

*TEN-YEAR ANNIVERSARY OF THE  
MAINTENANCE ACT 99 OF 1998 — A TIME  
TO REFLECT ON IMPROVEMENTS,  
SHORTCOMINGS AND THE WAY FORWARD*

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I INTRODUCTION

1. *Background*

The Maintenance Act 23 of 1963 moved the burden of maintenance enforcement from the then Supreme Courts to maintenance courts.<sup>1</sup> The aim of the Act 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.<sup>2</sup> 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.<sup>3</sup>

In response to the problems encountered with the 1963 Maintenance Act and to fulfil South Africa's international<sup>4</sup> and constitutional<sup>5</sup> obligations, the Maintenance Act 99 of 1998 was introduced. As the bulk of the Maintenance Act would have been in operation for exactly ten years on 26 November 2009, the government thought it appropriate to obtain a ten-year review of

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<sup>1</sup> Lesbury van Zyl *Handbook on the South African Law of Maintenance* 2 ed (2005) 52.

<sup>2</sup> D S P Cronjé and J Heaton *South African Family Law* 2 ed (2004) 58; Mothokoa Mamashela 'The courts' interpretation of section 31 of the Maintenance Act 99 of 1998 and its predecessors' (2005) 122 *SALJ* 217 at 227.

<sup>3</sup> SA Law Reform Commission *Issue Paper 5: Project 100: Review of the maintenance system* (1997) para 2.9.

<sup>4</sup> In terms of art 27(4) of the United Nations Convention on the Rights of the Child state parties are obliged to take all appropriate measures to secure the recovery of maintenance for children from their parents or other persons having the financial responsibility for them.

<sup>5</sup> In terms of s 28(1)(b) and (c) of the Constitution of the Republic of SA, 1996 every child has the right to family care or parental care and to basic nutrition, shelter, basic health care services and social services.

the Act. I was subsequently instructed to compile a report, of which this article is an abbreviated version.

## 2. *The Maintenance Act 23 of 1963*

In terms of the 1963 Maintenance Act, a maintenance officer attached to the maintenance court first had to undertake an enquiry when a complaint was made that someone was in default in respect of a maintenance order or that sufficient cause existed for the substitution or discharge of an existing maintenance order.<sup>6</sup> Thereafter proceedings could be instituted in the maintenance court. Upon considering all the evidence placed before it the court could order the liable party (the maintenance debtor) to pay periodic amounts to the person entitled to the maintenance (the maintenance creditor) or into that person's bank account, or to the maintenance officer, or an institution or organization for onward transmission to the maintenance creditor.<sup>7</sup> The maintenance court also had the power not to make an order.<sup>8</sup> Where a maintenance order was already in operation, the maintenance court could substitute or discharge it or decline to make an order.<sup>9</sup> If the maintenance court made or substituted a maintenance order it could also order two photographs to be taken of the maintenance debtor to facilitate tracing him or her.<sup>10</sup>

Although s 11(1) of the 1963 Maintenance Act determined that failure to comply with a maintenance order constituted an offence which was punishable with a fine or imprisonment, the courts almost never imposed these sanctions because they did not want to 'kill the goose that lay the golden eggs'.<sup>11</sup> As a result, the threat of a criminal sanction was no longer feared by convicted offenders and the provisions of s 11 of the Act became mere empty words.<sup>12</sup>

The courts could make certain other orders to ensure that arrear maintenance was paid and that future maintenance payments would be made, namely orders for the payment of arrears and interest,<sup>13</sup> orders authorizing the issue of warrants of execution against the movable and immovable property of an offender,<sup>14</sup> and garnishee orders which authorized the payment of maintenance from the offender's earnings.<sup>15</sup> The problem with all these orders was that they could be made only upon the conviction of

<sup>6</sup> Section 4(1).

<sup>7</sup> Section 5(4)(a).

<sup>8</sup> Section 5(4)(c).

<sup>9</sup> Section 5(4)(b).

<sup>10</sup> Section 5(5).

<sup>11</sup> Op cit note 3 at para 3.11.

<sup>12</sup> C P M Meyer 'The 1998 Maintenance Act: An improvement on its predecessor?' (1999) 2 *Judicial Officer* 121 at 129.

<sup>13</sup> Section 12(2)(a).

<sup>14</sup> Section 11(2)(b).

<sup>15</sup> Section 12(1).

an offender.<sup>16</sup> Situations often arose, however, where offenders could not be convicted in terms of s 11(1) of the Act although it had been established that they had been in a position to comply with the maintenance order.<sup>17</sup>

### 3. *The Maintenance Act 99 of 1998*

The Maintenance Act 99 of 1998 came into operation on 26 November 1999, except for ss 5, 7(1)(d) and 7(2), which contain the provisions concerning maintenance investigators. These provisions were put into operation only on 1 November 2006 because until then the government simply did not have the money to fill the position of maintenance investigator at each maintenance court.<sup>18</sup> The first maintenance investigators had already been appointed in 2003 on a contract basis.

The stated object of the Maintenance Act is to restate and amend certain laws relating to maintenance. Although the new Act is similar in many respects to the 1963 Act, it deals in greater detail with the origin of maintenance obligations and provides for more effective mechanisms for their enforcement. It aims at improving the quality of life of all citizens and freeing the potential of all persons by every means possible, including, among others, by the establishment of a fair and equitable maintenance system.<sup>19</sup>

## II CHANGES IMPLEMENTED BY THE MAINTENANCE ACT 99 OF 1998

The most important changes brought about by the Maintenance Act 99 of 1998 relate to the application of the Act, the appointment of maintenance investigators, additions to the types of orders that a maintenance court can make, and the onus to prove lack of means moving from the maintenance defaulter to the prosecution in criminal proceedings.

### 1. *Application of the Act*

In the first place, the Maintenance Act covers not only the duty of support between spouses and the duty of support between blood relations, but extends to a contractual duty of support between persons who are not related to each other by blood or marriage.<sup>20</sup> Even life partners who live together outside marriage or a civil union and who have agreed on a duty of support can therefore use the provisions of the Act to enforce that duty.<sup>21</sup>

<sup>16</sup> M M Lotriet 'Die effektiwiteit van onderhoudsbevele in familieregtelike konteks' Deel 1 (1996) 31 *The Magistrate* 123 139.

<sup>17</sup> Op cit note 3 para 3.15.

<sup>18</sup> Op cit note 12 at 123.

<sup>19</sup> Dept of Justice and Constitutional Development *Comprehensive Report on the Maintenance Programme* (2007) 1.

<sup>20</sup> Section 2(1).

<sup>21</sup> Cronjé and Heaton op cit note 2 at 58.

