

THRHR - Vol 77 No. 2.
MEI 2014

New measures to better secure maintenance payments for disempowered women and vulnerable children*

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OPSOMMING

Nuwe maatreëls om onderhoudsbetalings aan ontmagtigde vrouens en kwesbare kinders te verseker

In hierdie artikel val die soeklig op innoverende onderhoudsafdwingingsmaatreëls wat vir Suid-Afrika in die vooruitsig gestel word in onderskeidelik 'n kwalitatiewe navorsingstudie in die onderhoudshowe in Taung, Zeerust en Lichtenburg en die onlangse konsep Maintenance Amendment Bill 2013. Teen die agtergrond van die Grondwet van die Republiek van Suid-Afrika, 1996 en die huidige probleme wat met die onderhoudstelsel ervaar word, word die vernaamste voorstelle van die navorsingstudie en wysigings van die konsepwetsontwerp bespreek wat die betreurenswaardige posisie waarin vrouens en kinders hulle bevind, kan verbeter.

Die voorstelle van die navorsingstudie het betrekking op kansellering van onderhoudswanbetalers se bestuurslisensies; weiering om paspoorte aan hulle uit te reik; bevels vir betaling in goedere of dienste; elektroniese kennisgewings van verskuldige betalings; beter regulering van besoldigingsbeslagbevele; en strengere afdwinging van kriminele sanksies teen moedswillige wanbetalers. Die wysigings van die konsepwetsontwerp het betrekking op uitbreiding van die jurisdiksie van onderhoudshowe om ook die applikant in 'n onderhoudsaak se werksplek in te sluit; verpligting op elektroniese kommunikasiedienste om onderhoudswanbetalers se kontakbesonderhede aan onderhoudshowe te voorsien; beperking op die uitstel van onderhoudsverrigtinge; uitbreiding van die aanwendingsterrein van sekere siviele afdwingingsmaatreëls; skepping van 'n geleentheid vir werkgewers en derde partye wat betalings ten behoeve van wanbetalers moet maak om kommentaar te lewer oor die toepaslikheid van sodanige verpligting op hulle; verpligting van verslaggewing aangaande wanbetalings aan kredietburo's en voorsiening vir sodanige verslaglewering op 'n heelwat vroeëre stadium, verhoging van die maksimum strawwe vir sekere misdrywe, en skepping van bykomende misdrywe.

Daar word aan die hand gedoen dat die konsepwetsontwerp verder behoort te strek deur ook voorsiening te maak vir innoverende afdwingingsmaatreëls soos voorgestel in die navorsingstudie.

* This article is based partly on Sephai *Innovative maintenance enforcement methods and their effect on indigent women and children* (LLM dissertation Unisa 2013).

Laastens word die geskiktheid van die voorstelle van die navorsingstudie en die wysigings van die konsepwetsontwerp beoordeel in die lig van vrouens, kinders en wanbetaaiers se fundamentele grondwetlike regte.

1 INTRODUCTION

In this article, the searchlight falls on innovative maintenance enforcement methods and mechanisms envisaged for South Africa in a qualitative research study conducted in the maintenance court (the qualitative research study) and the recently published draft Maintenance Amendment Bill 2013 (the draft Bill).¹

Against the backdrop of the Constitution of the Republic of South Africa, 1996, and the current problems experienced with the maintenance system, especially as far as disempowered women and vulnerable children are concerned, the most important suggestions of the qualitative research study and the amendments of the draft Bill are discussed. Only those suggestions and amendments which could improve the dismal position of women and children regarding their maintenance claims are the object of scrutiny.

It is further argued that the draft Bill should have gone further by including some of the innovative maintenance enforcement methods suggested in the qualitative research study. Lastly, the appropriateness of the introduction of the suggested enforcement methods and the amendments contained in the draft Bill into South African law is considered in the light of constitutional provisions.

2 BACKGROUND

For many years women and children have had great difficulty in obtaining economic support from the people who are legally liable to maintain them. Breadwinners abandon their families and many households are headed by children and single mothers.² It is not surprising that poverty rates and vulnerability to hunger are the highest amongst women and children in South Africa.³

Upon relationship breakdown, mothers usually become the care-giving parents of children born from the relationship and they have to take care of the children on a daily basis.⁴ This becomes a burden on mothers because it minimises their chances of getting full-time employment.⁵ Sometimes they do manage to get part-time employment, but with an insufficient salary for their survival and that of their children.⁶ As a result of the fact that a woman's place was traditionally seen to be in the home it further appears that most single mothers do not have the qualifications and skills they require to join the labour market.⁷

1 It was recently published for comment by the Dept of Justice and Constitutional Development.

2 Statistics South Africa *Social profile of South Africa, 2002-2009* Report No 03-19-00 Table 1.4 and Table 1.5.

3 *Ibid* Table 1.8, Figure 1.10, Figure 4.8, Figure 4.15 and Figure 4.16

4 Clark and Goldblatt "Gender and family law" in Bonthuys and Albertyn (eds) *Gender, law and justice* (2007) 220.

5 Van Zyl "Gender issues and the Bill of Rights" in *Bill of Rights compendium* (loose-leaf) (1998) para 3126.

6 Williams "The legal construction of poverty: Gender, 'work' and the 'social contract'" 2011 *Stell LR* 484 470-471.

7 Sinclair assisted by Heaton *The law of marriage* (1996) 139.

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Most women who approach the maintenance court are therefore unemployed or engaged in limited paid employment and depend on maintenance and social grants to survive. It appears, however, that these women experience great difficulty and hardship when they want to obtain maintenance orders in their or their children's favour.⁸ This is especially applicable to women who reside in rural areas and have to initiate the process of claiming maintenance.⁹ These applicants have to use public transport or walk long distances to reach the magistrates' offices. They are expected to make several visits to the maintenance court before their case is finalised: first to lodge the complaint with a maintenance clerk and then to appear at the informal enquiry before the maintenance officer and later at the formal enquiry in the maintenance court, which could be postponed several times, as often happens in practice. Many of them give up on their application when they are faced with problems, for example when there is no return of service due to the fact that the maintenance debtor (the respondent) cannot be traced. The applicants are requested to bring at least the personal details and address of the respondent, which is difficult to obtain in most cases because of the state of their relationship.

Therefore, although the legal rules underlying post-divorce maintenance apply equally to men and women, it is generally women who are not on an equal footing with men upon marriage breakdown.¹⁰ It is clear that the non-payment of maintenance has *inter alia* become a sex and gender issue.¹¹ Section 9 of the Constitution guarantees sex and gender equality. It is also clear that the difficulties and hardship that these women have to endure to obtain their and their children's maintenance entitlements undermine their dignity, which is protected by section 10 of the Constitution.

Furthermore, the non-payment of maintenance has also become a children's rights issue.¹² Section 28(1) of the Constitution states that every child has the right to basic nutrition, shelter, basic health care services and social services,¹³ and the right to be protected from neglect.¹⁴ and section 28(2) provides that a child's best interests are of paramount importance in every matter concerning the child. Maintenance obligations towards children should therefore be regarded as a primary obligation.¹⁵

To uphold the provisions of section 28 of the Constitution and to help to place women on an equal footing with men, it is imperative that women and children receive the maintenance that is due to them. It is imperative that our courts and maintenance debtors should realise that women and children in South Africa

⁸ See eg Faber "Corruption hampers child benefits" 10 August 2013 *Weekend Argus* 10.

⁹ Sindiswa "Maintenance courts let single mothers down" 10 August 2013 *Weekend Argus* 10.

