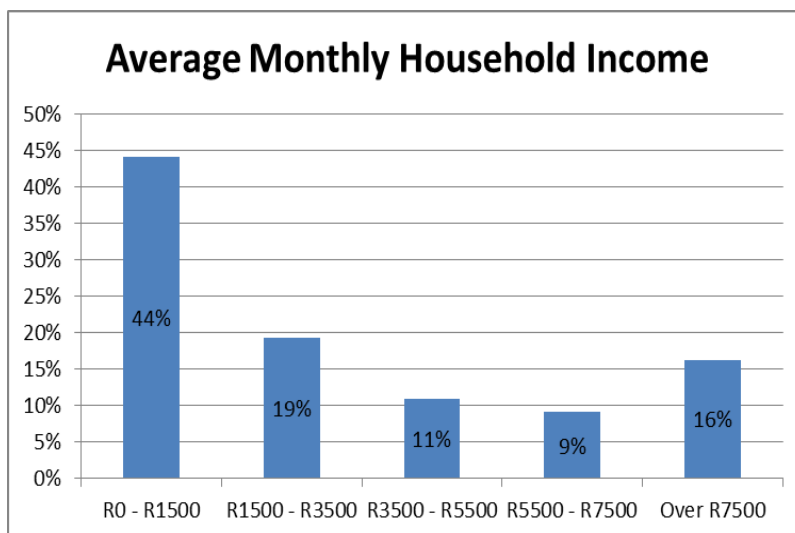
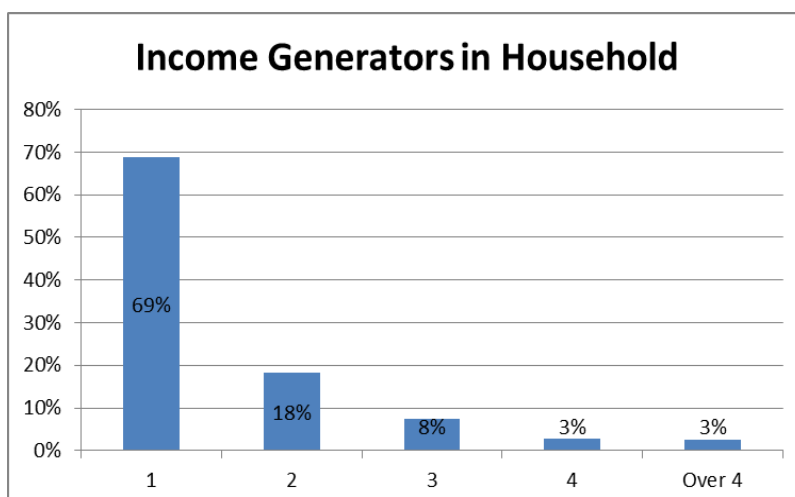
4. General:

4.1 Additional comments:

8.2 Annexure 1.28.3 Annexure 1.38.4 Annexure 1.4

8.5 Annexure 1.58.6 Annexure 1.68.7 Annexure 1.7

8.8 Annexure 1.88.9 Annexure 1.98.10 Annexure 1.10

8.11 Annexure 1.118.12 Annexure 1.128.13 Annexure 1.13

8.14 Annexure 1.14**List of questions for regional heads**

1. How many maintenance courts are there in your region?
2. How many cases are handled by these courts on a daily basis?
3. How many new maintenance orders are made by these courts per month?
4. How many substitution orders are made by these courts per month?
5. How many orders by default are issued by these courts per month?
6. How many orders for the attachment of emoluments are issued by these courts per month?
7. How many criminal convictions are handed down by these courts against maintenance defaulters per month?
8. How many maintenance officers are appointed in the maintenance courts in your region?
9. Does every maintenance court in your region have at least one maintenance investigator?

Yes	No
-----	----

10. If you answered 'No' to question 9, please indicate in which courts no maintenance investigator has been appointed as yet:
11. Regions are responsible for ensuring that courts are capacitated and that more clerks, maintenance officers and maintenance investigators are appointed. What have you done so far in regard to the appointment of maintenance investigators?
12. What are the qualifications for appointment as a maintenance investigator?
13. Over and above the appointment of maintenance investigators, do you still make provision for the use of independent tracing agents?

Yes	No
-----	----

14. In your opinion, what are the biggest successes that have resulted from the appointment of maintenance investigators?
15. Are there sufficient systems in place in all the maintenance courts in your region to record all payments made by maintenance debtors/defaulters?

Yes	No
-----	----

16. If so, what kind of systems do they use?
17. If not, are there any plans to improve the situation? Please explain.
18. Do you think Operation Isondlo has positively changed the negative public perception of the maintenance system that has prevailed up to now? Please explain your answer.
19. In how many maintenance courts in your region have Justice Deposits Accounts Systems (JDAS) been implemented?
20. How has the operation of JDAS improved the maintenance system in your region?
21. In how many maintenance courts in your region have Electronic Funds Transfer (EFT) Systems been implemented?
22. How has the operation of EFT Systems improved the maintenance system in your region?
23. What would you say are the biggest problems in your region with the recovery of maintenance and the enforcement of maintenance orders?

8.15 Annexure 1.15

List of questions for Accounts and EFT Clerk

1. How long have you been working on the Justice Deposits Accounts System (JDAS)?

2. How do you think JDAS has contributed to making the maintenance system more effective?

3. What do you think could be done to improve JDAS?

4. How long have you been working on the Electronic Funds Transfer (EFT) System?

5. In your opinion, how has the EFT System contributed to making the maintenance system more effective?

6. What do you think could be done to improve the EFT System?

THANK YOU FOR YOUR COOPERATION!

8.16 Annexure 1.16**List of questions for maintenance officers**

1. In which part of the magistrates' court building is the maintenance court situated?

Please describe.

2. What are your qualifications?
3. How many cases do you deal with on a daily basis?

Less than 10 cases	10-20 cases	20-30 cases	30-40 cases	40-50 cases	More than 50 cases
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4. In how many of these cases do you seek the assistance of a maintenance investigator on a daily basis?

1-5 cases	5-10 cases	10-15 cases	15-20 cases	20-25 cases	More than 25 cases
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5. How many maintenance investigators have been appointed in your maintenance court?
6. In your opinion, how much does the assistance of the maintenance investigator(s) contribute to your success in your job?

Not at all	Only a little bit	Quite a bit	Tremendously
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7. How often do you request the services of maintenance investigators from other jurisdictions of the maintenance court?
8. In which specific area was/were the maintenance investigator(s) most helpful?
9. Do you think that the appointment of more maintenance investigators to your court would contribute to making the recovery of maintenance and the enforcement of maintenance orders more effective?

Yes	No
-----	----

10. How often do maintenance debtors/defaulters notify you of any change of their address or employment, as is required of them by section 16(4) of the Maintenance Act 99 of 1998?

11. How often are maintenance debtors/defaulters found guilty of an offence and liable on conviction to a fine or to imprisonment in terms of section 39 of the Maintenance Act 99 of 1998 where they failed or refused to give notice of any change of their place of residence or employment?
12. How often do you cause a notice regarding the obligation to make periodical payments on behalf of a maintenance debtor/defaulters to be served on the **administrators of pension funds** in terms of section 16(3) of the Maintenance Act 99 of 1998?
13. How often do you cause a notice relating to the attachment of emoluments to be served on **employers** in terms of section 29 of the Maintenance Act 99 of 1998?
14. Do employers generally comply with notices which direct them to make payments from the salary of a maintenance debtor/defaulters to the maintenance court or to the maintenance creditor?

Yes	No
-----	----

15. How often do employers notify you that a maintenance debtor/defaulters, on whose behalf they are making periodical payments, has left their service?
16. How often are maintenance orders enforced in terms of section 29(4) of the Maintenance Act 99 of 1998 against employers who failed to make particular payments in accordance with a notice directing them to make specified payments on behalf of a maintenance debtor/defaulters?
17. Do you usually afford a maintenance debtor/defaulters's employer an opportunity to comment upon the feasibility/ practicability of an emolument attachment order?

Yes	No
-----	----

18. How often do you apply for orders by default against maintenance debtors in terms of section 18 of the Maintenance Act 99 of 1998?
19. How often are interim/provisional maintenance orders made in terms of section 21(3)(a) of the Maintenance Act 99 of 1998 pending the results of scientific tests regarding paternity?
20. Have you received any training in the analysis of paternity tests?

Yes	No
-----	----

8.17 Annexure 1.17**List of questions for maintenance investigators**

1. What are your qualifications?
2. Have you undergone training as a maintenance investigator at the Justice College?

Yes	No
-----	----
3. What aspects did the training cover?
4. Was the training adequate or would you say you need additional time for training?

Training was adequate	Additional training is needed
-----------------------	-------------------------------
5. Which maintenance courts do you service/ do you work for?
6. How often are you requested to locate maintenance debtors/defaulters?
7. How often are you requested to locate beneficiaries?
8. On average, how many maintenance debtors/defaulters do you trace per day?
9. On average, how many beneficiaries do you trace per day?
10. Which methods of tracing them do you use most frequently?
11. How often do you make use of the Trans Union ITC Information Support Service?
12. Does this system help you to trace maintenance debtors/defaulters and beneficiaries?
In what way?
13. How often do you make use of the DJINI (Departmental Internet)?
14. Does the DJINI help you to trace maintenance debtors/defaulters and beneficiaries? In what way?
15. Do you make use of tracing agents to help you to trace maintenance debtors/defaulters and beneficiaries?

Yes	No
-----	----
16. Which tracing agents do you use most frequently?
17. On average, how long does it take you to trace a maintenance debtor/defaulters or a beneficiary?
18. What could be done, in your opinion, to improve your chances of tracing maintenance debtors/defaulters?
19. How often do you serve subpoenas on parties?

20. How often do you serve warrants of execution against their property on maintenance debtors/defaulters?
21. What success have you had in locating the property (movable and immovable) of maintenance debtors/defaulters?
22. How often do you serve notices with a copy of a garnishee order on the employers of maintenance debtors/defaulters?
23. How often do you serve notices with a copy of a garnishee order on the pension funds of maintenance debtors/defaulters?
24. How often do you serve orders on third parties for the attachment of the present or future debts of maintenance debtors/defaulters?
25. Section 43 of the Maintenance Act 99 of 1998 stipulates that a maintenance court may order that two photographs be taken of the maintenance debtor/defaulters. Who takes these photographs and do you use them when you have to serve subpoenas on maintenance debtors/defaulters?
26. How often do you take statements under oath from parties?
27. How often do you take statements under oath from the employers of one of the parties?
28. How often are you requested to gather information about the financial position of parties?
29. How do you go about gathering information about the financial position of parties?
30. How often are you requested to determine the quantum of a maintenance claim?
31. How do you go about determining the quantum of a maintenance claim?
32. How often are you requested to investigate a maintenance defaulter's defence of lack of means?
33. How do you go about investigating a maintenance defaulter's defence of lack of means?
34. How often do you find that a maintenance defaulter's defence of lack of means/failure to pay was due to his or her unwillingness to work?
35. How often do you find that a maintenance defaulter's defence of lack of means/failure to pay was due to his or her own misconduct?
36. How often do you expose fraud on the part of maintenance debtors/defaulters?
37. What kind of fraud do you expose most frequently?

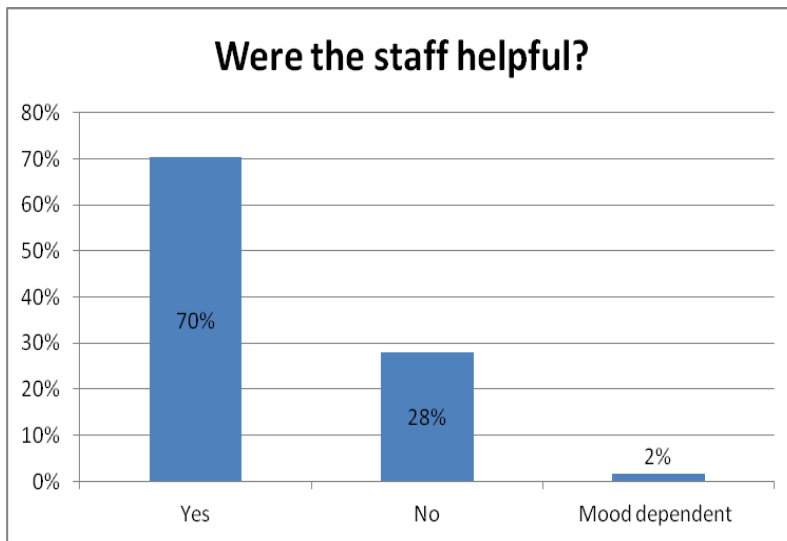
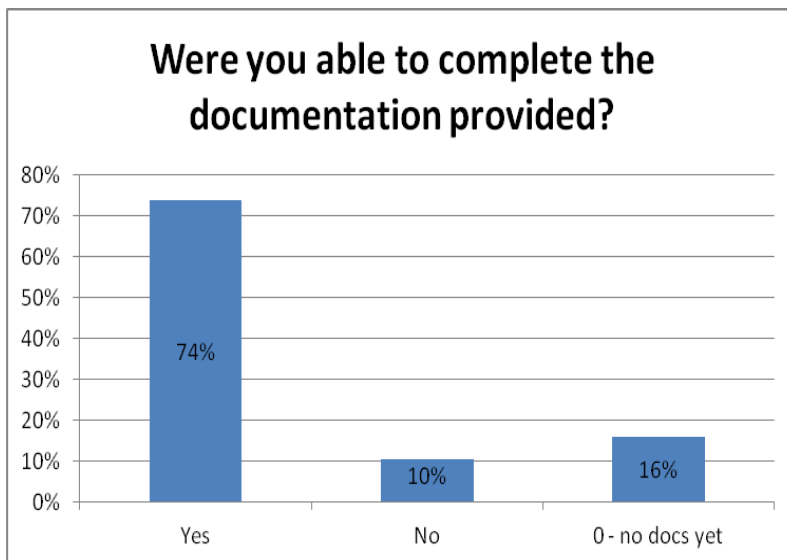
38. How often do maintenance officers from other jurisdictions of the maintenance court request your assistance?