## 2. *The appointment of maintenance investigators*

One of the most significant changes brought about by the Maintenance Act concerns the appointment of maintenance investigators.<sup>22</sup> In terms of s 5(1) of the Act the Minister<sup>23</sup> may appoint one or more persons to perform any of the powers, duties or functions of maintenance investigators under the Act. Section 5(2) further stipulates that the Minister must take all reasonable steps within the available resources of the Department of Justice and Constitutional Development to ensure that at least one maintenance investigator is appointed for each maintenance court. In terms of s 7(1)(d) a maintenance officer may require a maintenance investigator to perform certain tasks forming part of the investigation of complaints that needs to be undertaken.<sup>24</sup> The powers, duties and/or functions of maintenance investigators are subsequently set out in s 7(2). These include that a maintenance investigator can be required to:

- locate a person who is liable to pay maintenance or who can provide relevant information,
- serve or execute court papers,
- take statements from anyone who may be able to give relevant information, or
- gather information about the identification, whereabouts and financial position of the person who is liable to pay maintenance, the financial position of the person who is entitled to maintenance, or any other relevant matter.

In the past, complainants, who were mostly women, were responsible for providing financial information and the whereabouts of the maintenance debtors to enable the presiding officer in the maintenance court to make a maintenance order. Now, however, this burden is supposed to be borne by maintenance investigators. At first, some legal commentators had doubts as to whether maintenance investigators would be able successfully to carry this burden,<sup>25</sup> while others were convinced that given the wide-ranging responsibilities assigned to maintenance investigators, they have the potential to play a powerful part in reducing the workload of maintenance officers, ensuring the proper investigation of maintenance complaints and speeding up the process of obtaining, substituting, discharging and enforcing maintenance orders.<sup>26</sup>

<sup>22</sup> Mamashela op cit note 2 at 235.

<sup>23</sup> Or other authorized officer.

<sup>24</sup> In terms of s 6(1) and (2).

<sup>25</sup> Michelle Kelly 'Onderhoud — Eers weeskind, nou stiefkind' (2000) 25 *Codicillus* 53 at 54.

<sup>26</sup> Op cit note 12 at 123; Mamashela op cit note 2 at 235; D S P Cronjé & J Heaton *South African Family Law* (1999) 73.

### 3. *Additions to the types of orders that a maintenance court can issue*

In addition to the orders and criminal sanctions that a maintenance court could make under the 1963 Act, the Maintenance Act 99 of 1998 makes provision for a range of new orders, which include the following:

#### (a) *Maintenance payment by way of a lump sum*

In terms of s 1 of the Maintenance Act an order for the periodical payment of sums of money towards someone's maintenance is merely one of the orders included within the meaning of the term 'maintenance order'. The Act also allows the maintenance court to make an order for the payment of maintenance by way of a once-off lump sum.<sup>27</sup>

#### (b) *Orders directing third parties to make periodical payments on behalf of the maintenance debtor*

In terms of s 16(2) of the Maintenance Act, if a person owes the maintenance debtor periodical instalments of money because of a contract between them, a maintenance court may direct that person to make the periodical payments to the maintenance creditor and not to the maintenance debtor.

#### (c) *Order by default*

Another innovation contained in the Maintenance Act is its provision for orders by default in terms of s 18. One of the biggest stumbling blocks of the 1963 Act was that maintenance debtors frequently evaded summonses to appear in court.<sup>28</sup> Now, if the maintenance court is satisfied that the maintenance debtor knows that he or she has been subpoenaed to appear before the court but has failed to do so,<sup>29</sup> it may call upon the person who lodged the complaint to adduce evidence in support of the complaint. After considering the evidence, the maintenance court may in the absence of the maintenance debtor make, substitute or discharge a maintenance order, make any other order it considers appropriate, or decline to make an order. A maintenance order by default can therefore be made against a maintenance debtor who tries to prolong or obstruct proceedings by simply not appearing before the court on the appointed date and time.<sup>30</sup>

#### (d) *Civil execution of maintenance orders*

An extremely important improvement brought about by the Maintenance Act is the provision for the civil execution of maintenance orders. In terms of

<sup>27</sup> Op cit note 12 at 122.

<sup>28</sup> Brigitte Clark 'The new Maintenance Bill — Some incremental reform to judicial maintenance procedure' (1998) 371 *De Rebus* 63 at 67.

<sup>29</sup> According to Lizelle Pretorius 'Step-by-step maintenance applications in the maintenance court' (2004) 430 *De Rebus* 36 at 38 the return by a maintenance officer, police officer, sheriff or maintenance investigator showing that the subpoena was served on such person will be sufficient proof that he or she has knowledge of the fact that he or she had to attend court.

<sup>30</sup> Cronjé & Heaton op cit note 2 at 61.

s 24(1) any order made by a maintenance court has the effect of an order made in a civil action. This means that maintenance and arrear maintenance may thus, like any other civil debt, also be enforced in the ordinary courts and not necessarily in terms of the Maintenance Act.<sup>31</sup>

Furthermore, a new chapter on civil execution is included in the Act.<sup>32</sup> Section 26(1) provides that if a maintenance debtor fails to make a payment in accordance with a maintenance order, such an order can be enforced in respect of any amount which the maintenance debtor has so failed to pay together with any interest on it by execution against the movable and immovable property of the maintenance debtor,<sup>33</sup> the attachment of emoluments due to the maintenance debtor,<sup>34</sup> or the attachment of any present or future debt owing or accruing to the maintenance debtor.<sup>35</sup> When a maintenance debtor is in arrears for longer than ten days, the maintenance creditor may apply to the maintenance court<sup>36</sup> for the authorization of the issue of a warrant of execution, an order for the attachment of emoluments, or an order for the attachment of any debt. Unlike the position under the 1963 Act, all these sanctions can be imposed even before a maintenance debtor is convicted of the offence of failing to comply with a maintenance order. The execution of a maintenance order is therefore no longer dependent on the outcome of a criminal prosecution.

In addition, a totally new sanction of the Maintenance Act is the attachment of present or future debts owing to the maintenance debtor in order to cover any arrear maintenance.<sup>37</sup> The person who has incurred the obligation to pay the debt is directed to make the payment mentioned in the order within the time and in the manner specified. If the person who owes the maintenance debtor the debt fails or refuses without sufficient reason to make the payments stipulated in the order, he or she commits an offence which is punishable with a fine or imprisonment for a period not exceeding six months.<sup>38</sup>

#### 4. *Shift of onus to prove lack of means upon criminal prosecution*

In terms of the 1963 Maintenance Act, upon being tried for failure to comply with a maintenance order, an accused who raised the defence of lack of means<sup>39</sup> bore the onus of proving it.<sup>40</sup> After the new constitutional dispensation of 1994, such a reverse onus on the accused had become unconstitutional. In terms of s 31(1) of the Maintenance Act 99 of 1998

<sup>31</sup> Ibid at 63

<sup>32</sup> Chapter 5.

<sup>33</sup> As contemplated in s 27.

<sup>34</sup> As contemplated in s 28.

<sup>35</sup> As contemplated in s 30.

<sup>36</sup> In terms of s 26(2).

<sup>37</sup> In terms of s 30.

<sup>38</sup> Section 38(1).

<sup>39</sup> Section 11(1) and (3).

