

**RECOGNITION AND ENFORCEMENT OF FOREIGN CHILD SUPPORT ORDERS: A
COMPARATIVE ANALYSIS OF ERITREAN AND SOUTH AFRICAN LAW**

by

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Summary

Recognition and enforcement of foreign child support orders are characterised by persistent difficulties because, in most cases, child support orders are required to be re-evaluated over time because of changed circumstances. On the other hand, the Transitional Civil Procedure Code of Eritrea (TCPCE hereinafter) imposes requirements before foreign judgments are recognised and enforced. This study investigates the requirements under the TCPCE vis-à-vis effective recognition and enforcement of foreign child support orders. The method employed is a comparative analysis between Eritrean and South African law as well as the Hague Convention of 2007. The writer argues that some of the requirements under the TCPCE are hindrances for effective recognition and enforcement of foreign child support orders because they contradict with some features of child support orders. In specific circumstances, the domestic enforcement mechanisms also have lacunas. Hence, recognition and enforcement of foreign child support orders under the TCPCE are problematic.

Keywords

Arrears; Child support orders; Domestic enforcement mechanisms; Finality; Maintenance Act 99 of 1998; Nakfa (ERN); Prescription period; Reciprocal Enforcement of Maintenance Orders Act 80 of 1963; Recognition and enforcement of foreign child support orders; Transitional Civil Procedure Code of Eritrea

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Bereket Tsegai Embaye

June 2023

Declaration of Originality

I declare that **'RECOGNITION AND ENFORCEMENT OF FOREIGN CHILD SUPPORT ORDERS: A COMPARATIVE ANALYSIS OF ERITREAN AND SOUTH AFRICAN LAW'** is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.

I further declare that I submitted the mini-dissertation to originality checking software and that it falls within the accepted requirements for originality.

I further declare that I have not previously submitted this work, or part of it, for examination at Unisa for another qualification or at any other higher education institution.

BEREKET TSEGAI EMBAYE

Signature:

A small, square image showing a handwritten signature in black ink on a light-colored background. The signature is stylized and appears to be the name 'Bereket Tsegai Embaye'.

Date: 14 June 2023

Abbreviations

ACRWC	African Charter on the Rights and Welfare of the Child
<i>AJICL</i>	<i>African Journal of International and Comparative Law</i>
CC	Constitutional Court of South Africa
<i>CILSA</i>	<i>Comparative and International Law Journal of Southern Africa</i>
CRC	Convention on the Rights of the Child
<i>Fam Advoc</i>	<i>Family Advocate</i>
<i>Fam LQ</i>	<i>Family Law Quarterly</i>
HCCH	Hague Conference on Private International Law
<i>ICLQ</i>	<i>The International and Comparative Law Quarterly</i>
<i>JPAM</i>	<i>Journal of Policy Analysis and Management</i>
<i>JSSW</i>	<i>The Journal of Sociology & Social Welfare</i>
<i>Mich J Race & L</i>	<i>Michigan Journal of Race & Law</i>
SALC	South African Law Commission
<i>SALJ</i>	<i>South African Law Journal</i>
SALRC	South African Law Reform Commission
TCCE	Transitional Civil Code of Eritrea

TCPCE	Transitional Civil Procedure Code of Eritrea
<i>THRHR</i>	<i>Tydskrif vir Hedendaagse Romeins-Hollandse Reg</i>
REMOA	Reciprocal Enforcement of Maintenance Orders Act 80 of 1963
REMOA Africa	Reciprocal Enforcement of Maintenance Orders (Countries in Africa) Act 6 of 1989

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Chapter 1

Introduction

1.1 General Overview

The issue of enforcing child support orders arises where the 'judgment debtor' fails to pay the 'judgment creditor' in terms of a court order.¹ Enforcement of child support orders is characterised by its persistent difficulty,² as instituting enforcement proceedings by the child or custodian parent becomes difficult with little prospect of obtaining an adequate or regular income in the long run.³ It may be easy to get a maintenance order against a non-custodian parent, but enforcement is quite another matter.⁴ The primary issue in this instance is that, in most cases, child support orders are required to be re-evaluated over time because of changed circumstances⁵ such as an increase in the creditor's needs, an increase or decrease in the debtor's income, and the presence of other dependent family members of the debtor.⁶ Additional reasons for non-compliance with court orders include that the child support debtor may not have income, and sometimes he fails to pay child support because he has misgivings about how the money is being spent.⁷ The issue becomes more problematic in the case of enforcement of foreign child support orders⁸ because, besides those obstacles which hamper easy enforcement of domestic child support

¹ Nick Wikeley, *Child Support Law and Policy* (Hart Publishing 2006) 444 and 447.

² Wikeley, *Child Support* 437; Walton Garrett, 'Alimony and Child Support Enforcement' (1979) 1 *Family Advocate* 18, 18.

³ Barbara Stark, *International Family Law an Introduction* (Ashgate 2005) 223.

⁴ Wikeley, *Child Support* 437.

⁵ Maureen Pirog and Kathleen Ziol-Guest, 'Child Support Enforcement: Programs and Policies, Impacts and Questions' (2006) 25 *JPAM* 943, 955.

⁶ Henry MR, Schwartz VS and Reynolds MR, *A Guide for Judges in Child Support Enforcement* (2nd edn, National Reference Centre, Office of Child Support Enforcement 1985) 72-74.

⁷ Sumati Dubey, 'A Study of Reasons for Non-Payment of Child Support Orders by Non-Custodial Parents' (1995) 22 *The JSSW* 115, 123. Dubey lists additional reasons for non-payment of child support on time which include; (1) the non-custodial parent believes that the mother of the child would not allow him visitation; (2) the non-custodial parent believes that he is not the father of the child; (3) the non-custodial parent believes that he is not responsible because he did not want to have a child and the mother was the one who wanted to have a child and so she alone is responsible for the support and upbringing of the child.

⁸ Garrett, 'Alimony and Child Support Enforcement' 18; Henry, Schwartz, and Reynolds, *Guide* 218.

orders, requirements imposed by the enforcing state to validate foreign judgments further complicate the matter.

States impose different tests and standards before recognising and enforcing foreign judgments.⁹ However, some tests are common to many countries. The most common requirements states impose before recognising and enforcing foreign judgments are jurisdiction of the foreign court, a fair trial, that the judgment must not violate principles of public policy, and the finality of the decision.¹⁰ All the requirements enumerated here are obstacles for an expedited recognition and enforcement of foreign judgments. The requirement of finality,¹¹ however, poses a unique challenge in the context of the recognition and enforcement of foreign child support orders and complicates the already complicated problem even more.

To solve the problem of recognition and enforcement of foreign child support orders, the Hague Conference on Private International Law (HCCH hereinafter) began to address the issue from the 1950s.¹² During that period, the HCCH approved two conventions - the Convention on the Law Applicable to Maintenance Obligations towards Children of 24 October 1956,¹³ and the Convention Concerning the Recognition and Enforcement of Decisions Relating to Maintenance Obligations

⁹ Saloni Khanderia, 'The Hague Conference on Private International Law's Proposed Draft Text on the Recognition and Enforcement of Foreign Judgments: Should South Africa Endorse it?' (2019) 63 *Journal of African Law* 413, 414.

¹⁰ For instance, the tests in Eritrea based on article 456/1 and 458 are bilateral/multilateral agreements, reciprocity, competence of court, fair trial, finality and enforceability of the judgment and public policy. In South Africa based on the modern Roman-Dutch common law, the tests are jurisdiction/competence of the court, finality of the judgment, public policy issues and the judgment must not fall foul of the Protection of Businesses Act 99 of 1978. The tests in England (according to Paul Torremans and James J. Fawcett (eds), *Private International Law* (15th edn, Oxford University Press 2017) 932 and 956) include jurisdiction, fair trial, public policy concerns and finality. In the USA (according to Ann Laquer Estin, 'International Divorce: Litigating Marital Property and Support Rights' (2011) 45 *Fam LQ* 293, 320) the tests are jurisdiction, due process of law/fair trial, public policy and finality.

¹¹ According to Christopher Forsyth, *Private International Law: the Modern Roman-Dutch Law Including the Jurisdiction of the High Courts* (5th edn, Juta 2012) 457-58, finality here refers to a foreign judgment that is final and conclusive and it should not be alterable by the court that pronounced it.

¹² Eimear Long, 'The New Hague Maintenance Convention' (2008) 57 *ICLQ* 984, 984.

¹³ Convention on the Law Applicable to Maintenance Obligations towards Children of 24 October 1956 <<https://www.hcch.net/en/instruments/conventions/full-text/?cid=37>> (accessed 25 December 2021).

towards Children of 15 April 1958.¹⁴ In addition, the United Nations New York Convention on the Recovery Abroad of Maintenance, which provides for a global framework for administrative cooperation on this issue,¹⁵ was adopted on 2 June 1956.¹⁶ Then in the 1970s the HCCH revised and extended the 1956 and 1958 conventions and replaced them with the Convention on the Law Applicable to Maintenance Obligations of 2 October 1973¹⁷ and the Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations of 2 October 1973¹⁸ respectively.¹⁹

Dissatisfied with the four Hague Conventions and the 1956 New York Convention,²⁰ the HCCH with the help of the United Nations launched an operation in 1992 to rework all the previous conventions. The objective was to provide a comprehensive convention that would build on the best features of the existing conventions.²¹ After long and thorough studies and discussions, the commission produced a new 'comprehensive and conclusive' convention:²² the Convention on the International Recovery of Child Support and Other Forms of Family Maintenance of 23 November 2007 (Hague Convention of 2007 hereinafter).²³ Besides its simplicity, accessibility,

¹⁴ Convention Concerning the Recognition and Enforcement of Decisions Relating to Maintenance Obligations towards Children of 15 April 1958 <<https://www.hcch.net/en/instruments/conventions/full-text/?cid=32>> (accessed 25 December 2021).

¹⁵ Long, 'Maintenance Convention' 984-85.

¹⁶ United Nations New York Convention on the Recovery Abroad of Maintenance that provide for a global framework for administrative cooperation of 2 June 1956 <<https://assets.hcch.net/docs/30c3a5d7-4a53-4a6c-ae5-226600585cc3.pdf>> (accessed 25 December 2021).

¹⁷ Convention on the Law Applicable to Maintenance Obligations of 2 October 1973 <<https://www.hcch.net/en/instruments/conventions/full-text/?cid=86>> (accessed 25 December 2021).

¹⁸ Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations of 2 October 1973 <<https://www.hcch.net/en/instruments/conventions/full-text/?cid=85>> (accessed 25 December 2021).

¹⁹ Long, 'Maintenance Convention' 985.

²⁰ William Duncan, 'The Development of the New Hague Convention on the International Recovery of Child Support and Other forms of Family Maintenance' (2004) 38 Fam LQ 663, 666.

²¹ Long, 'Maintenance Convention' 985.

²² Long, 'Maintenance Convention' 985 and 996.

²³ Protocol on the Law Applicable to Maintenance Obligations of 23 November 2007 <<https://www.hcch.net/en/instruments/conventions/full-text/?cid=133>> (accessed 25 December 2021). As of October 2021, 47 countries and one union (the European Union) have

flexibility and efficiency, the finality test, which posed a particular hindrance for the recognition and enforcement of foreign child support orders, is excluded in the 2007 Hague Convention.²⁴

In Eritrea, there is no special law that governs the recognition and enforcement of foreign child support orders. However, the Transitional Civil Procedure Code of Eritrea (TCPCE hereinafter) addresses the general recognition and enforcement of foreign judgments.²⁵ As there is no special law that governs the recognition and enforcement of foreign judgments in the country, the provisions of the TCPCE on enforcing foreign judgments should govern the enforcement of foreign child support orders as well. However, requirements such as the finality test required for the recognition and enforcement of foreign judgments under the TCPCE²⁶ are obstacles for an easy enforcement of foreign child support orders.

The finality test is in direct contradiction with the feature of child support being subject to variation. So, in the absence of international treaties, recognition of foreign child support orders becomes very problematic in Eritrea as the country has not yet ratified any of the HCCH conventions, the United Nations New York Convention of 1956 or any other bilateral or multilateral treaties on this issue.²⁷ However, once foreign judgments are recognised in Eritrea, they are enforced as if they were decided by local courts²⁸ though these mechanisms have irreconcilable gaps.²⁹

In South Africa, apart from the Reciprocal Enforcement of Maintenance Orders Act 80 of 1963 (REMOA hereinafter) and the Reciprocal Enforcement of Maintenance

ratified/acceded to this convention<<https://www.hcch.net/en/instruemnts/conventions/statutes-table/?cid=131>> accessed 18 July 2022.

²⁴ See Article 22 of the Hague Convention of 2007. Under this article the grounds for refusing recognition and enforcement are listed but the finality test is excluded.

²⁵ Articles 456 to 460 of the TCPCE provide for the enforcement of foreign judgments in general.

²⁶ Based on article 458 of the TCPCE the requirements imposed in respect of foreign judgments are reciprocity, competence of the foreign court, fair trial, finality and enforceability of the judgment, and public policy matters.

²⁷ This is according to data provided to me by Mr Eyob Asmelash, Head Unit, Division of International Organizations, Department of Desks, Ministry of Foreign Affairs of the State of Eritrea on 26-11-2020.

²⁸ Article 460/3/ of the TCPCE.

²⁹ The mini-dissertation will discuss this issue in brief in chapter 2.

Orders (Countries in Africa) Act 6 of 1989 (REMOA Africa hereinafter),³⁰ there is no special legislation that governs the recognition and enforcement of foreign child support orders.³¹ In addition, though South Africa became a member to the HCCH on 14 February 2002,³² the country has not yet ratified any convention related to recognition and enforcement of foreign child support orders.³³ Therefore, the common law is the only remaining option for the enforcement of foreign child support judgments in the country.³⁴ However, the finality and conclusivity test is one requirement for the enforcement of foreign judgments under the common law.³⁵ So, recognition and enforcement of foreign child support orders, apart from those decided in the proclaimed countries under the REMOA, are difficult in South Africa.

³⁰ Although the REMOA Africa follows a much easier administrative procedure than the REMOA, since the states designated under this Act have become part of South Africa, it is not currently in use (Forsyth, *PIL* 451).

³¹ Amy Lauren Brown, 'Cross Border Recovery of Child Maintenance: Should South Africa Ratify and Implement the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance?' (LLM thesis, University of the Western Cape 2016) 65 and 76.

³² South Africa-HCCH Members <<https://www.hcch.net/en/states/hcch-members/details1/?sid=68>> (accessed 17 November 2021). According to the South African Law Commission, Issue Paper 21 Project 121 at 8, the country became the 59th Member State of the HCCH on 14 February 2002.

³³ South Africa-HCCH Members <<https://www.hcch.net/en/states/hcch-members/details1/?sid=68>> (accessed 17 November 2021). According to this source South Africa is a contracting party to five instruments of the HCCH, which are (1) Convention of 5 October 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions; (2) Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents; (3) Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters; (4) Convention of 25 October 1980 on the Civil Aspects of International Child Abduction; and (5) Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Inter-country Adoption.

³⁴ Forsyth, *PIL* 451; Khanderia, 'The Hague Conference on Private International Law' 416; Christa Roodt, 'The Recognition and Enforcement of Foreign Judgments, Maintenance orders and Arbitral Awards: a Proposal for Structural Reform' (2004) 45 *Codicillus* 64, 65.

³⁵ Forsyth, *PIL* 419; Roodt, 'Recognition and Enforcement' 65; South African Law Commission, Issue Paper 21 Project 121 at 14. As stated by Forsyth, *PIL* 419, reciprocity is not listed as a requirement for the recognition and enforcement of foreign judgments under the modern ROMAN-Dutch common law and the reciprocity test that was previously imposed under REMOA is now repealed (Forsyth, *PIL* 450; Christa Roodt, 'Recognition and Enforcement of Foreign Judgments: Still a Hobson's Choice Among Competing Theories?' (2005) 38 *CILSA* 23). The absence or removal of the reciprocity test is a step in the right direction because as Roodt, 'Recognition and Enforcement' 23 states, it is pointless to condition recognition and enforcement on reciprocity since a denial of justice to private litigants in the courts of one state cannot induce justice to other individual litigants in the courts of another. Roodt further states that it is not states but innocent individual litigants who are penalised for the lack of reciprocity on the part of the rendering state.

Therefore, the mini-dissertation will analyse the recognition and enforcement of foreign child support orders in Eritrea by comparing it with the South African law. It will also make a comparative analysis with the Hague Convention of 2007.

1.2 Problem statement

According to the TCPCE, recognition and enforcement of foreign judgments are based on statute and treaty. However, recognition and enforcement of foreign judgments including child support orders based on treaty are not practical in Eritrea because the country has not concluded a treaty of judicial assistance with any other country yet. One of the statutory requirements for the recognition and enforcement of foreign judgments under the TCPCE is the finality test.³⁶ However, since child support orders are varied in many jurisdictions, the finality requirement cannot be met. Therefore, foreign child support creditors remain without any recourse in enforcing what is due to them.³⁷

Although South Africa has designated some countries for the recognition and enforcement of foreign child support orders,³⁸ the procedure for the registration of foreign judgments follows complicated diplomatic and administrative channels.³⁹ Hence, child support creditors whose countries are designated by the REMOA find it difficult to enforce future maintenance orders. Apart from the REMOA, there is no other statutory law that governs the recognition and enforcement of foreign child support orders in South Africa. So, foreign child support creditors are left with the option of invoking the common law rules in enforcing what is awarded to them in their domestic courts. The common law rules apply the finality and conclusivity test though.⁴⁰ However, since child support orders are varied over time in many jurisdictions, foreign child support creditors in most cases cannot enforce what is due to them.

³⁶ Article 458 /d/ of the TCPCE.

³⁷ The foreign child support creditor remains with only one option i.e. to launch a new suit against the debtor in the domestic courts though this mechanism is costly and ineffective.

³⁸ This is based on the REMOA.

³⁹ Forsyth, *PIL* 450.

⁴⁰ Forsyth, *PIL* 419; Roodt, 'Recognition and Enforcement' 65.

The mini-dissertation will discuss the above-mentioned problems in the two countries and will try to find practical solutions.

1.3 Research questions

The mini-dissertation asks the main question: 'What is the current legal position in Eritrea regarding the recognition and enforcement of foreign child support orders?'

Four sub-questions follow:

- a. May enforcement of foreign child support orders be denied because of the finality requirement in the TCPCE?
- b. Does the effective enforcement of foreign child support orders depend on the law of the enforcing country only or on that of the rendering country as well?
- c. How can Eritrea effectively enforce foreign child support orders to fulfil its duty of protecting the child's best interest?
- d. Are there practical lessons that Eritrea can learn from the South African laws on the recognition and enforcement of foreign child support orders?

1.4 Aims and objectives of the study

This mini-dissertation aims to:

- a. analyse and evaluate the current legal position in Eritrea on dealing with the recognition and enforcement of foreign child support orders by comparing it with that of South Africa;
- b. evaluate whether the domestic child support enforcement mechanisms are effective, and examine if they are sufficient for enforcement of foreign child support orders;
- c. explore and critically evaluate Eritrea's procedural options to fulfil its obligations in enforcing foreign child support orders properly; and, finally;
- d. make recommendations on how Eritrea can resolve the problems relating to enforcing foreign child support orders in a manner that will suit everyone and is realistic given Eritrea's socio-economic situation.