¹⁰ De Jong "New trends regarding the maintenance of spouses upon divorce" 1999 *THRHR* 80-81; Carnelley and Hoctor "Maintenance defaulters: Aiding the process and process-in-aid" 2003 *Obiter* 511.

¹¹ Carnelley "A review of the criminal prosecution and sentencing of maintenance defaulters in South Africa, with commentary on sentencing strategies" 2012 *SACJ* 344 355.

¹² *Ibid.*

¹³ Subsection (c).

¹⁴ Subsection (d).

¹⁵ Hoctor and Carnelley "Maintenance arrears and the rights of the child: *S v November* 2006 (1) SACR 213 (C)" 2007 *TS:LR* 200.

often rely on the prompt payment of maintenance money in order to survive.¹⁶ This point was also emphasised by our Constitutional Court in *Bannatyne v Bannatyne (Commission for Gender Equality, as amicus curiae)*,¹⁷ where Mokgoro J held that “[t]he judiciary must endeavour to secure for vulnerable children and disempowered women their small but life-sustaining legal entitlements”. She further stated that “[e]ffective mechanisms for the enforcement of maintenance obligations are thus essential for the simultaneous achievement of the rights of the child and the promotion of gender equality”.¹⁸

Over the years the state has put mechanisms in place to help solve the problems related to maintenance. The first of these measures was the Maintenance Act 23 of 1963, but because of flaws in this Act the new Maintenance Act 99 of 1998 was enacted. However, even after the coming into operation of the new Maintenance Act, there is still evidence that women and children are battling to exercise their rights and to have them enforced in terms of the Act.¹⁹

3 PROBLEMS EXPERIENCED WITH THE MAINTENANCE SYSTEM

3.1 General

It has been established that the maintenance system is dysfunctional as a result of logistical difficulties in the maintenance courts.²⁰ Some of these difficulties are that maintenance courts are understaffed and officials do not attend training regularly to keep up with developments in maintenance matters.²¹ Further, the lack of material resources, such as computers, internet connections and means of transport, hampers effective service delivery in the maintenance courts.²² Although maintenance investigators have been appointed²³ to assist applicants, who are mostly women, in tracing respondents, it is difficult for these investigators to accomplish this enormous task because of the lack of the above-mentioned resources.²⁴ Furthermore, it appears that even where a maintenance court has been successful in granting a maintenance order, it is usually either for an insufficient amount²⁵ or the respondent fails to make the necessary payments due to resistance or a lack of means.²⁶ It is very difficult for the applicant to prove that the respondent does in fact have the means to support his children, when he claims

16 *Ibid*.

17 2003 2 SA 363 (CC) para 27.

18 Para 30.

19 Carnelley 2012 SACJ 344.

20 *Bannatyne* para 26.

21 Wamhoff and Burman “Parental maintenance for children: How the private maintenance system might be improved” 2002 *Social Dynamics* 148; Singh, Naidoo and Mokolobate “Coming to court for child support – The policy, the practice and reality” 2004 *SALJ* 143–154; Mamashela “Some hurdles in the implementation of the Maintenance Act 99 of 1999” 2006 *Obiter* 595; 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* 602 609–610 611–612; Faber 10 August 2013 *Weekend Argus* 10.

22 De Jong 2009 *SALJ* 608 612–613; Clark “The South African child’s right to maintenance – A constitutionally enforceable socio-economic right?” <http://bit.ly/1fPMbQ> (accessed 6 October 2012); Faber 10 August 2013 *Weekend Argus* 10.

23 Ito s 5 of the Maintenance Act.

24 Wamhoff and Burman 2002 *Social Dynamics* 151; De Jong 2009 *SALJ* 603.

25 Heaton *South African family law* (2010) 153.

26 De Jong 2009 *SALJ* 603.

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to have nothing to contribute.²⁷ Other problems relate to the difficulties associated with getting money paid to complainants²⁸ and corruption in our maintenance courts.²⁹

The current condition of the maintenance system has been aptly described as follows:

"Corruption, laws with no teeth, a chaotic payment system, a dire lack of resources, and the burden of proof falling on the wrong person: these are the ghosts that still haunt our child maintenance system, legislated in 1998 and only ever meant as a stopgap... It is now 2013 and despite a few small tweaks, there is no genuine attempt to revamp it."³⁰

3.2 Specific problems with the execution of maintenance orders

Any problems that may exist with the maintenance system are magnified when maintenance orders have to be executed.

3.2.1 Problems regarding civil execution

In terms of section 24(1) any order made by a maintenance court has the effect of an order made in a civil action. This means that, like any other civil debt, maintenance and arrear maintenance can be enforced in the ordinary courts and not necessarily in terms of the Maintenance Act.³¹ Furthermore, a new chapter on civil execution is included in the Act.³² Even though a maintenance debtor has not yet been convicted of the offence of failing to comply with a maintenance order, an application can be made to court for civil execution so as to enforce a maintenance order as per section 26 of the Act. A maintenance order may be enforced by means of a warrant of execution against property of the respondent,³³ the attachment of emoluments³⁴ or the attachment of debts owed to the respondent.³⁵

There are, however, several problems with regard to the implementation of the civil remedies provided for in the Maintenance Act.

As far as warrants of execution are concerned, a first problem is that respondents often acquire movable property using the name of another person.³⁶ Should the need arise to authorise a warrant of execution against such property, it is difficult to prove that the property belongs to the defaulter if he raises the defence that the property does not belong to him. It also causes huge delays in the execution process as inter-pleader proceedings will have to be instituted. It further appears that warrants of execution are, in practice, not issued frequently enough.³⁷

27 Faber 10 August 2013 *Weekend Argus* 10.

28 De Jong 2009 *SALJ* 604.

29 Faber 10 August 2013 *Weekend Argus* 10; Sindiswa 10 August 2013 *Weekend Argus* 10.

30 10 August 2013 *Weekend Argus* 10.

31 De Jong 2009 *SALJ* 595.

32 Ch 5.

33 Ito s 27.

34 Ito s 28.

35 Ito s 30.

36 See Mamashela 2006 *Obiter* 605 who states that some respondents deliberately frustrated the attachment of their property by registering it in the name of a relative, new girlfriend or new wife. See also Wamhoff and Burman 2002 *Social Dynamics* 167.

37 See Wamhoff and Burman 2002 *Social Dynamics* 167 who state that "courts are reluctant to authorise the issue of a warrant of execution against property".

This is because there are no proper investigations into the attachable property of respondents.³⁸ This is partly attributable to the fact that maintenance investigators do not have the necessary transport to drive to the respondent's residence to do proper investigations. Another hurdle in enforcing warrants of execution is the sheriff's attachment and storage costs. According to Mamashela³⁹ the sheriff must be paid his fees for attachment up front, before he actually attaches property. Because the complainants are generally either unemployed or in low-paid employment, they do not have the money to pay for these fees and the sheriff will not serve the order of execution on the defaulter.⁴⁰

With regard to the attachment of emoluments, it is obvious that where a maintenance debtor is self-employed this enforcement method is not a useful option. In this regard, Mamashela refers to the example of a defaulter operating a taxi service where it would be very difficult to find out how much he earns per month and request him to enforce a garnishee order against himself.⁴¹ If, however, the defaulter is employed by an employer, the remedy can be used, but only if the particulars of the defaulter, such as his identity number and employee number, are known. Applicants often have no knowledge of these particulars and maintenance investigators are not always able to help them in this regard.⁴² A further problem appears to be lack of co-operation on the part of employers regarding emolument attachment orders and a general difficulty in getting employers to comply with the provisions of the Maintenance Act that affect them.⁴³ The problems relate to either delays in implementing orders for deductions from employees' salaries or complete failure to do so. Other problems relate to charging the beneficiaries administrative fees for effecting emoluments attachment orders, making a single lump-sum payment for all their affected employees without allocating reference numbers and amounts to assist maintenance clerks in allocating the money correctly, and failing to appear in court, thereby making it impossible for the magistrate to sign the orders.⁴⁴