<sup>40</sup> Section 3.

failure to comply with a maintenance order is still an offence. However, if the accused raises the defence of lack of means, the state now bears the onus of establishing whether or not the failure was in fact due to the accused's unwillingness to work or to misconduct.<sup>41</sup>

### III OTHER GOVERNMENT INITIATIVES SINCE THE ENACTMENT OF THE MAINTENANCE ACT 99 OF 1998

Despite the innovations in the Maintenance Act, there is unfortunately still evidence that '... women continue to struggle to access maintenance due to inefficiencies in the system and lack of adequate resources and capacitation'.<sup>42</sup> In *Bannatyne v Bannatyne*<sup>43</sup> the Constitutional Court pointed out that the legislative remedies of the maintenance court were totally ineffective to protect the rights of women and the best interests of children. The court found that logistical difficulties in the maintenance courts frustrate the good intentions of the Maintenance Act.

Furthermore, the national office of the Department of Justice and Constitutional Development '... remains inundated with complaints from members of the public emanating from courts nationally'.<sup>44</sup> To counter this, the following initiatives have been introduced since the enactment of the Maintenance Act:

#### 1. *Access to Transunion ITC information support service*

In 2004 the Transunion ITC information support service to maintenance investigators was established.<sup>45</sup> It provides an extra tool towards 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. The ITC information support service has since been decentralized to all maintenance investigators appointed across the country. By being able to access this information through desktop computers, maintenance investigators no longer have to waste time and money visiting the deeds office, the Registrar of Companies or local banks or making numerous telephone calls.

#### 2. *Operation Isondlo*

Operation Isondlo is an ongoing campaign which was launched in December 2005<sup>46</sup> to identify the strengths and weaknesses of the maintenance

<sup>41</sup> *S v Nduku* 2000 (2) SACR 382 (Tk); *S v Mabona* 2001 (2) SACR 306 (Ck); *S v Cloete* 2001 (2) SACR 347 (C); *S v Magagula* 2001 (2) SACR 123 (T).

<sup>42</sup> Raesibe Tladi 'Report on the success of Operation Isondlo' 1 at <http://www.pmg.org.za/docs/2006/061016maintenance.pdf> (accessed on 5 March 2009).

<sup>43</sup> 2003 (2) BCLR 111 (CC).

<sup>44</sup> Op cit note 19 at 8.

<sup>45</sup> Op cit note 42 at 4.

<sup>46</sup> Bridgette Shabalala 'Launch of Operation Isondlo' (2006) 1 *Justice Today* 26.

system and to address the weaknesses through, inter alia, the following interventions:

(a) *Capacity building at maintenance courts*

In this regard the positions of 577 maintenance clerks, 86 legally qualified maintenance officers, 145 maintenance investigators and 100 legal interns were created and filled at various courts throughout the country.<sup>47</sup> Existing staff members, such as clerks and interpreters, were also empowered through capacity building to fulfil the functions of maintenance officers.<sup>48</sup> In addition, all maintenance court officials in Pretoria and Johannesburg received mediation training during March and April 2008 as part of a project to pilot the utilization of mediation services in the maintenance court environment.<sup>49</sup>

(b) *Stricter enforcement of the provisions of the Maintenance Act 99 of 1998*

The Department believed that it should start by putting its own house in order. It therefore identified all civil servants who owed maintenance and encouraged them to pay or face the wrath of the law.<sup>50</sup> Operation Isondlo also set up roadblocks and conducted blitzes in all provinces to track down maintenance defaulters with long outstanding warrants of arrest.

(c) *Decreasing the backlog of maintenance cases*

During the period December 2006 to May 2007 the Department contracted the services of several tracing agents<sup>51</sup> to deal with the backlog in tracing maintenance defaulters and beneficiaries of unclaimed maintenance monies. They traced literally thousands of beneficiaries and many defaulters.<sup>52</sup>

(d) *Introducing public education and awareness campaigns*

The Department developed material in all eleven official languages concerning complainants' rights to child support and spousal maintenance and distributed it to all regions to be handed out at the various maintenance courts.<sup>53</sup> The Department also partnered with Bright Media in August 2007 to pilot the Maintenance Multi Media Project in Johannesburg. The project used television, radio, print and the web to educate the public on their rights regarding child support and to enable maintenance complainants to understand the process.<sup>54</sup> Furthermore, several outreach events and awareness

<sup>47</sup> Op cit note 19 at 2.

<sup>48</sup> Op cit note 46 at 26.

<sup>49</sup> Madelene de Jong 'Newly introduced public mediation services in the maintenance court environment — Does it make a difference in the short term?' (2009) 72 *THRHR* 274.

<sup>50</sup> Op cit note 46 at 26.

<sup>51</sup> Such as Lexis Nexis, Marang and Traceworks.

<sup>52</sup> Op cit note 19 at 5-6.

<sup>53</sup> Op cit note 42 at 7.

<sup>54</sup> Op cit note 19 at 4-5.

campaigns were held across the country where the Department issued cheques for unclaimed maintenance to beneficiaries whom the Department had traced.

### 3. *Justice Deposits Account System (JDAS) and Electronic Funds Transfer (EFT)*

JDAS is a fairly new electronic financial system utilized to administer bail, fines and maintenance monies received by magistrates' courts. It replaced the manual card system and made information on case history and maintenance payments to beneficiaries readily accessible.<sup>55</sup>

A huge improvement to the system was achieved when the disbursement of maintenance monies to beneficiaries via EFT was first piloted in a few courts<sup>56</sup> in March 2006 and then rolled out nationally soon afterwards.<sup>57</sup> Through EFT maintenance monies are paid directly by national office into the bank accounts of maintenance beneficiaries. The immediate beneficiaries of the EFT project were those who already had bank accounts. Maintenance beneficiaries who did not have bank accounts were also encouraged and assisted via a parallel initiative hailed as 'banking the unbanked' to open bank accounts with commercial banks of their choice. Some of the major banks assisted the Department with the opening of Mzansi bank accounts<sup>58</sup> by having staff available at the various courts with the necessary application forms. Mini-ATMs were also placed in areas where they were needed by maintenance beneficiaries.

## IV QUALITATIVE RESEARCH UNDERTAKEN

To determine the practical effect of the changes brought about by the Maintenance Act 99 of 1998 and the initiatives introduced by the government over the past ten years, qualitative research was undertaken by sending out four question lists to different maintenance court officials. It was felt that this kind of research at grassroots level would be the best indicator of the strengths and weaknesses of the Maintenance Act on its ten-year anniversary.<sup>59</sup>

<sup>55</sup> Op cit note 42 at 9.

<sup>56</sup> At Umbumbulu, Nqeleni and Elliotdale.

<sup>57</sup> Dept of Justice and Constitutional Development 'Another successful intervention for the payment of maintenance monies' 1 at [http://www.doj.gov.za/m\\_statements/2006/20060928\\_EFTStatement.pdf](http://www.doj.gov.za/m_statements/2006/20060928_EFTStatement.pdf) (accessed on 4 March 2009) noted that it had been the fastest rollout project of any kind in the history of the Department.