1.5 Significance of the study

As many Eritreans live in the diaspora,⁴¹ disputes about child support with one parent residing outside the country are common. Hence, the residence of the child and his/her custodian parent in one jurisdiction and the parent with the child support obligation in another jurisdiction complicates the enforcement of child support orders. As a result, the burden of securing the right of the child becomes heavier both for the custodial parent and the state. However, Eritrea has failed to enact comprehensive laws that can secure effective and efficient enforcement of foreign child support orders, and it has not signed any treaty of judicial assistance with any other country yet. The outcome of these failures and problems is that many children and their custodians live in poverty.

In addition, the enforcement of foreign child support orders has become more significant owing to the Covid-19 pandemic worldwide because the custodian parent may have lost his/her job. Further, enforcement of child support orders has deteriorated during this pandemic since courts and other government agencies authorised to enforce child support orders have been closed or their functioning has been impaired. Furthermore, restrictions on movement in general and on cross-border travel in particular have aggravated the problem.⁴²

⁴¹ Sally Healy, 'Eritrean's Economic Survival' (Conference Paper, Chatham House, 20 April 2007) 16 states that although obtaining an accurate figure for the number of Eritrean migrants is hugely problematic, an estimation suggests that 720 000 migrants are formally registered with the Government of Eritrea. The Government of Eritrea further estimates (according to Healey) that 350 000 are illegal, unregistered migrants. Another writer, Berhane Tewolde, 'A Socio-Economic Analysis of Migration and Remittances in Eritrea' (GAN Editions 2008) 121, indicates that over 900 000 Eritrean nationals reside abroad, from the population of the country estimated at 4 410 161 in 2001. According to Mirjam Van Reisen, Meron Estefanos and Conny Rijken, *The Human Trafficking Cycle: Sinai and Beyond* (Wolf Legal Publishers 2013) 136, 'the number of Eritreans outside the country seeking refuge mainly in neighbouring countries such as Sudan and Ethiopia at the end of 2009 was estimated to be 197,313'.

⁴² In most parts of Eritrea, for instance, the courts are the authorities that have the power to enforce child support orders, but they were closed in the last week of March 2020, and the movement of people both domestically and internationally has been severely restricted since then. Domestic movements are still severely restricted because privately owned transportation services (particularly public buses) are not allowed to transport people yet. On the other hand, based on section 8(1)(b)(ii) of Government Gazette of 26 March 2020 No. 43167, enforcement of child maintenance was not suspended during the covid-19 pandemic in South Africa.

This mini-dissertation will address these different issues in detail and should help Eritrea curb the problems relating to the mechanisms for recognising and enforcing foreign child support orders. Moreover, the mini-dissertation may provide South Africa with helpful examples and insights. Finally, it is submitted that this mini-dissertation will make an important contribution to the literature on Eritrean law in this field of study and may also encourage others to do further research on related topics.

1.6 Research methodology

This mini-dissertation will analyse and evaluate the law in Eritrea regarding the recognition and enforcement of foreign child support orders. In addition, the mini-dissertation will follow a comparative approach between South African laws and practices and those of Eritrea because the Republic of South Africa is in a better position than Eritrea in the area of child support orders in general and concerning the enforcement of foreign child support orders in particular.⁴³ Therefore, the State of Eritrea may benefit from considering and perhaps adopting the Republic of South Africa's laws and mechanisms in enforcing foreign child support orders. It will also briefly discuss the domestic enforcement mechanisms of both countries because the domestic mechanisms are the ones a state will use in enforcing a foreign judgment in its territory.⁴⁴

However, Shani Van Niekerk ('Covid-19: No "Payment Holiday" for Maintenance Payers' <<https://www.adams.africa/family-law/>> accessed 21 September 2021) argues that the de facto position is different from the law. Van Niekerk states: 'For most of the "lockdown" thus far the effects of economical abuse against woman [sic] and children have been ignored...The stark reality of economic abuse has, disappointingly, been given a further "excuse" in the current state of affairs. It would seem that recalcitrant compliers of maintenance payments are now most conveniently using the word "COVID-19" as a blanket excuse to avoid paying maintenance. The outcome of which leaves dependent woman and children without the means to access basic necessities. The vulnerable become resultantly even more vulnerable.'

⁴³ For instance, South Africa has two Acts with regard to this issue: the REMOA and the REMOA Africa. However, Eritrea has no such Acts yet.

⁴⁴ Brown, 'Cross Border Recovery' 68 states that the measures available for domestic and foreign enforcement of child support orders are the same in South Africa since there are no specifically designed laws for the enforcement of foreign child support orders. As mentioned above, no specific laws are available in Eritrea for the exclusive enforcement of foreign child support orders. Art 460(3) of the TCPCE states that 'where the application is allowed and permission to execute is granted, the foreign judgment shall be executed in Eritrea as though it had been given by [an] Eritrean court' (this is an official English version of the Code). In addition, Art 33 of the Hague Convention of 2007 also supports this argument by stating that

Since the judicial practice and literature on the Eritrean part of the discussion are lacking, it is challenging to study how the different principles and doctrines on enforcing foreign child support orders are recognised in the country. Therefore, the mini-dissertation will analyse the Eritrean laws based on the Hague Convention of 2007 and those of South Africa. In short, it will follow the analytical and comparative approaches.

The sources the mini-dissertation will rely on include Eritrean and South African statutes (and court cases if there are any). In addition, the mini-dissertation will refer to regional and international conventions regarding this issue, with particular emphasis on the Hague Convention of 2007. Particular attention is given to this convention because it is the most coherent and up to date of its kind, and it is the most developed law on enforcing foreign child support orders. The mini-dissertation will also refer to the relevant commentaries and reports of the HCCH, articles in law journals, theses and dissertations, books, and internet websites.

1.7 Limitations of the study

The expected limitations of this mini-dissertation include the following:

- a. There is no adequate and coherent law on the enforcement of foreign child support orders in Eritrea. This lack will make it difficult to assess how each child support enforcement principle is construed and interpreted in Eritrea.
- b. The judicial practice on this particular issue is inadequate or is almost non-existent.
- c. There is no system of reporting cases in the Eritrean courts. This feature makes it difficult to find appropriate court cases relating to the issue.

'the state ... shall provide at least the same range of enforcement methods for cases under the Convention as are available in domestic cases'.

- d. In the Eritrean discussion, there is a lack of literature on the enforcement of child support cases in general and the enforcement of foreign child support orders in particular.⁴⁵

1.8 Overview of the chapters

Chapter 1 will provide the background to the study, clarify the problem statement, state the main research questions raised, explain the aims and objective of the study, clarify its significance, describe the methodology that will be applied, elucidate the limitations of the mini-dissertation, and give an overview of the chapters of the mini-dissertation. Generally, this chapter is an introduction to the mini-dissertation.

Chapter 2 will discuss the current position in Eritrean law dealing with the recognition and enforcement of foreign child support orders. The required formalities, procedural options, and tests and requirements for enforcing foreign child support orders will be analysed in detail. This chapter will also discuss the current mechanisms for enforcing domestic child support orders.

Chapter 3 will discuss the South African law on the recognition and enforcement of foreign child support orders. The required formalities, procedural options, and requirements for enforcing foreign child support orders will be discussed. Court cases on this issue will also be analysed (if there are any). In addition, this chapter will briefly discuss the enforcement measures and mechanisms of domestic child support orders in South Africa.

Chapter 4 will provide a comparative analysis of the Eritrean and South African law on enforcing child support orders in general and enforcing foreign child support orders in particular. The points of concord and discord between the two countries' laws will be evaluated by comparing the systems to one another. In respect of specific principles, reference will be made to the Hague Convention of 2007 so that

⁴⁵ A further and unique limitation is lack of internet access, which has been aggravated by the Covid-19 pandemic as the internet service is only available at the head office in the Ministry of Justice of Eritrea in the capital city, Asmara. I live 30 km outside Asmara and have to go to Asmara whenever in need of internet access.

the two countries' laws can be evaluated to determine whether they accord with current international practices on enforcing foreign child support orders.

Chapter 5 will conclude the mini-dissertation. It will also make recommendations on how Eritrea can better enforce child support orders in general and foreign child support orders in particular, by commenting on the available alternative mechanisms that can help the country meet its obligations in securing the best interests of the child principle.

Chapter 2

The Current Legal Position in Eritrea on Recognition and Enforcement of Foreign Child Support Orders

2.1 Introduction

According to article 456(1) of the TCPCE,⁴⁶ foreign judgments can be recognised and enforced in Eritrea on the basis of treaty and on the basis of the statutory requirements of the TCPCE. However, as mentioned in Chapter 1, Eritrea has not signed any bilateral or multilateral treaties of judicial assistance for the recognition and enforcement of foreign judgments. Therefore, recognition and enforcement of foreign judgments in the country will entirely be governed by the TCPCE. This chapter will discuss and analyse whether the provisions of the TCPCE that govern the recognition and enforcement of foreign judgments are effective in the recognition and enforcement of foreign child support orders.

2.2 Formal and procedural requirements for the recognition of foreign judgments

Unlike in many other countries where recognition and enforcement of foreign child support orders are performed by special agencies, execution of such judgments in Eritrea is achieved by courts. Article 15(3) of the TCPCE states that the High Courts 'shall decide applications for the enforcement of foreign judgments...'.⁴⁷ Further, article 456(2) and (3) of the TCPCE states that no foreign judgment is executed in Eritrea unless an application to that effect is made to the High Courts. Articles 15(3) and 456(2) and (3) of the TCPCE stipulate the courts that have exclusive jurisdiction

⁴⁶ Transitional Civil Procedure Code of Eritrea.

⁴⁷ Prior to 2012, decisions on applications for the enforcement of foreign judgments were under the exclusive jurisdiction of the High Courts in accordance with article 15(3) of the TCPCE. However, article 15(1)(c) of Proclamation No.167 of 2012 amended article 15 of the TCPCE as a whole and re-determined the exclusive jurisdiction of the High Courts. The proclamation, however, fails to address the issue whether article 15 (3) of the TCPCE is detached from the exclusive jurisdiction of the High Courts or not. The Proclamation is silent on this matter. The jurisdiction of the High Courts regarding enforcement of foreign judgments is, however, retained under article 46(3) of the Draft Civil Procedure Code of Eritrea of 2015 (DCPCE hereinafter).

to decide whether a particular foreign judgment should be recognised or not.⁴⁸ They do not, however, stipulate any court that has exclusive jurisdiction to enforce foreign judgments. Therefore, we can conclude from the words of these two articles that the lower courts can enforce foreign judgments as well.

‘An application for the execution of a foreign judgment shall be in writing and shall be accompanied by a certified copy of the judgment to be executed’.⁴⁹ This means that any form of application other than a written form is not acceptable and the foreign judgment must have a seal of the court which pronounces it. In addition, the foreign judgment must be accompanied by a certificate signed by the president or registrar of that court and it should state that the judgment is final and enforceable.⁵⁰ Therefore, whether a foreign judgment is final and enforceable is not determined by the court which is approached for execution but by the foreign court which has pronounced it.⁵¹ However, the law is silent on whether the foreign judgment should be translated into the working language of the court where recognition is sought.⁵²

The court in which the recognition and enforcement of a foreign judgment is sought is required to notify the judgment debtor to present his observations on the issue.⁵³ The court has a discretion whether to hold pleadings⁵⁴ if the judgment debtor objects to

⁴⁸ No justification is given on why the High Courts have such exclusive jurisdiction. According to Sedler (Ethiopian Civil Procedure 8), however, the rationale for giving exclusive jurisdiction to the High Courts is related to the competence of the courts; ‘more important cases should be heard by the courts higher in the hierarchy...’.

⁴⁹ Article 457(a) of the TCPCE. The DCPCE does not affect the articles discussed under this section because articles 494-498 of the DCPCE are identical to articles 456-60 of the TCPCE. Even the heading of the chapter and the heading of each article and their arrangement are the same.

⁵⁰ Article 457(2) of the TCPCE.

⁵¹ I will discuss the finality and enforceability tests below in this chapter.

⁵² Ibrahim Idris Ibrahim, ‘Ethiopian Law of Execution of Foreign Judgments’ (1999) 19 JEL 17, 23; Tecele Hagos Bahta, ‘Recognition and Enforcement of Foreign Arbitral Awards in Civil and Commercial Matters in Ethiopia’ (2011) 5 Mizan Law Review 105, 112. In the personal experience of the researcher, however, the practice of the courts in Eritrea is that they require a foreign document to be translated into the working language of the courts. The translation is done by a private person who is licensed to work as a translator and the translated document is authenticated by the registrar of the High Courts in the country.

⁵³ Article 459(1) of the TCPCE.

⁵⁴ Article 459(1) of the TCPCE.

the foreign judgment on the ground of lack of fulfilment of the conditions listed under article 458 of the TCPCE.⁵⁵

2.3 Material requirements for the recognition of foreign judgments

A foreign judgment is recognised and registered in Eritrea if some conditions are fulfilled. Based on article 458 of the TCPCE foreign judgments receive recognition in Eritrea if: (a) there is a reciprocity agreement between Eritrea and the country whose judgment is sought to be executed; (b) the judgment was given by a court duly established and constituted; (c) there was fair trial during the proceedings; (d) the judgment to be executed is final and enforceable; and (e) execution is not contrary to public order or morals.⁵⁶ The conditions listed above are not distinct and independent of each other: they are cumulative. Therefore, a foreign judgment must fulfil all these conditions before it can be recognised in Eritrea. Below I discuss each of these conditions.

2.3.1 Competence/jurisdiction of a court

Article 458(b) requires that the court which renders the judgment should be duly established and constituted. The court should have international jurisdiction⁵⁷ and it should have the capacity to adjudicate the case.⁵⁸ However, the law does not clarify which law determines whether a foreign court is duly established; should it be determined based on the Eritrean law, or should it be established based on the foreign law, or should it be established based on international law?⁵⁹ Article 458(b) excludes recognition and enforcement of maintenance judgments given by foreign

⁵⁵ Ibrahim, 'Enforcement of Foreign Judgments' 23. According to article 459(3) of the TCPCE, if some issues are not clear and are doubtful as to their true meaning, the court suspends its decision until all doubtful issues have been clarified by the foreign court.

⁵⁶ Based on article 496, the conditions for the recognition of foreign judgments under the DCPCE are a replica of article 458 of the TCPCE.

⁵⁷ The word 'judicial jurisdiction' is commonly used in Eritrea to refer to international jurisdiction. However, for the sake of clarity I will use the word 'international jurisdiction' in this mini-dissertation.

⁵⁸ RA Sedler *Ethiopian Civil Procedure* (Faculty of Law Haile-Selassie I University in association with Oxford University Press 1968) 393.

⁵⁹ Ibrahim, 'Execution of Foreign Judgments' 24.

administrative authorities as the article requires the foreign judgment to be rendered by a court only.⁶⁰

2.3.2 Fair trial

Another requirement is procedural due process of law in the foreign country. Article 458(c) states that a foreign judgment shall not be executed unless 'the judgment-debtor was given the opportunity to appear and present his defence'. According to this article, the judgment debtor should receive the notice in due time and with a proper mode of service of summons.⁶¹ In addition, the judgment debtor and judgment creditor should be given an equal opportunity to present their case.

2.3.3 Public policy and public orders

The defence of public policy is commonly used in many legal systems to refuse recognition and enforcement of foreign judgments.⁶² Albeit difficult in its definition and the different meanings given for it across legal systems, the defence of public policy is generally used if a foreign judgment is 'manifestly incompatible with the public policy of the requested state'.⁶³ The defence of public policy against recognition and enforcement of foreign judgments, however, has to be interpreted strictly.⁶⁴ It is not sufficient that a foreign judgment contradicts a mandatory law in the requested state;

⁶⁰ The exclusion of recognition and enforcement of foreign judgments (including child support orders) given by foreign administrative agencies is not in line with current international trends. According to MR Henry, VS Schwartz and MR Reynolds *A Guide for Judges in Child Support Enforcement* (2nd edn, National Reference Centre, Office of Child Support Enforcement 1985) 40-41, for instance, sixteen states of the US have enacted legislation that allows the establishment and enforcement of child support orders by administrative agencies, for instance the states of Virginia and Alaska (Henry, Schwartz and MR Reynolds, *Guide* 45). Article 19(1) and (3) of the Convention on the International Recovery of Child Support and Other Forms of Family Maintenance of 23 November 2007 (Hague Convention of 2007 hereinafter) (available at <<https://www.hcch.net/en/instruments/conventions/specialised-sections/child-support>> accessed 25 December 2021) and Article 1 of the Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations of 2 October 1973 (available at <<https://www.hcch.net/en/instruments/conventions/full-text/?cid=85>> accessed 25 December 2021) both recognise decisions given by administrative authorities.

⁶¹ Sedler, *Ethiopian Civil Procedure* 394.

⁶² Garcimartin F and Saumier G, *Recognition and Enforcement of Foreign Judgments* (Preliminary Document No. 1 of December 2018 Explanatory Reports of the Twenty-Second Session of 18 June – 2 July 2019, HCCH) 63.

⁶³ Garcimartin and Saumier *Recognition and Enforcement* 64.

⁶⁴ Garcimartin and Saumier *Recognition and Enforcement* 64-65.

it has to violate an important value and fundamental rule of law of the requested state.⁶⁵ For instance, the defence of public policy could be successful if a foreign judgment violates constitutional principles, the sovereignty or the security of the requested state.⁶⁶

A foreign judgment is not recognised and enforced in Eritrea if its recognition and enforcement are against public morals or orders.⁶⁷ The grounds for denying recognition and enforcement of foreign judgments for violating public order or morals are not given in the law.⁶⁸ However, there are well-known international criteria for the application of public order and morality which many countries use for refusing recognition and enforcement of foreign judgments.⁶⁹

Article 813(1) of the Transitional Civil Code of Eritrea (TCCE hereinafter) states that '[t]he obligation to supply maintenance shall as a rule [be] fulfilled by means of maintenance allowance...'. Article 825 of the TCCE prohibits any agreement that provides an exception to the provisions under Chapter 12 of the TCCE.⁷⁰ Here a question may arise whether a foreign child maintenance order which is to be paid in a lump-sum form can be recognised and enforced in Eritrea. It is true that this type of foreign judgment is inconsistent with the law in Eritrea. Although the foreign judgment is not in line with the law in Eritrea, recognition and enforcement could not be refused on the ground of public policy as the judgment does not violate the values of the community or a fundamental rule of law.⁷¹

⁶⁵ Garcimartin and Saumier *Recognition and Enforcement* 65; Christopher Forsyth, *Private International Law: the Modern Roman-Dutch Law Including the Jurisdiction of the High Courts* (5th edn, Juta 2012) 464.

⁶⁶ Garcimartin and Saumier 'Recognition and Enforcement' 65; According to Garcimartin and Saumier (at 65) the defence of public policy also overlaps with the defence of due process of law (natural justice) in some states.