With regard to the attachment of debts, the defaulter can choose to frustrate the system by closing his bank account and opening another bank account with a different bank. It also appears that orders for the attachment of debts are not made frequently enough because there are no proper investigations by maintenance investigators attached to maintenance courts into the present or future debts owing or accruing to respondents.⁴⁵

3.2.2 Problems regarding criminal execution

Another method of enforcing maintenance orders is by way of criminal prosecution. Section 31(1) of the Act provides that a person who fails to pay maintenance may be found guilty of an offence. Sentences of various kinds may be imposed in terms of the Criminal Procedure Act 51 of 1977, namely the imposition

38 De Jong 2009 *SALJ* 610.

39 Mamashela 2006 *Obiter* 604-605.

40 See also Wamhoff and Burman 2002 *Social Dynamics* 167.

41 Mamashela 2006 *Obiter* 603. See also Wamhoff and Burman 2002 *Social Dynamics* 151.

42 De Jong 2009 *SALJ* 602-603.

43 De Jong 2009 *SALJ* 602-603; Mamashela 2006 *Obiter* 603-604; Wamhoff and Burman 2002 *Social Dynamics* 165.

44 *Ibid.*

45 De Jong 2009 *SALJ* 610; Wamhoff and Burman 2002 *Social Dynamics* 168.

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of fines, direct or periodical imprisonment and postponement or suspension of sentences.⁴⁶

The implementation of criminal remedies also presents certain difficulties. It appears that the courts are faced with a dilemma in the sense that when sentencing the defaulter they have to consider the best interests of the child and at the same time they have to pass a sentence that will have the desirable effect on the defaulter.⁴⁷ Payment of a fine and imprisonment as criminal sanctions may therefore not be the best options since they may deprive dependants of the defaulter's money or his earning capacity and also his presence.⁴⁸ As a result it has become a common practice for the courts to suspend orders for fines or imprisonment and, as an appropriate condition of suspension, to order the defaulter to pay off the arrears together with the existing maintenance order in monthly instalments.⁴⁹ This practice has rendered criminal sanctions for defaulting on maintenance ineffective.⁵⁰ As defaulters are aware that they will not easily be sentenced to payment of a fine or a term of imprisonment, they do not regard these criminal sanctions as a threat.

Another problem concerns the inappropriate rate of repayment or term of repayment of the arrears that an accused maintenance defaulter is ordered to pay upon conviction.⁵¹ In *S v November*⁵² four maintenance matters where suspended sentences were accompanied by orders to repay arrears at a specified monthly rate came before the High Court on automatic review. In all four matters it appeared that the rate of repayment was too low in comparison with what the convicted defaulters could actually afford. Bozalek J stated that

"each one of these cases represents a failure of justice *vis à vis* the complainant [the wife] and the minor children in respect of whom the maintenance was payable. Quite apart from the fact that none of the defaulting parties offered any valid reason for their failure to meet their obligations, the terms upon which they were required to pay off the arrears were so lenient as in some cases to be indefensible. The underlying reason for these inappropriate orders stemmed from the failure by the presiding officer to conduct a proper enquiry into the accused's financial circumstances in order to ascertain what he could reasonably be required to pay in respect of the arrears rather than what he offered to pay or what the magistrate simply thought was appropriate. Another likely reason for the leniency of the terms of repayment was a failure to view the accused's non-compliance in a sufficiently serious light".⁵³

46 See also Terblanche *The guide to sentencing in South Africa* (1999) 3-7.

47 Carnelley and Hoctor 2003 *Obiter* 512-513; De Jong 2009 *SALJ* 611; Carnelley 2012 *SACJ* 345 355.

48 Carnelley 2012 *SACJ* 355; Wamhoff and Burman 2002 *Social Dynamics* 165.

49 Ito s 40 of the Act.

50 Clark "The new maintenance bill - Some incremental reform to judicial maintenance procedure" 1998 *De Rebus* 5; Carnelley 2012 *SACJ* 345 357 who states that sometimes the courts suspend a sentence three or four times, so people think nothing of a suspended sentence.

51 Hoctor and Carnelley 2007 *TSAR* 202.

52 2006 1 *SACR* 213 (C).

53 Para 8. The decision in this case is discussed in para 4.4 below.

4 THE QUALITATIVE RESEARCH STUDY

4.1 Purpose and details of the study

To determine the effect of the current maintenance system, and its enforcement methods, on women and children in practice, qualitative research was undertaken. Two categories of people were interviewed, namely experts in the field of maintenance, who work in the districts of Taung, Zeerust and Lichtenburg in the North West Province, and members of the public, that is, the applicants and respondents in maintenance cases in the same districts. The emphasis was placed on the experts' experience in their field and on the life experiences of members of the public regarding the way they are affected by the maintenance system and the methods by which it is enforced. Eleven of the twenty targeted experts were interviewed in the three districts.⁵⁴ Forty of the sixty targeted applicants were interviewed⁵⁵ and twenty-five of the sixty targeted respondents were interviewed.⁵⁶ Many of the problems experienced with the maintenance system in South Africa⁵⁷ are reflected in the responses from the experts, the applicants and the respondents.

4.2 Responses from experts

Three maintenance investigators,⁵⁸ two maintenance officers,⁵⁹ and three magistrates⁶⁰ were interviewed. All of them are of the view that the maintenance system must be improved to ensure that respondents take it seriously and applicants can have confidence in it.

From the interviews it appears that all forms of civil execution are regularly granted in the three districts. There are, however, difficulties with the application of some of these civil enforcement methods.⁶¹ The experts explained that as far as warrants of execution against property are concerned, respondents often have few assets, if any, to attach. If the sheriff or maintenance investigator finds assets in the possession of a defaulter, such assets are almost invariably registered in third parties' names. As a result, an inter-pleader summons usually prevents the attachment of property found in the possession of a defaulter. All the experts recorded difficulties in using emolument attachment orders if the defaulter is unemployed and there is no salary to deduct, or if the defaulter is temporarily employed and he is not registered on the database of his temporary employer. Experts are nevertheless of the opinion that the attachment of emoluments is the most effective method of enforcement because money is deducted by the employers before it is deposited in the defaulters' bank accounts. It was further explained that it is difficult to attach money in the bank accounts of the defaulters because this enforcement process takes time and defaulters have access to their money as and when they please and they often simply withdraw all the money from their account before it can be attached.

54 I.e. 55%.

55 66.6%.

56 I.e. 41.6%.

57 See para 3 above.

58 One from each district.

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60 One from each district.

61 See also para 3.2.1 above.

All experts, especially in the three districts, are of the opinion that the current system of payment of maintenance orders is inadequate. Defaulters' dependents are often in a state of financial hardship and they are often forced to live in a state of financial hardship.

With regard to the enforcement of maintenance orders, the experts are of the opinion that the current system of enforcement is inadequate. Defaulters' dependents are often in a state of financial hardship and they are often forced to live in a state of financial hardship.

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4.3 Responses from applicants and respondents

Almost all the applicants and respondents are of the opinion that the current system of maintenance orders is inadequate. Defaulters' dependents are often in a state of financial hardship and they are often forced to live in a state of financial hardship.

Concerning the enforcement of maintenance orders, the experts are of the opinion that the current system of enforcement is inadequate. Defaulters' dependents are often in a state of financial hardship and they are often forced to live in a state of financial hardship.