<sup>58</sup> These are South Africa's low-cost national bank accounts designed for people over sixteen who have never had a bank account before. See SA Info Reporter 'Mzansi: SA banking spreads its net' 1 at <http://www.southafrica.info/services/consumer/mzansi.htm> (accessed on 12 March 2009).

<sup>59</sup> On 26 November 2009.

### 1. *List of questions for regional heads*

The first questionnaire was prepared for the regional heads of the maintenance courts in each of the nine provinces of South Africa. Its aim was to ascertain:

- if all the different orders and other enforcement mechanisms provided for in the Maintenance Act are indeed used in all regions across South Africa
- what the current situation with regard to manpower in the regions is
- what successes have been achieved through the appointment of maintenance investigators
- what successes have been achieved through the recent government initiatives, such as Operation Isondlo, JDAS and the EFT project
- what problems with regard to the recovery of maintenance and the enforcement of maintenance orders still exist.

The questionnaire was sent out to all regional heads to be completed electronically. In addition, regional heads were each asked to identify five maintenance courts in which the remaining three question lists could be administered.<sup>60</sup>

### 2. *List of questions for accounts and EFT clerks*

The second questionnaire was prepared for the accounts and EFT clerks in the forty-five maintenance courts that were identified by the regional heads, so as to determine their views on:

- whether JDAS and the EFT system are utilized in all identified maintenance courts
- what the benefits of JDAS are
- what can be done to improve JDAS
- what the benefits of the EFT system are
- what can be done to improve the EFT system.<sup>61</sup>

### 3. *List of questions for maintenance officers*

The third questionnaire was prepared for the maintenance officers in the forty-five identified maintenance courts across the country, to ascertain:

- where maintenance courts and offices are generally located

<sup>60</sup> The following maintenance courts were identified: Gauteng — Johannesburg, Roodepoort, Sebokeng, Soshanguve and Mamelodi; Limpopo — Giyane, Thambamoopo, Mhala, Mokerong and Praktiseer; North West — Potchefstroom, Rustenburg, Molopo, Temba and Vryburg; Mpumalanga — Standerton, Mkobola, Kwa-Mhlanga, Nelspruit and Witbank; Free State — Welkom, Kroonstad, Bethlehem, Botshabelo and Bloemfontein; KwaZulu Natal — Durban, Umlazi, Verulam, Pietermaritzburg and Ntuzuma; Northern Cape — Victoria West, Upington, Kuruman, Kimberley and De Aar; Eastern Cape — East London, Port Elizabeth, Queenstown, Grahamstown and Butterworth; Western Cape — Mitchell's Plain, Malmesbury, Cape Town, Bishop Lavis and Atlantis.

<sup>61</sup> Thirty-five completed question lists were received from accounts and EFT clerks.

- what the scope of maintenance officers' qualifications and training is
- the workload of maintenance officers
- whether maintenance officers make optimal use of maintenance investigators
- whether maintenance officers are familiar with the provisions of the Maintenance Act and the enforcement mechanisms it provides.<sup>62</sup>

#### 4. *List of questions for maintenance investigators*

The fourth questionnaire was prepared for the maintenance investigators in the forty-five identified maintenance courts. It elicited information about:

- their qualifications and training
- their workload
- the functions they perform
- what successes they have achieved
- what obstacles they encounter in fulfilling their functions
- what they think can be done to improve matters.<sup>63</sup>

## V RESULTS OF QUALITATIVE RESEARCH

### 1. *Responses from the regional heads*

#### (a) *Utilization of orders and enforcement mechanisms*

It is very encouraging to see that orders by default, one of the innovations of the Maintenance Act, are now regularly being made in all regions. According to Operation Isondlo statistics, a total of 5 926 orders by default were made across the country between January and June 2008. The most default orders were made in the Eastern Cape,<sup>64</sup> while the fewest were made in the Northern Cape,<sup>65</sup> where the regional head reports that '[a]bout five courts are reluctant to give default judgments'.

It further appears that both civil and criminal enforcement mechanisms are in use across the country. A total of 14 427 orders for the attachment of emoluments, 1 379 warrants of execution, 946 orders for the attachment of debts and 10 254 orders in criminal proceedings in terms of s 30 were issued in South Africa between January and June 2008.<sup>66</sup> It is a bit disappointing, however, that only 1 379 warrants of execution against the movable or immovable property of maintenance debtors were executed in the whole country during that six-month period.

<sup>62</sup> Thirty-five completed question lists were received from maintenance officers.

<sup>63</sup> Thirty-two completed question lists were received from maintenance investigators.

<sup>64</sup> 1 159 orders.

<sup>65</sup> 192 orders.

<sup>66</sup> According to Operation Isondlo statistics obtained from the Department of Justice and Constitutional Development.

*(b) Manpower issues*

There is still a wide gap between the manpower stipulations in the Maintenance Act and actual appointments of either maintenance officers or maintenance investigators. Section 4(2) of the Act enables the Minister<sup>67</sup> to appoint one or more maintenance officers to a maintenance court and s 5(2) directs him to work towards appointing at least one maintenance investigator for each maintenance court. However, most maintenance courts in South Africa still do not have a legally qualified maintenance officer,<sup>68</sup> and only the regional head of Limpopo could claim that every maintenance court in his region has at least one maintenance investigator. In certain other regions, however, there are more than fifty maintenance courts which still do not have any maintenance investigators.<sup>69</sup>

*(c) Successes of the appointment of maintenance investigators*

According to the regional heads the greatest successes resulting from the appointment of maintenance investigators were that they gained better access to communities and to information than had been achieved without them, thereby greatly improving the enforcement of maintenance orders. They further reported that maintenance investigators were more active and visible in communities than was possible with the use of independent tracing agents or the sheriff.

*(d) Successes of Operation Isondlo, JDAS and the EFT project*

It is clear that all the interventions that have been initiated under the Operation Isondlo campaign are starting to bear fruit in the sense that:

- People have a better understanding of the Maintenance Act and procedures in the maintenance courts.
- More women are approaching the maintenance court and demanding what is due to them.
- Maintenance courts are having more successes with securing maintenance and even future maintenance for women and children.<sup>70</sup>
- The turnaround time for maintenance cases has been decreased.

<sup>67</sup> Or another designated officer.

<sup>68</sup> For example, although the regional head in the Western Cape indicated that there are fifty-five maintenance courts in that region, he stated that only eight maintenance officers had been appointed to date, although permission had been received to appoint a further twenty. Even after these new positions have been filled, there will still be a shortfall of twenty-seven maintenance officers in this region.

<sup>69</sup> For example, the Eastern Cape has fifty-nine maintenance courts where no maintenance investigator has been appointed as yet, KwaZulu Natal fifty-eight and the Free State fifty-six.

<sup>70</sup> With regard to orders relating to the periodic payment of future maintenance from pension funds, annuities or the like, see *Mngadi v Beacon Sweets & Chocolate Provident Fund* [2003] 2 All SA 279 (D); *Magewu v Zozo* 2004 (4) SA 578 (C); *Burger v Burger* 2006 (4) SA 414 (D); and *Soller v Maintenance Magistrate, Wynberg* 2006 (2) SA 66 (C).