⁶⁷ Article 458(e) of the TCPCE; article 496(5) of the DCPCE uses the same words too.

⁶⁸ Ibrahim, 'Execution of Foreign Judgments' 31.

⁶⁹ Ibrahim, 'Execution of Foreign Judgments' 31. According to Ibrahim these criteria include fraud; a foreign judgment that contradicts judgments of the requested state; foreign judgments related to administrative, penal and tax issues, etc.

⁷⁰ Article 813(1) is included under Chapter 12 of the TCCE.

⁷¹ According to Bahta, 'Recognition and Enforcement' 34; Ibrahim, 'Execution of Foreign Judgments' 30-31, a foreign judgment is refused recognition on the ground of public policy if that judgment is repugnant to the fundamental economic, legal, moral, religious, social, and political standards of particular society or a particular state.

2.3.4 Reciprocity

The principle of reciprocity states that courts of one country should recognise and enforce judgments of another country if that other country is prepared to do the same.⁷² Reciprocity is used as ‘a self-help measure designed to ensure respect for a state’s judgment by another state’.⁷³ However, the principle is criticised for victimising innocent individuals for the failure of their states to make reciprocity agreements.⁷⁴ It is argued that the principle of reciprocity should be ‘absolutely rejected’ as it has a ‘retrograde tendency’.⁷⁵ This could be the reason that many countries do not impose the reciprocity test for the recognition and enforcement of foreign judgments⁷⁶ though, on the other hand, many other countries retain it.

Based on article 458(a) of the TCPCE, Eritrea retains the reciprocity test.⁷⁷ As stated in the previous paragraph, the reciprocity test victimises innocent individuals. The matter becomes worse in cases of child support orders since the victims of the reciprocity impediments are children who should otherwise be protected by every country.⁷⁸ Hence, removal of the reciprocity requirements in the recognition and enforcement of foreign child support orders could be one mechanism to enhance the rights of every child. Further, courts should apply the reciprocity test restrictively. This means courts should not refuse enforcement of foreign child support orders unless

⁷² John O’Brien, *Conflict of Laws* (2nd edn, Cavendish Publishing Limited 1999) 263.

⁷³ Samuël Teshale, ‘Reciprocity with Respect to Enforcement of Foreign Judgements in Ethiopia: a Critique of the Supreme Court’s Decision in the *Paulos Papassinous Case*’ [2000] 12 AJICL 569-578, 571.

⁷⁴ Ibrahim, ‘Execution of Foreign Judgments’ 24.

⁷⁵ Gillespie GE (tr), *The Theory and Practice of Private International Law* (2nd edn, William Green & Sons 1892) 317.

⁷⁶ According to Ibrahim, ‘Execution of foreign Judgments’ (at 24) countries such as Argentina, Brazil, and some US states (eg New York and California) do not impose the reciprocity test. According to Forsyth, *PIL* 417 South African law also does not impose the reciprocity test.

⁷⁷ Article 458(a) of the TCPCE states that ‘[p]ermission to execute foreign judgments shall not be granted unless the execution of Eritrean Judgments is allowed in the country in which the judgment to be executed was given.’

⁷⁸ For instance Article 27(4) of the CRC imposes a duty on all state parties ‘to take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the State Party and from abroad.’ As a signatory to the CRC, Eritrea should inter alia ensure that all children get what is legally due to them.

they prove that the country whose judgment is requested for enforcement refuses to enforce Eritrean judgments.⁷⁹

2.3.5 Finality and enforceability of the decision

Article 458(d) of the TCPCE states: 'Permission to execute a foreign judgment shall not be granted unless ... [it] is final and enforceable'. Two conditions are set under this sub-article: finality and enforceability. The discussion below starts with finality.

A reason for the application of the finality test could be to prevent enforcement of foreign judgments after they have been varied or set aside by the court that made them.⁸⁰ If a foreign judgment is enforced and the foreign court thereafter varies or overturns the previous judgment, it could be detrimental to either of the parties and the principle fails to achieve its main objective. The main objective of enforcement of a foreign judgment is to do justice to everyone and to prevent any country from becoming a safe haven to judgment defaulters.⁸¹

In general, a judgment is regarded as final if the judgment does not leave any rights of the parties to be determined in subsequent proceedings⁸² and if it cannot be varied in the future.⁸³ There are certain common conditions to satisfy the requirement of finality of a judgment: (a) the original judgment cannot be varied or abrogated; (b) the judgment is *res judicata* in the country it was given; (c) if the judgment is *in personam*, it must be for a certain sum of money.⁸⁴

Despite the above three criteria, however, there is no consensus across legal systems as to when a foreign judgment is considered as final.⁸⁵ Under common law legal systems, if a judgment cannot be considered again by the same court in

⁷⁹ Ibrahim, 'Execution of Foreign Judgments' 24.

⁸⁰ Forsyth, *PIL* 457.

⁸¹ Forsyth, *PIL* 417; Henry, Schwartz, and Reynolds, *Guide* 194.

⁸² Marussia Borm-Reid, 'Recognition and Enforcement of Foreign Judgments' (1954) 3 *ICLQ* 49, 55.

⁸³ Paul Torremans and James J. Fawcett (eds), *Private International Law* (15th edn, Oxford University Press 2017) 549.

⁸⁴ Borm-Reid, 'Recognition and Enforcement' 556; Henry, Schwartz, and Reynolds, *Guide* 214; Torremans and Fawcett, *PIL* 550.

⁸⁵ Garcimartin and Saumier. *Recognition and Enforcement* 27.

ordinary proceedings (that is, if it has a *res judicata* effect), it is considered final regardless of whether an appeal lies against it or not.⁸⁶ In England, for instance, a judgment is considered final if it has a *res judicata* effect and cannot be varied or abrogated by the court that made the original judgment.⁸⁷ In contrast, in many civil law system countries if an appeal is pending for a particular judgment or if the time for appeal has not expired, that judgment is not final.⁸⁸ In Germany for instance, a judgment is not final if it is subject to ordinary forms of appeal or review.⁸⁹

Like in many other jurisdictions, the word ‘finality’ is not defined in the TCPCE.⁹⁰ Bahta and Ibrahim, however, argue that a foreign judgment is not final according to the TCPCE if the time for appeal has not expired or if an appeal lies against it.⁹¹ Based on this argument a foreign judgment under appeal or one whose time for appeal has not expired cannot be enforced, as the judgment fails to satisfy the finality test under the TCPCE.⁹² However, article 332 of the TCPCE states:

An appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the Appellate Court may order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree, but the Appellate Court may for sufficient cause order stay of execution of such decree.

Although article 332 of the TCPCE governs domestic judgments, I argue that there is no limitation which entails that it cannot govern foreign judgments as well, since there is no specific provision that governs the effect of appeal on foreign judgments. In addition, the TCPCE was mostly prepared based on the 1908 Indian Civil Procedure Code⁹³ and since India is a common law country, (but with traces of civil law in it)⁹⁴

⁸⁶ Garcimartin and Saumier, *Recognition and Enforcement* 27.

⁸⁷ Torremans and Fawcett, *PIL* 549 and 550.

⁸⁸ Garcimartin and Saumier ‘Recognition and Enforcement’ 27.

⁸⁹ Dieter Martiny, ‘Recognition and Enforcement of Foreign Money Judgments in the Federal Republic of Germany’ (1987) 35 *The American Journal of Comparative Law* 721, 732.

⁹⁰ (Ibrahim, ‘Execution of Foreign Judgments’ 28.

⁹¹ Bahta, ‘Recognition and Enforcement’ 119-20; Ibrahim, ‘Execution of Foreign Judgments’ 29.

⁹² Bahta, ‘Recognition and Enforcement’ 119-20; Ibrahim, ‘Execution of Foreign Judgments’ 29.

⁹³ Ibrahim, ‘Execution of Foreign Judgments’ 21.

⁹⁴ Farrukh Khan, ‘How Common Is Common Law in India?’

<<https://www.legalserviceindia.com/legal/article-4807-how-common-is-common-law-in-india-.html>> accessed 19 April 2022.

the rule under the common law on this issue is most probably to be applied in India too. Recognition and enforcement under the TCPCE in particular are said to adhere to the common law approach.⁹⁵ Hence, the rule under the TCPCE seems to follow the common law approach. Therefore, contrary to what Bahta and Ibrahim have argued,⁹⁶ it is my view that a foreign judgment is final and conclusive under the TCPCE even if the time for appeal is not expired or even if an appeal lies against it.

Another circumstance where the finality requirement could be determined is concerning judgments given in default. Where a default judgment is given in a country against a defendant who is allowed to apply for rescission of the judgment within a specific period, that judgment is not regarded as final until the prescribed period has elapsed.⁹⁷ Under the German law, for instance, a defendant is allowed to apply within two weeks for the rescission of a default judgment without raising reasons for the rescission. The judgment is not final until the two-week period has expired.⁹⁸ After the two weeks, however, the judgment is regarded as final.⁹⁹ In other legal systems where no period is specified for an application to rescind a default judgment, the judgment becomes final 'once the possibility of rescission becomes remote'.¹⁰⁰ In Eritrea, judgments given in default can be rescinded '...within one month of the day when he [the debtor] became aware of such decree or order'.¹⁰¹ Hence, foreign judgments given in default can be recognised and enforced in Eritrea only if a period of one month has elapsed from the day where the judgement debtor knows about it.

Contrary to the finality requirement, the prescription period is another condition for the recognition and enforcement of foreign judgments. To be recognised and enforced, a foreign judgment should not be 'superannuated'.¹⁰² The period of limitation applies only in cases of arrears that are already due and does not affect future maintenance

⁹⁵ Ibrahim, 'Execution of Foreign Judgments' 20.

⁹⁶ Bahta, 'Recognition and Enforcement' 119-20; Ibrahim, 'Execution of Foreign Judgments' 29.

⁹⁷ Torremans and Fawcett, *PIL* 549.

⁹⁸ Forsyth, *PIL* 459.

⁹⁹ Forsyth, *PIL* 459.

¹⁰⁰ Forsyth, *PIL* 459. According to Forsyth, this is the rule in South Africa according to the decision of some courts and the arguments of some of the leading authors of the country in this field.

¹⁰¹ Article 78(1) of the TCPCE.

¹⁰² Forsyth, *PIL* 419.

orders.¹⁰³ However, there is no unanimity as to which law should govern the prescription period of a judgment. Garcimartin and Saumier¹⁰⁴ recommend that the period of limitation should be governed by the law of the enforcing state. The Convention on the International Recovery of Child Support and Other Forms of Family Maintenance of 23 November 2007 (Hague Convention of 2007 hereinafter) on the other hand states that both the law of the rendering and of the enforcing states should be compared and the one with the longer period of limitation should prevail.¹⁰⁵ In Eritrea, the prescription period for arrears in respect of child support is three months from the due date.¹⁰⁶ The principle is if maintenance arrears have not been received or are not claimed within three months after their due date, a later claim to collect them is not acceptable unless the creditor proves that such arrears are necessary for his subsistence.¹⁰⁷ The three-month period of limitation under the TCCE seems to be too short and the child would lose benefits that could be necessary for his life, including food, shelter, clothing and other basic needs. Therefore, this short period of limitation contradicts the country's obligation to secure the principle of the best interest of the child.¹⁰⁸

In many jurisdictions, child support orders are, in principle, paid periodically and can be varied over time.¹⁰⁹ The aspect of child support being subject to variation is true particularly in respect of future maintenance orders. Future child maintenance orders

¹⁰³ The Hague Conference on Private International Law, *Practical Handbook for Caseworkers under the 2007 Hague Child Support Convention* (Hague Conference on Private International Law Permanent Bureau 2013) 171.

¹⁰⁴ Garcimartin and Saumier '*Recognition and Enforcement*' 79-80.

¹⁰⁵ Article 32 (5) of the Hague Convention of 2007.

¹⁰⁶ Article 817 of the TCCE.

¹⁰⁷ Maintenance orders, from the very beginning, are decided in favour of a child if courts or other administrative agencies (authorised to do so) find it necessary for the basic needs of the child. Therefore, the necessity criterion under article 817 of the TCCE could not be a convincing argument because the child maintenance order would not have been given at all had that not been necessary for the child. To make matters worse (or may-be better) the courts focus on the reason why a maintenance creditor did not claim in time instead of the necessity criterion under article 817 of the TCCE.

¹⁰⁸ The country is obligated to secure the best interest of the child both under domestic law (article 681(1) of the TCCE) and under international conventions (the country acceded to the CRC on 3 August 1994 and to the ACRWC on 22 December 1999)

¹⁰⁹ In Eritrea, for instance, future child support is varied based on articles 814 and 682 of the TCCE.

can be varied upon proof of change of the financial circumstances of the parties.¹¹⁰ Since child support orders are paid for a longer period of time, the needs of the children and the means of the parents could change and therefore a variation order is given so that children receive the support they need and parents pay proportionate to their means.¹¹¹ In a similar way, provisional maintenance orders can be varied and therefore are not final.¹¹² Hence, in principle, they are not enforced in other jurisdictions. A reason for rejection of enforcement of foreign provisional maintenance orders is that it would be futile if the provisional order were to be varied in the country of rendition after enforcement.¹¹³

On the other hand, arrears which are due cannot be varied.¹¹⁴ Therefore, foreign maintenance orders given for arrears which are due are final and can be enforced in another country unless it is proved that the law of the rendering country permits variation of child support retroactively.¹¹⁵ If the law of the country of rendition permits retroactive variation of maintenance arrears which are already due, then the order cannot be enforced in Eritrea since it is not final.¹¹⁶

The second condition a foreign judgment is required to satisfy under article 458(d) of the TCPCE is the enforceability criterion. Enforceability relates to whether the judgment is capable of being enforced in the state where that judgment was originally made.¹¹⁷ A statement of enforceability is given by the country of rendition.¹¹⁸ The question may arise whether there is any possibility where a foreign court can declare its own judgment unenforceable. After all, there may be doubt if any court can give an unenforceable judgment under its own law.

¹¹⁰ Forsyth, *PIL* 449; Henry, Schwartz, and Reynolds, *Guide* 213.

¹¹¹ Hague Conference, *Practical Handbook* 171.

¹¹² Torremans and Fawcett, *PIL* 549.

¹¹³ Forsyth, *PIL* 457.

¹¹⁴ Henry, Schwartz, and Reynolds, *Guide* 213; Torremans and Fawcett, *PIL* 549.

¹¹⁵ Henry, Schwartz, and Reynolds, *Guide* 213.

¹¹⁶ Forsyth, *PIL* 449.

¹¹⁷ Article 25(1)(b) of the Hague Convention of 2007; Hague Conference, *Practical Handbook* 248-49; Torremans and Fawcett, *PIL* 621. According to the Hague Conference, *Practical Handbook* (at 72) if a foreign judgment needs recognition, only the requirement for enforceability is replaced by a requirement that the decision has effect in the state of origin, because no enforcement of the decision is being requested.

¹¹⁸ Article 457(b) of the TCPCE.

There are circumstances, however, where a valid judgment could be unenforceable under the same law the judgment was originally based on. A foreign judgment could be declared unenforceable by the court of rendition if a stay of execution were to be ordered by a court of appeal, if it were to be overturned on appeal,¹¹⁹ or if prescription has taken place.¹²⁰ In addition, a foreign court could declare that a judgment given by certain administrative authorities is not judicially enforceable.¹²¹ The rationale of the enforceability requirement is that a judgment that is not enforceable in the state of origin should not be enforced elsewhere.¹²²

Hence, except for arrears which are due and cannot be varied retroactively in the country where the order was given, foreign orders for future maintenance, provisional maintenance orders, arrears which are due but can be varied retroactively in the court of the country of rendition, and child support orders given in default (if the law of the country of rendition permits opposition) all fail to satisfy the finality test under the TCPCE and therefore cannot be enforced in Eritrea.

A foreign judgment that is recognised under the TCPCE is enforced in Eritrea as if it had been given by an Eritrean court.¹²³ Therefore, all the mechanisms applied to collect domestic child support orders are used in enforcing foreign child support orders too. The next section will briefly discuss the domestic enforcement mechanisms.

2.4 Mechanisms for enforcement of judgments

In Eritrea there is no special law that governs enforcement of domestic child support orders. Therefore, the rules under the TCPCE that govern enforcement of judgments in general similarly govern enforcement of child support orders.

If a judgment debtor fails to voluntarily satisfy a judgment given against him, the judgment is enforced either by civil or criminal proceedings. Enforcement of

¹¹⁹ Garcimartin and Saumier 'Recognition and Enforcement' 27.

¹²⁰ Hague Conference, *Practical Handbook* 78.

¹²¹ Article 19(3) of the Hague Convention of 2007.

¹²² Garcimartin and Saumier 'Recognition and Enforcement' 27.

¹²³ Article 460(3) of the TCPCE.

judgments by civil proceedings includes attachment of properties,¹²⁴ withholding of income,¹²⁵ garnishment orders,¹²⁶ civil contempt proceedings,¹²⁷ and ordering the debtor to furnish security or obtain surety.¹²⁸ The criminal proceedings include a fine and imprisonment.¹²⁹

In the civil enforcement proceedings there is no sequence as to when to apply each mechanism. Therefore, the discussion hereinafter does not reflect one mechanism's having priority in importance or effectiveness over another.

Attachment of property is one of the mechanisms used to enforce child support.¹³⁰ It is a mechanism where property of the debtor is seized and sold to satisfy a debt.¹³¹ However, not all properties of the debtor are seized to satisfy a debt. Based on article 404 of the TCPCE the necessary wearing-apparel, cooking vessels, bed and bedding; tools and instruments used by the debtor in his profession, trade or art; if the judgment debtor is a farmer, cattle and grains used to earn his livelihood; such amount of food and money which can be used by the debtor for a period of three months; pensions and alimonies; and any other property declared by law to be exempted from attachment are not attached to satisfy a debt.¹³² Properties that can be attached to satisfy a debt include movable and immovable properties;¹³³ shares in movables;¹³⁴ negotiable instruments¹³⁵ etc.¹³⁶ If a debtor has many properties that can be attached to satisfy a debt, the property attached should be the one with a value that corresponds to the amount of the debt already due.¹³⁷ Although attachment

¹²⁴ Article 394(1) of the TCPCE.

¹²⁵ Article 411(1) of the TCPCE.

¹²⁶ Article 409 of the TCPCE.

¹²⁷ Article 389(1)(a) and (b) of the TCPCE.

¹²⁸ Article 382(a)and(b) of the TCPCE.

¹²⁹ Article 625 of the Transitional Penal Code of Eritrea (TPCE hereinafter).

¹³⁰ Article 394(1) of the TCPCE.

¹³¹ Wikeley, *Child Support* 455.

¹³² However, I could not find any other law in Eritrea that exempts certain properties from attachment.

¹³³ Articles 406 and 414 of the TCPCE; agricultural produce (arts 407 and 408 of the TCPCE).

¹³⁴ Article 410 of the TCPCE.

¹³⁵ Article 412 of the TCPCE.

¹³⁶ Although it is not clear whether the list of properties that can be attached under the TCPCE is exhaustive or not, I think the list should be inclusive since properties such as vehicles are commonly used in attachment proceedings.