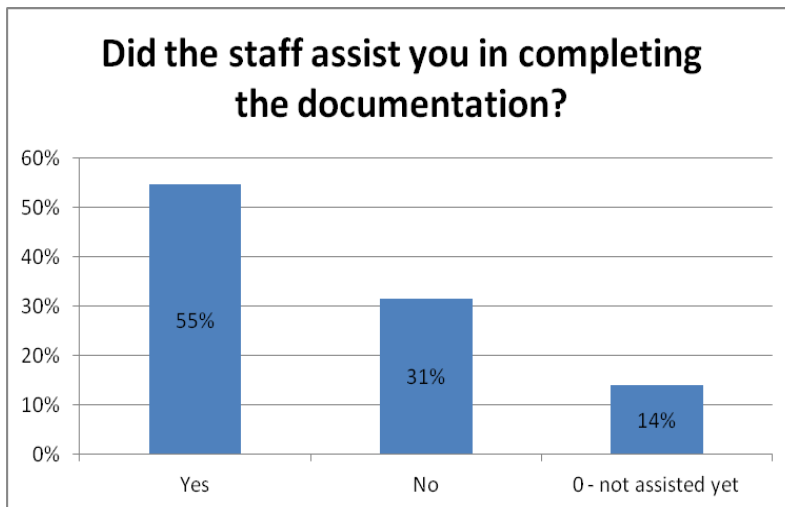
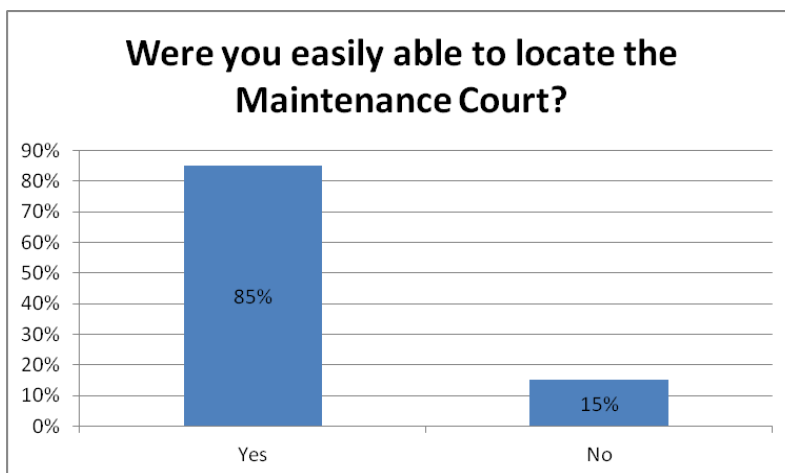
39. Would you say that you have contributed to reducing the turn-around time of the maintenance case backlog?

Yes	No
-----	----

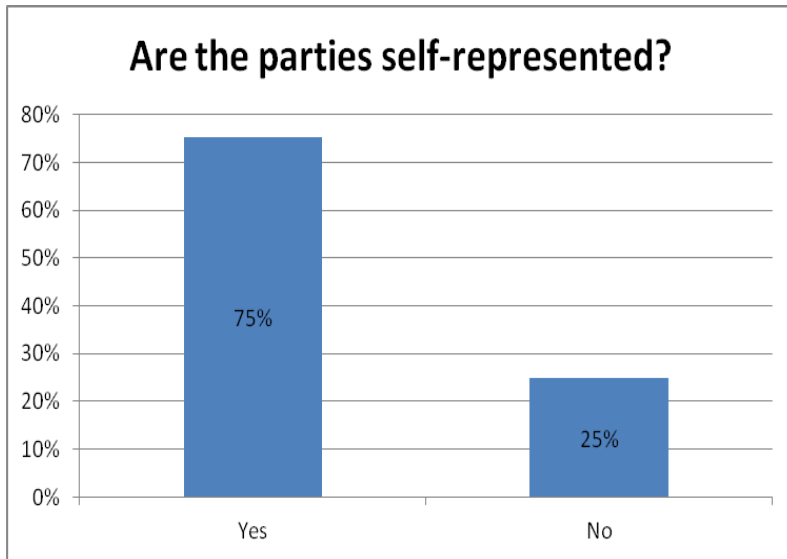
40. Describe your biggest successes as a maintenance investigator.

41. What seem to be the biggest problems/obstacles in doing your job properly?

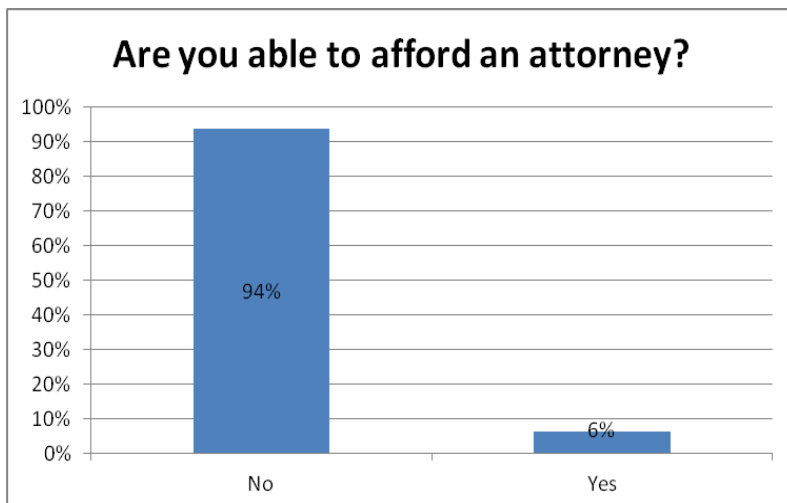
8.18 Annexure 4.1(a)8.19 Annexure 4.1(b)

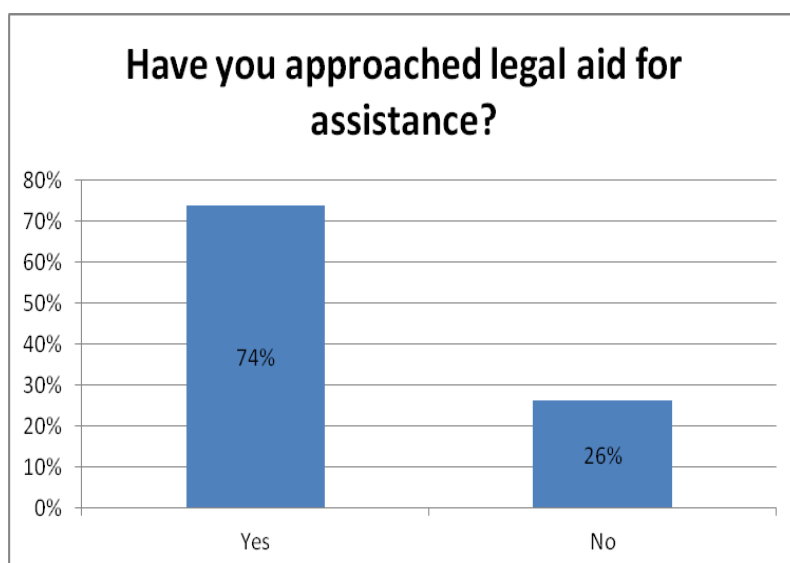
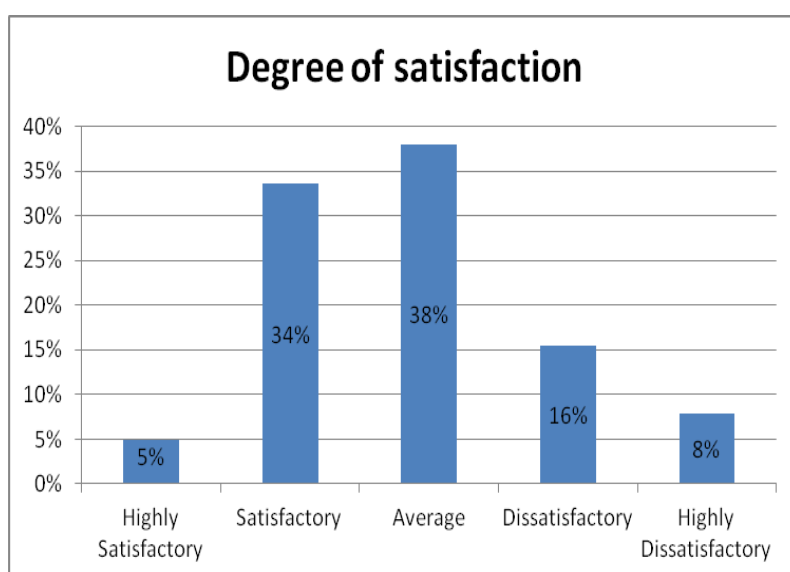
8.20 Annexure 4.1(c)8.21 Annexure 4.1(d)

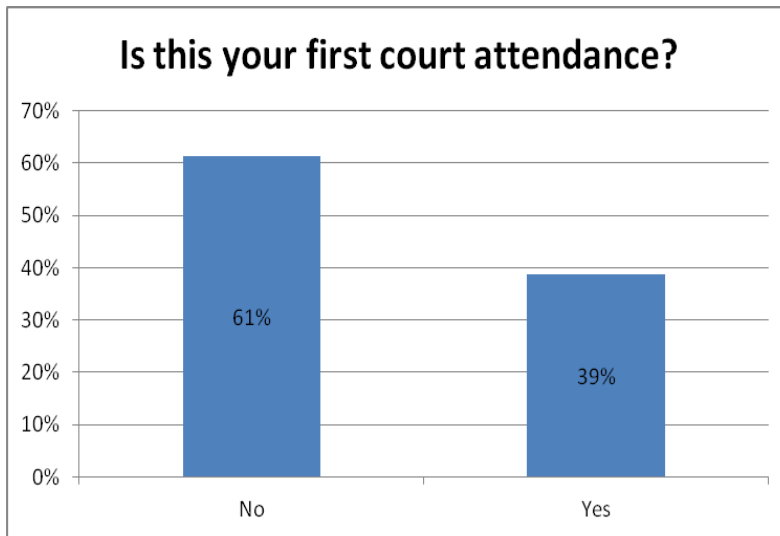
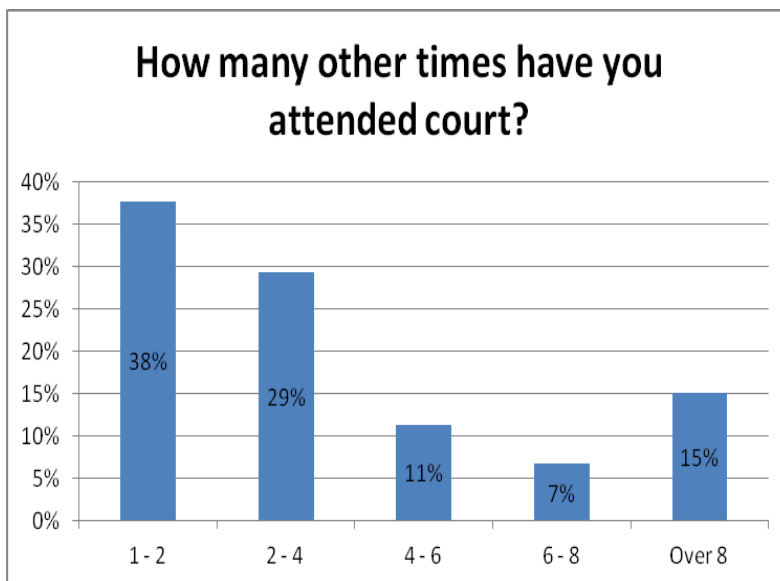
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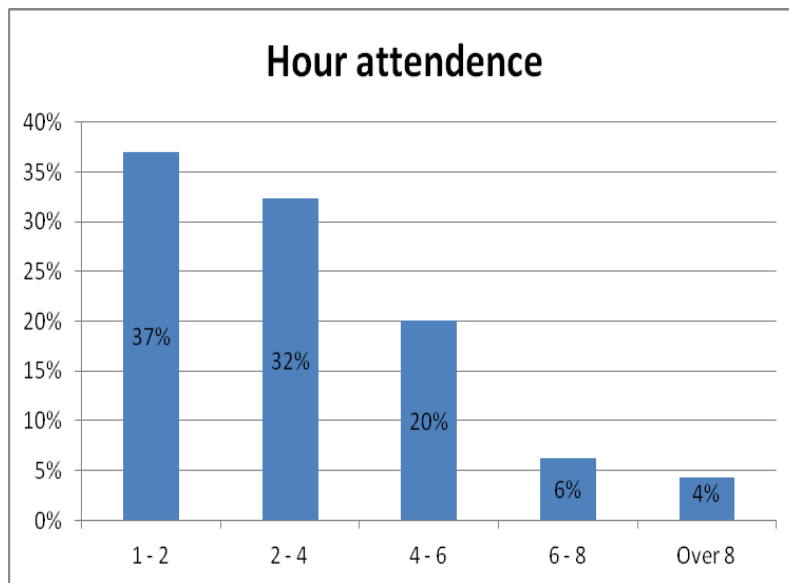
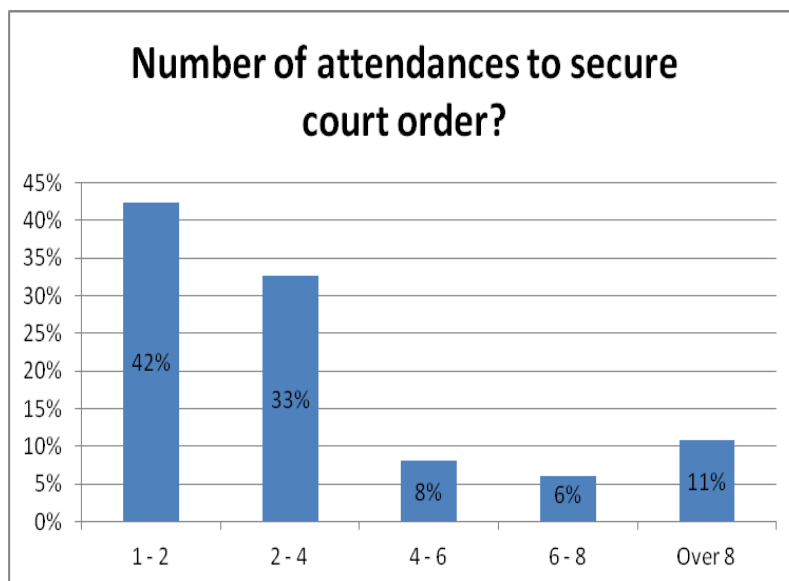