It was clear from the interviews that the current system of maintenance orders is inadequate. Defaulters' dependents are often in a state of financial hardship and they are often forced to live in a state of financial hardship.

Ten of the twenty targeted applicants and respondents were interviewed. All of them are of the view that the maintenance system must be improved to ensure that respondents take it seriously and applicants can have confidence in it.

Thirty-six of the sixty targeted applicants and respondents were interviewed. Many of the problems experienced with the maintenance system in South Africa are reflected in the responses from the experts, the applicants and the respondents.

62 See also para 3.2.1 above.

63 Only five applicants and respondents were interviewed.

64 The four were interviewed in the three districts.

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All experts also reported serious problems with criminal enforcement methods, especially the imposition of a fine or term of imprisonment in terms of section 31 of the Act.⁶² The experts indicated that they are all reluctant to order the payment of a fine, because they feel that the money should go to the defaulters' dependants rather than the state. They said that they hardly ever impose prison sentences, as sending defaulters to prison is tantamount to denying the defaulters' dependants the right to maintenance because when the defaulters are in prison they invariably lose their jobs.

With regard to other methods of enforcement that can be introduced in maintenance courts, the experts mentioned the cancellation of the defaulters' driver's licences and refusal to issue passports to them. They were also of the view that defaulters who claim unemployment and insufficient means should be ordered to pay maintenance in kind, by taking on chores such as bathing the child, helping the child with homework, etc.

With regard to the tracing of defaulters, the three maintenance investigators explained that they have to trace defaulters in most cases because the defaulters often change their addresses or may even abscond from their employment. When they are dismissed, the former employer has no idea of the defaulter's whereabouts. They added that it is difficult to trace defaulters when members of the defaulters' families have no idea of their whereabouts, which is usually the case.

4.3 Responses from applicants

Almost all the applicants who were interviewed had already been granted maintenance orders in their favour or, more often, in favour of their children. The amounts of the maintenance orders in respect of children were mostly far less than R1 000 per child.⁶³ All the applicants explained that the amount they received does not meet the needs of their children, which makes life difficult for their children.

Concerning their employment status, most applicants said that they are unemployed. Fifteen applicants reported that they are employed, but it appeared that these applicants were only in temporary employment and received salaries of as little as R80 a day. The reason for this state of affairs was that they could not get permanent employment close to their homes, and that they could not leave as there would be no one to look after their children. It appeared that none of them could afford a helper to assist them with their child care responsibilities.

It was clear that many of the applicants and their children live in dire poverty.

Ten of the forty applicants complained that they do not receive maintenance regularly. They said that when they checked with the respondents as to why the maintenance had not been deposited, they got differing stories – either that the respondent had had to pay creditors or that the applicant should not bother him but find a job in order to take care of their child herself.

Thirty-six of the applicants receive money via the electronic funds transfer (EFT) system and four collect their money at the relevant maintenance office.⁶⁴

⁶² See also para 3.2.2 above.

⁶³ Only five applicants received more than R1 500 per child.

⁶⁴ The four who collected their money from the court all came from remote rural areas which are far from the court.

Those who receive money via the EFF system reported that they often receive the money late. Five of these applicants also reported that on several occasions they received payments for the wrong amount of money – that is an amount which did not correspond to the amount of the maintenance order. In due course they were instructed by the maintenance office to withdraw such money and return it to the office so that it could be paid to the correct beneficiary. They complained that this meant that they had to spend more money on bank charges for unnecessary transactions. The four who still collect their money at the court explained that the reason why they do so is that they do not have bank accounts.⁶⁵ These applicants also alleged that they are secondary victims in the sense that, sometimes, even when the respondent had paid maintenance, the maintenance court officials had misappropriated the money. It was only when the applicants checked with respondents and learnt that maintenance payments had indeed been made that they discovered that such payments had been misappropriated by the court officials.

The applicants all agreed that it is not easy to access the maintenance office. Thirty-three applicants indicated that they have to use public transport which they cannot really afford. Seven applicants stated that they walked to the maintenance office and often arrived late, upon which they were told that the respondent had already left because the officials thought that the applicant was no longer interested in pursuing her application. They added that the officials did not even bother to find out from them whether they were still going to attend or to enquire about the reason why they were late. They were merely told to submit new applications, which was extremely disappointing and discouraging.

In response to the question whether the applicants know their rights when they do not receive maintenance regularly, they explained that they simply approach the maintenance office and that they are thereupon given a date to appear before a maintenance officer or to appear in court. Five applicants explained that on the date when they had to appear in court, the respondents brought their salary slips along to prove that maintenance was deducted from their wages every month. It was then found that the employers either did not quote the correct reference number or did not quote a reference at all. Those applicants were then sent home and told that the money first had to be traced before it could be paid to them. Three of them reported that they only received those payments after approximately three months, while two said they never received the money and eventually gave up on their legitimate maintenance claims. It further appears that twenty-five of the applicants did not know the identity number of the respondents because they had merely had casual relationships with them. They had not considered that it might be necessary to know these identity numbers one day. Thirty-two applicants did, however, know where the respondents lived, but in eight cases the applicants said that the respondents had subsequently changed their addresses and that they could no longer get hold of the respondents.

Lastly, it is apparent that most of the applicants are of the view that the respondents do not take their maintenance obligations seriously. Furthermore, they do not receive the assistance they are entitled to when they approach the maintenance office. They are of the opinion that respondents should be arrested and put

⁶⁵ One of them has, however, recently opened a bank account and has forwarded the details to the maintenance office and is waiting for the details to be captured on the system.

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behind bars for failure to pay maintenance because they do not pay in any event. As far as the applicants are concerned, justice is not seen to be done in the maintenance courts.

4.4 Responses from the respondents

To understand both sides of the problems surrounding maintenance payments and their enforcement, twenty-five respondents who already had maintenance orders against them were also interviewed.

Nine respondents indicated that they comply with the maintenance orders against them, and thanked their employers for deducting the money from their wages. Four of the nine indicated that they would not have complied with the order if their employer had not been deducting the maintenance from their wages.

Sixteen respondents were therefore found to be in arrears with their maintenance obligations. Of these, nine respondents indicated that they had been in arrears for over six months, and seven indicated that at most they had been in arrears for about three or four months. They proffered excuses such as that they are only in temporary employment and cannot afford to pay maintenance out of their small salaries. Those who are self-employed indicated that their payments depend on how much profit they are making, meaning that if they are making little or no profit they cannot afford to make maintenance payments. It is clear that others, who are indeed employed, do not pay simply out of stubbornness or spite because there is great animosity between them and their ex-partners. Six respondents also reported that as they do not have contact with their children they do not feel obliged to maintain them.

In response to the question whether they would like to receive a reminder by short message service (sms) when maintenance payments are due, eighteen respondents replied positively.

From the responses of the respondents, it is nonetheless clear that the majority do not feel threatened by the maintenance system and they would do what they can to frustrate it.

4.5 Innovative suggestions to improve the maintenance system for women and children

From the responses of the participants in the qualitative research study it appears that the following measures are suggested to improve the maintenance system and better ensure that women and children receive their maintenance entitlements: the cancellation of the defaulters' driver's licences; the refusal to issue passports to defaulters; orders for payment in kind; sms notifications of payments due; an altogether better regulation of emolument attachment orders and a stricter enforcement of criminal sanctions against recalcitrant defaulters.