¹³⁷ Article 394(2) of the TCPCE.

of property is commonly used to enforce child support orders, it may not always be effective since a debtor may not have enough properties to satisfy the debt.

Income withholding is a second mechanism used to enforce child support orders.¹³⁸ Where the property attached is the salary of an employee, the court may send an order to the employer instructing the employer that the amount due must be withheld from such salary.¹³⁹ The employer withholds the amount from the salary of the debtor and remits it to the court¹⁴⁰ so that the court can give the amount to the creditor. Based on article 404(f) of the TCPCE, however, more than two-thirds of the salary of the debtor cannot be withheld to pay a debt. The entire salary of a debtor is exempt from liability to attachment if the salary of the debtor is not more than \$2 per day and if the debtor has no other means of income.¹⁴¹ In addition, more than half of the income of sea-men¹⁴² cannot be withheld to satisfy a debt.¹⁴³ There is no justification as to why special treatment is given to sea-men insofar as income withholding is concerned. The special restriction could be undesirable under certain circumstances. For instance, if the debtor has a large salary and many children to support, the one-half restriction could be detrimental to the children and the custodian parent.

If the employer fails to withhold the salary of a debtor, the law has no remedy.¹⁴⁴ Despite this lacuna, however, income withholding is one of the common mechanisms of enforcement of child support orders in Eritrea.

A third mechanism of enforcement of child support orders under the TCPCE is garnishment orders.¹⁴⁵ Garnishment is an order where a court attaches property of a

¹³⁸ Article 411 of the TCPCE.

¹³⁹ Article 411(1) of the TCPCE.

¹⁴⁰ Article 411(2) of the TCPCE.

¹⁴¹ The restrictions on income of debtors are common in many states although the amount could be different based on the amount of the income and the number of other family members supported by the debtor.

¹⁴² The code does not provide any definition of 'sea-men'.

¹⁴³ Article 121(2) of the Transitional Maritime Code of Eritrea (TMCE hereinafter) and article 404(f) of the TCPCE.

¹⁴⁴ According to William Statsky, *Family Law* (5th edn, West Legal Studies Series 2012) 372 in some US states a fine or imprisonment is imposed on an employer who fails to withhold the income of an employee. Some states go further and make an employer who fails to withhold income liable to pay the amount he fails to withhold from the employee (Henry, Schwartz and Reynolds, *Guide* 136).

debtor held by a third party (such as money in a bank or shares in a corporation) in order to satisfy a debt.¹⁴⁶ Enforcement of child support orders by garnishment orders is, however, not common in Eritrea. The reason may be the effect such an order has for the third party and the restrictions it imposes on the third party for an indefinite period of time.¹⁴⁷

A fourth civil enforcement mechanism under the TCPCE is civil contempt proceedings. If a debtor, who is capable of satisfying a debt, has wilfully failed to do so, the court may order the arrest of the judgment debtor in civil prison for a period not exceeding six months.¹⁴⁸ The purpose of detention under civil contempt proceedings is not punishment but remedial and coercive.¹⁴⁹ This means that the aim of detention under civil contempt proceedings is not to punish the debtor but to forcefully persuade him to pay what is due to the creditor. Therefore, it can be argued that the debtor should be released from detention before the expiry of the six-month period if he satisfies the court order.¹⁵⁰ However, the law does not provide a solution if the debtor, after a six-month period of imprisonment, fails to pay his debt.

Another civil enforcement mechanism commonly used by courts in Eritrea is enforcement through a surety. The courts order the debtor to obtain a surety who can comply with arrears which are already due and with future maintenance. If the debtor fails to pay in due time, the surety is obliged to pay to the extent to which he has rendered himself personally liable.¹⁵¹

In addition to the civil enforcement mechanisms discussed above, failure to pay child support orders is a criminal offence under the TPCE. Based on article 625 of the

¹⁴⁵ According to article 409 of the TCPCE a garnishment order is made by way of a written order of the court prohibiting the creditor from recovering the debt and the debtor from making payment thereof until the further order of the court.

¹⁴⁶ *Garner BA* (editor in chief), *Black's Law Dictionary* (9th edn, West Publishing Co. 2009) 749-50.

¹⁴⁷ Article 409(1) of the TCPCE states that the court shall made a written order prohibiting the creditor from recovering the debt and the debtor from making payment thereof until a further order of the court has been made.

¹⁴⁸ Article 389(1) of the TCPCE. Although the law imposes incarceration of a maintenance debtor in a civil prison, there is no separation of civil and criminal prisons in Eritrea.

¹⁴⁹ Henry, Schwartz and Reynolds, *Guide* 152 and 156; Sedler, *Ethiopian Civil Procedure* 273.

¹⁵⁰ Sedler, *Ethiopian Civil Procedure* 273.

¹⁵¹ Article 382 of the TCPCE.

TPCE, a person who fails to pay maintenance is punishable ‘up-on complaint’¹⁵² with a fine or simple imprisonment not exceeding six months.¹⁵³ In addition, someone who neglects and abandons children without care can be punished with simple imprisonment or a fine.¹⁵⁴ The purpose of criminal detention is to punish the offender for his failure to pay arrears which are already due.¹⁵⁵ However, criminal prosecution is not an effective mechanism of enforcing child support orders as the primary source of the income of the debtor, particularly if he is a wage earner, ‘dries up’ with his imprisonment.¹⁵⁶ Despite its existence under the TPCE, criminal contempt proceedings are not a common mechanism of enforcing child support orders in Eritrea.

Effective enforcement of child support orders was needed more than ever during the Covid-19 pandemic since the custodian parent may have lost her job. However, enforcement was more problematic during that period since the courts which are authorised to enforce child support orders were not functioning for about seven months,¹⁵⁷ and in some parts of the country they were not fully functioning until mid-2021. In addition, restrictions on movement, both domestic and cross-border, aggravated the problem. Even now domestic movement is not fully functioning¹⁵⁸ and affects enforcement of child support orders negatively.

¹⁵² ‘Punishment up-on complaint’, according to the TPCE, means that the offence is not committed against the public but against individuals. Hence, a claim is not instigated by a public prosecutor but by the individual who is the victim of the accused.

¹⁵³ Under the TPCE, there is a difference between simple and rigorous imprisonment. According to article 105 of the TPCE, simple imprisonment is a sentence applicable to offences of a not very serious nature committed by persons who are not a serious danger to society, whereas rigorous imprisonment, according to article 107 of the TPCE, is a sentence applicable only to offences of a very grave nature committed by offenders who are particularly dangerous to society. The conditions of enforcement of rigorous imprisonment are more severe than those of simple imprisonment. Besides providing for the punishment and for the rehabilitation of the offender, the sentence of rigorous imprisonment is intended also to provide for a strict confinement of the offender and for special protection to society.

¹⁵⁴ Article 626 of the TPCE

¹⁵⁵ Statsky, *Family Law* 370.

¹⁵⁶ Elizabeth D. Katz, ‘Criminal Law in a Civil Guise’ (2019) 86 *University of Chicago Law Review* 1241, 1309; Garrett WW, ‘Alimony and Child Support Enforcement’ [1979] *Fam Advoc* 18-21 and 42-44, 42; Statsky, *Family Law* 370.

¹⁵⁷ Courts were totally closed from 26 March 2020 to 15 October 2020.

¹⁵⁸ Private buses which were used by the majority of the population in Eritrea, particularly in rural areas, are not yet allowed to transport people (as at Jun 2023).

2.5 Conclusion

In this chapter it was indicated that, in Eritrea, recognition and enforcement of foreign child support orders are governed under the TCPCE. According to the TCPCE, recognition and enforcement of foreign judgments are based on statute and treaty. Recognition and enforcement of foreign child support orders cannot be made based on the statutory provision of the TCPCE due to the finality test. As foreign child support orders are varied over time in many jurisdictions, the finality test under the TCPCE cannot be met in most cases. Recognition and enforcement of foreign child support orders based on treaty are not practical in Eritrea because the country has not concluded a treaty of judicial assistance with any other country yet.

Where all the statutory conditions under the TCPCE are fulfilled, a foreign judgment receives recognition in Eritrea and is enforced by the same mechanisms used to enforce domestic child support orders. The mechanisms used to enforce child support orders are civil and criminal proceedings. However, the enforcement mechanisms have drawbacks. For instance, the law does not provide a solution if the employer of the debtor employee fails to withhold the income of the debtor after a court ordered the employer to withhold the wage of the employee. Further, if a court ordered the imprisonment of a debtor for not more than six months, the law has no solution if the debtor still fails to pay his debt after the six-month period has passed. Furthermore, imprisonment of the debtor indirectly aggravates the problems of the child since imprisonment renders the debtor unable to work and hinders the child from getting what is due to him. In addition, imposing a fine on the debtor does not benefit the child because the money which should have been given to the child goes to the government instead.

Therefore, it is concluded that foreign child support orders cannot effectively be recognised and enforced under the current laws of Eritrea.

The next chapter will discuss the recognition and enforcement of foreign child support orders in South Africa and will explain whether Eritrea can learn from the laws and experiences of South Africa.

Chapter 3

The Current Legal Position in South Africa on Recognition and Enforcement of Foreign Child Support Orders

3.1 Introduction

Effective enforcement of child support orders is a constitutional right in South Africa,¹⁵⁹ and the state has a duty to prevent parents from failing to comply with their duty to support their children.¹⁶⁰ The function of the state is to create a well-structured apparatus to enforce child support orders effectively.¹⁶¹ Children's domestic maintenance rights are protected and enforced under the Maintenance Act 99 of 1998 (Maintenance Act hereinafter).¹⁶² On the other hand, recognition and enforcement of foreign child support orders are governed by the Reciprocal Enforcement of Maintenance Orders Act 80 of 1963 (REMOA hereinafter), Reciprocal Enforcement of Maintenance Orders (countries in Africa) Act 6 of 1989 (REMOA Africa hereinafter), and the rules of the common law.¹⁶³ However, the states designated under the REMO Africa have become part of South Africa. Hence, this Act

¹⁵⁹ *Bannatyne v Bannatyne (Commission for Gender Equality, as Amicus Curiae)* 2003 (2) SA 363 (CC) [17]. In this case, the CC stated that effective enforcement of child support orders secures the paramount principle of the best interest of the child which is enshrined under section 28 of the Constitution. The CC further stated that since divorced women are usually the care giving parents of their children, enforcement of child support orders raises issues of gender equality which is enshrined under section 9(3) of the Constitution: [17] and [29-30]. The constitutionality of effective enforcement of child support orders was reiterated in *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) [69]. In this case, the CC stated that 'within the bounds of the Constitution, effective relief [must] be granted for the infringement of any of the rights entrenched in it... [A]n appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced... The courts have a particular responsibility in this regard and are obliged to "forge new tools" and shape innovative remedies, if needs be, to achieve this goal.'

¹⁶⁰ Tshepo L. Mosikatsana, 'Children's Rights and Family Autonomy in the South African Context: A Comment on Children's Rights under the Final Constitution' (1998) 3 Mich. J. Race & L. 341, 388-89 <<https://repository.law.umich.edu/mjrl/vol3/iss2/2>> (accessed 16 September 2020).

¹⁶¹ Brigitte Clark, 'The South African Child's Right to Maintenance – a Constitutionally Enforceable Socio-Economic Right?' (a conference paper delivered at the 4th World Congress on Family Law and Children's Rights, Cape Town 20 – 23 March 2005) 5 <<https://scholar.google.com/scholar?cluster>> (accessed 9 April 2021).

¹⁶² Sections 26-31 of the Maintenance Act 99 of 1998 govern the domestic enforcement mechanisms.

¹⁶³ South African Law Commission (SALC hereinafter), Issue Paper 21 (Project 121) *Consolidated Legislation Pertaining to International Co-operation in Civil Matters* (SALC 2003) 4.

is not currently in use.¹⁶⁴ This chapter will discuss the procedural and substantive requirements applied under the rules of the South African common law and the REMOA.

3.2 Recognition and enforcement of foreign judgments based on the common law

Under the rules of the common law 'a foreign judgment is not directly enforceable but constitutes a cause of action.'¹⁶⁵ Hence, the creditor has to institute a fresh civil action for enforcement.¹⁶⁶ Before the civil action is instituted, however, the foreign judgment should satisfy some procedural requirements.

The foreign judgment and all the documents attached to it should be certified copies and should be translated to the working language of the local courts.¹⁶⁷ In addition, all the documents have to be authenticated according to the Rules of Court.¹⁶⁸ Then all the certified and authenticated documents are sent to the debtor with the summons.¹⁶⁹

One thing that should be clear from the outset is that South African courts do not examine the merits of foreign judgments.¹⁷⁰ It is not the concern of the local court to examine whether a foreign judgment is right or wrong, or whether or not it agrees with the foreign court's judgment.¹⁷¹ The duty of the local court is to examine whether or not the foreign judgment satisfies all the common law requirements in respect of recognition and enforcement.

¹⁶⁴ SALC, *International Co-operation* (Report 2003) 16; Christopher Forsyth, *Private International Law: the Modern Roman-Dutch Law Including the Jurisdiction of the High Courts* (5th edn, Juta 2012) 451.

¹⁶⁵ SALC, *International Co-operation* (Report 2003) 10-11; Christian Schulze, 'Practical Problems Regarding the Enforcement of Foreign Money Judgments' (2005) 17 SA Merc LJ 125, 126; Saloni Khanderia, 'The Hague Conference on Private International Law's Proposed Draft Text on the Recognition and Enforcement of Foreign Judgments: Should South Africa Endorse it?' (2019) 63 JAL 413, 416.

¹⁶⁶ SALC, *International Co-operation* (Report 2003) 10-11.

¹⁶⁷ Forsyth, *PIL* 474.

¹⁶⁸ Forsyth, *PIL* 474.

¹⁶⁹ Forsyth, *PIL* 474.

¹⁷⁰ HR Hahlo, 'The Finality of Foreign Default Judgments' (1969) 86(3) SALJ 354, 354; Forsyth, *PIL* 468-69; Khanderia, 'Hague Conference' 420.

¹⁷¹ Forsyth, *PIL* 468.

Under the common law, the material requirements a foreign judgment is required to satisfy are:¹⁷²

- a. The foreign court which pronounces the judgment should have international competence to adjudicate the case.
- b. The judgment should be final and conclusive and should not have prescribed.
- c. The judgment should not be against public policy.
- d. The judgment should not be one obtained by fraud.
- e. The judgment should not be related to penal or revenue laws. In addition, it should not violate the Protection of Businesses Act 99 of 1978.

The criteria mentioned above are necessary to ensure that only judgments which have been given based on the law of the foreign country, judgments which have been decided based on due process of law, and those that are not against the public policy of the enforcing state, are recognised and enforced. However, viewed in terms of efficiency and financial costs, certain of the requirements listed above cause great expense and delay. The finality requirement further creates a particular hindrance for recognition and enforcement of foreign child support orders. Hence, the discussion in this section will focus mainly on the latter issue.

The requirement that a foreign judgment should be final and conclusive means that all issues of a case between the same parties should have been decided once and for all by a court.¹⁷³ In short, a foreign judgment satisfies the finality and conclusivity test if it has a *res judicata* effect on the parties.¹⁷⁴ The finality of a judgment, as a rule, is not affected by appeal.¹⁷⁵ A judgment is enforceable even though it is still pending on appeal.¹⁷⁶ In addition, the court has a discretion whether or not to enforce a

¹⁷² *Jones v Krok* 1995 (1) SA 677 (A) 14.

¹⁷³ Schulze, 'Practical Problems' 131.

¹⁷⁴ Hahlo 'Finality of Foreign Default Judgments' 354; Schulze, 'Practical Problems' 131.

¹⁷⁵ Hahlo, 'Finality of Foreign Default Judgments' 454; Forsyth, *PIL* 458; Schulze, 'Practical Problems' 131.

¹⁷⁶ Citing the *Rosenstrauch v Korb* 1931 GWL 103 case, PSG Leon, '*Roma non locuta est: the recognition and enforcement of foreign judgments in South Africa*' (1983) 16(3) CILSA 325, 342-43, states that it is a settled law in South Africa that the possibility of appeal does not destroy the finality of a judgment. However, Hahlo ('Finality of Foreign Default Judgments' 354) argues that the rule that states that the possibility of an appeal does not destroy the

foreign judgment which is appealable.¹⁷⁷ However, if a stay of execution is granted in the foreign court pending appeal then the judgment cannot be enforced in South Africa.¹⁷⁸

Another situation where the finality requirement is affected is in case of default judgments. Foreign default judgments are not enforced in South Africa unless the debtor waives his right to contest the judgment or until the period to contest the judgment under the foreign law has expired.¹⁷⁹ A problem with a foreign default judgment arises if the foreign law where the judgment originates from has no period of limitation as to when a debtor can contest the judgment.¹⁸⁰ In such circumstances the judgment remains inconclusive until the debtor brings action to contest the judgment in the foreign court or until he waives his right to do so.¹⁸¹

According to Hahlo, the rule which states that a foreign default judgment is not final as long as the defendant can apply to rescind it should not be applicable in all cases.¹⁸² If there is a possibility of rescission, Hahlo suggests, the finality of a foreign default judgment should not be determined by strict rules of law but by a common sense test.¹⁸³ Forsyth supports Hahlo's argument where he states that there should be an exception to the finality and conclusivity test and the remoteness of the time for rescission of default judgments should be considered.¹⁸⁴

The suggestion of the authors that there should be an exception to the finality criterion in the case of foreign default judgments is particularly convincing in the case of child support orders since the Constitution affords paramount importance to the

finality of a judgment is illogical, because it does not make any difference whether a foreign judgment is rescinded by a court of first instance or by an appellate court.

¹⁷⁷ Forsyth, *PIL* 458.

¹⁷⁸ Schulze, 'Practical Problems' 131-32.

¹⁷⁹ South African Law Reform Commission (SALRC hereinafter), (Project 121) *Consolidated Legislation Pertaining to International Judicial Co-operation in Civil Matters Report* (SALRC December 2006) 57-58; Forsyth, *PIL* 460.

¹⁸⁰ Forsyth, *PIL* 459; SALRC, *International Judicial Co-operation* (Report 2006) 57.

¹⁸¹ Hahlo, 'Finality of Foreign Default Judgments' 355; Forsyth, *PIL* 460; SALRC, *International Judicial Co-operation* (Report 2006) 57.

¹⁸² Hahlo, 'Finality of Foreign Default Judgments' 355.

¹⁸³ Hahlo, 'Finality of Foreign Default Judgments' 358.

¹⁸⁴ Forsyth, *PIL* 460. According to Forsyth (*PIL* 459), Kahn also suggested that 'finality in default judgments is reached once the possibility of rescission is remote'.

principle of the best interest in all matters concerning children.¹⁸⁵ However, the researcher disagrees with Hahlo's general suggestion that the finality of foreign default judgments should not be determined by rigid rules but by the common sense test, because the common sense test could lead to conflicting judgments, as common sense could be interpreted differently by different judges. If South Africa had a specific period of limitation as to when a debtor could contest a default judgment, it would have been better to govern the issue by way of a specific rule instead of the common sense test since a specific rule would provide certainty and clarity. However, as the general understanding in current South African law is that there is no specific time limit as to when default judgments can be rescinded,¹⁸⁶ Hahlo and Forsyth's common sense test is the only suitable suggestion.