- The public's trust and confidence in the maintenance system have increased.
- The Department's adherence to Batho Pele — putting people first — has been advanced.

However, some of the regional heads emphasized that it should be borne in mind that Operation Isondlo is an ongoing campaign and that much more still needs to be done to build capacity at the maintenance courts and to promote public education and awareness.

It further emerged that JDAS is currently operative in all except one of South Africa's maintenance courts.<sup>71</sup> All regional heads reported great improvements in efficiency<sup>72</sup> and security<sup>73</sup> resulting from the introduction of JDAS.

As far as the EFT system is concerned, it appeared that this system is commended by all for reducing the time beneficiaries previously spent in queues, providing both beneficiaries and defendants with the flexibility and convenience of using ATMs instead, bringing an end to cash-in-transit deliveries, and freeing staff to do other administrative work instead of dealing with lengthy queues all day long.

It appears, however, that the EFT project is not widely embraced in KwaZulu Natal, the Western Province and North West as many people had reservations about being forced to open bank accounts.

*(e) Biggest problems with the recovery of maintenance and the enforcement of maintenance orders*

It is clear that the biggest problem is the fact that there are too few maintenance court officials. In this regard, six of the nine regional heads attributed most of their problems to having too few maintenance investigators and maintenance officers or too few who were properly qualified. Although the other three regional heads did not mention a staffing shortage directly, the problems they mention can be seen as arising from a shortage of manpower.

The second biggest problem seems to be the lack of co-operation from employers regarding emolument attachment orders. Nearly all regional heads said they have difficulty getting employers to comply with the aspects of the Maintenance Act that affect them. The following problems were mentioned:

<sup>71</sup> The regional head of the Free State indicated that Botshabelo is not yet on JDAS, but that the situation is being addressed at present. All other regional heads pointed out that JDAS is operative in all maintenance courts in their respective regions.

<sup>72</sup> JDAS was more efficient in that it speeded up access to information and the processing of payments and reconciliations.

<sup>73</sup> JDAS improved security by providing greater data integrity and information security than with the card system, where cards and files were misplaced or went missing. It also reduced the risk of robbery and the risk of fraud and theft by officials.

- delays in implementing orders for deductions from employees' salaries and in some cases complete failure to do so
- 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
- failing to appear in court, making it impossible for the magistrate to sign the orders.

The third biggest problem relates to the tracing of maintenance debtors and beneficiaries. Although most of these problems were attributed to having too few maintenance investigators, the following added to the difficulty:

- receiving subpoenas from other provinces, especially when they arrive after the return date for a maintenance investigation
- tracing debtors across provincial boundaries — most of the respondents responsible for paying maintenance to beneficiaries in Limpopo Province, for example, live and work in Gauteng
- tracing defaulters in rural areas where roads have no names and houses no numbers
- the inability of some claimants to provide essential information about the defaulters' whereabouts or employment or salary.

The fourth biggest problem, which relates to troublesome defendants, arose either from resistance from the defendant or a lack of means. Respondents often avoid the servicing of documents, apply to have the order set aside or renege on payments.

Lastly, regional heads listed unemployment, too many financial responsibilities, poor management of income and no valuable assets to attach as problems in extracting maintenance from respondents.

## 2. Responses from the accounts and EFT clerks

### (a) Utilization of JDAS and EFT

It appears from the responses of the participating accounts and EFT clerks that both JDAS and the EFT system are in widespread use across the country. Most of the participating clerks have been working on these two systems for the past two to three years.

### (b) Benefits of JDAS

The accounts and EFT clerks confirmed the views of the regional heads, namely that JDAS improved efficiency and security in the maintenance system in various important ways. They drew attention, in addition, to the positive effects on both staff and beneficiaries of using JDAS. From their own point of view, JDAS was easy to master and led to improved productivity, less of the stress that arose from dealing with receipt books, calculations and long queues, and greater job satisfaction generally.

*(c) Proposed improvements to JDAS*

The problem that is most often mentioned by the clerks themselves is the slowness of the system running JDAS. The second biggest category of comments from accounts and EFT clerks included several suggestions for improvements to the software.<sup>74</sup> A few clerks also expressed a need for more training on JDAS and improved support from Helpdesk.

*(d) Benefits of EFT*

The accounts and EFT clerks confirmed all the points in favour of the EFT system that were made by the regional heads above. The only additional points are that clerks now face fewer complaints than in the past and that dealing with fewer cheques means fewer get lost in the post or are dishonoured.

*(e) Proposed improvements to EFT*

The suggestion that was voiced most often and most urgently by accounts and EFT clerks was for EFT and JDAS to be linked or integrated so that payments could be done directly on JDAS.

Furthermore, there is widespread dissatisfaction with the delays incurred by sending forms to the national office of the Department of Justice and Constitutional Development before EFT payments can be made. It was proposed instead that transfers to beneficiaries' accounts should be made directly by the receiving office as soon as deposits are received.

Several suggestions were also made for changes to the EFT software programme.<sup>75</sup> Some clerks further reported frequent mistakes by depositors, banks, beneficiaries and CEFTU officials in the use of reference numbers.

Lastly, many of the clerks said that more personnel should be appointed and that they should be properly trained. Several felt that clerks should specialize in particular aspects of the process.

<sup>74</sup> Such as:

- Remove or improve the authorization process
- Amend or upgrade the programme to include
  - o the calculations of arrears
  - o the transfer of files
  - o a record of all transactions made (Transfers into a beneficiary's bank account are automatically cleared from the system, for example.)
  - o monthly reconciliations
- Prevent JDAS from showing single payments as double payments.

<sup>75</sup> So as to enable:

- audit trails to be drawn and lists compiled,
- EFT to operate like the Basic Account System (BAS) so that supervisors could authorize the journalising process independently and at intervals instead of having to be next to the counter clerk for every transaction, and
- monthly reconciliations to be done on the internet.

### 3. *Responses from the maintenance officers*

#### (a) *Location of maintenance courts*

Some maintenance courts and offices are located in the most secluded parts of magistrates' court buildings which are not readily accessible or comfortably equipped and furnished for the many complainants and defendants who visit these courts every day. Others are located in temporary buildings. There are also quite a few maintenance officers who indicated that they do not have an allocated maintenance court at all and that the general courts, and sometimes even the criminal courts, are used to hear maintenance cases. In the areas where family courts have been established, there is a marked improvement in the location of the maintenance court and offices and the amenities of the building.

#### (b) *Scope of maintenance officers' qualifications and training*

It emerged that 73.5 per cent of the maintenance officers who participated in this survey are legal graduates with either a B Juris, B Proc or LLB degree. The rest of the maintenance officers had a matric certificate or a paralegal or other diploma that was not necessarily law-related.