The suspension or denial of driver's licences and passports could be used when dealing with cases of chronic default. In other jurisdictions it is usually used only after a maintenance defaulter has been in arrears for a specific number of months.⁶⁶

⁶⁶ See eg s 25-517A of the Arizona Revised Statutes in terms of which the Department of Economic Security or its agent shall notify a maintenance defaulter who is at least six months in arrears in making child support payments, periodic payments on a support arrearage or periodic payments pursuant to a court order of support that the defaulter may

continued on next page

or where all other enforcement methods have failed.⁶⁷ If a respondent wilfully remains in default and/or fails to enter into an acceptable payment plan after a notice of the intended suspension or revocation has been served on him, his passport or driver's licence may be suspended or revoked either at a court hearing⁶⁸ or by the relevant state department or local licensing body upon application by the maintenance court.⁶⁹ A defaulter who fails to return his licence or passport to the relevant department should be guilty of an offence. An exception could, however, be made for a maintenance defaulter who requires a licence or passport for purposes of employment. If the defaulter pays the arrears in full or satisfactorily reschedules payments for the arrears, his licence or passport should be returned to him. Where a defaulter does not have a driver's licence or passport his name could be put on a control list to ensure that no passport or driver's licence would be issued to him, if he applied for one. Here again, if the defaulter pays the arrears in full, or satisfactorily makes arrangements to pay off the arrears, his name should be removed from the control list. It is hoped that the threat of having their driver's licences or passports suspended would persuade more defaulters to fulfil their maintenance obligations towards women and children. To use Mamashela's example, it is especially the defaulter who operates a taxi service⁷⁰ who could be encouraged to make regular maintenance payments by the use of this innovative enforcement method.

An order for payment in kind is an interesting suggestion which would do much to curb the all too popular defence of lack of means (or no income due to unemployment). By taking on chores such as bathing the child or helping the child with homework, a respondent could undoubtedly contribute to the maintenance of his children, relieve the applicant of this burden and allow her to engage in some sort of economic activity herself on a more regular basis. In this regard, it is interesting to note that section 17(4) of the Namibian Maintenance Act 9 of 2008 makes provision for payments of maintenance to be made in kind in the form of specified goods or livestock, for all or some portion of the settlement of amounts already owing or the future payment of instalments. The following examples are given of orders that can be made in terms of this subsection:⁷¹

"For example, the maintenance order might require the defendant to make a certain monthly payment plus annual delivery of one head of cattle. It might say that the defendant can provide the complainant with a house to live in instead of

be referred to court for a hearing to suspend or deny his driver's licence or recreational licence.

67 See eg Part III (License denial) of the Family Orders and Agreements Enforcement Assistance Act, 1996 (ss 62-78) in Canada, in terms of which a provincial enforcement service may, after all other enforcement mechanisms have failed, apply to the Minister to have the licence or passport of a maintenance debtor who is in persistent arrears under a support order suspended or revoked. In terms of s 67(3)(c), the provincial enforcement service must send a notice to the debtor stating that it intends to make a licence/passport denial application and advising the debtor that the denial application will not be made if the debtor enters into a payment plan that is acceptable to the provincial enforcement service or satisfies the provincial enforcement service that the debtor is unable to pay the amount in arrears and that the making of the application is not reasonable in the circumstances.

68 According to the position in Arizona, USA: see fn 64.

69 According to the position in Canada: see fn 65.

70 See para 3 2 1 above: Mamashela 2006 *Obiter* 603.

71 Legal Assistance Centre "Guide to the Maintenance Act 9 of 2003" (2007) 45 available at <http://bit.ly/1h7yglf> (accessed on 2 September 2013).

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contributing towards the costs of rent. A taxi driver might arrange to give a child a free lift to school each day to reduce the other parent's expenses."

It can indeed be argued that payment in kind refers to payment in some form other than money and that such payment could include the taking on of chores as suggested by the experts in the qualitative research study. Here there seems to be an overlap between the concept "care" and the concept "maintenance".⁷²

As regards sms notifications of payments due, it appears that in other jurisdictions where similar systems are in place⁷³ they improve compliance with maintenance orders and increase contact with applicants and respondents and participation in appointments and hearings. In South Africa, too, an sms notification system would greatly benefit court officials, applicants and respondents. Seeing that a recent research study has shown that only eighteen per cent of South Africa's vast population are without mobile phones,⁷⁴ an sms system could be widely utilised and efficiently assist in preventing the build-up of arrears. It also appears that respondents would appreciate the implementation of such a system.⁷⁵ Court officials would then only have to deal with a few defaulters, as all respondents would be reminded of their monthly payments before they fall due and would again be notified when they miss a payment. Applicants would then receive their money on time and more regularly. The sms notification system could also be used to remind the parties of informal maintenance enquiries and court hearings. Such a system could further be of help where one of the parties anticipates a problem regarding attendance at an enquiry and would like to notify the other party and the court official concerned that he or she would be late for the enquiry or would like to reschedule the enquiry altogether.

Seeing that the attachment of emoluments is regarded as the most effective method of enforcement by the experts and is indeed welcomed by respondents, better regulation of such orders to address the problems experienced with them in practice seems to be indicated.⁷⁶ A first step in this regard would be to apply

⁷² Although the concept "maintenance" is not defined in the Children's Act 38 of 2005, the definition of the concept "care" in s 1(1) of the Act clearly contains elements of maintenance: see para (a)(iii) of the definition.

⁷³ See eg the state of Arizona in the USA where an automated dialling system is used in terms of which the Arizona Department of Economic Security or its agent relies on automated remedies which are triggered when non-custodial parents (the respondents) have not paid maintenance in accordance with court orders. This technology relies on information maintained in the Arizona Tracking and Location Automated System to generate automated telephone reminders: Levi "Auto-dialer helps increase child support payments in Arizona" <http://bit.ly/1h7gGwR> (accessed on 2 September 2013). The system generates pre-recorded telephone reminder messages to parents about their child-support obligations. Respondents with new child support orders or newly modified orders receive automated reminder messages about their child-support obligation before their first payment is due or after a first payment has been missed. Respondents who have not made a child support payment for at least ninety days are targeted to receive an automated reminder each month until payment is received. Furthermore, respondents and applicants with scheduled court hearings receive an automated reminder message two days prior to their scheduled hearing.

⁷⁴ "Mobile phone usage in South Africa" <http://bit.ly/1eKrs7O> (accessed on 30 January 2013).

⁷⁵ See para 4.4 above.

⁷⁶ Garnishment of income is usually also the first step in the enforcement process in other jurisdictions. See eg the province of Nova Scotia in Canada: Canada: Nova Scotia MEP "FAQ" <http://bit.ly/1aiKqYW> (accessed on 25 May 2013).