Most of the time maintenance orders are paid periodically.¹⁸⁷ In addition, the orders can be varied over time by the courts that pronounced them. Thus, due to the finality requirement, future maintenance orders¹⁸⁸ and provisional maintenance orders are not enforceable under the common law because they fail to satisfy the finality and conclusivity test. In addition, maintenance arrears, in some countries, are varied subsequently by the court that made the original order.¹⁸⁹ Therefore, arrears arising from orders made in countries that allow variation of the original order are not enforced under the common law either.¹⁹⁰ Hence, to enforce foreign arrears that fall due after registration of the foreign judgment in South Africa, the creditor has to request the foreign court that gave the original order to give another final order so that arrears would satisfy the requirement of finality under the rules of the common law.¹⁹¹

¹⁸⁵ Section 28(2) of the Constitution.

¹⁸⁶ Forsyth, *PIL* 459.

¹⁸⁷ Forsyth, *PIL* 449.

¹⁸⁸ Christa Roodt, 'The Recognition and Enforcement of Foreign Judgments, Maintenance Orders and Arbitral Awards: a Proposal for Structural Reform' [2004] *Codicillus* 64, 65; Christa Roodt, 'Recognition and Enforcement of Foreign Judgments: Still a Hobson's Choice among Competing Theories?' (2005) 38 *CILSA* 15, 20; Forsyth, *PIL* 449.

¹⁸⁹ Forsyth, *PIL* 449.

¹⁹⁰ Forsyth, *PIL* 449.

¹⁹¹ Forsyth, *PIL* 451.

Then the new foreign order has to pass the registration process in the local courts again¹⁹² because 'recognition... is a *conditio sine qua non* of enforcement'.¹⁹³

Another issue under the common law is whether a foreign judgment has expired due to prescription. In South African private international law, procedural matters are governed by the *lex fori*¹⁹⁴ while substantive issues are governed by the *lex causae*.¹⁹⁵ According to Neels:¹⁹⁶

[A] distinction is made between strong and weak prescription rules (so-called dual characterisation). Strong prescription rules extinguish both the remedy and the underlying right, whereas weak prescription rules extinguish the remedy only. Strong prescription rules form part of substantive law and are governed by the law applicable to substantive-law issues (eg, the proper law or *lex causae* of the contract). Weak prescription rules form part of procedural law and are governed by the law of *the forum*. As liberative prescription in South Africa ... extinguishes both the remedy and the underlying right, the rules and principles in this regard are classified as strong or substantive.¹⁹⁷

Although prescription is regarded as substantive in South African law, the issue of whether prescription of a foreign judgment (including a child support order) should be determined based on the laws of the *lex causae* or the *lex fori* has not yet been fully resolved. Conflicting judgments have been delivered on the issue.¹⁹⁸ In the important case of *Society of Lloyd's v Price*, *Society of Lloyd's v Lee* the *lex causae* was applied in determining prescription, but the decision was based on policy

¹⁹² Forsyth, *PIL* 451.

¹⁹³ Forsyth, *PIL* 451.

¹⁹⁴ Forsyth, *PIL* 23.

¹⁹⁵ Forsyth, *PIL* 85; *Society of Lloyd's v Price*, *Society of Lloyd's v Lee* 2006 (5) SA 393 (SCA) [10].

¹⁹⁶ Jan L. Neels, 'Falconbridge in Africa' (2008) 4 J Priv Int'l L 167, 173-74.

¹⁹⁷ According to the *Society of Lloyd's v Price*, *Society of Lloyd's v Lee* [15 and 16], prescription under the Prescription Act 18 of 1943 was characterised as procedural. However, the Prescription Act 68 of 1969 changed the nature from procedural to substantive.

¹⁹⁸ Neels, 'Falconbridge in Africa' 183-84. According to Neels, the *lex fori* was applied in the cases of *Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd* 1986 (3) SA 509 (D); *Minister of Transport Transkei v Abdul* 1995 1 SA 366 (N). The proper law of the contract (usually, the *lex causae*) was applied in the cases of *Laurens v von Höhne* 1993 (2) SA 104 (W) and *Society of Lloyd's v Romahn* 2006 (4) SA 23 (C). In addition, the proper law of the contract was applied in the *Kühne & Nagel AG Zurich v APA Distributors (Ply) Ltd* 1981 (3) SA 536 (W), according to Forsyth, *PIL* 85.

considerations.¹⁹⁹ The court did not categorically find that prescription should always be governed by the *lex causae*.

The discussion in this section shows that reciprocity is not a prerequisite for the recognition and enforcement of foreign judgments under the common law. Recognition and enforcement under the modern Roman-Dutch common law are based on comity.²⁰⁰ This is one positive characteristic of the Roman-Dutch system, as states do not pay the price for their failure to make reciprocity agreements: instead, reciprocity 'victimises innocent individuals'.²⁰¹

A request by the creditor to a foreign court to give a final order for every arrear amount accumulated and the re-registration of every order of the foreign court in the local courts takes a lot of time and resources of the creditor as well as the debtor. Hence, enforcement of child support orders under the common law may cost more than the outstanding arrears and as a result creditors may not be motivated to claim what is due to them.²⁰² This scenario is heart-breaking, considering minor children are the creditors most of the time.²⁰³ To resolve this problem, South Africa promulgated the REMOA, which is discussed hereunder.

3.3 Recognition and enforcement of foreign judgments based on the REMOA

To ease the difficulty of recognition and enforcement of foreign child support orders under the rules of the common law, the law empowers the Minister of Justice and Correctional Services to designate countries for the purpose of recognition and

¹⁹⁹ *Society of Lloyd's v Price, Society of Lloyd's v Lee* [31].

²⁰⁰ Roodt, 'Hobson's Choice' 23; Forsyth, *PIL* 42.

²⁰¹ Roodt, 'Hobson's Choice' 23.

²⁰² Amy Lauren Brown, 'Cross Border Recovery of Child Maintenance: Should South Africa Ratify and Implement the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance?' (LLM thesis, University of the Western Cape 2016) 88.

²⁰³ With the promulgation of the Constitution of the Republic of South Africa, 1996 (the Constitution hereinafter), the procedure under the common law also violates constitutional rights of children because s 28(2) of the Constitution requires that the best interest of the child should be of paramount importance in every matter concerning the child.

enforcement of child support orders.²⁰⁴ The Minister has designated countries for that purpose.²⁰⁵

Designation eases the difficulty of recognition and enforcement of foreign child support orders because decisions that originate in designated countries are registered and enforced directly in the local courts after they pass through some diplomatic channels.²⁰⁶ No formal requirements are stipulated for judgments originating from designated countries. In addition, a foreign provisional child support order can be recognised and enforced under the REMOA after an inquiry has been made by local maintenance officers.²⁰⁷ Further, designation reduces expenses on the part of the creditor as the confirmation and enforcement processes are completed by the authorities of the country where the judgment originates and the authorities of the enforcing country.²⁰⁸

A maintenance order which is made in a country designated under the REMOA has to pass through diplomatic channels before it is registered and enforced by the local courts in South Africa. First, the competent authority in the foreign country must transmit the judgment to the Minister of Justice and Correctional Services of South

²⁰⁴ Section 2(1) of the REMO as amended by ss 46 and 47 of Act 97 of 1986.

²⁰⁵ According to Forsyth, *PIL* 450 and Brigitte Clark, *Handbook of the South African Law of Maintenance* (4th edn, LexisNexis 2016) 245, the countries proclaimed under the REMO are: Australia (Capital Territory, New South Wales, Northern Territory, State of Queensland, South Australia, Tasmania, State of Victoria, Western Australia), Botswana, Province of Ontario (Canada) Cocoa (Keeling) Islands, Cyprus, Fiji, Guernsey, Isle of Man, Kenya, Lesotho, Malawi, Mauritius, New Zealand, Nigeria, Norfolk Island, Sarawak, Singapore, St Helena, Swaziland(now Eswatini), Zambia, Zimbabwe (under Proc R345 of 1960); Isle of Jersey (under Proc R131 of 1961); British Columbia (Canada) (under Proc R175 of 1962); Hong Kong (under Proc R274 of 1963); North West Territories (Canada) (under Proc R60 of 1970); California (USA) (under Proc R1 of 1971); Alberta (Canada) (under Proc R175 of 1971); United Kingdom (England, Northern Ireland, Scotland, Wales) (under Proc R9 of 1976); Province of Manitoba (Canada) (under Proc R19 of 1985); Germany (under Proc R68 of 1988); Namibia (under Proc R1837 of 1993); New Jersey (USA) (under Proc R1372 of 1994); Florida (USA) (under Proc R1802 of 1994).

²⁰⁶ Section 3 of the REMOA.

²⁰⁷ Section 4(1) of the REMOA.

²⁰⁸ Section 3 of the REMOA. Despite the above-mentioned advantages, however, recognition of foreign child support orders under the REMOA has a weakness. According to Brown ('Cross Border Recovery' 63), since the process is paper based the respondent has no option to contest the process of recognition regardless of his reasons for wanting to do so. However, a debtor can raise the defence of lack of means if he is charged for failure to pay maintenance of a duly registered foreign child support order.

Africa.²⁰⁹ After that, the Minister or any other person acting under the authority of the Minister transmits the order to a local maintenance court which is located in the jurisdiction where the maintenance debtor resides for registration.²¹⁰ In addition, a foreign maintenance judgment which is decided in a country designated under the REMOA must be certified²¹¹ before it is registered in the maintenance courts.²¹²

When a foreign judgment passes all the above-mentioned formal and procedural requirements, it is registered in the maintenance court. Registration of foreign child support orders under the REMOA, however, has only prospective effect.²¹³ Hence, the REMOA is not applicable in case of arrears accumulated before registration. Therefore, such arrears have to be recovered based on the rules of the common law.²¹⁴

A provisional maintenance order is also recognised and enforced under the REMOA after passing through all the diplomatic channels and satisfying certain conditions.²¹⁵ A maintenance court should confirm a provisional foreign maintenance order before registering and enforcing it.²¹⁶ In addition to all the procedural requirements a final foreign maintenance order must satisfy, a provisional maintenance order should also specify witnesses who could testify in the case and specify any opposition which was made in the foreign court.²¹⁷

A maintenance officer in the maintenance court then has to make inquiries²¹⁸ with a view to confirming the order.²¹⁹ During the inquiry, the maintenance officer may

²⁰⁹ Section 3 of REMOA.

²¹⁰ Section 3 of REMOA.

²¹¹ Section 3 of the REMOA. However, the REMOA does not specify who should certify the foreign judgments.

²¹² According to Forsyth (*PIL* 450-51), the registration process is administrative because the clerk of the court has no discretion regarding the registration process coming from the proclaimed countries under the REMOA. Hence a person who is not satisfied by the registration cannot appeal.

²¹³ Forsyth, *PIL* 451.

²¹⁴ Forsyth, *PIL* 451.

²¹⁵ Section 4(1) of the REMOA; Forsyth, *PIL* 450.

²¹⁶ Section 4(1) of REMOA. According to Forsyth, *PIL* 457 the reason for confirmation of provisional foreign maintenance orders is that it would not be desirable if the foreign court varied the order after it was enforced in South Africa.

²¹⁷ Section 4(1) of REMOA.

²¹⁸ Section 4(1) of REMOA.

summon any person, including the debtor, and may request evidence regarding the earnings of the person who is liable.²²⁰ After making a full inquiry, the maintenance court may confirm the provisional maintenance order with or without variation, may remit the case to the foreign court for collection of further evidence, or may make no order at all.²²¹ If a maintenance court makes any order regarding the foreign provisional maintenance, it can vary or discharge the order at any time if it finds good reason to do so.²²² Any interested person who is not satisfied by the order of a maintenance court may appeal to the provincial or local division of the High Court of South Africa having jurisdiction.²²³ A provisional maintenance order confirmed by the local court is regarded as an order given by the local court.²²⁴

Under the REMOA there are no material requirements which foreign child support orders must satisfy.²²⁵ The one and only requirement is that the country where the judgment originates from should be designated under the Act.

There is debate, however, on whether reciprocity is required under the REMOA. Some authors argue that even though the title of the REMOA refers to reciprocal enforcement there is no specific requirement of reciprocity under the Act.²²⁶ However, the SALRC argues that reciprocity is required under the REMOA.²²⁷ The SALRC argues that with the fulfilment of the reciprocity requirement in mind, the REMOA makes provision (in sections 7 and 8) for the transmission of South African judgments to countries which are designated under the Act.²²⁸

In fact, the REMOA does not provide the conditions on which the Minister of Justice and Correctional Services should base the decision to designate a particular country

²¹⁹ Clark, *Handbook* 119.

²²⁰ Section 4(1) of REMOA.

²²¹ Section 4(3) (a), (b), and (c) of REMOA.

²²² Section 4(3)(d) of REMOA.

²²³ Section 4(4) of REMOA.

²²⁴ Forsyth, *PIL* 450.

²²⁵ SALRC, *International Judicial Co-operation* (Report 2006) 93. According to Forsyth (*PIL* 451) the only defence a maintenance debtor can raise is lack of means to pay the arrears.

²²⁶ FJ Bosman and GJ Van Zyl, 'Children, Young Persons and their Parents' in JA Robinson (ed), *The Law of Children and Young Persons in South Africa* (Butterworth 1997) 72; Roodt 'Hobson's Choice' 19 and 20; Forsyth, *PIL* 450.

²²⁷ Roodt 'Hobson's Choice' 23; SALRC, *International Judicial Co-operation* (Report 2006) 92.

²²⁸ SALRC, *International Judicial Co-operation* (Report 2006) 92.

under the Act. Further, the requirement of reciprocity under section 6 *bis* has been repealed.²²⁹ Hence, in the absence of any requirement by the law it cannot be said that reciprocity is a condition that should be fulfilled under the REMOA.

Once a foreign maintenance order has been registered in South Africa it is deemed to be, for enforcement matters, one decided by the local maintenance courts.²³⁰ Hence, the domestic enforcement mechanisms which are discussed hereinafter then apply to the enforcement of foreign maintenance order.²³¹

3.4 Mechanisms for enforcement of judgments

3.4.1 Civil enforcement mechanisms

Based on section 26(1) of the Maintenance Act, the civil enforcement mechanisms for maintenance orders are a warrant of execution, attachment of emoluments, and attachment of debts. There are conflicting cases on whether or not civil enforcement is restricted to the maintenance courts or whether the High Court also has jurisdiction to enforce maintenance orders.²³² Due to the length restrictions which apply to mini-dissertations, I will not delve into the conflicting cases.

A maintenance creditor can apply for a warrant of execution if the maintenance debtor fails to fulfil his obligation 'for a period of ten days from the day on which the relevant amount became payable or any such order [ie, a maintenance order] was made'.²³³ Then a maintenance court can issue a warrant of execution against the

²²⁹ SALRC, *International Judicial Co-operation* (Report 2006) 92; Forsyth, *PIL* 450.

²³⁰ Section 6 of REMOA.

²³¹ Brown, 'Cross Border Recovery' 76.

²³² *Thomson v Thomson* 2010 (3) SA 211 (W); *PT v LT* 2012 (2) SA 623 (WCC); *JM v LM* 2014 (2) SA 403 (WCC). According to De Jong M and Heaton J 'Post-divorce Maintenance for a Spouse or Civil Union Partner' in Heaton J (ed) *The Law of Divorce and Dissolution of Life Partnerships in South Africa* (Juta Cape Town 2014) 156-61 and Clark, (*Handbook* 117), besides the civil enforcement mechanisms specified under section 26(1) of the Maintenance Act, child support orders can also be enforced by writ of execution ordered by the High Court.

²³³ Section 26(2)(a)(i) of the Maintenance Act. The other orders a maintenance court can give under section 26(2)(a)(i) include: (a) sum of money which is due to the child or to the child's mother for expenses incurred in relation to the birth of the child or for expenses incurred in connection with the maintenance of the child from the date of birth of the child to the date of enquiry (see section 16(1)(a)(ii) of the Maintenance Act); (b) costs related to the services of process of the enquiry (see section 20 of the Maintenance Act); and (c) costs incurring in

movable property of the debtor.²³⁴ If movable property of the debtor is insufficient to satisfy the debt, the court can order the attachment of immovable property of the debtor.²³⁵ The value of properties attached for execution should be sufficient to satisfy the debt fully (inclusive of interest and the cost of execution).²³⁶

Problems of enforcement of child support orders by warrant of execution are: First, the maintenance creditor is required to pay the costs of attachment and storage of the properties to be attached.²³⁷ Hence, the cost of storage and attachment aggravates the financial woes of the maintenance creditor. Second, the maintenance debtor may try to avoid a warrant of execution by registering properties in the names of other persons,²³⁸ which may cause a delay in the process or halt the execution process altogether.

The second civil enforcement mechanism is attachment of emoluments.²³⁹ According to section 1 of the Maintenance Act, emoluments include salary, wages, allowances or any other form of remuneration, whether expressed in money or in kind. Attachment of emoluments is effective if the maintenance debtor is employed and his salary is fixed and is known to the maintenance creditor.²⁴⁰

There are challenges, however, with enforcement of maintenance orders by way of attachment of emoluments. First, enforcement is not effective if the maintenance debtor is self-employed.²⁴¹ In addition, the maintenance creditor is required to give

carrying out of scientific tests related to the paternity of the child (see section 21(4) of the Maintenance Act).

²³⁴ Section 27(1) of the Maintenance Act.

²³⁵ Section 27(1) of the Maintenance Act.

²³⁶ Section 27(1) of the Maintenance Act.

²³⁷ Mothokoa Mamashela, 'Some Hurdles in the Implementation of the Maintenance Act 99 of 1998' [2006] *Obiter* 590, 604-605; M de Jong and KKB Sephai, 'New Measures to Better Secure Maintenance Payments for Disempowered Women and Vulnerable Children' (2014) 77 *THRHR* 195, 199-200; Tamazin L. Coutts, 'A Critical Analysis of the Implementation of the Maintenance Act 99 of 1998: Difficulties Experienced by the Unrepresented Public in the Maintenance Court as a Result of the Poor Implementation of the Act' (LLM Dissertation, University of KwaZulu-Natal 2014) 100 &101.

²³⁸ Mamashela, 'Some Hurdles' 605; Coutts, 'Critical Analysis' 101.

²³⁹ Section 28 of the Maintenance Act.

²⁴⁰ De Jong and Sephai 'New Measures' 200.