#### (c) *Workload of maintenance officers*

There is a heavy burden on maintenance officers in our maintenance courts. The maintenance officers of only three courts, all situated in the countryside, indicated that they deal with fewer than ten cases a day. Thirteen of the remaining thirty-five participating maintenance officers deal with ten to twenty cases per day, ten with twenty to thirty cases per day, six with thirty to forty cases per day, one with forty to fifty cases per day and two with more than fifty cases per day.

#### (d) *The role of maintenance investigators according to maintenance officers*

All the maintenance officers who participated in this survey seek the assistance of a maintenance investigator on a daily basis. It is particularly insightful that this is the case even where no maintenance investigator has been appointed to a maintenance court.<sup>76</sup> It further transpired that many maintenance officers of maintenance courts that do have their own maintenance investigators regularly use maintenance investigators from other jurisdictions of the maintenance court, usually to serve subpoenas and other court documents or when their own maintenance investigators are unavailable.

Furthermore, all maintenance officers agree that the maintenance investigators contribute to their successes. Maintenance investigators were particularly helpful in tracing defaulters and serving subpoenas. Maintenance investigators were also helpful in gathering information concerning the

<sup>76</sup> It appears that these maintenance courts use the services of maintenance investigators from neighbouring maintenance courts.

financial position of maintenance defaulters and attaching emoluments and pension funds. It is therefore not surprising that 74.3 per cent of the participating maintenance officers concluded that the appointment of more maintenance investigators to their courts would make the recovery of maintenance and the enforcement of maintenance orders more effective.

*(e) Knowledge of relevant legislation and utilization of enforcement mechanisms*

Several questions were put to the participating maintenance officers to test their knowledge of the Maintenance Act and to ascertain if all enforcement mechanisms were being used optimally.

For example, to test their knowledge of the Maintenance Act, maintenance officers were asked, first, how often maintenance debtors/defaulters notified them of any change of their residential address or employment, as is required of maintenance debtors/defaulters by s 16(4) of the Act and, secondly, how often these maintenance debtors/defaulters were found guilty of an offence in terms of s 39 of the Act for failing to do so. Although 97 per cent of maintenance officers indicated that maintenance debtors/defaulters rarely or never notified them of any change in their place of residence or employment, it appears that none or very few of these debtors/defaulters are ever convicted in terms of s 39. This implies that maintenance officers are either unwilling to convict maintenance debtors of the offence created in terms of s 39 or they are unaware of this provision in the Maintenance Act.

To ascertain if all enforcement mechanisms are optimally utilized, the maintenance officers were asked, inter alia, how often they cause notices regarding the obligation to make periodical payments on behalf of a maintenance debtor/defaulter or the attachment of emoluments to be served on the administrators of pension funds or employers and how often they apply for orders by default against maintenance debtors. It is apparent that all these mechanisms are in use in maintenance courts across the country. It is worth noting that the only maintenance officer who indicated that all these mechanisms are seldom or never applied in his/her maintenance court, does not have a legal qualification but only a diploma in cost and management accounting. This suggests that there is a direct correlation between the qualifications of a maintenance officer and the frequency with which enforcement mechanisms are used.

4. *Responses from the maintenance investigators*

*(a) Scope of maintenance investigators' qualifications and training*

No uniform or standard qualification is set for maintenance investigators in the nine regions in South Africa. The maintenance investigators who participated in this survey exhibit a wide variety of academic qualifications varying from a matric to a law degree. It further emerged that 75 per cent of them underwent training as a maintenance investigator at the Justice College. However, not all maintenance investigators received training on all the facets

that training as a maintenance investigator should cover.<sup>77</sup> It is therefore not surprising that 77.8 per cent of the trained maintenance investigators indicated that they needed additional training.

*(b) Workload of maintenance investigators*

It must be noted that an enormous task rests on the shoulders of maintenance investigators, some of whom serve up to eight different jurisdictions.<sup>78</sup> Those investigators who serve one maintenance court only are usually stationed in the densely populated jurisdictions of the maintenance court.

*(c) Functions performed by maintenance investigators*

It is evident that in practice maintenance investigators are indeed performing all the responsibilities or functions assigned to them in terms of the Maintenance Act.

First, 90 per cent of the participating maintenance investigators are requested to locate debtors on a daily basis and 70 per cent of these investigators are requested to locate beneficiaries on a daily or weekly basis. Secondly, the participating maintenance investigators are required to serve subpoenas and notices regarding the attachment of emoluments on parties and employers on a daily basis. On a less regular basis, these investigators are also required to execute warrants of execution against defaulters' property or to serve notices regarding the attachment of debts owing or accruing to maintenance debtors. Furthermore, maintenance investigators regularly take statements under oath from parties and employers and go about gathering information about the financial position of parties.

It was discouraging to see that only 12.9 per cent of the maintenance investigators indicated that they were the official responsible for taking two photographs of maintenance debtors in terms of s 43 of the Maintenance Act. Even more disappointing was the fact that an overwhelming 97 per cent of them said that no such photographs were ever taken in their courts.<sup>79</sup>

*(d) Successes achieved by maintenance investigators*

Different investigators found their greatest satisfaction in very different kinds of success. Taken together, the responses seemed to cover every conceivable aspect of their work. Here, in descending order of frequency, are the kinds of success that were listed:

<sup>77</sup> For example, all of them received training on tracing and investigation skills, but only 8.3 per cent received training on the operation of ITC.

<sup>78</sup> For example, the maintenance investigator in Atlantis does not only do work for Atlantis, but also for Malmesbury, Vredenburg, Hopefield, Laaiplek, Moorreesburg, Piketberg and Porterville.

<sup>79</sup> The reasons offered for this were either that no camera was available or that s 43 was not applied in court.

- reducing the turnaround time of the maintenance case backlog in general
- reducing or eliminating backlogs of untraced defaulters, particularly those who had eluded tracing for years
- moving large amounts of money into the hands of beneficiaries
- uncovering dishonesty or fraud by defaulters who tried to escape their obligations that way
- tracing beneficiaries who would otherwise not have received the payments due to them
- exposing dishonesty or fraud on the side of complainants.

(e) *Obstacles in performing the functions of maintenance investigator*

Maintenance investigators reported that the greatest obstacle in performing their functions is a lack of the following resources:

- a state or subsidized vehicle available seven days a week
- a cell phone for use away from the office
- a direct telephone and fax line in office
- internet access, if possible on a laptop provided by the state
- a digital camera
- a tape recorder for recording conversations, for example when a defaulter refuses to give a statement
- a firearm for personal protection, for example when serving a summons at night or over weekends in a dangerous neighbourhood
- a colour printer for good reproductions to be used as evidence in court
- an office where clients could be interviewed in private.

Several investigators mentioned their managers' lack of trust regarding flexible working hours. Some of them also referred to a lack of trust and support from superiors on matters of jurisdiction. It appears that it is often impossible to get the assistance of a sheriff in a neighbouring district, for example, and yet one cannot enter that district in person to pursue a defaulter. This applies across provincial boundaries too.

Other obstacles mentioned relate to improved training of investigators<sup>80</sup> and the difficulty of obtaining information confirming employment.