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sections 28 and 29 of our Maintenance Act to the letter of the law to ensure that the best use possible is made of this enforcement method. If employers on whom a notice has been served for the purposes of satisfying a maintenance order fail to make any particular payment in accordance with that notice, the maintenance order should be enforced against such employers as provided for in section 29 of the Act and the employer sentenced upon conviction to a fine or imprisonment for the maximum period as provided for in section 38. Employers must quite simply be compelled to comply. Secondly, it is recommended that a number of changes should be effected to these two sections to better regulate this important enforcement tool. To encourage employers to comply with emolument attachment orders, provision should be made for the retention of an administration fee by employers as compensation for the additional administrative duty.⁷⁷ It is submitted that this administration fee should be borne by the respondent and not by the applicant. Alternatively, this burden could be borne by the state. However, the government would have to budget for these extra costs well in advance, especially if it wants to show its commitment to improving the maintenance system. Where employers make a single lump-sum payment for all their affected employees they must be obliged to separately identify the portion of the payment that is attributable to each maintenance debtor and they must include each debtor's appropriate reference number.⁷⁸ Furthermore, it is perhaps necessary to include a provision stating that an employer may not refuse to employ, may not discharge or may not otherwise discipline a maintenance debtor as a result of an emolument attachment order.⁷⁹

Lastly, since too many respondents see no real threat in the enforcement remedies of our maintenance system⁸⁰ and the applicants are crying out for a stricter enforcement of the criminal enforcement remedies,⁸¹ the decision in *S v November*⁸² should be taken very seriously. With reference to *Bannatyne v Bannatyne (Commission for Gender Equality, as amicus curiae)*⁸³ and *S v Visser*⁸⁴ the court said that in order to ensure effective enforcement of maintenance payments to secure the rights of children and to uphold the dignity of women, it is necessary

77 See also Mamashela's suggestion that magistrates should add at least ten percent of the maintenance instalment for administration of garnishee orders to encourage employers to comply: Mamashela 2006 *Obiter* 604. This is indeed also the position in Arizona, where its s 25-504H of the Arizona Revised Statutes employers may deduct a handling fee and withhold and retain an additional one dollar per payment (but not more than four dollars per month) for each maintenance debtor for the cost of compliance with garnishment.

78 See also s 25-504H of the Arizona Revised Statutes which has a similar provision.

79 See s 25-504C of the Arizona Revised Statutes in this regard. In terms of this section a maintenance debtor who is wrongfully refused employment, discharged or otherwise disciplined may recover damages suffered, plus reinstatement if appropriate, plus reasonable attorney fees and costs incurred against the employer.

80 See para 4.4 above.

81 See para 4.3 above. See also Carnelley 2012 *SACJ* 357 358-359. She argues that periodical imprisonment and correctional supervision should be used more frequently.

82 *Supra*.

83 *Supra* para 27 where the court said that "[o]ur maintenance courts and the laws that they implement are important mechanisms to give effect to the rights of children protected by section 28 of the Constitution".

84 2004 1 SACR 393 (SCA) 399F where the court said that "it is important that courts regard deliberate failures to comply with maintenance orders as serious offences and punish such failures accordingly".

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ensure that persons on whom maintenance orders fail to pay are imprisoned. Section 29 of the Act must quite clearly state a number of important elements: attachment of wages, administration fee, etc.⁸⁵ It is submitted that the court should not be in a position to grant a maintenance order in advance of the payment of the payment of the debt, unless it is necessary to employ, may not be a result of an

enforcement remedy for a stricter order in *S v November v Bammatyne v Sser*⁸⁴ the court ordered payments to be made, it is necessary

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for prosecutors and magistrates to inform themselves of the range of available sentencing options and also of the comprehensive range of tools and procedures available in the Act to ensure that the best interests of children are protected by the proper enforcement of maintenance orders.⁸⁵ It was further decided that when a separate order for the repayment of arrears is made upon conviction of a maintenance defaulter, the instalments of such repayment must be fixed on the basis that maintenance is a primary obligation on the part of the defaulter and not one which ranks equally with every other expense which the defaulter may have.⁸⁶ In this regard, the defaulter's financial means must be properly investigated and taken into account to determine a realistic rate and period for the repayment of arrears.⁸⁷ Although it is evident from the decision in *November* that the court wanted to ensure that the rights of the child are given paramount importance in maintenance matters, the court unfortunately found that it could not rectify the issues regarding the repayment of arrears in the four matters before it as section 304(2) of the Criminal Procedure Act 51 of 1977 prevents a reviewing court from increasing a sentence or referring a case back to the court *a quo*.⁸⁸ This last part of the decision has been rightly criticised⁸⁹ as it is felt that the court should have used the constitutional injunction⁹⁰ to exercise the discretion it possesses in its capacity as upper guardian of minors to promote the interests of the child by rectifying the orders immediately.

5 THE DRAFT BILL

5.1 Purpose of the draft Bill

The purpose of this Bill is to amend the Maintenance Act in the interim, as a further step in the reform of the entire South African maintenance system.⁹¹

Although the draft Bill contains a range of amendments, the focus below will fall only on those amendments which have the potential to assist vulnerable children and disempowered women in obtaining their maintenance entitlements.⁹² These amendments relate to extending the jurisdiction of maintenance courts to include the applicant's place of employment; obliging electronic communications service providers to provide maintenance courts with contact information for maintenance defaulters; limiting postponements of maintenance enquiries; giving certain civil enforcement methods a wider field of application; giving employers and third parties who have to make payments on behalf of maintenance debtors an opportunity to comment on this responsibility; making credit bureau reporting of maintenance defaulters obligatory and introducing credit

⁸⁵ Para 11.

⁸⁶ Para 12.

⁸⁷ Para 13 and 14.

⁸⁸ Para 16.

⁸⁹ Hoctor and Carnelley 2007 *TSAR* 205.

⁹⁰ Ito s 28(2).

⁹¹ Dept of Justice and Constitutional Development "Note on the Maintenance Amendment Bill, 2013" ("Note") 1. According to the department a review of the entire Act is currently being conducted by the SALRC under the existing Project 100 which deals with investigations in respect of Family Law and the Law of Persons.

⁹² Some of the amendments contained in this Bill are a repeat of amendments proposed in the earlier draft Judicial Matters Amendment Bill, 2011, which was never put forward to parliament.

bureau reporting of maintenance debtors at a much earlier stage; increasing the maximum penalties for certain offences; and creating additional offences.

5.2 Relief envisaged by the draft Bill to improve the position of women and children

Clause 1 of the draft Bill seeks inter alia to amend section 6 of the Maintenance Act in order to extend the jurisdiction of maintenance courts by also giving the court in the magisterial district within which the applicant carries on business or is employed (and not only the court in the magisterial district within which the applicant resides) jurisdiction to institute a maintenance enquiry.⁹³ Such an amendment would make the maintenance court more accessible and greatly assist applicants who work in different magisterial districts from the ones in which they reside. They would be spared having to make long and difficult journeys to the maintenance court and take extended periods of time off work in order to go to the maintenance court in which they live, which in many cases is far from their places of work.⁹⁴

Clause 2 of the draft Bill seeks to amend section 7 of the Act⁹⁵ to oblige electronic communications service providers (such as Vodacom, MTN and Cell C) to provide maintenance courts with contact information for maintenance defaulters or other persons who may be affected by a maintenance order.⁹⁶ The maintenance court will, however, only issue such a direction to electronic communications service providers on application by the maintenance officer and if it is satisfied that all reasonable efforts by the maintenance officer or the maintenance investigator to locate the whereabouts of a person have not borne fruit. The electronic communications service providers must then check their databases to determine whether the person being sought is indeed one of their customers and, if so, they must supply his contact information to the maintenance court within the period set out by the court in the direction. The provision of this information will greatly assist applicants who have lost contact with the respondents after family separation. It will also ease the enormous task of maintenance investigators of tracing respondents and compensate for the fact that these court officials do not have all the necessary resources to perform their duties properly. Furthermore, if maintenance investigators had to spend less time on tracing respondents this would reduce their administrative workload and free them to use their expertise and time to concentrate on investigations into possible attachable property of, or present or future debts owing to, respondents.

93 Clause 9 of the draft Bill, which seeks to amend s 23 of the Maintenance Act, contains a similar amendment where the transfer of maintenance orders from one area of jurisdiction to another is concerned. These amendments would bring the provisions of the Maintenance Act into line with s 28(1)(a) of the Magistrates' Courts Act 32 of 1944, which bases jurisdiction, among others, on place of employment in addition to place of residence.