²⁴¹ Mamashela, 'Some Hurdles' 603; De Jong and Sephai 'New Measures' 200.

the identity and employee numbers of the maintenance debtor.²⁴² Most of the time, however, this is not possible for the maintenance creditor.²⁴³ Another difficulty with this mechanism is that often employers are not cooperative in deducting the amount of emolument orders from the salaries of their employees or they do not do it correctly.²⁴⁴ In addition, employers charge administrative fees to maintenance creditors instead of to maintenance debtors and this aggravates the financial distress of the maintenance creditors.²⁴⁵ A further drawback of this system is that in some instances employers dismiss employees to avoid the process of emolument attachment orders.²⁴⁶

Based on section 30(1) of the Maintenance Act, attachment of debts is a third civil mechanism to enforce maintenance orders. An order for attachment of debts is an order for the attachment of any debt at present or in future owing or accruing to the maintenance debtor.²⁴⁷ This mechanism is not as effective as it should be because proper investigation is not made whether a maintenance debtor has present or future debts accruing to him.²⁴⁸ In addition, maintenance debtors may close their bank accounts to frustrate the enforcement process and open another account easily.²⁴⁹

In the civil execution mechanisms the maintenance creditor can only choose one remedy at any given time.²⁵⁰ It is argued, however, that 'the maintenance creditor should be allowed to apply in the alternative at the onset' and the court should decide which mechanism can effectively enforce the order.²⁵¹

²⁴² De Jong and Sephai 'New Measures' 200.

²⁴³ De Jong and Sephai 'New Measures' 200.

²⁴⁴ Mamashela, 'Some Hurdles' 603-604; Madelene de Jong, 'Ten-Year Anniversary of the Maintenance Act 99 of 1998 — a Time to Reflect on Improvements, Shortcomings and the Way Forward' (2009) 126 SALJ 590, 602; De Jong and Sephai 'New Measures' 200; Coutts, 'Critical Analysis' 100 & 102. However, based on s 29(4) of the Maintenance Act, a court can make an order against an employer who failed to deduct the amount of the emoluments orders to the extent that he failed to do so.

²⁴⁵ De Jong and Sephai 'New Measures' 200.

²⁴⁶ Mamashela, 'Some Hurdles' 604; Coutts, 'Critical Analysis' 102.

²⁴⁷ Section 30(1) of the Maintenance Act.

²⁴⁸ De Jong and Sephai 'New Measures' 200.

²⁴⁹ De Jong and Sephai 'New Measures' 200.

²⁵⁰ South African Law Reform Commission, Discussion Paper 157 (Project 100B) *Review of the Maintenance Act 99 of 1998* (SALRC May 2022) 145.

²⁵¹ SALRC, *Review of the Maintenance Act* 145.

3.4.2 Criminal enforcement mechanisms

A maintenance debtor who fails to pay on time can be criminally charged and if convicted is liable 'to a fine or to imprisonment for a period not exceeding one year or to such imprisonment without the option of a fine'²⁵² or both the fine and imprisonment.²⁵³ Besides the criminal enforcement mechanisms specified under the Maintenance Act, contempt of court proceedings is another 'recognised method' used for enforcement of child support orders.²⁵⁴ In *Bannatyne v Bannatyne*, the Constitutional Court (CC hereinafter) stated that enforcement of maintenance orders can be secured by way of contempt proceedings in the form of 'process-in-aid' made to the High Court.²⁵⁵

If a maintenance debtor in a criminal prosecution in terms of the Maintenance Act claims lack of means,²⁵⁶ the state must prove that the accused has the ability to pay the debt on time, or that his lack of means was due to his unwillingness to work or due to his misconduct.²⁵⁷

However, punishing a maintenance debtor by imprisonment or imposing a fine does not secure the financial needs of the maintenance creditor. In contrast, they have negative consequences. If a maintenance debtor is imprisoned for his failure to pay maintenance, he may not be able to work; as a result he may not have a means of

²⁵² Section 31(1) of the Maintenance Act. It is not stated in the Maintenance Act how much a maintenance debtor can be fined.

²⁵³ Brown, 'Cross Border Recovery' 72.

²⁵⁴ *Bannatyne v Bannatyne* [20].

²⁵⁵ *Bannatyne v Bannatyne* [20]. According to Marita Carnelley, ('A Review of the Criminal Prosecution and Sentencing of Maintenance Defaulters in South Africa, with Commentary on Sentencing Strategies' (2012) 25 S Afr J Crim Just 343, 353), the elements of the crime of contempt of court include: (1) an existing and valid court order; (2) the order must have come to the attention of the defaulter; (3) the defaulter must have been able to comply with the order; (4) the defaulter must have disobeyed the order; and (5) the non-adherence or disobedience must have been either intentional or negligent. Carnelley further states that the punishment for contempt of court includes any of the sentencing options, including imprisonment.

²⁵⁶ According to Clark (*Handbook* 101) there is no consensus among courts on whether or not lack of means is the only defence.

²⁵⁷ Section 31(2) of the Maintenance Act.

income.²⁵⁸ In addition, if a maintenance debtor is imprisoned it could be difficult for him to find a job once released from custody because of his criminal record.²⁵⁹ Therefore, imprisonment has a negative impact on the child creditor and other dependant family members of the maintenance debtor. Similarly, a fine does not benefit the child or other dependant family members of a maintenance debtor since the money that should have been given to them goes to the state instead.²⁶⁰

To avoid or at least mitigate the negative consequences of a fine or imprisonment, courts are expected to impose appropriate penalties on maintenance defaulters without at the same time 'killing the goose that lays the golden egg'.²⁶¹ Hence, courts are hesitant to criminally sanction maintenance defaulters.²⁶² Often courts suspend fines or imprisonment, and instead 'order the defaulter to pay the arrears together with the existing maintenance order in monthly instalments'.²⁶³ However, this mechanism proves to be ineffective because maintenance defaulters are not threatened by the criminal prosecution as they are aware that they will not easily be fined or imprisoned.

On the other hand, by referring to different court cases which have been decided recently, Carnelley in her 2022 article states that 'the historical approach to always suspend imprisonment sentences *in casu* has hopefully shifted'.²⁶⁴ Further, Carnelley concludes that 'the courts are more prepared to sentence recalcitrant maintenance defaulters to direct imprisonment without the option of a fine, without suspending the

²⁵⁸ Carnelley, 'A Review of the Criminal Prosecution' 356; De Jong and Sephai, 'New Measures' 201; Coutts, 'Critical Analysis' 99; Clark, *Handbook* 106-111; Kruger H, 'Maintenance for Children' in Boezaart T (ed) *Child Law in South Africa* (2nd edn, Juta 2017) 72. In *S v Seroke* 2004 (1) SACR 456 (T) [9], the court stated that maintenance officers or magistrates should consider all the available enforcement options provided under the Maintenance Act. The magistrates or maintenance officers should ensure that the sentence to be imposed will not result in imprisonment of defaulters because imprisonment does not benefit the child who receives maintenance.

²⁵⁹ *S v Seroke* [7]; Brown, 'Cross Border Recovery' 70.

²⁶⁰ *S v Seroke* [8]; De Jong and Sephai, 'New Measures' 201.

²⁶¹ Coutts, 'Critical Analysis' 99.

²⁶² Coutts, 'Critical Analysis' 99-100; De Jong and Sephai 'New Measures' 201.

²⁶³ De Jong and Sephai, 'New Measures' 201.

²⁶⁴ Marita Carnelley, 'Prosecution and sentencing of maintenance defaulters' (2022) 35 S Afr J Crim Just 115, 128.

sentence, and without changing the criminal proceedings into a maintenance inquiry as had previously been the practice.’²⁶⁵

To strike a balance between the effectiveness of criminal sanctions against maintenance defaulters and mitigating the negative effect of the criminal sanctions on the interest of maintenance creditors, many writers²⁶⁶ suggest that other criminal enforcement mechanisms such as ‘periodical imprisonment and correctional supervision should be used more frequently’.²⁶⁷ The writer of the mini-dissertation fully agrees with the suggestion of the authors because the primary goal of enforcement of child support orders is not punishing the defaulter but securing the interest of maintenance creditors.

3.4.3 Reports to credit bureaus

Credit bureau reporting is another mechanism for enforcement of child support orders. Under this mechanism, potential creditors are notified that the debtor is a bad credit risk.²⁶⁸ The aim of the credit bureau reporting mechanism is to stop defaulters from obtaining credit ‘that incurs unnecessary costs which would prevent them from meeting their maintenance obligations’,²⁶⁹ thus ensuring that the payment of maintenance is a priority.²⁷⁰

²⁶⁵ Carnelley, ‘Prosecution and sentencing of maintenance defaulters’ 115.

²⁶⁶ Carnelley ‘A Review of the Criminal Prosecution’ 358–359; Brown, ‘Cross-Border Recovery’ 69, Coutts, ‘Critical Analysis’ 120; Clark, *Handbook* 109 and 110.

²⁶⁷ In *S v Visser* 2004 (1) SACR 393 (SCA) [19], the court ordered that the defaulter be imprisoned for 1440 hours with suspension of 1160 hours for a period of 5 years upon compliance with conditions imposed by the court. In *S v November and three similar cases* 2006 (1) SACR 213 (C) [11], the court recommended that maintenance officers and magistrates should be aware of the different enforcement mechanisms including correctional supervision and periodical imprisonment so that the best interest of the child is secured. According to Clark, (*Handbook* 109 and 110), ‘periodical imprisonment means that after the working week, the defaulter’s freedom is severely curtailed which, in appropriate circumstances, may have the desired effect of bringing the defaulter to his senses. Correctional supervision is a community based punishment which includes house arrest, compensation, employment ... and supervision by a probation officer’. It is also stated that many countries removed enforcement of child support orders by criminal prosecution due to its ineffectiveness (Brown ‘Cross Border Recovery’ 69; Coutts, ‘Critical Analysis’ 120).

²⁶⁸ De Jong and Sephai ‘New Measures’ 212.

²⁶⁹ De Jong and Sephai ‘New Measures’ 212.

²⁷⁰ Coutts, ‘Critical Analysis’ 173.

According to section 31(4) of the Maintenance Act, if a maintenance debtor is criminally convicted for failure to pay maintenance on time, that person's personal particulars are sent to businesses functioning in the granting of credit or in the credit rating of persons. In a civil enforcement mechanism, on the other hand, credit bureau reporting is made after an application for a civil enforcement mechanism has been granted by the courts.²⁷¹ The objective of the prompt reporting of defaulters to credit bureaus is to ensure that defaulters are stopped from obtaining credit at an earlier stage, thus reducing the risk of further defaults in maintenance payments.²⁷² According to the Minister of Justice and Correctional Services, however, the provisions of the Maintenance Act relating to credit bureau reporting have not yet been implemented,²⁷³ because there is a gap in the law: the Maintenance Act does not provide 'a correlative responsibility for the credit bureaus to receive the default orders'.²⁷⁴ It was expected that section 26(2A) of the Maintenance Act would be amended by the end of 2022 to address this gap.²⁷⁵ To the best of the researcher's knowledge, however, the law has not yet been amended.

As highlighted in this section, the civil and criminal mechanisms applied for enforcement of child support orders are not effective. The ineffectiveness of these mechanisms became worse during the Covid-19 lockdown as is discussed below.

3.5 Enforcement of child support orders during the Covid-19 lockdown

On Thursday 26 March 2020 South Africa declared a complete national lockdown due to the Covid-19 pandemic.²⁷⁶ Although the lockdown was necessary to save the lives of the population, many businesses and organisations have gone into liquidation and

²⁷¹ Section 26(2A) of the Maintenance Act (as amended by section 11 of the Maintenance Act 9 of 2015).

²⁷² De Jong and Sephai 'New Measures' 212.

²⁷³ Mayibongwe Maqhina, 'Maintenance Defaulters to be blacklisted' (*Cape Times*, 5 September 2022) <<https://www.iol.co.za/capetimes/news/maintenance-defaulters-to-be-blacklisted-fc975c52-5809-41f7-afa2-ac335a8376a2>> (accessed 24 October 2022).

²⁷⁴ Maqhina, 'Maintenance Defaulters to be blacklisted'.

²⁷⁵ Maqhina, 'Maintenance Defaulters to be blacklisted'.

²⁷⁶ The Disaster Management Act 57 of 2002 in GN R418 GG 43167 of 26 March 2020, 3.

many people have suffered ‘lay-offs, retrenchments and [r]eductions in salary’.²⁷⁷ As a result, many maintenance creditors have lost what they should have got from their debtors. In addition, even though courts can only accept the defences allowed under the Maintenance Act,²⁷⁸ many maintenance debtors failed to pay arrears which are due under ‘a blanket excuse of “due to Covid-19 lockdown” without any clear and convincing proof of their financial decline’.²⁷⁹

In accordance with the country’s complete lockdown, entry into courts was allowed only in respect of ‘urgent and essential matters’.²⁸⁰ Fortunately, however, enforcement of maintenance orders was among those cases which continued to be heard in court.²⁸¹

Although enforcement of maintenance orders was allowed to be heard during the lockdown, the hearings were seriously affected because of restrictions in international and domestic travel. Persons who entered the country a week before, during, or after the lockdown were not allowed to enter the court unless their case was ‘urgent or essential’ and they had tested negative for the virus.²⁸² In addition, persons who had been in contact with or exposed to persons who were from high-risk countries were not allowed to enter the court.²⁸³ Further, persons who had been in contact with or exposed to persons who tested positive for Covid-19 were not allowed to enter the court.²⁸⁴ The process of screening out when a person entered the country and testing whether someone had had any contact with a person who had Covid-19 could have an adverse effect on the maintenance creditor due to the delay in that process. In addition, since persons from high-risk countries were totally prevented from entering the country, enforcement of foreign child support orders coming from the so-

²⁷⁷ Lezanne Taylor, ‘Child Maintenance and the Impact of Covid-19 on a Party’s Inability to Pay’ <<https://www.laboursmart.co.za/Newsletter/DownloadNewsletter?newsletterId=44cc723f-77b6-40e9-b485-940cfe08ce06-Child>> (accessed on 18 August 2022); Shani Van Niekerk, ‘covid-19: No “Payment Holiday” for Maintenance Payers’ <<https://www.adams.africa/family-law/>> (accessed 21 September 2021).

²⁷⁸ Section 31(2) of the Maintenance Act.

²⁷⁹ Van Niekerk No “Payment Holiday”.

²⁸⁰ Regs 2(b) and 5(a) of GN R418 GG 43167 of 26 March 2020.

²⁸¹ Reg 8(1)(b)(ii) of GN R418 GG 43167 of 26 March 2020.

²⁸² Reg 2(d) of GN R418 GG 43167 of 26 March 2020.

²⁸³ Reg 2(e) of GN R418 GG 43167 of 26 March 2020.

²⁸⁴ Reg 2(f) of GN R418 GG 43167 of 26 March 2020.

called 'high-risk countries' which are not designated under the REMOA was adversely affected. This is because unless the maintenance creditor hired a local attorney, most of the time, he must come to South Africa so that he can institute a new claim under the rules of the common law.

In addition to the travel and court service restrictions, most of the enforcement mechanisms were also suspended during the lockdown. Attachment of orders both for movable and immovable property and sales at auction were suspended during the lockdown.²⁸⁵ With some exceptions, all criminal cases were postponed to dates after the lockdown.²⁸⁶ Enforcement of child support orders by criminal prosecution were not part of the exceptions specified under the regulations.²⁸⁷ In addition, since most private and public companies or organisations were not operative during the lockdown, attachments of emoluments were not effective. Therefore, it can be concluded that enforcement of child support orders was worse in South Africa during the Covid-19 lockdown.

3.6 Conclusion

Recognition and enforcement of foreign child support orders in South Africa are governed by the rules of the common law and the REMOA. The common law imposes material requirements before a foreign judgment is recognised in South Africa. The finality and conclusivity criterion is one of them. Due to the finality requirement, only final arrears which have accumulated before registration in the local courts can be recognised and enforced under the rules of the common law.

The REMOA does not impose any material criteria for the recognition and enforcement of foreign child support orders. However, recognition and enforcement under this Act is based on designation of the country where the order was made. Hence, maintenance orders that are made in designated countries and become due after the orders have been registered in South Africa are enforced under the REMOA.

²⁸⁵ Reg 5(f) of GN R418 GG 43167 of 26 March 2020.

²⁸⁶ Reg 3(b) of GN R418 GG 43167 of 26 March 2020.

²⁸⁷ Reg 3 of GN R418 GG 43167 of 26 March 2020.

In addition, provisional maintenance orders pronounced in designated countries and confirmed by the local courts are enforced under the REMOA.

Future and provisional maintenance orders, except those given in the few countries designated under the REMOA, are not enforceable in South Africa. All foreign maintenance arrears which accrued before the order was registered in the local courts have to go through the exhausting procedure of the common law so that they can be enforced in the country.

After registration, foreign child support orders are enforced by the same mechanisms applied to enforce domestic child support orders. However, the civil enforcement mechanisms have many drawbacks, and application of the criminal mechanism is believed not to be in the best interest of the child. The ineffectiveness of the domestic enforcement mechanisms worsened during the Covid-19 lockdown.

In the next chapter, a comparative analysis between Eritrean and South African law will be made. In addition, the two countries' laws will be discussed in light of the main principles of the Hague Convention of 2007.

Chapter 4

A Comparative Analysis between Eritrean and South African Law on the Recognition and Enforcement of Foreign Child Support Orders

4.1 Introduction

This chapter will provide a comparative analysis of the Eritrean and South African law on the recognition and enforcement of foreign child support orders. The points of concord and discord between the two countries' laws will be evaluated by comparing the systems to one another. The main issues that will be discussed in this chapter are: the authorities responsible for recognition and enforcement; formal and procedural requirements; material requirements; and the domestic mechanisms of the two countries for enforcement of child support orders.

In respect of specific principles, reference will be made to the Convention on the International Recovery of Child Support and Other Forms of Family Maintenance of 23 November 2007 (Hague Convention of 2007 hereinafter) so that the two countries' laws will be evaluated to determine whether or not they accord with current international trends.

4.2 The authorities responsible for recognition and enforcement of foreign child support orders

In Eritrea, recognition and enforcement of foreign judgments fall under the jurisdiction of the courts. According to articles 15(3) and 456(2) and (3) of the Transitional Civil Procedure Code of Eritrea (TCPCE hereinafter) the High Courts have exclusive jurisdiction to decide whether or not foreign judgments should be recognised in the country. However, the law does not stipulate any court that has exclusive jurisdiction to enforce foreign judgments. Hence, foreign judgments, including child support orders, are enforced by the High Courts as well as by the lower courts.²⁸⁸

²⁸⁸ See para. 2.2 of the mini-dissertation.

Under the South African common law, recognition and enforcement of foreign judgments is performed by the courts.²⁸⁹ Unlike the TCPCE, however, there is no court under the South African common law that has exclusive jurisdiction to recognise and enforce foreign child support orders.²⁹⁰ Jurisdiction under the South African common law depends on the rules for claims sounding in money.²⁹¹ Hence, recognition of foreign child support orders is more accessible under the South African common law than under the TCPCE because the TCPCE limits the courts that can recognise foreign judgments.