(f) *Proposed improvements*

In the first place maintenance investigators plead for the scarce resources referred to in the discussion under the previous heading to be supplemented. Other suggestions for what could be done to improve their chances of tracing maintenance defaulters were

- being allowed to work flexible hours so as to have time to meet with chiefs, councillors, detectives, tracing agents and other civic or commu-

<sup>80</sup> Some investigators, for example, pointed out that they are unable to operate the transunion ITC information support service.

- nity services to exchange information and to provide them with lists of defaulters and beneficiaries to assist in tracing
- receiving specialized training in tracing
  - being issued with credible identification, for example name tags and identity cards
  - formulating a policy on jurisdiction for tracing defaulters across district and provincial boundaries.

## VI RECOMMENDATIONS

It is abundantly clear from the qualitative research data that the South African maintenance system has improved greatly over the past ten years. Orders by default are now being made regularly against evasive maintenance debtors in all regions. Both civil and criminal enforcement mechanisms are in use across the country to tighten the noose around the necks of maintenance defaulters. Court judgements which endeavour to refine and improve these enforcement mechanisms are applied in practice.

Furthermore, maintenance investigators, whose office was newly introduced by the Maintenance Act, have played a positive role in maintenance courts all over South Africa during the past few years.

It is also apparent that Operation Isondlo is a highly constructive initiative on the part of the Department of Justice and Constitutional Development. Much has been done to ensure that the weaknesses of the maintenance system are addressed systematically. Other government initiatives such as JDAS and the EFT system have contributed greatly to the efficient, secure and convenient processing of maintenance payments. Moreover, through the Transunion ITC information support service maintenance debtors and beneficiaries are traced swiftly.

Despite the progress that has been made towards the establishment of a fair and equitable maintenance system in South Africa, certain areas still need considerably more attention. These areas relate to manpower, practices and procedures, training, infrastructure, attitudes and the dynamics between different court officials.

### 1. *Manpower*

It appears that the biggest problem with regard to the recovery of maintenance and the enforcement of maintenance orders is insufficient staffing. Despite the provisions of s 4(2) of the Maintenance Act, most maintenance courts in South Africa still do not have a legally qualified maintenance officer appointed to them. In these courts the important role of maintenance officer is fulfilled by unqualified clerks, legal interns or public prosecutors. Furthermore, despite the provisions of s 5(2) of the Act, many courts still do not have a maintenance investigator appointed to them. These courts have to rely on maintenance investigators from neighbouring districts instead. It is also evident that there is a shortage of maintenance clerks in the maintenance courts. Many of the accounts and EFT clerks who participated in this study indicated that more personnel should be appointed.

It is therefore not surprising that the results of the qualitative research undertaken indicate that all categories of court officials are totally overburdened. In many courts, for example, the appointed maintenance officers deal with more than thirty cases daily, which means that they cannot spend even fifteen minutes per enquiry.

It is therefore crucial that more maintenance court officials should be appointed as a matter of urgency to comply with the benchmarks set in the Maintenance Act for maintenance officers and maintenance investigators in particular. However, it seems that the Department of Justice and Constitutional Development lacks the necessary funds for this. Accordingly, it is essential that provision be made in the governmental budget for the 2010-2011 financial year for the creation of the many new posts required in maintenance courts.

## 2. *Practices and procedures*

A number of practices, processes and procedures applied in maintenance courts need to be looked at under this heading.

In the first place, the reluctance of certain courts in the Northern Cape to make default judgements should be investigated and dealt with. Section 18 was included in the Maintenance Act to deal effectively with maintenance debtors who try to prolong or obstruct proceedings by simply not appearing before the court when subpoenaed to do so. By not applying the provisions of this section strictly, these maintenance courts in the Northern Cape are sending out the wrong message to maintenance debtors, namely that the South African judicial system is not serious about the recovery of maintenance and the enforcement of maintenance orders.

Secondly, although it appears that civil enforcement mechanisms are in use in all regions, the frequency with which these mechanisms are applied could be improved. This is especially the case with the issuing of warrants of execution and orders for the attachment of debts. More thorough investigations should therefore be undertaken into attachable property of maintenance defaulters, or present or future debts owing or accruing to them.

Thirdly, maintenance officers should be well informed of the range of sentencing options available upon the criminal conviction of a maintenance defaulter. Maintenance courts' discretion to suspend or postpone sentences should be limited.<sup>81</sup> In practice, sentences of imprisonment, suspended on the condition that defendants are not found guilty of further contraventions of the Maintenance Act, are deemed appropriate and are frequently used. Other options should also be explored.<sup>82</sup> Although the payment of a fine by deliberate maintenance defaulters would mostly be inappropriate and meaningless,<sup>83</sup> a fine could indeed be an option where the court finds that there is

<sup>81</sup> *Op cit* note 28 at 68.

<sup>82</sup> Marita Carnelley & Shannon Hoxtor 'Maintenance defaulters: Aiding the process and process-in-aid' (2003) 24 *Obiter* 506 at 512-14.

<sup>83</sup> *S v Koopman* 1998 (1) SACR 621 (C) at 624b-c.

no shortage of funds.<sup>84</sup> Whether direct imprisonment is a suitable sentence should be assessed in the light of the best interests of any children involved. Where such a sentence is imposed, the defendant will probably lose his employment, placing children in a more perilous position. If, on the other hand, the defendant is in any event not paying maintenance, there is little to lose and from a policy position the courts should ensure that their decisions are strictly adhered to.<sup>85</sup> Another option is periodical imprisonment with the possibility of imprisonment built in to the order, as was applied in *S v Visser*.<sup>86</sup> Maintenance courts should further note that correctional supervision can be a highly suitable punishment for maintenance defaulters. This is a community-based punishment where the offender is not removed from the community where he lives and works, but his freedom of movement is limited by supervised house arrest and he provides a free service to the community through community service.<sup>87</sup>

Fourthly, it was very disappointing to note that almost no photographs of maintenance debtors are ever taken in terms of s 43 of the Maintenance Act, which re-enacted the provisions of s 5(5) of the old Maintenance Act of 1963. These provisions, which cater for two photographs to be taken of maintenance debtors to facilitate tracing them should they fail to comply with maintenance orders, have therefore been flatly ignored for more than forty-five years now. Maintenance courts should immediately start using this extremely helpful enforcement mechanism expressly provided for in the Maintenance Act. Surely each maintenance court can afford a digital camera for use by its maintenance investigator.

Lastly, the findings of this study strongly criticize the current practice whereby the national office of the Department is responsible to effect EFT payments to beneficiaries all over South Africa. Serious consideration should therefore be given to the accounts and EFT clerks' plea that EFT payments should be decentralized so as to exclude the national office. It also emerged that there should be an information drive to encourage all relevant role players to use the correct JDAS reference numbers whenever payments are made.

### 3. *Training*

The research results of this study indicate that there is a direct correlation between the qualifications of maintenance officers and the frequency with which enforcement mechanisms are utilized in maintenance courts. Where

<sup>84</sup> Op cit note 1 at 102.