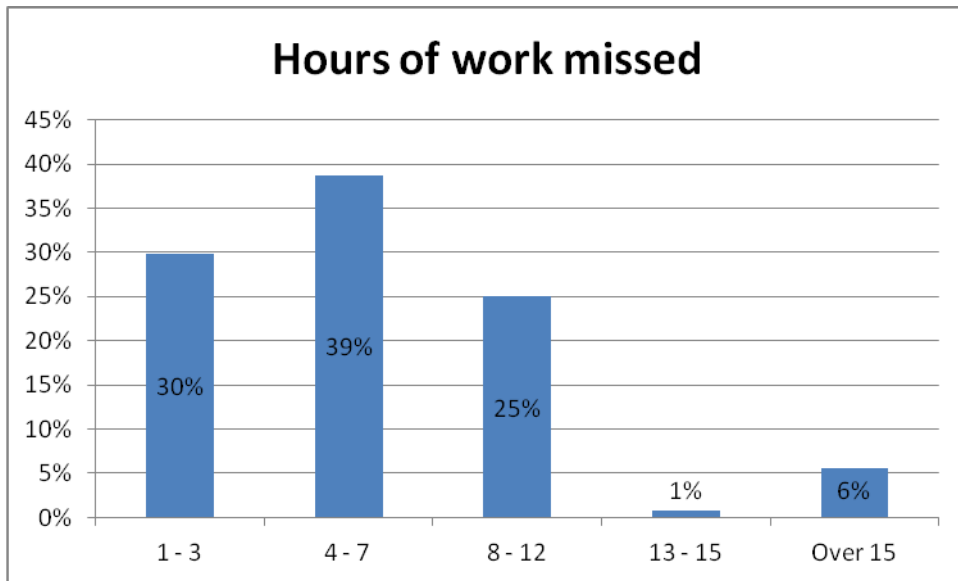
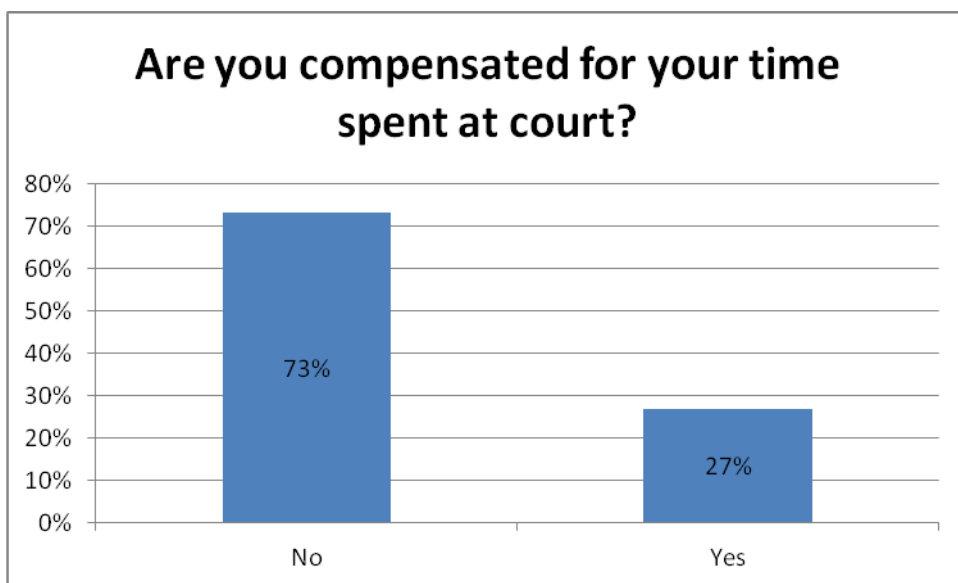
8.23 Annexure 4.1(f)



8.24 Annexure 4.1(g)8.25 Annexure 4.1(h)

8.26 Annexure 4.1(i)8.27 Annexure 4.1(j)

8.28 Annexure 4.1(k)8.29 Annexure 4.1(l)

8.30 Annexure 4.1(m)8.31 Annexure 4.1(n)

8.32 Annexure 4.2

* Please note that spelling errors have not been amended as the comments have been transcribed directly as found on the interviewees comment sheet

KEY:

A:

F: Female

EL: East London

PE: Port Elizabeth

GHT: Grahamstown

MTH: Mthatha

R: Respondent

M: Male

MDT: Mdantsane

KWT: King Williams Town

ZW: Zwelitsha

4.2	Qno	Court	Party	Sex	Language	Comments
4.2.1	1	EL	A	F	Xhosa	
4.2.2	2	EL	A	F	Xhosa	Waiting is a big problem - wishes they would speed up so that she can go to work
4.2.3	3	EL	A	F	Xhosa	tired of waiting and worried about work - going to lose overtime because taking too long
4.2.4	4	EL	A	F	Xhosa	very difficult to get Respondent to court, also the court does not include provision for an increase in existing maintenance
4.2.5	6	EL	A	F	Afrikaans	women and children have rights - not enforced, waiting 2 years for an order, Respondent in JHB, has not come once - always "short notice"
4.2.6	7	EL	R	M	Xhosa	can't comment, first time and still early in the day
4.2.7	8	EL	A	F	Xhosa	tired of postponements, waiting hours long
4.2.8	10	EL	A	F	Xhosa	can't afford a lawyer. Not happy, want it to go faster
4.2.9	11	EL	A	F	Xhosa	don't organise the court file - come in to do it - they need to explain your rights, you don't know what you need to bring or what to do and when you must do it, Respondent is never available - too many postponements
4.2.10	12	EL	A	F	Xhosa	no one explained that she can move to KWT except me, takes too long, investigations are not done, never given infor about your rights or the procedure, lack of support from court staff, hours of waiting

4.2.11	13	EL	A	F	Other	first experience at EL Maintenance court so can't comment
						takes months to get a trial date, cannot get hold of the fathers for subpoenas - no one helps - difficult to trace, maintenance investigations not done, MI not doing their job, no vending machines or food, women too scared to go to the toilet in case they miss being called, difficult to sit in the waiting room with the Respondent
4.2.12	15	EL	A	Male	English	
4.2.13	16	EL	A	F	Xhosa	hungry - no food available
4.2.14	19	EL	A	F	Afrikaans	Not unhappy
4.2.15	20	EL	A	F	Xhosa	nowhere to get food
4.2.16	23	EL	A	F	English	look at getting earlier court dates - have to wait 2 months - too long!
						waiting many hours - wish to be assisted earlier, postponements take so long - while you struggle - started case 6 months ago - still no solution
4.2.17	24	EL	A	F	Xhosa	
4.2.18	26	EL	A	F	Afrikaans	women and children not assisted
						doesn't understand the process - keeps coming back/postponing - not sure why
4.2.19	37	EL	A	F	Xhosa	
						service could be better. Women stressed enough as it is - staff should be more helpful in general
4.2.20	38	EL	A	F	Afrikaans	
4.2.21	46	EL	A	F	English	the place is horrific - no one knows what they are doing
						child's father has "connections" in the court - no proper financial enquiry - nobody is interested or will help her
4.2.22	49	EL	A	F	English	
						never been satisfied with Mdantsane Mag court - moved to EL - much better, Mdantsane need to be trained in customer care, ignore people
4.2.23	50	EL	R	F	Xhosa	
						staff need to learn to communicate properly with the public - we are left in the dark
4.2.24	55	PE	A	F	Xhosa	
						follow ups not done by staff - court file has been lost, have absolutely no idea of what is going on at all
4.2.25	56	PE	A	F	Xhosa	
						bit of a circus, running around yelling, staff ignore women sitting there, no idea what you need to fill out, no clear instructions, enquiries door is locked
4.2.26	57	PE	A	F	English	
4.2.27	58	PE	A	F	Afrikaans	has been a good experience and feels

						that I have been helped sufficiently
4.2.28	59	PE	A	F	Xhosa	feel like really been helped
4.2.29	62	PE	A	M	Xhosa	system is flawed, no clear indication of who goes where for what - you never know where you are supposed to be
4.2.30	63	PE	A	F	Afrikaans	need to change procedure - the procedure that was explained is not what is happening
4.2.31	64	PE	A	F	Xhosa	Good service and experience so far
4.2.32	67	PE	A	F	Xhosa	no facilities for children - change nappies etc.
4.2.33	69	PE	A	F	Xhosa	the process takes too long
4.2.34	71	PE	A	F	Xhosa	happy with the process
4.2.35	73	PE	A	F	Xhosa	process takes too long
4.2.36	74	PE	A	F	Afrikaans	want to be helped more quickly, 1st time - feeling very much in the dark, wish someone would explain the procedure
4.2.37	76	PE	A	F	Xhosa	person out of town - WOA authorised - but never arrested - battling to get the Respondent to court, court staff don't encourage garnishees or help enforce order
4.2.38	77	PE	A	F	Afrikaans	after 2 years still not getting maintenance - trying to get arrears
4.2.39	78	PE	A	F	Xhosa	facilities clean and sufficient
4.2.40	79	PE	A	F	English	no point in commenting as nothing ever changes
4.2.41	80	PE	A	F	Afrikaans	haven't been at court long enough to comment
4.2.42	81	PE	A	F	Xhosa	everything has been good so far
4.2.43	82	PE	A	F	Afrikaans	haven't been helped yet so cannot comment
4.2.44	84	PE	A	F	Xhosa	been waiting for 4 years for a WOA to be effected
4.2.45	85	PE	A	F	English	justice system : "sucks" - not here for the children at all - it is all about who you know at court - not surprising many women give up the fight - if she doesn't get what she needs the kids can go and live with their father
4.2.46	86	PE	A	F	English	been doing maintenance for years so know procedure, you just have to "go with the flow, you can't do anything else"
4.2.47	87	PE	A	F	Afrikaans	not satisfied with waiting, people never get arrested on a warrant, man not held