The promulgation of the Reciprocal Enforcement of Maintenance Orders Act 80 of 1963 (REMOA hereinafter) made recognition and enforcement of foreign child support orders more efficient in South Africa. Based on section 3 of the REMOA, a maintenance order made in a proclaimed country is transmitted to the Minister of Justice 'through diplomatic channels' by any authority of such country recognised for that purpose. The diplomatic channels are required to receive foreign maintenance orders and to transmit them to the local maintenance courts where the registration process takes place.²⁹² The registration procedure is administrative because it is performed by the clerk of the court.²⁹³ Hence, if a foreign maintenance order passes through the diplomatic channels, the clerk of the court has no choice but to register the order.²⁹⁴

Comparing the TCPCE and the South African common law on this issue, the position under the common law seems to be better because, under the Eritrean law, parties could be obliged to file a case for recognition in the High Courts and then to file another case for enforcement in the lower courts.²⁹⁵ The procedure under the

²⁸⁹ Christopher Forsyth, *Private International Law: the Modern Roman-Dutch Law Including the Jurisdictions of the High Courts* (5th edn, Juta 2015) 421 and 468; see para. 3.2. of the mini-dissertation.

²⁹⁰ Forsyth, *PIL* 421 and 474.

²⁹¹ Forsyth, *PIL* 421 and 449.

²⁹² Section 3 of the REMOA.

²⁹³ Forsyth, *PIL* 421 and 450-51.

²⁹⁴ Forsyth, *PIL* 421 and 451; see para. 3.3. of the mini-dissertation.

²⁹⁵ See para. 2.2 of the mini-dissertation.

Eritrean law creates delay and unnecessary costs to the parties as well as congestion in the High Courts.²⁹⁶

It may be argued that the South African position of restricting the registration processes only to the maintenance courts under the REMOA could hamper accessibility. However, the maintenance courts are specialised courts and could be easily accessible since they only adjudicate special cases. In addition, the REMOA reduces the cost for foreign maintenance creditors and the inconvenience they might otherwise have faced, since the registration process is facilitated by diplomatic channels. Further, since no criteria are imposed, registration and enforcement under the REMOA is simpler. However, facilitating the process through diplomatic channels may not be accessible because the diplomats may prioritise other tasks to it. In addition, few countries have been designated under the REMOA.

The process of recognition and enforcement of cross-border child support orders under the Hague Convention of 2007 is facilitated by central authorities designated for that purpose.²⁹⁷ The functions of the central authorities are to receive (and transmit) applications, and to facilitate the institution of proceedings in respect of such applications.²⁹⁸ As the central authorities are special agencies solely established for facilitating recognition and enforcement of cross-border child support orders, and the people working there are experts (or will become experts with time) the process is efficient. In addition, the process is free of charge in most cases²⁹⁹ and therefore creditors are not worried about cost.

Comparing the Eritrean and South African laws with the Hague Convention of 2007, the latter is more efficient and cost effective than the former two.

²⁹⁶ There are no High Courts in two of the six regions in the country. Particularly in the port city of Assab (that is around 800 km from the Capital Asmara), the absence of a High Court causes a lot of delay and expenses since parties are obliged to go to the capital to get access from the High Courts.

²⁹⁷ Article 4 of the Hague Convention of 2007.

²⁹⁸ Article 6(1)(a) and (b) of the Hague Convention of 2007. In addition, according to article 6(2) of the Hague Convention of 2007 the central authorities provide or facilitate legal assistance to the creditor, help to locate the debtor, provide information about the financial circumstances of the debtor, help to collect ongoing maintenance arrears and transfer them to the creditor etc.

²⁹⁹ Article 15 of the Hague Convention of 2007.

However, foreign child support orders are registered and enforced under Eritrean and South African laws, as well as under the Hague Convention of 2007 only if they satisfy certain procedural and material requirements.

4.3 Formal and procedural requirements/receiving and processing applications

Under the TCPCE and the rules of the South African common law, creditors directly apply to the courts for the recognition of foreign child support orders.³⁰⁰ According to section 3 of the REMOA, however, an application for the recognition and enforcement of foreign child support in South Africa should pass through diplomatic channels. Under the REMOA, a maintenance order pronounced by a maintenance court in a designated country is transmitted to the Minister of Justice through diplomatic channels by a special government agency authorised for such purpose.³⁰¹ The filing of an application through diplomatic channels under the REMOA reduces the burden of the creditor because he is relieved of expenses which he would normally have had to incur if he personally had to travel to the enforcing country.

Under the Hague Convention of 2007 application is made through the central authorities of the requesting and enforcing countries.³⁰² In addition, creditors from contracting states could directly apply to the central authority of the enforcing states if they prefer to do so.³⁰³ This is an added advantage to the creditor as the convention gives the creditor an option whether to apply directly or through the central authorities.

According to article 457(a) of the TCPCE, an application for the recognition and enforcement of a foreign judgment should be accompanied by a 'certified copy of the judgment to be executed'. In addition, the president or registrar of the foreign court where the judgment was pronounced should send a certificate that confirms whether or not the judgment is final and enforceable.³⁰⁴ Under the South African common law, judgments and other accompanying documents should be certified copies, they

³⁰⁰ See paras. 2.2 and 3.2 of the mini-dissertation.

³⁰¹ Section 3 of the REMOA; see para. 3.3 of the mini-dissertation.

³⁰² Article 9 of the Hague Convention of 2007.

³⁰³ Article 37 of the Hague Convention of 2007.

³⁰⁴ Article 457(b) of the TCPCE.

should be translated to the working language of a South African court, and all the documents should be authenticated.³⁰⁵ As far as formalities are concerned, the South African law under the REMOA imposes fewer and simplified criteria. According to section 3 of the REMOA the only formal requirement is that certified copies of the judgment and all other accompanying documents should be submitted.³⁰⁶ The formal requirements under the Hague Convention of 2007 are: (a) simple copies are accepted unless the authority of the enforcing state requested certified copies³⁰⁷ or unless a challenge or an appeal lies against the judgment;³⁰⁸ (b) all documents should be translated to the working language of the enforcing court;³⁰⁹ and (c) a document must be submitted which states that the judgment is enforceable under the laws of the court of rendition or, if the judgment is given by an administrative authority, a document that explains that the judgment is made according to the laws of the requesting state.³¹⁰

It is clear that the TCPCE, the REMOA, and the rules of South African common law require that the foreign judgments and other accompanying documents should be certified copies, while the Hague Convention of 2007 accepts simple copies unless a challenge is made or an appeal lies against the foreign judgment. Besides the requirements of certified copies, the common law requires that the judgment and other documents should be authenticated³¹¹ while there is no such requirement under the TCPCE, under the REMOA, and under the Hague Convention of 2007. In respect of this issue, the TCPCE and the REMOA seem to serve the creditor better because authentication exposes the creditor to extra costs and delay, as authentication is

³⁰⁵ Forsyth, *PIL* 474. According to Tim Fletcher and Lisa de Waal, 'Enforcement of Judgments in South Africa: Overview' (Cliffe Dekker Hofmeyr Inc, 1 April 2022) <[https://uk.practicallaw.thomsonreuters.com/w-0353610?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/w-0353610?transitionType=Default&contextData=(sc.Default)&firstPage=true)> accessed 9 August 2022, the foreign documents are authenticated by a South African diplomat or consular office in the foreign country, by a relevant government authority of the foreign country, or by diplomatic or consular office of the foreign country in South Africa.

³⁰⁶ See para. 3.3 of the mini-dissertation.

³⁰⁷ Articles 12(2), 25(3)(a).

³⁰⁸ Articles 25(2).

³⁰⁹ Article 44(1). According to article 44(1) of the Convention, the documents should also be sent in their original language to the enforcing country.

³¹⁰ Articles 25(1)(b) and 30(3)(a)).

³¹¹ See para. 3.2 of the mini-dissertation.

done by an officer other than the person who first issues the original document.³¹² The TCPCE requires a certificate from the requesting country that states that the judgment is final and enforceable under the foreign law³¹³ while the REMOA³¹⁴ and the South African common law do not have such a requirement.³¹⁵ On the other hand, under article 25(1)(b), the Hague Convention of 2007 requires a document from the requesting country which confirms that the judgment is enforceable under the law of the country of origin.

The TCPCE and the Hague Convention of 2007 require a certificate that confirms the finality and enforceability of a foreign judgment. However, it is uncommon that courts pronounce judgments which cannot be enforced under their own law.

The South African common law and the Hague Convention of 2007 require that all documents should be translated to the working language of the enforcing country³¹⁶ while there is no such requirement under the TCPCE and the REMOA. Although translation of materials to the working language of the enforcing court is not an express requirement under the TCPCE and the REMOA, it could be inferred that such translations are necessary as the courts cannot rely on documents if they do not know their contents.

After a court has ensured that all the procedural and material requirements have been satisfied, it checks whether or not the foreign judgment satisfies all the material requirements under its law.³¹⁷

4.4 Material requirements

As discussed in the previous two chapters, the material requirements should be satisfied before a foreign judgment is recognised and enforced under the TCPCE³¹⁸

³¹² Garner BA (editor in chief), *Black's Law Dictionary* (9th edn, West Publishing Co. 2009) 151.

³¹³ See para. 2.2 of the mini-dissertation.

³¹⁴ There is no such requirement under the provisions of the REMOA.

³¹⁵ Forsyth, *PIL* 473. Forsyth states that '[i]t is quite clear that the Roman-Dutch practice of requiring letters requisitorial from the foreign court no longer applies'.

³¹⁶ See para. 3.2 of the mini-dissertation and article 44(1) of the Hague Convention of 2007.

³¹⁷ See paras. 2.3 and 3.2 of the mini-dissertation

³¹⁸ See para. 2.3 of the mini-dissertation.

and under the South African common law.³¹⁹ Under the REMOA, however, there are no material requirements.³²⁰ On the other hand, the Hague Convention of 2007 has indirectly imposed material requirements for recognition and enforcement of child support orders.³²¹ Under its article 22, the Hague Convention of 2007 lists the grounds for refusing recognition and enforcement.³²²

There are differences between the TCPCE, the South African common law, and the Hague Convention of 2007 as to whether or not the material requirements listed in each law are cumulative or independent of each other. The TCPCE states that foreign judgments 'shall not' be recognised and enforced in Eritrea unless the conditions listed under article 458 are satisfied.³²³ Hence, the requirements are cumulative of each other.³²⁴ The rule is the same under the South African common law, that is, that all requirements must be satisfied before a foreign judgment is recognised and enforced in the country.³²⁵ Under the Hague Convention of 2007, on the other hand, the requirements for refusing recognition and enforcement are independent of each other.³²⁶ Since article 22 of the Hague Convention of 2007 uses the word 'may' instead of 'shall' or 'must', the competent authority can recognise and enforce a foreign child support judgment if at least one of the conditions listed is met.³²⁷ Each criterion will be discussed hereafter.

³¹⁹ See para. 3.2 of the mini-dissertation.

³²⁰ See para 3.3 of the mini-dissertation.

³²¹ Borrás A and Degeling J, '*Convention of 23 November 2007 on the International Recovery of Child Support and other Forms of Family Maintenance*' (Explanatory Report adopted by the 21st session (2013) Permanent Bureau of the Conference The Hague: Netherlands) <<https://assets.hcch.net/docs/09cfaa7e-30c4-4262-84d3-daf9af6c2a84.pdf>> accessed 29 July 2021 para 443.

³²² Recognition and enforcement of a decision may be refused if: (1) the decision is against public policy of the enforcing state; (2) if the decision was obtained by fraud; (3) if the same issue for the same parties is pending in another court; (4) if the decision is incompatible with a previous decision given on the same issue for the same parties; (5) in decisions given by default, if the respondent did not have proper notice of the proceedings and did not have an opportunity to be heard or to challenge the decision on appeal.

³²³ See para 2.2 of the mini-dissertation.

³²⁴ See para 2.3 of the mini-dissertation.

³²⁵ Christian Schulze, 'Practical Problems Regarding the Enforcement of Foreign Money Judgments' (2005) 17 SA Merc LJ 125, 127.

³²⁶ Borrás and Degeling '*Convention*' para 477.

³²⁷ Borrás and Degeling '*Convention*' para 477.

Reciprocity is one of the requirements that must be satisfied before a foreign judgment is recognised and enforced under the TCPCE.³²⁸ However, there is no reciprocity requirement either under the South African common law³²⁹ and the REMOA,³³⁰ or under the Hague Convention of 2007. However, the Hague Convention of 2007 does not prevent existing reciprocity agreements among member states or provinces of member states.³³¹ As stated in previous chapters,³³² the requirement of reciprocity victimises innocent individuals. This is especially true in the case of child support orders, since the victims are children who should be protected by every law possible. The laws that do not impose the reciprocity criterion seem to better serve the interests of children.

Competence of the court which makes a foreign child support order is another criterion for the recognition and enforcement of child support orders both under the TCPCE and the South African common law.³³³ The foreign court which pronounces the judgment should have international competence to adjudicate the case. However, the TCPCE does not clarify whether the jurisdiction of a foreign court is determined based on the Eritrean law, the law of the foreign country where the judgment is pronounced, or international law.³³⁴ On the other hand, international jurisdiction under South African common law is determined by the principles recognised under South African law in relation to jurisdiction of foreign courts.³³⁵

The requirement of 'original rules of direct jurisdiction'³³⁶ was intentionally left out under the Hague Convention of 2007 because it was believed that such a

³²⁸ Article 458(a).

³²⁹ See para 3.2 of the mini-dissertation.

³³⁰ See para 3.3 of the mini-dissertation.

³³¹ Articles 46(1)(g); 51(3) and 52(1) of the Hague Convention of 2007.

³³² See paras 2.3.4 and 3.2 of the mini-dissertation.

³³³ See para 3.2. of the mini-dissertation.

³³⁴ See para 2.3.1 of the mini-dissertation

³³⁵ Forsyth *PIL* 419-20; Schulze, 'Practical Problems' 127. According to Forsyth, (*PIL* 449), since maintenance orders are 'periodical money claims ... in theory the law relating to claims sounding in money applied to the determination of whether a particular court is internationally competent or not'.

³³⁶ According to the Hague Conference on Private International Law, *Practical Handbook for Caseworkers under the 2007 Hague Child Support Convention* (Hague Conference on Private International Law Permanent Bureau 2013) 104, 'direct rules of jurisdiction' exist when a law provides the basis when a court may make a decision.

requirement is not important since the competence of a foreign court that pronounced a child support order can be determined on the basis of 'indirect rules of jurisdiction'.³³⁷ In addition, it was concluded that countries could not agree on the introduction of 'original direct jurisdiction' since they have different jurisdictional grounds for recognition and enforcement of foreign judgments.³³⁸

It is clear that the requirement of international jurisdiction of courts under the TCPCE and the South African common law is different from the requirement under the Hague Convention of 2007. The TCPCE and the South African common law could not be denounced for the imposition of the requirement of international jurisdiction of courts because states generally have responsibilities to ensure that only judgments made by legally formed institutions are enforced under their jurisdiction. On the other hand, the Hague Convention of 2007 could not be condemned for not incorporating such a criterion because it may be extremely difficult to reach consensus³³⁹ and it is necessary to make a compromise in order to make a law that works for all contracting states.

In addition, the TCPCE and the South African common law recognise foreign judgments decided by courts only.³⁴⁰ However, foreign judgments decided by administrative authorities are recognised and also enforced under the Hague Convention of 2007.³⁴¹ Compared to the TCPCE and the South African common law on this issue, the Hague Convention of 2007 secures the principle of the best interest

³³⁷ According to Borrás and Degeling, '*Convention*' para 21, 'indirect rules of jurisdiction' exist when a law sets the basis upon which a decision must have been made in order for it to be recognised and enforced in another state. The 'indirect rules of jurisdiction' are provided under Article 20 of the Hague Convention of 2007.

³³⁸ Borrás and Degeling, '*Convention*' paras 22 and 18. In para 18 it is stated that '...to make original maintenance decisions, there is the divergence between on the one hand those systems which accept creditor's residence/domicile without more as a basis for jurisdiction (typified by the Brussels /Lugano and Montevideo regimes), and on the other hand systems which require some minimum nexus between the authority exercising jurisdiction and the debtor (typified by the system operating with in the United States of America)'.

³³⁹ Borrás and Degeling, '*Convention*' paras 21 (D) and 22.

³⁴⁰ See para 2.3.1 of the mini-dissertation and the case of *Jones v Krok* 1995 (1) SA 677 (A) 14. It is not clear, however, whether or not foreign judgments decided by administrative authorities are recognised and enforced under the REMOA because the only requirement under the REMOA is that the country where the judgment originates from should be designated under the Act (see para 3.3 of the mini-dissertation).

³⁴¹ Article 19(1).

of the child better because it acknowledges foreign judgments given by courts as well as by administrative authorities while the other two have limited their scope by recognising foreign judgments decided by courts only.

A third criterion under the TCPCE and the South African common law is the due process requirement. This criterion is also enshrined under article 22(b) of the Hague Convention of 2007. Hence, the TCPCE and the modern South African common law are in line with current international trends on this issue.

A fourth criterion under the TCPCE and the South African common law is the public policy (*ordre public*) requirement.³⁴² The public policy requirement is also provided for under article 22(a) of the Hague Convention of 2007. As a general rule, however, the public policy requirement should be interpreted restrictively and should only be raised if recognition and enforcement of a foreign judgment 'would lead to an intolerable result...'.³⁴³ Hence, the three laws are similar on the requirement of public policy.

The finality and enforceability requirement is a fifth criterion under the TCPCE.³⁴⁴ Under the common law position in South Africa, the finality requirement also exists.³⁴⁵ Although enforceability is not a requirement under the South African common law, the condition can be fulfilled by referring to the public policy requirement under the law. However, finality is not a requirement under the REMOA and the Hague Convention of 2007.³⁴⁶ Nevertheless, the enforceability requirement is enshrined under article 18(2)(d) of the Hague Convention of 2007. Hence, foreign child support orders cannot be enforced under the TCPCE, the South African common law, or the Hague Convention of 2007 if they are not enforceable in the country where the judgment is pronounced. However, since the REMOA does not impose any material criteria,³⁴⁷ it

³⁴² See paras 2.3.3 and 3.2 of the mini-dissertation.

³⁴³ Borrás and Degeling, '*Convention*' paras 478-79.

³⁴⁴ See para 2.3.5 of the mini-dissertation.

³⁴⁵ See para 3.2 of the mini-dissertation.

³⁴⁶ As stated under section 3.2 of the mini-dissertation, the requirement of finality is a hindrance to the recognition and enforcement of child support orders as child support orders are varied over time in many jurisdictions.

³⁴⁷ See para 3.3 of the mini-dissertation.

is not clear whether recognition and enforcement of foreign child support orders in South Africa can be refused based on policy considerations.

Since the TCPCE and the South African common law impose the finality criterion, foreign provisional child support orders cannot be enforced under these laws because provisional orders cannot satisfy the finality requirement.³⁴⁸ Provisional orders are, however, enforceable under the REMOA³⁴⁹ and under the Hague Convention of 2007.³⁵⁰ The enforcement of provisional child support orders under the REMOA and under the Hague Convention of 2007 is another advantage to the maintenance creditor because the maintenance creditor will not have to wait until a final judgment is pronounced. Hence the REMOA and the Hague Convention of 2007 better secure the principle of the best interest of the child on this issue.