94 Dept of Justice and Constitutional Development "Note" 3.

95 Dealing with the investigation of maintenance complaints.

96 This clause is based largely on the provisions of s 4 of the Protection from Harassment Act 17 of 2011 which gives the court the statutory power to issue a direction that obliges electronic communications service providers to furnish the court with information which is necessary for purposes of identifying a person who has allegedly been involved in the harassment (cyber stalking) of another person by means of electronic communications or electronic mail. The information would include the name, surname, identity number and address of the respondent.

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Clause 2 further makes provision for an administration fee payable to the electronic communications service provider by the applicant to compensate the service provider for this additional administrative duty. The Department of Justice and Constitutional Development has acknowledged that the fact that the obligation to pay this tariff⁹⁷ is placed on the applicant personally and not on the state is likely to elicit criticism.⁹⁸ However, the department indicated that because of their critical financial constraints, it would probably be the only feasible method at this stage.⁹⁹ Another possibility would, of course, be to make the respondent responsible for this administration fee.¹⁰⁰

In terms of clause 4, a new subsection is to be added to section 10 of the Maintenance Act.¹⁰¹ In terms hereof maintenance courts will have a duty to ensure that postponements of maintenance enquiries are limited in number and in duration. It further gives maintenance courts the discretion to make interim maintenance orders in cases where a postponement of the enquiry is indeed necessary and justified. This new discretion will address the situation where respondents in maintenance enquiries do everything in their power to drag out the proceedings for as long as possible, to their benefit and to the detriment of vulnerable children and disempowered women.¹⁰² It is further foreseen that the amendment will improve service delivery and access to justice. Respondents will naturally be anxious to have their matters finalised as soon as possible, especially where they are required to pay increased amounts in terms of an interim order.¹⁰³ Women and children will not have to wait years before they get a maintenance order in their favour and have it properly enforced.

Clause 5 seeks *inter alia* to amend section 16(2) of the Maintenance Act to the effect that not only a maintenance court but also a High Court and a Regional Court having jurisdiction to make a maintenance order shall be empowered to direct a person or the administrator of a pension fund who owes the maintenance debtor periodical instalments of money because of a contract between them to make the periodical payments to the applicant instead of to the maintenance debtor. This amendment will therefore give the mechanism created in section 16(2) a wider field of application to increase the likelihood that women and children involved in divorce litigation in the High Court or the Regional Court¹⁰⁴ will receive their maintenance entitlements.

Clauses 5 and 11 further seek to amend section 16(2)(a) and section 28(1) of the Act respectively so as to give a third party, who owes the maintenance debtor periodical instalments of money, and an employer, who employs a maintenance debtor, an opportunity to comment upon the feasibility of a proposed order to

⁹⁷ The proposed tariff under the Protection from Harassment Act for this purpose is currently R80.

⁹⁸ Dept of Justice and Constitutional Development "Note" 5.

⁹⁹ *Ibid.*

¹⁰⁰ As is suggested with regard to the administration fee payable to employers. It is also submitted that the sheriff's attachment and storage costs when executing warrants of execution should be borne by the respondent.

¹⁰¹ Dealing with the enquiry by the maintenance court.

¹⁰² *Ibid* 6.

¹⁰³ *Ibid.*

¹⁰⁴ Since the commencement of the Jurisdiction of Regional Courts Amendment Act 31 of 2008 on 9 August 2010 a Regional Court has jurisdiction to hear divorce-related issues.

make payments on behalf of the debtor or a proposed emolument attachment order before the order is made.¹⁰⁵ It is anticipated that such amendments would result in better co-operation from third parties and employers regarding these orders.

Clause 10 contains a very important amendment in respect of the enforcement of maintenance orders. It seeks to insert section 26(2A) into the Maintenance Act, to oblige maintenance officers to furnish the personal details of maintenance debtors to a business which has as its object the granting of credit or is involved in the credit rating of persons as soon as a complaint is made in terms of section 26 of the Act. At present, maintenance officers have the discretion to make such reports to credit bureaus in terms of section 31(4) only after a maintenance defaulter has been convicted of an offence under section 31 of the Act. This amendment will therefore stop debtors from obtaining credit at a much earlier stage to ensure that they do not incur unnecessary costs which would prevent them from meeting their maintenance obligations. In this regard, it is also interesting to note that clause 12 of the draft Bill intends to amend section 31(4) of the Act to oblige maintenance officers to report a convicted defaulter to credit bureaus and remove their discretion whether or not to do so.

Clauses 12, 13, 14 and 15 seek to increase the maximum penalties prescribed in sections 31(1),¹⁰⁶ 35,¹⁰⁷ 38¹⁰⁸ and 39¹⁰⁹ of the Act respectively. These amendments will lend more weight to the seriousness of the relevant offences.¹¹⁰ Furthermore, clause 16 will create two additional offences. First, in terms of a new section 39A of the Act, a person who wilfully hinders or obstructs a maintenance investigator in the exercise of his or her powers or the performance of his or her duties will be guilty of an offence which is punishable with a fine or imprisonment for a period not exceeding one year. Secondly, a new section 39B will make it an offence for a maintenance debtor to neglect to submit two photographs of himself to the maintenance officer after an order has been made against him by the maintenance court. In this regard clause 18 of the draft Bill seeks to amend section 43 to oblige the maintenance court to request a maintenance debtor or against whom an order has been made to submit two photographs of himself or herself to the maintenance officer. At present, section 43 provides that a maintenance court may, at the request of the maintenance officer, direct that two

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- 105 These amendments are proposed so as to bring ss 16(2) and 28(1) into line with the decisions in *S v Ngkoela* 2000 2 SACR 420 (T) and *S v Ruseemela* 2000 2 SACR 98 (T).
- 106 If the amendment is enacted, a maintenance defaulter could be liable upon conviction to a fine or to imprisonment for a period of three years, instead of one year.
- 107 If the amendment is enacted, a person who wilfully interrupts the proceedings at a maintenance enquiry or who wilfully hinders or obstructs the maintenance court in the performance of its functions at the enquiry could be liable upon conviction to a fine or to imprisonment for a period of one year, instead of six months.
- 108 If the amendment is enacted, third parties obliged to make periodical payments on behalf of maintenance debtors and employers served with emolument attachment orders who fail to make the necessary payments to the maintenance creditor, or who fail to give certain notices to the maintenance court, could be liable upon conviction to a fine or to imprisonment for a period of two years instead of six months.
- 109 If the amendment is enacted, a maintenance debtor who fails to give notice of changes of his address or employment could be liable upon conviction to imprisonment for a period of one year, instead of six months.
- 110 Dept of Justice and Constitutional Development "Note" 11.

- 111 See De Jo
112 See para 5
113 See para 4
114 S 14 of the
115 S 10.
116 S 21(1)
117 S 21(2).
118 S 21(4).
119 S 33(1).
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photographs be taken of the person against whom the maintenance court has made a maintenance order. The current provisions have, however, been flatly ignored and it appears that almost no photographs of respondents are ever taken in terms of section 43.¹¹¹ Hopefully, shifting the onus from the maintenance court to the respondent regarding the photographs will provide a more practical solution and better facilitate the tracing of respondents when they fail to comply with maintenance orders.