<sup>85</sup> Op cit note 82 at 512-13.

<sup>86</sup> 2002 (1) SACR 50 (C). In this case the court sentenced an accused who deliberately refused to pay maintenance to 1440 hours periodical imprisonment to be served on weekends from 18h00 on Fridays to 18h00 on Sundays. The court further ordered that the imprisonment should be reduced by fifteen hours for every R500 that the accused paid off on arrears.

<sup>87</sup> S S Terblanche *The Guide to Sentencing in South Africa* 2 ed (2007) 344.

maintenance officers were not in possession of legal degrees, enforcement mechanisms were less frequently applied. It is therefore imperative that all maintenance officers should have legal degrees. Research results further indicate that although the participating maintenance officers generally have a good knowledge of the relevant legislation, some of them are nevertheless unaware of certain provisions of the Act. Accordingly, it is very important that maintenance officers receive ongoing training in topical issues such as mediation, the analysis of paternity tests, accountancy, new developments in the law of maintenance and innovative enforcement methods.

Furthermore, a uniform or standard minimum qualification should be set for maintenance investigators in all regions. It is proposed that a paralegal diploma should be the norm. Moreover, all maintenance investigators should participate in a standardized training programme offered by the Justice College, which covers all relevant facets, namely tracing and investigation skills, legal aspects and their practical implementation, elementary drafting skills, basic mathematical and accounting skills, ITC operation and communication, and mediation and interviewing skills. It is also important to note that a high percentage of maintenance investigators who had already received training at the Justice College indicated that they needed additional time for training. Consequently, ongoing training would seem to be an excellent idea, or more advanced or specialized training in, for example, tracing.

There was also a plea for proper training from participating accounts and EFT clerks. It is indeed imperative that they too should receive regular training on new versions of JDAS and on the process of EFT payments if these are to be decentralized to regions.

The crux of the matter is that it has been established that a well-trained and specialized corps of maintenance court officials is most definitely a prerequisite for the establishment of a fair and equitable maintenance system in South Africa. It is just not good enough, for example, for public prosecutors or legal interns to perform the role of maintenance officers. It is proposed that as soon as the benchmark regarding the appointment of a maintenance officer to every maintenance court in South Africa in terms of s 4(2) of the Maintenance Act is complied with, s 4(1) needs to be revised to the effect that public prosecutors should no longer be deemed to have been appointed as maintenance officers. It is submitted that the only suitable role for public prosecutors in the maintenance court is to prosecute maintenance defaulters in terms of s 31 of the Maintenance Act.

#### 4. *Infrastructure*

It is impossible for maintenance courts in general and for maintenance officers and maintenance investigators in particular to function properly and effectively if the necessary infrastructure is not provided. In the first place, the location of maintenance courts is to be given priority. Too many maintenance courts are still situated in inaccessible and secluded parts of magistrates' court buildings and far too many districts have no designated maintenance court at all. Maintenance courts should preferably be located within a family

court, but where such courts have not yet been established, maintenance courts should be located separately with other family-law and child-law sections of the magistrates' court. These courts should then be suitably equipped and furnished to accommodate the constant stream of complainants and defendants who visit the maintenance courts on a daily basis.

Furthermore, the scarce resources in maintenance courts need to be supplemented to ensure that court officials can perform their different functions properly. In this regard it is imperative that maintenance investigators' access to information should be improved, inter alia, by providing them with internet access on their own desktop computers in their own offices. Their specific requests regarding transport, telephones, cameras and tape recorders should also be given serious consideration. An apparently trivial but nonetheless essential matter is their request for credible identification. Likewise, the accounts and EFT clerks' proposals regarding the upgrading and streamlining of JDAS and the EFT software programmes and their pleas to have JDAS and EFT linked or integrated should be given urgent attention.

##### 5. *Attitudes*

The attitude of parents, employers and society at large towards the payment of maintenance needs to be changed.

Many liable parents renege on their obligations to maintain their dependants, especially where children are brought up in single-parent households.<sup>88</sup> In particular, parents who do not take care of the children on a daily basis perceive the other parent, the caregiver, as squandering the maintenance money she (or he) receives and spending it on herself (or himself) rather than on their children. This perception is totally wrong.<sup>89</sup> It has indeed been shown that the parent who is awarded the care of children upon divorce, usually the mother, experiences a substantial drop in her standard of living, whereas the other parent, usually the father, is financially better off after divorce.<sup>90</sup> Although there is not much that the Department can do to correct this perception, it is proposed that all maintenance court officials should be made aware of the real truth so that they can correct this perception when faced with it in the maintenance-court environment.

According to the nine regional heads the second biggest problem with the recovery of maintenance and the enforcement of maintenance orders in courts is the lack of cooperation from employers regarding emolument attachment orders. The lassitude of employers to implement these orders promptly and correctly and to appear in maintenance courts needs to be addressed. This can perhaps be done by incorporating in notices relating to the attachment of emoluments clear and detailed stipulations as to how

<sup>88</sup> Op cit note 28 at 64.

<sup>89</sup> See *Mngadi v Beacon Sweets & Chocolate Provident Fund* op cit note 70; *Magevu v Zozo* op cit note 70 and *Bannatyne v Bannatyne* op cit note 43.

<sup>90</sup> Madelene de Jong 'New trends regarding the maintenance of spouses upon divorce' (1999) 62 *THRHR* 75 at 80.

payments should be made. If a payment is not made precisely in accordance with the notice, the employer should be prosecuted.<sup>91</sup>

Furthermore, it appears that some beneficiaries are still reluctant to participate in the EFT project. The Department must therefore continue with the nationwide poster campaigns and other initiatives to encourage these beneficiaries to open low banking cost Mzansi accounts and to allay any fears the public might still have.

Lastly, all people should be encouraged to be responsible.<sup>92</sup> Women should be advised not to have more children with men who already neglect their maintenance obligations towards other children. Men who do not earn a lot of money should be advised not to have more children. Parents' earning capacities need to be taken into consideration when family planning is done. Once again, such values can be instilled in members of the society through poster campaigns at maintenance and other community courts.

#### 6. *Dynamics between different court officials*

The research results of this study also reveal that there is a need to work on the dynamics between maintenance investigators and their managers and between maintenance investigators and sheriffs of the magistrates' courts.

The issues of trust between maintenance investigators and their managers should be addressed. In this regard special attention should be paid to maintenance investigators' requests regarding flexible working hours. It would perhaps deliver excellent results in practice if maintenance investigators in rural areas could be on duty when commuters who work in the big cities go home at night or for the weekend.

Related to this is the issue of collaboration between maintenance investigators and sheriffs of the magistrates' courts. Effective and efficient coordination between these officials needs to be established. To this end, the formulation of a policy on jurisdiction for tracing defaulters across district and provincial borders should be high on the Department's priority list.

All in all, there should be collaboration between all court officials to form a united front against maintenance defaulters across the country.

<sup>91</sup> In terms of s 38 of the Maintenance Act.

<sup>92</sup> Op cit note 25 at 58.