					accountable for not pitching, on-going process	
4.2.48	88	PE	A	F	Xhosa	the staff try hard to help, always support the person with the child, but if Respondent doesn't want to pay you can be here 10 times - but court tries their best
4.2.49	89	PE	A	F	Xhosa	very confused - don't know what to expect at all
4.2.50	91	PE	R	M	English	waiting is too long, tired, cold, stressed - delayed - other appointments
4.2.51	92	PE	A	F	English	court staff not there for children, it's about who you know - if you know respondent will help him, so many delays, maintenance investigations not carried out, court file is always missing
4.2.52	93	PE	R	M	Xhosa	generally the men are not taken care of - prejudiced - feel like you are being punished, complainant keeps coming to court - no "good cause"
4.2.53	94	PE	A	F	Xhosa	waiting for hours, waiting area not nice
4.2.54	97	PE	A	F	English	have been happy with application and court procedure - very unhappy with the cash hall - filthy - staff picking noses - very lazy
4.2.55	99	PE	A	M	English	takes a long, long time, court never starts on time, when child reaches majority - should report working, court not supportive of men - prejudiced towards men
4.2.46	100	PE	A	F	Xhosa	staff helpful and understanding, never had a bad experience in 4 years
4.2.57	101	GHT	A	M	Xhosa	feel victimized as a man, pay for a child when you are not given access, paying for child to attend school - but child doesn't go, not enough weight given to the pro rata split
4.2.58	104	GHT	A	F	Xhosa	taking way too long
4.2.59	107	GHT	R	M	Xhosa	not a nice situation, procedure is fine but it becomes personal and not about maintenance
4.2.60	108	GHT	A	F	Xhosa	waiting outside in the cold - and the wait is too long
4.2.61	109	GHT	R	M	Xhosa	undignified and embarrassing - 3 ladies attending to the matters - he is a man - setup is not private enough - discuss sensitive matter with everyone listening, staff not qualified - yet they

						make decisions for the parties
4.2.62	112	GHT	A	F	Xhosa	the staff do help :)
4.2.63	113	GHT	R	M	Xhosa	girlfriend wants drinking money - uses maintenance - my child lives in the shack next door - I can see what is happening
4.2.64	114	GHT	R	M	Xhosa	worried - all clerks are women - men are not fairly represented
4.2.65	116	GHT	A	M	Xhosa	everything is good - no complaints
4.2.66	117	GHT	A	M	Xhosa	everything is fine so far
4.2.67	118	GHT	A	F	Xhosa	happy at the moment
4.2.68	119	GHT	A	F	Xhosa	service has been very good
4.2.69	120	GHT	R	M	Afrikaans	the waiting area is very cold
4.2.70	121	GHT	A	F	Xhosa	unfair - he is self-employed and he lies, can't catch him, says he isn't working, investigator not doing their job, not even an interim order in place
4.2.71	124	GHT	A	F	Xhosa	haven't experienced enough yet to know
4.2.72	126	GHT	A	F	Xhosa	waiting area not easy to find
4.2.73	127	GHT	A	F	Xhosa	not getting the service hoped for, deducting money on the 15th of the month - and getting it a month later - running into problems with the school re fees
4.2.74	128	GHT	A	F	Xhosa	happy with the experience
4.2.75	134	GHT	A	M	Xhosa	lose 2 days work unpaid
4.2.76	135	GHT	R	M	Xhosa	everything is fine
4.2.77	138	GHT	R	M	Other	women have a more favourable position compared to Zim, the women might be wrong but they are still favoured
4.2.78	139	GHT	A	F	Xhosa	the wait is too long
4.2.79	140	GHT	R		Xhosa	need prosecutors to do their job, need educated people to do the job, the judge must not favour women
4.2.80	142	GHT	A	F	Xhosa	no privacy, too many people hear your personal business, not comfortable. Two months to get an appointment is not efficient, by the time you are heard the Respondent's particulars have changed, they should be experts - never ask the right questions, lots of room for error
4.2.81	146	GHT	A	F	Xhosa	has to miss school
4.2.82	147	GHT	A	F	Afrikaans	been waiting for 3 months, no information about the case, taking very

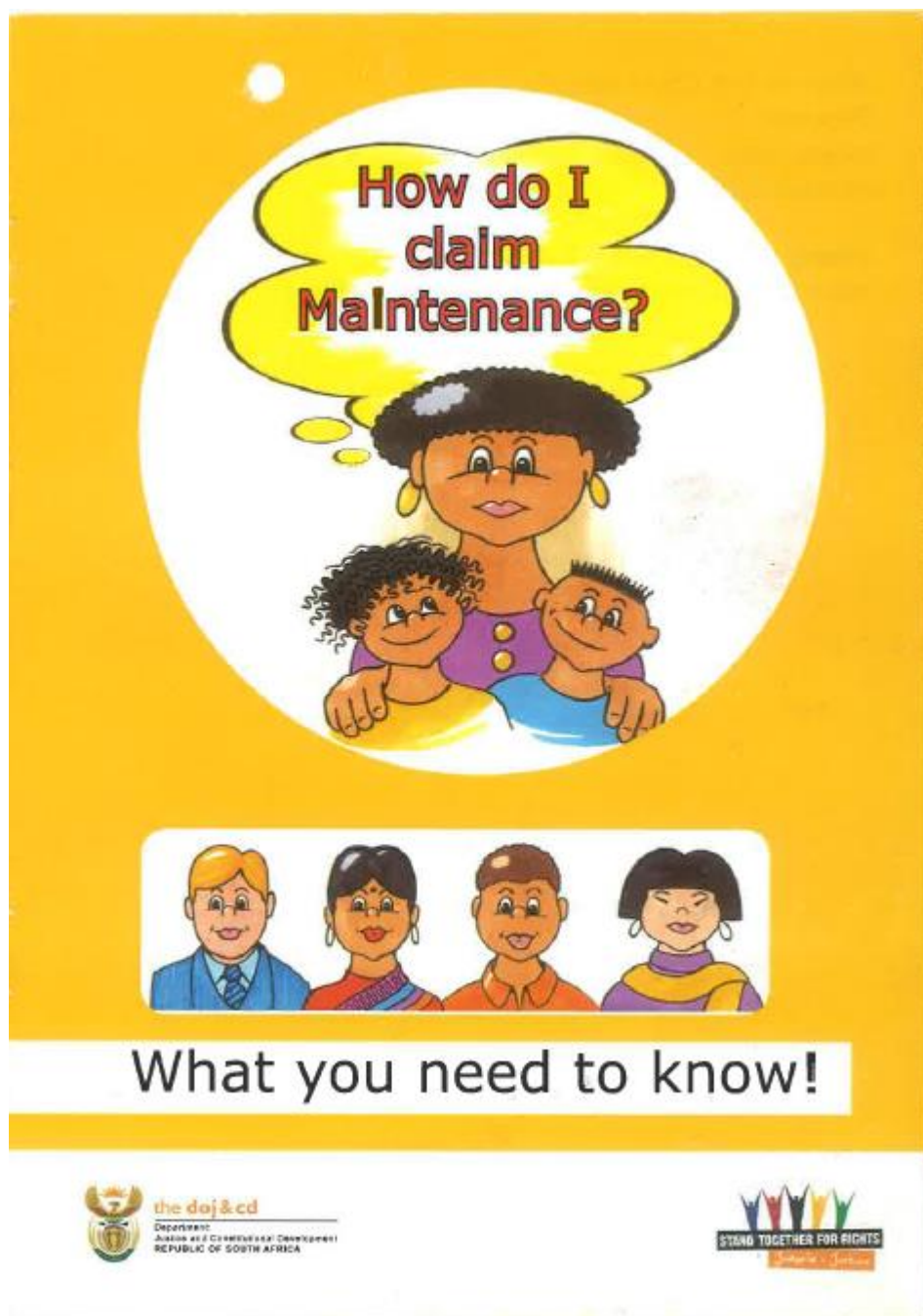
						long, child needs school things - she is a foster mother, doesn't have money for education
4.2.83	149	GHT	A	F	Xhosa	females at court do not listen to problems, males more helpful, payment of monies from maintenance takes long to be paid, pay it late even after it has been deducted from the salary of the respondent
4.2.84	150	GHT	A	F	Xhosa	everything is fine but it is hard getting an increase, it takes too long
4.2.85	151	MTH	A	F	Xhosa	not helped in 1 day - sometimes have to come back every day for a week, everyone sits outside and are clueless, given an appointment time and then helped after 3 or 4 hours
4.2.86	152	MTH	A	F	Xhosa	been waiting for a long time and not attended to
4.2.87	157	MTH	A	F	Xhosa	some staff members are not helpful, they are rude
4.2.88	166	MTH	A	F	Xhosa	maintenance officer advised subpoena not served - has to start all over
4.2.89	169	MTH	A	F	Xhosa	maintenance officer doesn't give you a chance to explain yourself
4.2.90	179	MTH	A	F	Xhosa	there is a disturbance since I did a transfer
4.2.91	180	MTH	A	F	Xhosa	you don't get money at the same time, you have to wait
4.2.92	188	MTH	A	F	Xhosa	not satisfied at all
4.2.93	189	MTH	A	F	Xhosa	we want money to be paid into account
4.2.94	201	MDT	A	F	Xhosa	Suggest that they start on time and at 8am
4.2.95	202	MDT	A	F	Xhosa	they told me to look for the Respondent who is living in Pretoria, I don't know where to find him
4.2.96	203	MDT	A	F	Xhosa	not assisted properly
4.2.97	205	MDT	A	F	Xhosa	don't care, no explanation, not helpful at all
4.2.98	210	MDT	A	F	Xhosa	they don't care about time, stay for long
4.2.99	213	MDT	A	F	Xhosa	service is very poor and staff not professional
4.2.100	216	MDT	A	F	Xhosa	Mr. Mtengwane is silly, does not care for people, he is very rude, doesn't comply, is unruly
4.2.101	220	MDT	A	F	Xhosa	Called by maintenance officers and didn't return

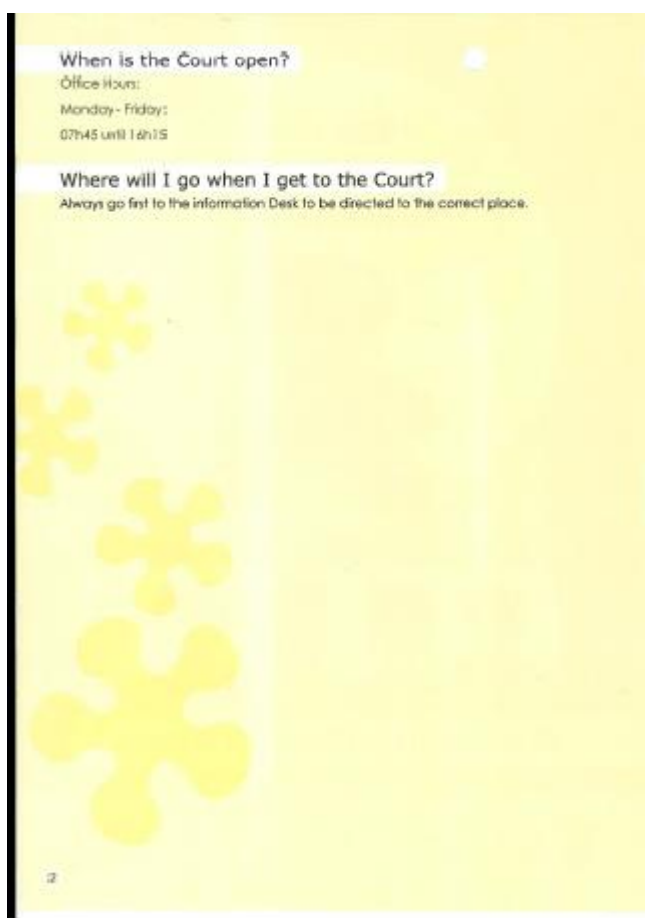
4.2.102	222	MDT	A	F	Xhosa	cashiers at cash hall don't care if I get money, they pay over late, not helpful at all
4.2.103	224	MDT	A	F	Xhosa	Mr. Mtengwana very rude to us
4.2.104	226	MDT	A	F	Xhosa	cashiers don't give money when they get it. Mr. Mtengwana is very rude to us and stands up for men
4.2.105	228	MDT	A	F	Xhosa	they don't care and are very rude to us
4.2.106	229	MDT	A	F	Xhosa	don't get money on the exact date, didn't even get last month's money
4.2.107	230	MDT	A	F	Xhosa	not receiving money since Dec, they say file is missing and they are looking for it
4.2.108	235	MDT	A	F	Xhosa	he agreed to pay R600, until now there is nothing, the maintenance officer says I must come every Friday
4.2.109	236	MDT	A	F	Xhosa	I want him to give him more money since everything expensive
4.2.110	242	MDT	A	F	Xhosa	Called by maintenance officers did not return
4.2.111	250	MDT	R		Xhosa	he travels all the way from Butterworth. Old and sick and his daughter doesn't bother to attend court
4.2.112	254	KWT	A	F	Xhosa	Poor service
4.2.113	260	KWT	A	F	Afrikaans	No waiting rooms, have to sit outside in bad weather, if you collect maintenance you wait outside on the front stoep in long queues, they treat us very bad
4.2.114	264	KWT	A	F	Afrikaans	Would like the court to get the right way to help us get the support we need
4.2.115	265	KWT	A	F	Xhosa	The staff take a very long time to assist people and there is no one to tell us where to go for certain cases
4.2.116	266	KWT	A	F	Xhosa	I wish that they could be waiting for us in the court while we are waiting to be called, stand outside for many hours in the cold, rain and heat
4.2.117	267	KWT	A	F	Afrikaans	No waiting room, very cold outside
4.2.118	268	KWT	A	F	Xhosa	Maintenance court officials should be more friendly and render more assistance. No proper explanation given and as a result you move up and down to get all the necessary documents, am in the initial stages but will see as time goes and will be more willing to participate again