6 CONSTITUTIONALITY OF PROPOSED CHANGES AND SUGGESTIONS

It could, perhaps, be argued that some of the proposed amendments contained in the draft Bill¹¹² or those suggested in the qualitative research study¹¹³ may be unconstitutional because they unfairly infringe some of a respondent's fundamental rights as guaranteed by the Constitution. For example, obliging electronic communications service providers to provide maintenance courts with the contact information of maintenance debtors may infringe their right to privacy.¹¹⁴ Likewise, making credit bureau reporting of maintenance defaulters obligatory and introducing credit bureau reporting of maintenance debtors at a much earlier stage may infringe their rights to privacy and to have their dignity protected.¹¹⁵ Furthermore, the suspension or denial of driver's licences and passports may infringe a defaulter's rights to freedom of movement,¹¹⁶ to leave the Republic,¹¹⁷ to a passport,¹¹⁸ and possibly, to lawful administrative action.¹¹⁹

On the other hand, in *Bannatyne v Bannatyne (Commission for Gender Equality, as amicus curiae)*¹²⁰ the Constitutional Court found that the failure to comply with maintenance orders undermines not only the best interests of children¹²¹ but also sex and gender equality¹²² and the dignity of women.¹²³

It is therefore necessary to weigh or balance the above-mentioned fundamental rights of respondents, women and children and to determine whether any of these rights can be limited in terms of section 36 of the Constitution.¹²⁴ More specifically, it needs to be established whether a limitation of respondents' rights is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

111 See De Jong 2009 SALJ 611.

112 See para 5.2 above.

113 See para 4.5 above.

114 S 14 of the Constitution.

115 S 10.

116 S 21(1).

117 S 21(2).

118 S 21(4).

119 S 33(1).

120 2003 (2) SA 363 (CC) para 30.

121 S 28(2) of the Constitution.

122 S 9.

123 S 10.

124 On the weighing up of competing rights or interests, see *S v Makwanyane* 1995 3 SA 391 (CC) 436; *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) 31; *Phillips v Director of Public Prosecutions* 2003 4 BCLR 357 (CC) 365; *Johncom Media Investments Ltd v M* 2009 4 SA 7 (CC) para 24.

It is clear from South African jurisprudence that section 28(2) of the Constitution vests children with a fundamental right to have their interests given priority in the process of balancing the rights of other persons against those of children.¹²⁵ Furthermore, it appears that sex equality and human dignity are two of the key values of our Constitution. Section 1(a) and (b) elevates non-sexism and human dignity to founding constitutional values. In terms of section 37(5), sex equality, human dignity and children's right to be protected from neglect¹²⁶ are also listed as rights which cannot be derogated from in the case of a state of emergency.

It therefore appears that children's right to be protected from neglect in terms of section 28(1)(c), their best interests in terms of section 28(2) and applicants' rights to human dignity and sex equality in terms of sections 9 and 10 are of particular importance to the constitutional aspiration to create an open and democratic society based on human dignity, freedom and equality and would probably outweigh respondents' rights to privacy, dignity, freedom of movement, their right to leave the Republic and their right to a passport and lawful administrative action.

In addition, cognisance should also be taken of the Canadian case, *Westendorp v Westendorp*,¹²⁷ where the Ontario Superior Court of Justice found that the suspension of a maintenance defaulter's driver's licence did not amount to an infringement of his fundamental rights under sections 7, 11 and 15 of the Canadian Charter of Rights and Freedoms in the Constitution Act, 1982. In this case Mr Westendorp was in arrears with spousal support payments. His driver's licence was suspended in terms of Part V of Ontario's provincial Family Responsibility and Support Arrears Enforcement Act, 1996¹²⁸ after he failed to comply fully with a notice from the Family Responsibility Office which requested him to pay off the arrears, enter into a repayment plan with the Family Responsibility Office or obtain a refraining order, which would prohibit the suspension of his licence. Mr Westendorp subsequently requested the court to strike down Part V of the Act because it violates the Canadian Charter of Rights and Freedoms. He argued that this part does not provide for a hearing prior to the suspension of the licence, is discriminatory against maintenance debtors, denies them proper legal safeguards, and is contrary to the values of a free and democratic society. Relying on section 15(1) of the Charter, he also claimed a constitutional right to drive where necessary in order to earn a living.¹²⁹ This section provides as follows:¹³⁰

"Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

125 See eg *Hay v B* 2003 3 SA 492 (W) 494I-J; *Laerskool Middelburg v Departementshoof, Mpumalanga Departement van Onderwys* 2003 4 SA 160 (T) 178C and *J v J* 2008 6 SA 30 (C) para 36. See also Kruger "The protection of children's rights in the South African Constitution: Reflections on the first decade" 2007 *THRHR* 239.

126 Ito s 28(1)(d).

127 2000 CanLII 22650 (ON SC).

128 Which echoes Part III of the Canadian federal Family Orders and Agreements Enforcement Assistance Act, 1996, referred to in fn 65 above.

129 Para 1.

130 This section is very similar to our equality clause.

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132 Para 6.

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Although section numbers were not referred to, some of the Mr Westendorp's arguments appear to be directed at sections 7 and 11 of the Charter which state as follows:

- “7 Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
- ...
 - 11 Any person charged with an offence has the right ...
 - (c) not to be compelled to be a witness in proceedings against that person in respect of the offence;
 - (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.”

He argued that because the court has the power to imprison a maintenance debtor in certain circumstances,¹³¹ the process is a criminal or quasi-criminal process, which entitles him to a hearing on the merits of whether the licence should be suspended.

The court firstly found that none of the listed grounds in section 15 or any analogous grounds were applicable in this case.¹³² With respect to the alleged lack of procedural safeguards, the court found that Part V of the Act does provide for a complete procedural code for the suspension of defaulters' licences. It permits a defaulter to avoid the suspension by entering into an agreement with the Director of the Family Responsibility Office regarding compliance with the support order and the payment of arrears. The Act also permits a defaulter to obtain an order refraining the suspension of the driver's licence.¹³³ The court further found that there is no entitlement in the circumstances to a hearing on the merits of whether the licence should be suspended. The court also found that the so-called "right to drive" is not a liberty protected by section 7 of the Charter.¹³⁴ Although Mr Westendorp tried to distinguish his case by saying that the right to drive is protected if it is necessary to earn a living, the court stated that the rights intended to be protected by section 7 of the Charter do not include a right of an economic character.¹³⁵ For all of these reasons, his claim to strike down Part V of the Act was dismissed.¹³⁶

Many of the arguments put forward in the above decision could also be applied to the South African context. In the light of this decision and the provisions of our own Bill of Rights, a limitation of respondents' fundamental rights in order to secure for vulnerable children and disempowered women their small but life-sustaining legal entitlements would, depending on the circumstances of a specific case, almost certainly be deemed to be reasonable and justifiable. The harm done by the infringement of respondents' fundamental rights is slight in comparison to the beneficial purpose the limitation is designed to achieve. The fact that some of the new measures to ensure that women and children receive the maintenance that is due to them may infringe respondents' fundamental

131 See ss 35(6) and 41(9) of the Family Responsibility and Support Arrears Enforcement Act, 1996.

132 Para 6.

133 Para 9.

134 Para 15.

135 Para 16.

136 Para 17.

rights should therefore not be seen as a bar to introducing these measures as soon as possible.

7 CONCLUSION

From the above discussion, it is clear that the widest possible relief should be available for disempowered women and vulnerable children to ensure expedient and effective enforcement of maintenance orders in their favour. Besides the proposed amendments contained in the draft Bill,¹³⁷ consideration should also be given to the other innovative methods of ensuring compliance with maintenance orders as put forward by the participants in the qualitative research study.¹³⁸ It is advised that all these suggestions should be incorporated in the draft Bill before it is sent to parliament. Such a step would address most of the problems experienced with the maintenance system and would be seen as a genuine attempt to revamp the system for the benefit of those who depend on it for their survival.

137 See para 5.2 above.

138 See para 4.5 above.

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