4.2.119	285	KWT	A	F	Xhosa	Defendant does not come, he received docs and they are still looking for him
4.2.120	304	ZW	0	F	Xhosa	The staff must please be quick and helpful to the public asap
4.2.121	305	ZW	A	F	Xhosa	Government should appoint people who care about client's and able to assist them. The staff are very rude
4.2.122	308	ZW	A	F	Xhosa	Sometimes you come and you never get your money, i changed my money to stop order but i never got it for 3 years, we stand for an hour and then told there is no money
4.2.123	309	ZW	A	F	Xhosa	The people assisting us are not friendly at all - we arrived early in the morning and they will tell us stories that the money has not arrived yet or sometimes they will tell us that our money is not there so we don't know where our money is going and they tell you to go home and come back another day - so wasting our money and getting nothing in return. They don't know their jobs and they don't care about us
4.2.124	311	ZW	R	F	Xhosa	I was receiving maintenance with a card, when he retired i never received money, court told me my card had expired. I visited the court many times and they refuse to help me, being trying to get assistance since 2006
4.2.125	314	ZW	A	F	Xhosa	If the staff could be more patient and friendly - they are helpful but not patient
4.2.126	315	ZW	A	F	Xhosa	Treated unfairly, must fill in forms for the bank for the 3rd time
4.2.127	318	ZW	A	F	Xhosa	Even if you have been here at court to collect money sometimes when you come you battle with the staff. They don't give you the money, say the computers are down whilst you have been there the whole day or say resp did not put the money in whilst it is a stop order, the date already passed for the money - forced to be rude and shout ay them and tell them the kids need money, after waiting they finally check their files, and give money, proves they lied to you, there are old ladies that come far from location and

						they have nothing and they are lied to and chased away
4.2.128	319	ZW	A	F	Xhosa	When i first came to maintenance court service delivery was good and i got money first time
4.2.129	321	ZW	A	M	Xhosa	Service is terribly slow, the place where we wait is a poor place to be waiting in, it is cold and dirty and not suitable for people
4.2.130	323	ZW	A	F	Xhosa	We are undermined by zwelitsha staff and magistrate's, waiting room is very dirty as if we are pigs. Even the consultations they send security - the staff don't address us if there is a problem. We are waiting for hours and then security will come and say there is no money or printout where i have stayed for a long time
4.2.131	341	ZW	A	F	Xhosa	Haven't found resp since 2012
4.2.132	342	ZW	A	F	Xhosa	Respondent not found since feb
4.2.133	343	ZW	A	F	Xhosa	Respondent not found since april

8.33 Annexure 6.1





How do I claim Maintenance?

What are my rights?

- It is the duty of both parents to support their child financially.
- This includes contributions towards paying for food, clothing, accommodation, medical care and education.
- The amount of maintenance will be determined in proportion to each parent's income.
- Both parents are responsible for the care of their child whether the child is born in or out of marriage.
- The person responsible for paying the maintenance has the right to appeal against the Maintenance Order.
- If the person responsible for paying maintenance does not pay, a complaint can be made at the Maintenance Court.
- A Maintenance Order may be made for:
 - Expenses in connection with the birth of the child
 - Expenses in connection with the maintenance of the child from the date of the child's birth to the date of the enquiry
 - In the case of a divorce, the ex-spouse is entitled to receive maintenance if it was included as part of the Divorce Court procedure.

When can I approach the Maintenance Court?

- When the other party does not provide for the maintenance of the child or family.
- When applying for maintenance for the first time.
- When the Divorce Court has made an order; to open a file for the court to inform the person responsible when, how and where payments are made.
- When applying for an increase or decrease of an existing Maintenance Order.

Which Court should I go to in order to apply for Maintenance money?

Please contact your nearest Court by telephone as they will be able to assist you with the correct information. (The Court in the district in which the child or person to be maintained resides.)

I need to claim Maintenance money - how do I go about applying for it?



- Phone your local Court to find out which Court is the correct one to go to for maintenance.



- Phone that Maintenance Court and confirm what you will need to bring with you in order to apply for maintenance money.



- Come to the Court and complete an application form.



- The Court will provide you with a date on which you and the Respondent (the other parent) will need to come to Court.



- The Court will issue a subpoena to the Respondent (the other parent) to appear in Court on a specific date.

Please note:
The entire process from applying for maintenance to receiving the first payment might take several weeks, depending on the co-operation of both parties.

Do I need to travel to the Court?

Always phone before traveling to the Court. It make sure that:

- You are going to the right Court.
- You have all the relevant information with you on the day.
- You know whether the Respondent (the other parent) needs to be there with you on the day.

I need to go to the Maintenance Court - what do I need to take with me?

Make sure you bring the following with you:



- ID book.



- ID number and photo of parent/person responsible for paying the maintenance money.



- Bank statement if you have a bank account.



- List of expenses describing the child's needs.
- Documents to prove these expenses, eg water and lights bill, grocery till slips, clothing accounts etc.
- Current payslip of both parties who earn an income.



- Physical, residential and work address of the person who needs to pay the money.
- Physical, residential and work address of a family member or next of kin.
- Court date (if already determined).
- Reference number (if already allocated).
- Court Order (if already granted).
- Divorce Agreement (in the case of a divorce).
- Payment date.

What expenses can be listed as the child's needs?

- Accommodation
- Water and Lights (Electricity bills)
- Food and other groceries
- Clothes
- School fees
- Medical costs
- Travel costs



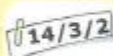
You will need to bring supporting documentation for each of these expenses, otherwise THE COURT CANNOT INITIATE PROCEEDINGS, eg: pay slip, electricity bills, school fees and receipts of medical costs

Why do I need a Court date?

To give the Court time to warn the other party to be present for the hearing.

Why is it necessary for each party to come to Court?

This is to reach an agreement of how much maintenance is needed and how much the person responsible can afford to pay.


What should I use as a Reference Number?

- You will receive a file number starting with 14/3/2 followed by your reference number allocated by the office;
- The number appears on your orange Maintenance card.
- Please quote your number whenever you make enquiries about your matter.

**How long will I wait for a Court Order to be issued?**

This depends on the co-operation of both parties. Should the parties reach an agreement, the first payment should be done as specified by the Court Order.

What are the different ways that I can collect Maintenance money?

- Garnishee order – the company takes the money directly from the responsible person's salary and pays it into the Court's bank account.
- Cash payment – you collect the money over the counter at the Court.
- Direct payment into your bank account – the respondent makes a deposit into your bank account.

**The best way to collect Maintenance is by the direct payment into your bank account.**

- The advantages are:
- No traveling to the Court
 - No transport costs
 - No standing in queues
 - No lost time off work.

6

How do I know if the money was paid?

- Always phone before coming to the Court, to ensure that the money is paid in.
- If the money is not paid in, the Court will text you and track whether a payment was made and, if not, will tell you what to do next.

**ALWAYS PHONE FIRST****How long will I wait for the money to be paid out to me?**

- The payment date is dependent on the Court Order.
- The person responsible must make payment to the Court for payment to be made to you.

Reasons for delay in payment

- The computer system is offline.
- Payment cannot be traced due to incorrect reference number being supplied.

Remember that when money is paid BY CHEQUE into your bank account, the money will ONLY BE AVAILABLE after SEVEN days.

I'm not comfortable using a bank account.

Remember it is just as safe and more convenient to use your bank account as it is to have a payment made to the Court in cash or through a garnishee order.

What steps do I take if I do not receive the money in my bank account?

- Request a detailed statement (not a mini statement) of your bank account at your local bank counter or ATM.
- Bring the bank statement together with your ID Book to the Court.
- The Court will issue summons to institute criminal charges against the person responsible for the payment.

If I am the person paying the Maintenance money, what do I need to do?

You can use the following methods of paying:

- Garnishee order – your employer takes the money directly from your salary.
- Cash payment – you come to the Court and pay the money over the counter.
- Direct payment into the bank account – you make a deposit directly into the bank account of the beneficiary.
- Keep the bank deposit slip to produce as a proof of payment, when required to do so.

NOTE: Direct payment can only be ordered by the court as the method of payment where:

- the court deems it fit in the circumstances
- upon the request of the respondent and/or the applicant to the court.

7

Your method of payment must be recorded on the Court Order.

Remember:

- The Reference Number provided by the Court must always be given when making a direct payment into the bank account or over the counter.
- Always fax the proof of payment (deposit slip or receipt) to the Court when paying directly into the bank account of the Court.

What if the bank account where the money was supposed to be paid in has been closed?

- Furnish the Court with new banking details.
- The Maintenance Officer will advise the Respondent of your new banking details and the amount owed by him.
- The new banking details will be recorded on the maintenance file.

What if the person who collects the Maintenance money becomes ill, disabled, dies or is out of the country?

- In the case of death, the Executor of the applicant's estate or Guardian of the child, is given permission to collect the money.
- In the case of illness, disability or where the authorized person is out of the country, a third party needs to be appointed. This can be done by producing a Power of Attorney document which authorizes the third party to collect maintenance.

Alternatively, the Department of Social Welfare (a Social Worker) can be contacted for assistance.

Where do I go for Custody and Access rights?

For more information regarding Custody and Access, refer to the office of the Family advocate.

For more information, please contact the following:

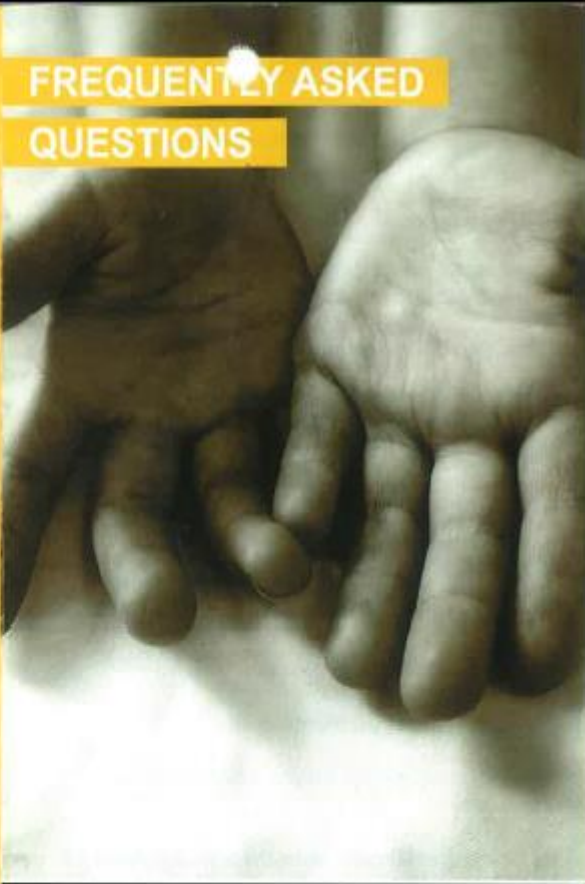
Department of Justice and Constitutional Development
 Chief Directorate: Promotion of the Rights of Vulnerable Groups.
 Tel: 012 315 - 1856/4
 Fax: 012 315 - 1851
www.justice.gov.za

8.34 Annexure 6.2

What will happen to me if I unjustifiably default or stop paying maintenance?


An order for civil execution, warrant of execution in terms of section 27 of the maintenance act, attachment of emoluments in terms of section 28 and attachment of debts can be granted against you.

FREQUENTLY ASKED QUESTIONS




MAINTENANCE

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Private Bag X81, Pretoria, 0001
www.justice.gov.za
2012



Department of Justice and Constitutional Development
REPUBLIC OF SOUTH AFRICA

Version 2
EP2012-302



STAND TOGETHER FOR RIGHTS
Simple Justice

Who should pay maintenance?

It is a legal obligation of both the biological parents, grandparents or legal guardian of the child to pay maintenance.

Can I claim maintenance from grandparents?

Yes maintenance can be claimed from the biological grandparent if the parents cannot pay maintenance.

Is maintenance a responsibility of biological parents only?

No, any person who is responsible to raise the child i.e legal guardian, adoptive parents and grandparents of the child, if the biological parents do not have means to pay maintenance.

Why must you pay maintenance?

You must pay maintenance for proper living and upbringing of the child, and includes the provision of food, clothing, accommodation, medical care and education.

Is it compulsory to pay maintenance?

Yes, it is compulsory to pay maintenance.

Where are you suppose to lodge a complaint for maintenance?

In any local magistrate court where the applicant and/or the child resides.

Can I go to any magistrate court in the country to lodge maintenance?

Yes, you can go to any local magistrate court where you and/or the child resides.

How often should maintenance be paid?

The maintenance money should be paid every month on the dates agreed upon by both the parties and granted by the court.

How much money should I be paid for maintenance?

The amount payable for maintenance will be determined by the needs of the child and the financial means of the parents.

At what age should you stop paying maintenance?

The maintenance should be paid until the child is self-supporting.

What happens when the person responsible for paying child maintenance dies?

The maintenance money should be paid out from the deceased estate for future maintenance.

What happens if the child reaches the age of 18 and she/he is still not self-supporting?

The payment of maintenance will continue until the child is self-supporting. However, the maintenance payment should be deposited directly to the child's banking account.

Can I increase/decrease the maintenance amount after the order has been granted?

Yes, you can request decrease/increase of the amounts, especially if the financial circumstances have changed.

What documents do I need to lodge a maintenance claim?

The Identity document, birth certificate of the child, bank statements of both the parents, list of the expenses of the child, list of expenses of both the parents, etc.

Can I claim maintenance while living together with the father/mother of the child?

Yes, you can claim maintenance if the other parent does not take responsibility of maintaining the child.

8.35 Annexure 6.3

Shaanaaz de Jager
djeggers@timesmedia.co.za

THE collection of outstanding maintenance could become easier with the establishment of a database of parents who fail to support their children in contravention of court orders.

The Chequematte Database – the brainchild of Port Elizabeth-based couple Richard and Rose will list the names of defaulters.

The idea is that banks and other businesses carry out credit checks against the database in a similar manner as they use other credit check facilities.

The Tarrs' plans also include "changing legislation" relating to how maintenance matters are reflected on credit checks.

The couple, originally from Durban, previously ran the project there but shut it down as they received no support from

"If

Richard Tarr said:

"We want Chequematte to be linked to credit checks, meaning that if a company does a credit check on someone, it will reflect that person is in arrears with maintenance."

Tarr said the applicants – generally women – would approach them with a titled copy of the judgment and outstanding amount and sign an affidavit. The defaulter's name would then be listed.

"We want this to succeed and need the public's support and support from non-government organisations, businesses and other experts on a board

to guide us."

"The project must be sustainable," the Tarrs have been inundated with emails since being interviewed on a radio station and launching a Facebook page, chequematte.co, three days ago.

East London attorney Tammy Courts who specialises in family and maintenance law, heard the radio interview.

Courts said her research towards her LL.M – which she is completing through the University of KwaZulu-Natal – related specifically to the difficulties experienced by the unrepresented public in the maintenance court.

This was "as a result of the poor implementation of the Maintenance Act and the lack of service delivery by the maintenance court staff, specific to the Eastern Cape".

Courts said: "It is for this reason that I am very interested in the objective of Chequematte is proposing as the area of arrears maintenance is only one of the many problems that become glaringly obvious upon analysis of my research."

It had also become clear to her during her time as an attorney and acting magistrate that the maintenance system

needed "tweaking". "I feel very strongly that an avenue needs to be made available to allow mainly women to obtain the best results while using the system, without unnecessarily incurring legal fees," Courts said.

Tarr said information, which would be confidential, would be made available to tracing agents, maintenance or legal offices, furniture or credit account providers, financial institutions, bank or estate agents, companies and employment agencies.

"How is it possible that if you owe a clothing company you can be blacklisted but when you owe child maintenance you do not get blacklisted?" Tarr asked.

"The children must come first," Tarr said the project they initially started in Durban in 2003 had a database of 1 500 names but they had to close it due to a lack of interest from other entities. All the information was destroyed.

8.36 Annexure 6.4

THE LAYMAN'S GUIDE TO CHILD MAINTENANCE LAW, SOUTH AFRICA



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HELP YOURSELF TO HELP YOUR CHILDREN

Prepared by:

Mrs. Tamazin Coutts

BA (Rhodes) LLB (Wits)

Attorney and Notary

Chapter 1: What is maintenance?

When must a parent support their child?

Both parents must support their child by paying maintenance in the following situations:-

- when the child is born of a marriage (the parents are married);
- when the child is born out of wedlock (the parents were not married);
- when the child is adopted;
- when the parents are divorced;
- when the child has reached the age of majority (18 years old) but is not yet able to support themselves financially (the child still depends on the parents).

What does the child cost?

Each child costs a certain amount, depending on their living situation. No two children are the same and costs will be different from child to child. When the court looks at what your particular child costs, it will look at things like:-

- how old the child is;
- how wealthy or poor the parents are;
- how much money both parents make;
- whether or not the child is at school;
- whether or not the child has brothers and sisters.

When you look at what your child costs you, it is important that you do not confuse the amount of the cost of the child with the amount that you can actually afford. Often the cost of the child is higher than what you can afford, and this is why you are asking for maintenance. If you do not include the things you cannot afford the court cannot work out what the child's real needs are and you may receive less maintenance as a result.

You will need to show the court how you have worked out the child's cost. This is done by keeping proof of all the money that you have spent on the child.

This means that whenever you buy an item for the child, for example food or clothing or school uniform, you need to keep the till slip proving that you bought those items. Payment of things like school fees, rent, water and electricity can be proved by bringing accounts or proof of deposit or bank statements. The more documents that you can find and bring to court the more you will be able to show the court the child's actual expenses.

Page Two

How much must each parent pay towards the cost of the child?

Once the cost of the child has been worked out the court needs to look at what each parent earns. Please note that maintenance is not a 50/50 split at all. The person who earns the most money pays the biggest portion of the maintenance of the child.

This means that if the child costs the total of R1,000.00 per month, and one parent earns R1,000.00 and the other earns R1,500.00, the parent earning R1,500.00 will pay more towards the child's maintenance.

The court staff will be able to help you calculate the portion of maintenance you will be expected to pay depending on your income. You must always bring the fact that you are aware that maintenance is not simply divided 50/50 to the court staff's attention. Please always insist on a proportionate split.

Chapter 2: When may you come to the maintenance court?

Who may come to maintenance court?

- a parent who needs financial assistance in supporting a child where no court order is in place (i.e. to get a court order for the first time);
- a parent who needs financial assistance in supporting a child where there is court order in place (i.e. going to court to change the existing court order). Remember that the maintenance court can also change a Divorce Order that was not made in the maintenance court;
- a parent who can no longer afford a maintenance payment, or where the child no longer needs such a large maintenance payment (this party may apply to court for a variation or discharge of the maintenance order in place);
- a child who has reached 18 years old and cannot yet support themselves financially;
- a grandparent who has assumed guardianship over a child.

It is important that you know that you do not have to be divorced to claim maintenance for your children. Married people may approach the court for maintenance for their children if their partner is not helping with the support of the children.

Maintenance courts are open every day, 5 days a week, and are found in every Magistrate's Court in the country.

Chapter 3: Which maintenance court must you go to?

You MUST go to the maintenance court closest to where the child for whom you want to claim maintenance lives. If you live in one area and your child in another, you cannot go to the court where you live – you must go to the court where the child lives.

Page Three

Chapter 4: What do the staff at the maintenance court do?Maintenance Officer/Clerk

When you arrive at maintenance court for the first time, the first member of staff you will meet is the maintenance officer. The job of the maintenance officer is this:-

- to hear your complaint and to provide you with the correct form to fill in;
- to help you fill in this form if you cannot do it alone and if you do not understand the form;
- to consider your complainant and to provide your complaint with a file and case number;
- to give you a court date where you and the person you are suing for maintenance will return to court;
- to send notice to the person you are suing (called a "subpoena") to tell them to be at court on the date you were given;
- to attempt to negotiate a settlement between the two parties;
- if there is no settlement, to assist you in court before the Magistrate.

The maintenance officer is the member of the court staff that you will spend the most time with.

Maintenance Investigator

Your matter will be passed to a maintenance investigator if:-

- the party you are suing cannot be found;
- the party you are suing is hiding information from the court, such as salary amounts, a pension, or any assets.

The job of the investigator is to trace the person who cannot be found and also to investigate the affairs of that person if necessary. The maintenance officer will give the instructions to the maintenance investigator.

Magistrate

You will only appear in front of a Magistrate when an order in your file will be made. If there are any postponements in your case, the maintenance officer will take you to the Magistrate, who will record the new date on your file.

Page Four

If your case has not been settled and a “trial” must go ahead, you will appear before the Magistrate in court. The maintenance officer will introduce you to the Magistrate.

You will always greet the Magistrate as “your worship”.

It is the duty of the Magistrate to record all orders on the court file. The Magistrate will also listen to your trial (which will be explained further on in this guide) and will make a decision on the final amount of maintenance to be paid by each party.

Chapter 5: How to claim for maintenance?

You must approach the Maintenance Court and complete the documentation discussed in Chapter 7. The process to be followed is discussed in Chapter 8.

Chapter 6: What information do you need to take to court?

Proof of income and expenditure

You will always need proof of what you earn, what assets you own and what monthly expenses you have. It is important that you bring as much of this information as possible:

- your salary slip (this gives the court a large amount of information about your salary and what deductions you have);
- 3 months bank statements (this allows the court to see what you spend your money on each month);
- all bills, such a municipality bills, school fees, medical bills;
- a list of the things you own for example, a car or house or your furniture;
- cash slips and till slips for things that you have bought the child;
- a list of any additional things your child might need but you cannot afford to pay for or buy;
- if you are unemployed, you will need to show the court that you have tried to find employment.

Chapter 7: What forms must you fill in?

J101E: When you are applying for maintenance for the first time and there is NO maintenance order in existence:-

(See attached J101E at back of guide)

Page Five

1. The first portion of the form requires that you fill in your personal information, including your name, identity number, age as well as your living and working addresses;
2. Thereafter you are required to fill in the particulars of the person from whom you wish to claim maintenance. If you do not have all the required information simply fill in the details you have at hand;
3. Where the form states “the Defendant is legally liable to maintain the child because:” (item **2** on the form) you will fill the basis of the duty of support that the Defendant has towards the child, for example, “the defendant is the biological father of the child”;
4. State the reason for you having the child in your care (item **2** on the form), for example “I am the biological mother of the child”;
5. Under **3** set out if the person against whom you are claiming maintenance has ever made maintenance payments in the past. If no payments have been made at all then mark the section that says no contribution towards maintenance has been made;
6. Under **4** set out the amount of maintenance which you are asking the court for, per child. Also fill in the birth dates of the children so that the court may be made aware of their ages and adjust their needs accordingly;
7. Further under **4** advise the court when you would like maintenance payments to begin;
8. Under **Assets and Income** list any assets you may have, including motor vehicles, household furniture, houses, savings accounts, investments etc. Use your salary advice where available to fill in your income. List all your deductions as reflected on your salary advice. If you are unemployed leave this section blank. If you receive any other income, including grants or maintenance payments;
9. Under **expenditure** you will be required to estimate monthly amounts per item as best you can. Where possible provide proof of payment of items such as rent or bond payments, accounts, lights, water and rates. Where you are unable to prove exact amounts, such as groceries, estimate the monthly amount spent to the best of your ability. Collect as much supporting documentation as possible.
10. You will note under **expenditure** there are 3 columns to be completed, namely self, child and total. The easiest way in which to complete this is to work through the list filling in only the **total** column. Once you have filled this in move onto the **self** column. Where items only relate to you, fill the entire amount in the **self** column, for instance your telephone account for your cellular telephone. Where an amount is divided between yourself and a child/children you will calculate the amount as follows:-
 - A child under 13 is considered to be “half an adult”;
 - An adult is counted as “1”; therefore a child under 12 is counted as “0.5”;

Page Six

- A child over 13 is considered an adult and is counted as “1”.
- Amounts which are shared between every member of the household, such as rental or groceries must be divided between all members of the household, for example:-
 - Rental Total = R3,000.00; 1 Adult and 1 child in household:
 - Therefore **self** share = R2,000.00 (2/3 of R3,000.00)
 - Therefore **child** share = R1,000.00 (1/3 of R3,000.00)
- At any stage where you are uncertain of any amounts of calculations of amounts you may leave the **self** and **child** columns empty and simply fill in the **total** column. The maintenance officer will then be able to assist you with the calculation of shares at a later stage.

J107E: When you are applying to change an already existing maintenance order (there is an order in place):

(See attached J107E at back of guide)

Follow the same process as listed under completion of the J101E. The difference between the completion of the two forms will be that the J107E will ask you for information about an already existing maintenance order. You will need to add as much information about the existing order as possible. If available make a copy of the order and attach it to your application.

Both forms are available at court. You may also photocopy the forms provided in this guide and use those to save time.

Once you have completed the form you must have same signed in front of a commissioner of oaths as this document operates as an affidavit. Attorneys and policemen and women are commissioners of oaths and will be able to assist you free of charge.

When you hand in either the J101E or the J107E you must also hand in a copy of your ID book, copies of the birth certificates for each child you are claiming maintenance for and a copy of a recent bank statement.

Chapter 8: What process is followed in maintenance court?

You will find that you will have to come to court more than one or two times in most cases. You will need to set aside a large part, if not all, of your day because there are long queues. You may wait for hours at a time. There are very few facilities at court, for instance toilets or places to eat so you may want to be prepared.

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First court visit:

On your first visit to court you will need to meet with the maintenance officer. If you have not already completed the forms that you need for your claim the maintenance officer will give you the forms to complete. In some courts the maintenance officer may help you to complete the forms but this is not always the case.

Once you have completed the forms the maintenance officer will give you a new date to return to court. If it is easy to find the person you are suing, then the court will send that person a subpoena (notice of the court hearing) through the sheriff.

Second court visit:

If the subpoena has been received by the person you are suing and that person is at court, the maintenance officer will sit both parties down and will discuss the matter. The point of this discussion is to try to clear up as many differences as possible and to try to settle the matter. If your case cannot be settled the maintenance officer will give you a new date to return to court for a "formal enquiry" or trial.

Trial date:

On this court date you will be taken to the court room where you will give evidence in front of the Magistrate. The maintenance officer will put you and the person you are suing in the witness box (one after the other) and will ask you questions about your income and expenses. This is to allow the court to "get the bigger picture" and make a decision as to what amount of maintenance the child needs and can be paid. This can be a lengthy procedure and in some cases may take more than a day. This will most likely be the most difficult and intimidating day of the maintenance process, especially if you do not have an attorney to explain the procedure. It is important that you relax and take your time when answering the maintenance officer and Magistrate's questions. There is no rush. You may ask for a question to be repeated. If you do not understand a question, you may ask for an explanation. If the trial is being held in a language you do not speak fluently, you may ask for an interpreter.

Maintenance cases are of a sensitive nature because they involve children. For this reason you will not ordinarily be allowed to bring anybody else into the court room with you.

You may bring a witness to prove any of the evidence that you wish to tell the Magistrate, but this person will wait outside the courtroom until they are called.

It is important that you are always aware of the following:-

- there may be postponements at any stage, for reason like the sheriff being unable to find the person you are suing, the court may be full, court staff may be ill or on leave, there may be need for a paternity test;
- often people feel that the maintenance officer bullies them into agreeing to take less maintenance than they want. You need to know that at the stage where you meet with the maintenance officer that you do not have to agree to anything and you can ask for a trial date;

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- maintenance cases have a habit of being drawn out, even when one party does their best to bring the matter to a close. Always weigh the cost of settling against the time, money and energy you will spend fighting in the maintenance court.

Chapter 9: How long does it take to get a maintenance order or change an existing order?

It will always be difficult to estimate exactly how long a case will take to become finalised. Each case will have different procedures and drawbacks. Ideally one would like to finish a maintenance case in two or three court attendances. In practice this very seldom happens. Postponements often drag maintenance cases out over months. It is important that you prepare yourself adequately where possible, for example, details of where the sheriff may find the person you are suing, completing your forms correctly and bringing the additional information to court, arriving early on trial dates, to make sure your matter has as few postponements as possible.

Chapter 10: What maintenance orders can you ask the court for?

You may ask the court for the following order:-

- a cash amount to be paid monthly e.g. R3,000.00 per month;
- medical expenses e.g. medical aid payments, over the counter medication, doctor's accounts;
- school fees and all school related expenditure including uniform, extra-murals and extra lessons;
- any other fixed expenses the child may have e.g. music lessons;
- purchase of clothing for the child;
- a lump sum yearly towards any expense;
- payment of future maintenance in certain cases;
- payment for tertiary education in certain cases.

Where the person you are suing does not come to court on the second appearance, and the subpoena shows that he received **personal** notice of the date, you may ask the court to grant you a default order. This means that the court may grant an order in your favour for the sum of maintenance that you have asked for. Before granting this order the Magistrate may ask you about your income and expenditure as you have set it out in your application. Based on what you have told the Magistrate the Magistrate will then either grant you the order that you asked for, or another amount that the Magistrate has found to be reasonable.

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When the person you are claiming maintenance from is a bad payer you may ask the court to "attach their salary". This means that the court will give an order to the employer of the person you are suing instructing them to deduct your maintenance amount from the salary before it is paid over to the person you are suing. This makes sure that maintenance is received.

Chapter 11: Where do you collect maintenance money?

It is easiest for you to receive maintenance payments directly into your personal banking account. When the court makes an order you will supply the maintenance officer with your banking details. Depending on what the court orders the person you are suing will either have to pay maintenance to court, and the court will transfer the money into your account, or they will make payment directly into your bank account.

Chapter 12: What must you do when maintenance is not being paid?

When you have a maintenance order in place but you are not receiving maintenance you have two options:-

Criminal complaint

You may approach the maintenance court and lay a criminal complaint against the maintenance defaulter. It is a criminal offence to not pay maintenance. The case will be brought before a criminal court and the maintenance defaulter will be fined, imprisoned and/or be made to pay the arrears if found guilty of the criminal offence. In some cases the court may decide that a new enquiry into the maintenance amount must be heard. In these cases the criminal court sends the matter back to the maintenance court where you will have a trial. In this case the Magistrate will determine if the arrears are due, and if so how they will be paid. The Magistrate may also amend the existing maintenance order. This is often a lengthy process, particularly given that criminal courts are very busy.

Civil execution

You may also approach the civil court (the maintenance court) if your maintenance is not being paid. You do not need to lay a criminal complaint. You will need to provide the court with a list of the amounts of maintenance which have not been paid and the dates on which they were due. You will also need to provide the court with details of the maintenance defaulters assets which can be attached, for example a bank account, furniture or a salary. The court will issue a warrant of execution and the sheriff will attach the maintenance defaulters property in the amount of the unpaid maintenance.

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This process is faster than the criminal process and has more positive results in most cases.

It is important to note that you will have to pay the sheriff's fees for any attachment done. This can be expensive if the sheriff attaches furniture because the sheriff has to store the furniture until it is sold. You will have to make sure that you have enough money to pay the sheriff.

Chapter 13: What to do when you can no longer afford to pay maintenance?

Where you find yourself paying maintenance in terms of a court order and you cannot make the payments either in full or in part because your circumstances have changed you **cannot** simply stop paying maintenance. You need to approach the court to ask for the order to be reduced or cancelled. You will fill in the J107E (see chapter 7 above) and bring a maintenance application to court. The procedure for this application will be the same as that set out in chapter 8.

Chapter 14: When can you ask the court to cover your costs?

The State covers the sheriff's fees for serving the subpoena on the person you are suing. For this reason, bringing an application in the maintenance court will not cost you money.

If you are being sued and you have travelled to court, particularly from out of town, you may ask the court to grant you reasonable travelling costs. You would need to keep proof of your transport costs, for example a bus ticket receipt. The State will then reimburse you this money. Please note that only reasonable amounts will be paid back to you – airfare is not reimbursed ordinarily. You **may not** ask for travelling costs if you are the person who brought the application.

Chapter 15: When is it necessary to appoint an attorney?

Generally you should be able to move through the whole maintenance process from start to finish without the help of an attorney. The problem comes when the other party has an attorney and you do not and your case is going to trial. When this happens it is important to realise that the maintenance officer who is helping you has hundreds of other cases and will not be able to give your case enough time to prepare properly for court. Often because of this the maintenance officer does not do as well as the attorney in court as the attorney has had far more time to prepare. When this happens it is better to find an attorney to at the very least help you understand the process better. Often when a party does not have an attorney they are easily bullied by the other party's attorney.

Should you wish to employ an attorney, you would be better off finding an attorney who specialises in family and maintenance law. Attorneys all charge different rates and you should compare them before hiring an attorney, as costs can become very expensive very quickly.

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Chapter 16: If you cannot afford an attorney who else can help you?

There may be times where you do not understand the procedure or feel intimidated by the court process. You may also find yourself in a position where you simply cannot afford an attorney but need assistance.

Unfortunately Legal Aid South Africa does not assist with maintenance matters from start to finish as they do not have the resources to be tied up in court for the hours that maintenance cases take.

In most Magistrates' courts in South Africa the family law area of the court has an available non-governmental organisation (NGO) dedicated to assisting parties in maintenance matters. These NGO's are usually located within the court building. You may ask the maintenance court staff to point you in the direction of the local NGO office.

Further queries

Any additional questions not dealt with in this booklet may be forwarded to (the intention being a creation of a website or advice office available to assist unrepresented parties with general maintenance enquiries)

J101E

APPLICATION FOR MAINTENANCE ORDER

COMPLAINT IN TERMS OF SECTION 6(1)(a) OF THE MAINTENANCE ACT, 1998
(ACT No. 99 OF 1998)

**Delete whichever is not applicable*

Reference No.

[This information should, as far as possible, be given in order to investigate the complaint. If space is insufficient, information should be supplied on attached annexure.]

I, _____

Born on

--	--	--	--	--	--

 age

--	--

 ID NO

--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--

Living at: _____ Working at: _____

Tel no: _____ Tel no: _____

Nearest police station: _____

Hereby declare under oath/truly affirm as follows

1. _____

Born on

--	--	--	--	--	--

 age

--	--

 ID NO

--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--

Living at: _____ Working at: _____

Tel. no.: _____ Tel. no.: _____

Nearest police station:

Is legally liable to maintain the child mentioned in 4. below, who is under my care.

2. *The defendant is legally liable to maintain the child because:

*The child mentioned in 4. below is under my care because:

3. The defendant has not supported *myself/the said child(ren) since (date) and has made *no contribution towards maintenance/the following contribution towards maintenance:

.....

4. I request that the Defendant be ordered to make the following contribution(s) towards maintenance: A monthly contribution of -

R..... in respect of myself (complainant), and/or

Amount		Child	Born							
R	in respect of		d	d	m	m	y	y	y	y
R	in respect of		d	d	m	m	y	y	y	y
R	in respect of		d	d	m	m	y	y	y	y

The first payment should be made on _____ and after that on or before the _____ day of each succeeding month.

All payments should be made to

in favour of

and/or

other contributions [for example, medical and dental costs, school fees, fees to tertiary institutions, school wear, expenses for sport and/or cultural activities, birth expenses and maintenance for child(ren) from birth]:

5. Particulars of my assets and *monthly/weekly income and expenditure (supported by documentary proof, where possible) are as follows:

Assets		Income		
Fixed property		Gross salary		
Investments		Minus: Deductions	Tax (PAYE)	
			Medical Aid	
Savings			Pension	
Shares			Other: UIF	
Motor vehicles		Total nett salary		
Other:		Other income (state source of income)		
		Total income		

Expenditure		Self	Child	Total
1	Lodging (bond repayment/levy/rent/board)			
2	Groceries/food/personal care (including hair			

	care/cosmetics etc.)					
3	Household expenditure	Water and electricity/gas/paraffin				
		Rates and Taxes				
		Laundry/Dry cleaning				
		Lunches				
		Telephone				
		Domestic worker				
		Garden service				
		Insurance (short term)				
4	Clothing	Clothes and shoes				
		School uniforms				
		Sports clothes				
		Disposable Nappies				
5	Transport	Bus/taxi/lift club				
		Car	Instalments			
			Insurance			
			Maintenance			
			Fuel			
			Licenses			
			Parking			
6	Educational	School fees				

	expenditure	Crèche/day care/after school care			
		Insurance (study policy)			
		Books/stationary			
		Outings/extramural			
		Sports			
		Other school expenditure			
7	Medical expenditure	Doctor/dentist/etc.			
		Medication (OTC)			
		Hospital			
		Other medical expenditure: Vitamins			
		Nappy cream			
8	Insurance	Life			
		Annuity (Investment Old Mutual)			
		Provident Fund			
		Liberty RA			
		House owners/house holders			
9	Pocket money/allowances				
10	Holidays, entertainment and recreation (including M-Net)				
11	Maintenance,	House			

	replacement and repairs of items	Household appliances			
		Kitchenware			
		Linen, towels etc.			
		*Bicycles/bikes/scooters			
		Other items(Educational toys)			
12	Personal Loans				
13	Security Alarm System				
14	Membership fees				
15	Religious contributions/charities				
16	Gifts				
17	TV license				
18	Reading material	Books/newspapers/periodicals			
19	Lease/credit agreement payments	Furniture			
		Appliances			
		Other:			
20	Pets	Food			
		Veterinary surgeon			
		License			
21	Other (not specified above)				
		Total expenditure			

Dated at EAST LONDON this day of 2013

Deponent

***Delete whichever is not applicable.**

FOR OFFICIAL USE ONLY

Oath/affirmation

1. I certify that before administering the *oath/affirmation I asked the complainant the following questions and wrote down *his/her answers in *his/her presence:

(a) Do you know and understand the contents of the declaration?

Answer Yes

(b) Do you have any objection to taking the prescribed oath?

Answer No

(c) Do you consider the prescribed oath binding on your conscience?

Answer Yes

2. I certify that the complainant acknowledged that *he/she knows and understands the contents of this declaration. The complainant uttered the following words: *”I swear that the contents of this declaration are true. So help me god.” / “I truly affirm that the contents of the declaration are true”. The *signature/mark of the complainant was affixed to the declaration in my presence.

Justice of the Peace/Commissioner of Oaths

Full name and surname (block letters)

.....

Designation (rank)

Business address (street address must be stated)

.....

Dated at **EAST LONDON** this day of **2013**

FORM B

[Regulation 2(2)]

**SUBSTITUTION OR DISCHARGE OF EXISTING MAINTENANCE ORDER
COMPLAINANT IN TERMS OF SECTION 6[1][b] OF THE MAINTENANCE ACT,
1998 [ACT No. OF 1998]**

Reference No.

[This information should, as far as possible, be given in order to investigate the complainant.]

APPLICANT

I,

(full name of person in favour of whom maintenance order was made)

(called “the deponent”)

born on (date)/age

identity number

living at

telephone number

working at

telephone number

nearest police station

hereby *declare under oath/truly affirm as follows:

RESPONDENT

1.

(full name of person against whom maintenance order was made)

born on (date)/age

identity number

living at

telephone number

working at

telephone number

nearest police station

The Respondent was ordered by the above Honourable Court (Court)

on the day of to pay –

(a) on a monthly basis with effect from
towards the maintenance of /the following

child the sum of –

in respect of , born on

R in respect of (name of child), born on

R in respect of (name of child), born on

R in respect of (name of child), born on

R in respect of (name of child), born on

All payments should have been made to

in favour of

and/or

(other contributions, for example medical and dental costs, school fees, fees to tertiary institutions, school wear, expenses for sport and/or cultural activities, birth expenses and maintenance for child(ren) from birth).

A copy of the order is recorded on the court file.

2. *Good cause/reason exists for the of the said maintenance order as follows:

(a) A monthly payment with effect from in the amount of –

R in respect of (name of child)

R in respect of (name of child)

R in respect of (name of child)

R in respect of (name of child)

The first payment must be made and after

that on or before the day of each succeeding month. All payments must be made to

In favour of

and

(b)

(other contributions, for example medical and dental costs, school fees, fees to tertiary institutions, school wear, expenses for sport and/or cultural activities, birth expenses and maintenance for child(ren) from birth).

4. Particulars of my assets and *monthly/weekly income and expenditures (supported by documentary proof, where possible) are as follows
- 5.

Assets

Fixed property:	R
Investments:	R
Savings:	R
Shares:	R
Motor vehicles:	R
Other:	
TOTAL	R

Income

Gross salary	R	
Minus: Deductions	Tax	R
	Medical Aid	R
	UIF	R
		R
		R
Total nett salary		R

		R
		R
Total income		R

Expenditure

			Self	Child(ren)	Total
1	Lodging (bond) repayment/ levy/ rent/ board)				
2	Groceries	(incl personal care)			
3	Household expenditure	Water and electricity/gas/ paraffin			
		Rates and taxes			
		Maintenance (cleaning materials)			
		Laundry/Dry- cleaning			
		Lunches			
		Telephone			
		Domestic worker			
		Garden services			

		Insurance				
4	Clothing	Clothes and shoes				
		School uniforms				
		Sports clothes				
5	Transport	Bus				
		Car	Instalments			
			Maintenance			
			Fuel			
			Licenses			
			Insurance And Tracking			
6	Educational expenditure	School fees				
		After school care				
		Crèche/day care				
		Insurance (study policy)				
		Books				
		Stationery				
7	Medical expenditure	Doctor/dentist/etc				
		Medication: OTC				
		Hospital				

		Other medical expenditure: Medical aid for child			
8	Insurance	Life			
		Annuity			
		House owners/ House holders			
9	Pocket money/ Allowances				
10	Holidays				
11	Maintenance, replacement and Repairs of items	House			
		Household appliances			
		Kitchenware			
		Linen, towels, etc			
12	Entertainment & recreation (incl M – Net)				
13	Personal loans				
	Woolworths				
	African Life				
14	Security alarm system				

15	Membership fees				
16	Religious contributions/ Charities				
17	Birthday parties				
18	TV licence				
19	Reading material	Books			
		Newspapers			
		Periodicals			
20	Lease/Hire purchase payments	Furniture			
		Appliances			
		Other			
21	Pets	Food			
		Veterinary surgeon (“vet”)			
		Licence			
22	Other (not specified above)				
	Total Expenditure				

Dated at **EAST LONDON** this the day of **2013**

.....
Signature of Deponent

Oath/Affirmation

1. I certify that before administering the *oath/affirmation I asked the deponent the following questions and wrote down *his/her answers in *his/her presence:

(a) Do you know and understand the contents of the declaration?

Answer

(b) Do you have any objection to taking the prescribed oath?

Answer

(c) Do you consider the prescribed oath binding on your conscience?

Answer

2. I certify that the deponent acknowledged that *he/she knows and understands the contents of this declaration. The deponent uttered the following words *”I swear that the contents of this declaration are true, so help me God”/”I truly affirm that the contents of the declaration are true.” The *signature/mark of the deponent was affixed to the declaration in my presence.

.....
Justice of the Peace/Commissioner of Oaths

Full name and surname

(block letters)

Designation (Rank)

Ex Officio Republic of South Africa

8.37 Annexure 7

Mending maintenance

07 May 2013

Trish Beaver



ONE woman attorney is gearing up to challenge the local maintenance court system by examining its flaws and educating women on how to use the system to their advantage.

Tammy Coutts, a former acting magistrate and practising family law attorney, is doing her Master's thesis on the maintenance courts.

Her experience as an acting magistrate in the Eastern Cape has made her determined to find a way to help women cope with the poor implementation of the existing laws that make obtaining maintenance almost impossible.

For many women, the maintenance court is a frustrating place to go when they need to get much-needed financial support from an ex-partner or -spouse. The process is long and user-unfriendly.

Those who have staying power may eventually get a court order in their favour, but the road to this destination is filled with endless administrative and legal potholes.

Coutts has examined the legal framework and says that the administration of the law is the biggest hurdle to achieving change. "There is not much fundamentally wrong with the law itself, but the way the system is constructed and the poor implementation of the law itself means there are endless delays and many untrained and unqualified people in positions throughout the system who really don't know what they are doing, [while] some of them do care about what they are doing."

Coutts says that, as a result, many single parents struggle to get a cent out of their partners to pay for school fees or just put food on the table. "In the rural areas where I have conducted my research, the women walk for hours to get to the magistrate's court.

"In winter it is freezing, and there is no inside waiting room in many of the courts where I conducted

my research. They are told to wait outside the court until their case is called. Some of them have young babies with them. There are insufficient ablution facilities and places to change nappies.

“They are scared to leave the queue in case their name is called, so many women sit there all day, hungry and too afraid to use the toilet. Often they are told at 4 pm that the case roll for the day is closed and they must return the next day.

“While acting as a civil magistrate in the Eastern Cape, I personally experienced the inefficiencies in the maintenance system. I had no working plug in my office and therefore could not use a computer without running an extension cord through to the adjoining court room. My superior and I volunteered to assist with the maintenance court roll as there was always an excessive case load in that court.

“Our offer was never taken up because even though there was an open court, there was no stenographer available to record the details. The maintenance courts are hugely underresourced both in the area of staff and infrastructure.”

However, there were some glimmers of hope. “It is ironic that sometimes things work well in the smallest magistrate’s courts out in the deepest rural areas despite a chronic lack of resources, yet the system in a major centre like Pietermaritzburg, which should have more resources, is fraught with inefficiencies.

“In major centres, an education campaign has been launched and posters and pamphlets have been provided, setting out one’s maintenance-related rights and the procedure to be followed when enforcing same. Sadly, however, so many of the people relying on the maintenance system are barely literate and do not understand the legal language and process description. These people need someone to spend time telling them what their rights are and what the process involves.”

Coutts said she has often observed that court officials were rude and abrupt with people, and there was no privacy in the court offices where the intimate details of your finances were picked over by a stranger.

“It is very embarrassing for a complete stranger to question the spending of your income; for instance questioning a smoking habit when you cannot feed your child. This is humiliating, especially when the rest of the people in the queue can hear what is being said.”

Coutts says that it is common for the maintenance officer to place undue pressure on both parties to settle the matter so that it does not clog up the court roll.

“Women come to the maintenance court, usually taking unpaid leave for the day, and then find that they don’t have the necessary papers to lodge a case. They have to return another day with the correct information, costing them an additional day’s income.”

It is evident from other research available that there appears to be a pervasive feeling that magistrates, prosecutors and even attorneys who deal with maintenance cases would much rather be dealing with criminal or civil work.

“The maintenance officer is tasked with preparing the case before it comes to court, yet these cases are often so badly prepared that there are endless delays. The maintenance investigator is supposed to investigate the financial circumstances of the parties if necessary, but they, like so many other staff dealing with maintenance matters, are often not trained and are frequently unqualified, and

investigations are often incomplete or simply not done.

“As an attorney, you often see women who come to you in desperation, wanting to take their partners to the maintenance court, and you know they really don’t have the money to pay your legal fees. But they have tried the maintenance court alone and have become so frustrated with the system that they are prepared to pay off the legal fees for years just to get some results.

“I believe that the only way complainants are going to be able to make the system work for them is to educate themselves about their rights and the maintenance process. As a result of the lack of resources and government funding, it is not likely that the system is going to improve dramatically any time soon. If parties within the process were armed with information, they would be more assertive about what to expect from the process.”

Coutts says that the issue of child maintenance is seen as a “social issue” by some countries, which believe it should be removed from judicial jurisdiction entirely. This approach favours the view that maintenance should fall into a social grant category and should be covered by the state.

Other First World countries have discussed the implementation of a “dad tax”, with tax being deducted generally. This is seen to be a way of forcing men to pay for their children by way of taxation.

Locally, Coutts has been in touch with a Port Elizabeth couple who are working on an initiative to black-list maintenance defaulters, to the extent that the defaulters cannot access certain public privileges, including overseas travel, if their name is on the list. This would work on the name-and-shame principle and defaulters would be urged to pay up to have their names removed from the list. Coutts believes that the public needs to receive access to education concerning the Maintenance Act and also coaching on how to deal with the maintenance court. She believes that NGOs and other bodies could play a bigger role in helping women access these facilities.

Maintenance court officials need to be trained and motivated to understand how important their job is. In a recent case, the Constitutional Court emphasised the need for the state to ensure the smooth running of maintenance courts to prevent the violation of children’s rights, as stated in Section 28(2) of the Constitution, and to promote gender equality. ‘

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- 9.2.4 D Singh, K Naidoo and L Mokolobate “Coming to court for child support – the policy, the practice and reality. A case study of black women in the maintenance system at the Johannesburg Family Court (2002 – 2004) (2004) 17 *Acta Criminologica* 143.
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- 9.2.7 L Pretorius ‘Step-by-step maintenance applications in the maintenance court’ (2004) 430 *De Rebus* 36.
- 9.2.8 M Carnelley "A review of criminal prosecution and sentencing of maintenance defaulters in South Africa, with commentary on sentencing strategies" (2012) 3 *SACJ* 163.
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- 9.2.16 S Hctor and M Carnelley ‘Maintenance arrears and the rights of the child’ (2007) 39 *TSAR* 199.
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- 9.4.31 *Nguza v Nguza* 1995 (2) SA 954 (TkGD)
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9.5. Legislation

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- 9.5.3 Children's Act 38 of 2005
- 9.5.4 Colony of Natal's Deserted Wives and Child Protection Act 10 of 1896
- 9.5.5 Constitution of the Republic of South Africa, Act 108 of 1996
- 9.5.6 Criminal Procedure Act 51 of 1977
- 9.5.7 Deserted Wives and Children Protection Act 7 of 1895 (Cape)
- 9.5.8 Deserted Wives and Children Protection Ordinance 44 of 1903 (Transvaal)
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- 9.5.10 Divorce Act 70 of 1979
- 9.5.11 Domestic Violence Act 116 of 1998
- 9.5.12 Harassment Act 17 of 2011
- 9.5.13 Maintenance Act 23 of 1963
- 9.5.14 Maintenance Act 99 of 1998
- 9.5.15 Socialist Assistance Act 13 of 2004

9.6. Treaties

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- 9.6.2 World Declaration on the Survival, Protection and Development of Children agreed to at the World Summit for Children on 30 September 1990.

9.7. Other

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