The issue of appeal is another condition that affects the finality requirement. According to article 332 of the TCPCE, unless an appellate court makes an order for suspension of the proceedings, an appeal shall not suspend execution proceedings as a rule.³⁵¹ In the case of child support orders in particular, the practice in the Eritrean courts is that payment of child support orders cannot stop because of an appeal as the child support is regarded as a lifeline for the child. If the debtor appeals the amount of the maintenance and wins on appeal, the amount he paid in advance can be accepted as a replacement for future payments instead of paying him in restitution.³⁵² Under the South African common law, unless a foreign court grants suspension of an execution process, a foreign judgment is enforceable even though it is still pending on appeal.³⁵³ Under the Maintenance Act 99 of 1998, unless the appeal is made against a decision which stated that the debtor is liable to maintain

³⁴⁸ See paras 2.3.5 and 3.2 of the mini-dissertation.

³⁴⁹ Section 4.

³⁵⁰ Article 31.

³⁵¹ According to Sedller (*Ethiopian Civil Procedure* 193), the reason for not suspending execution judgments for every case appealed from is because an appellant can apply for restitution if he wins on appeal. This is particularly true if the execution relates to monetary issues.

³⁵² The practice of the courts, I believe, is in line with the principle of securing the best interest of the child because the children get what is due to them at least until the decision which was in their favour is finally reversed on appeal.

³⁵³ HR Hahlo, 'The Finality of Foreign Default Judgments' (1969) 86(3) SALJ 354, 354; Forsyth, *PIL* 458; Schulze, 'Practical Problems' 131.

the creditor, the appeal does not suspend payment of maintenance.³⁵⁴ Here the TCPCE, the Maintenance Act and the South African common law are similar. All three of them adhere to the interest of the child by enforcing foreign child support orders unless an order for suspension of the proceedings is made by a foreign court.³⁵⁵

Regarding the finality of judgments decided by default, the TCPCE states that the defendant should apply to set aside the decision 'within one month of the day when he became aware of such decree or order'.³⁵⁶ However, the one-month period could lead to conflicting judgments since a period of a month could be 28 or 29 days, 30 days, or 31 days. Under South African law, a default foreign judgment is not enforced unless the debtor waives his right to contest the judgment or until the period to contest the judgment under the foreign law has expired.³⁵⁷ Therefore, a problem arises if there is no specific period of limitation as to when the debtor can challenge the judgment in the foreign country.

The prescription period is another requirement that must be addressed before foreign child support orders are recognised and enforced. Under the Transitional Civil Code of Eritrea (TCCE hereinafter), arrears of child support should not be enforced unless the creditor claims within three months from their due date, except under certain conditions.³⁵⁸ However, it is not clear whether the prescription period of foreign judgments is governed by the law of the foreign country or by Eritrean laws.³⁵⁹ Similarly, whether the period of prescription for foreign child support orders should be determined based on the laws of the *lex causae* or the *lex fori* has not yet been fully

³⁵⁴ Sections 25(3) and 26(3(a) of the Maintenance Act.

³⁵⁵ Although the Hague Convention of 2007 does not expressly authorise the recognition and enforcement of foreign child support orders, it can be inferred from the provisions of articles 23(10) and 24(6) that the Hague Convention in principle adheres to the recognition and enforcement of foreign child support orders even if an appeal lies against them. Articles 23(10) and 24(6) state that if an appeal is permitted by the law of the state addressed, it shall not have the effect of staying the enforcement of the decision unless there are exceptional circumstances.

³⁵⁶ Article 78(1) of the TCPCE.

³⁵⁷ South African Law Reform Commission (SALRC hereinafter), (Project 121) *Consolidated Legislation Pertaining to International Judicial Co-operation in Civil Matters Report* (SARLC December 2006) 57-58; Forsyth, PIL 460.

³⁵⁸ Article 817 of the TCCE.

³⁵⁹ See para. 2.3.5 of the mini-dissertation.

resolved in South Africa.³⁶⁰ Hence, both the Eritrean and South African laws fail to clarify which law should govern the period of prescription of child support orders. On the other hand, the prescription period for enforcement of arrears of foreign child support orders under the Hague Convention of 2007 is determined 'either by the law of the State of origin of the decision or by the law of the State addressed, whichever provides for the longer limitation period'.³⁶¹ The rule under the Hague Convention of 2007 clearly favours the principle of the best interest of the child since it selects the longest prescription period.³⁶²

4.5 Mechanisms for enforcement of judgments

Under the Eritrean law, the South African law, and the Hague Convention of 2007, the mechanisms used for enforcement of domestic child support orders are also applied to enforce foreign child support orders.³⁶³

4.5.1 Civil enforcement mechanisms

When a debtor fails to pay his debt on time, the creditor may apply to the court for execution of the order through civil enforcement mechanisms. In South Africa, according to section 26(2)(a) of the Maintenance Act, a creditor can sue a debtor 'if ... the debt has remained unsatisfied for a period of ten days ...'. In the TCPCE, however, there is no specified period after which a creditor can sue the debtor if the latter failed to pay maintenance on time. The time given in South Africa under the Maintenance Act is important because it gives the creditor a fixed time after which he can institute a claim and gives the courts no discretion to grant an indefinite time for the debtor to pay his debt.

As discussed in the previous two chapters, there are many civil enforcement mechanisms under the Eritrean and South African laws.³⁶⁴ However, both countries'

³⁶⁰ See para. 3.2 of the mini-dissertation.

³⁶¹ Article 32(5) of the Hague Convention of 2007.

³⁶² Borrás and Degeling, '*Convention*' para 578.

³⁶³ Article 460(3) of the TCPCE; section 6 of REMOA; articles 32(1) and 33 of the Hague Convention of 2007.

³⁶⁴ See paras. 2.4 and 3.4.1 of the mini-dissertation.

laws fail to provide a sequence as to when to apply each mechanism. Under the South African Maintenance Act the creditor is required to choose one mechanism at a time.³⁶⁵ According to the practice in the courts in Eritrea, however, a creditor can specify some or all of the mechanisms at a time and the courts choose to apply one or more of the mechanisms they consider appropriate to effectively enforce a judgment. Nevertheless, a civil enforcement mechanism under the TCPCE³⁶⁶ and under the South African Maintenance Act³⁶⁷ is required to be one with a value that corresponds to the amount of the debt already due. For instance, a court cannot order the sale of immovable property if selling of a movable property can satisfy the debt.³⁶⁸

Attachment of properties is one mechanism which is used to satisfy a debt both under the Eritrean law and the Maintenance Act of South Africa.³⁶⁹ Under the TCPCE some properties are excluded from attachment.³⁷⁰ Alimonies and pensions are some of the properties excluded from attachment under the TCPCE.³⁷¹ Under the Maintenance Act of South Africa, however, there are no properties that are excluded from attachment. According to sections 26(4) and 40(4) of the Maintenance Act a ‘pension, annuity, gratuity or compassionate allowance or other similar benefit’ can be attached to satisfy a maintenance debt. Exclusion of some properties from attachment could be wise because it helps the debtor and other dependant family members not to be jeopardised by the process. If the resources of the maintenance debtor are limited, for instance, exclusion of some assets could be necessary to save the livelihood of a debtor and his other dependent family members.³⁷² However, excluding alimonies and pensions could jeopardise the interest of the creditor too much because excluding such benefits could minimise the chance of satisfying the maintenance

³⁶⁵ South African Law Reform Commission, Discussion Paper 157 (Project 100B) *Review of the Maintenance Act 99 of 1998* (SALRC May 2022) para 11.4.

³⁶⁶ Article 394(2) of the TCPCE.

³⁶⁷ Section 27(1) of the Maintenance Act.

³⁶⁸ See paras 2.4 and 3.4.1 of the mini-dissertation.

³⁶⁹ See paras 2.4 and 3.4.1 of the mini-dissertation.

³⁷⁰ See para. 2.4 of the mini-dissertation.

³⁷¹ Article 404(d) of the TCPCE.

³⁷² For instance, it would be wise if properties used in the daily lives of the debtor and instruments used by the debtor in his profession were excluded from attachment.

debt. This is particularly true if the maintenance debtor receives large amounts of money from alimonies and pensions.

The second civil enforcement mechanism under the TCPCE is income withholding,³⁷³ although there are exceptions when withholding of income may not pass a certain amount of the debtor's salary.³⁷⁴ However, the TCPCE fails to grant a remedy if an employer fails to deduct the maintenance from the salary of the debtor employee and to send it to the maintenance creditor.

Income withholding is also applied as a civil enforcement mechanism under the Maintenance Act of South Africa.³⁷⁵ Unlike the lacuna under the TCPCE, the Maintenance Act grants a remedy if the employer fails to deduct the maintenance amount from the salary of the debtor employee and to send it to the maintenance creditor. If an employer fails to deduct from the income of the debtor and to pay the amount to the creditor, the '... maintenance order may be enforced against that employer in respect of any amount which that employer has so failed to pay...'.³⁷⁶ In addition, under the Maintenance Act of South Africa, there is no specific amount of income that is excluded from satisfying a maintenance debt.³⁷⁷ The only valid defence for non-payment of maintenance is the inability of the debtor to pay the debt. On this issue the Maintenance Act of South Africa seems to serve the principle of the best interest of the child better than the TCPCE because the specific restriction mentioned under the TCPCE³⁷⁸ could be detrimental to the child in some circumstances. For instance, if the debtor has a large salary and many children are to be maintained, or if some of the children require special treatment, the restrictions on non-withholding of income under the TCPCE could operate against the interest of the children.

³⁷³ Article 411 of the TCPCE.

³⁷⁴ See para 2.4 of the mini-dissertation.

³⁷⁵ Section 28 of the Maintenance Act.

³⁷⁶ Section 29(4) of the Maintenance Act.

³⁷⁷ See sections 28 and 29 of the Maintenance Act.

³⁷⁸ As discussed in para. 2.4 of the mini-dissertation, the entire salary of a debtor is exempt from liability to attachment if the salary is not more than \$2 per day and if the debtor has no other means of income, more than two-thirds of the salary of a debtor, and more than half of the income of seamen cannot be attached to satisfy a debt.

A third mechanism of enforcement of child support orders under the TCPCE³⁷⁹ and the Maintenance Act³⁸⁰ is garnishment orders (attachment of debts). However, this mechanism is not effective in either South Africa or Eritrea because a proper investigation may not be made on whether a debtor has present or future debts accruing to him.³⁸¹

A fourth civil enforcement mechanism under the TCPCE is civil contempt proceedings. If a debtor, although capable of satisfying a debt, has wilfully failed to do so, the court may order the incarceration of the judgment debtor for a period not exceeding six months.³⁸² The civil contempt proceedings available under the TCPCE is not a preferred way of enforcing child support orders because, as a general rule, debtors should not be imprisoned without the required degree of protection under criminal proceedings.³⁸³ In addition, imprisonment as a concept is not a preferred way of enforcement of child support orders since the debtor will lose his income to support the creditor and other dependent family members. Further, civil contempt proceedings are criticised for insufficiently safeguarding the rights of debtors.³⁸⁴ For instance, debtors are not represented by counsel even though they can be imprisoned at the end.³⁸⁵

Although contempt of court is punishable under South African law, the law does not distinguish between civil contempt and criminal contempt. Contempt of court is a criminal offence regardless of whether the contempt is committed in the context of a civil or a criminal case.³⁸⁶

Another civil enforcement mechanism commonly used by courts in Eritrea is enforcement through a surety. The courts order the debtor to obtain a surety who can

³⁷⁹ Article 409 of the TCPCE.

³⁸⁰ Section 30(1) of the Maintenance Act.

³⁸¹ See paras 2.4 and 3.4.1 of the mini-dissertation.

³⁸² See para. 2.4. of the mini-dissertation.

³⁸³ Elizabeth D. Katz, 'Criminal Law in a Civil Guise' (2019) 86 University of Chicago Law Review 1241, 1242.

³⁸⁴ Mnookin RH, 'Review: Using Jail for Child Support Enforcement' (1981) 48 U Chi LR 338-370, 366-67; Katz, 'Criminal Law in a Civil Guise' 1241-42.

³⁸⁵ Mnookin , 'Review: Using Jail for Child Support Enforcement' 366-67; Katz, 'Criminal Law in a Civil Guise' 1242.

³⁸⁶ See para. 3.4.2 of the mini-dissertation.

pay arrears as well as future maintenance. If the debtor fails to pay in due time, the surety is obliged to pay to the extent to which he has rendered himself personally liable.³⁸⁷ This mechanism is effective unless the debtor fails to find a surety. I could not find any law or case in South Africa that imposes enforcement of child support orders by way of a surety.

According to article 24(2) of the Hague Convention of 2007 the civil enforcement measures include: (a) wage withholding; (b) garnishment orders; (c) deductions from social security payments; (d) a lien on or forced sale of property; (e) tax refund withholding; (f) withholding or attachment of pension benefits; (g) credit bureau reporting; (h) denial, suspension or revocation of various licenses (for example, driving licenses). The civil enforcement mechanisms which are available under the Hague Convention of 2007, but do not exist in the TCPCE and in the Maintenance Act of South Africa are deductions from social security payments, tax refund withholding, and denial, suspension or revocation of various licenses. The additional mechanisms applied under the Hague Convention of 2007 are, I believe, other advantages of the Convention over the TCPCE and the Maintenance Act because they reduce the chance of evasion of payments by the debtor.

In addition to the civil enforcement mechanisms discussed above, the Transitional Penal Code of Eritrea (TPCE hereinafter) and the Maintenance Act of South Africa also provide for criminal enforcement mechanisms. These mechanisms will be discussed hereafter.

4.5.2 Criminal enforcement mechanisms

Criminal sanctions are other mechanisms for enforcement of child support orders both under the TPCE³⁸⁸ and under the Maintenance Act of South Africa.³⁸⁹ Based on article 625 the TPCE, if a person fails to pay maintenance, he is convicted and is

³⁸⁷ Article 382 of the TCPCE.

³⁸⁸ Article 625 of the TPCE.

³⁸⁹ Section 31(1) of the Maintenance Act.

punished to a fine or simple imprisonment³⁹⁰ not exceeding six months. According to article 88 of the TPCE the fine may be between 1 000 and 5 000 Nakfa (ERN), and the simple imprisonment may range from 10 days to six months.³⁹¹ On the other hand, the punishment for nonpayment of maintenance under the Maintenance Act of South Africa is a 'fine or imprisonment for a period not exceeding three years or ... such imprisonment without the option of a fine'.³⁹² In addition, the common law offence of contempt of court is another method for enforcement of child support orders.

The punishment under the Maintenance Act of South Africa is either a fine or imprisonment or both, while under the TPCE, a maintenance defaulter is punished either by a fine or imprisonment but not both. On the other hand, the TPCE specifies the amount of the fine whereas the Maintenance Act of South Africa fails to specify the amount. On this issue, the TPCE seems to be better than the Maintenance Act of South Africa because the discretion given to the judges is restricted under the former³⁹³ while the latter gives unrestricted discretion to judges, which may result in discrepancies among the decisions of the courts. In addition, specifying the amount of a fine may be helpful to the parties because it may help the parties to evaluate and predict the outcome of the fine that may be imposed on a maintenance defaulter.

To avoid the negative consequences of a fine and imprisonment, courts in South Africa impose periodical imprisonment and correctional supervision on maintenance defaulters. This mechanism strikes a balance between the effectiveness of criminal sanctions against maintenance defaulters and mitigating the negative effect of the criminal sanctions on the interest of maintenance creditors.³⁹⁴ In Eritrea, though correctional supervision is available as a punishment, it is not applicable for failure to

³⁹⁰ On the difference between simple and rigorous imprisonments, see para. 2.4 of the mini-dissertation.

³⁹¹ Article 105(1) of the TPCE.

³⁹² Section 31(1) of the Maintenance Act.

³⁹³ However, the amount of a fine under the TPCE is from 1 000 to 5 000 Nakfa (ERN).

³⁹⁴ See para. 3.4 of the mini-dissertation.

pay maintenance.³⁹⁵ To the best of my knowledge, periodical imprisonment is not available at all as a punishment under Eritrean law.

Under the Maintenance Act of South Africa, 'lack of means' is the defence which a debtor can raise if charged with nonpayment of maintenance.³⁹⁶ However, the debtor can nevertheless be convicted if the state proves that the lack of means was due to the debtor's unwillingness to work or misconduct. Under the TPCE, the defence a debtor can raise is the 'good cause' defence.³⁹⁷ Hence, the state has to prove that the debtor has failed to pay maintenance 'without good cause'. The defence a debtor has under the TPCE is broader than its counterpart under the Maintenance Act of South Africa. Since the 'good cause' defence under the TPCE could be interpreted very widely, the Maintenance Act of South Africa on this issue better serves the interest of the child because the Maintenance Act minimises the excuses a debtor could raise for nonpayment of maintenance.

In addition to the criminal and civil enforcement mechanisms discussed above, credit bureau reporting is another mechanism available for enforcement of child support orders in terms of the Maintenance Act of South Africa.³⁹⁸ If implemented, the mechanism will push debtors to pay maintenance orders on time because they may not want to have bad credit records. For those debtors who are not willing to pay on time, on the other hand, it will ensure that they are stopped from obtaining further credit, thus reducing the risk of further defaults in maintenance payments.³⁹⁹ However, the credit bureau reporting mechanism is not known to Eritrean law.

Unlike the Eritrean and South African laws, criminal sanctions are not recommended under the Hague Convention of 2007. This is because criminal sanctions are considered ineffective and counterproductive for the creditor. Except for a few wealthy offenders, criminal prosecution is not an appropriate mechanism of enforcing

³⁹⁵ Articles 102 and 103 of the TPCE.

³⁹⁶ Section 31(2) of the Maintenance Act.

³⁹⁷ Article 526 of the TPCE.

³⁹⁸ Sections 26(2A) (as amended by section 11 of the Maintenance Act 9 of 2015) and 31(4) of the Maintenance Act.

³⁹⁹ M de Jong and KKB Sephai, 'New Measures to Better Secure Maintenance Payments for Disempowered Women and Vulnerable Children' (2014) 77 THRHR 195, 212.

child support orders as the primary source of the income of the debtor, particularly if he is a wage earner, 'dries up' with his imprisonment.⁴⁰⁰

4.6 Conclusion

An application for recognition of a foreign child support order under the TCPCE and under the South African common law is made by creditors to the courts. However, the application for recognition of foreign child support orders under the REMOA is made through diplomatic channels. On the other hand, the application for recognition of foreign child support orders under the Hague Convention of 2007 is performed through the central authorities in the country of origin and those in the enforcing country.

If foreign child support orders receive recognition, they are enforced via the domestic enforcement mechanisms applied in the enforcing country. Both the TCPCE and the Maintenance Act of South Africa provide for a number of civil and criminal enforcement mechanisms, with few differences between the two laws and the mechanisms they apply. The Hague Convention of 2007 also recommends that Member States apply their domestic enforcement mechanisms in enforcing foreign child support orders. However, seeing the Eritrean and South African laws through the prism of the Hague Convention of 2007, the two countries' laws need some improvements. Recommendations on this issue will be discussed in the next chapter.

⁴⁰⁰ Katz, 'Criminal Law in a Civil Guise' 1309.

Chapter 5

Conclusions and Recommendations

5.1 Introduction

In this chapter, the findings on Eritrean and South African law regarding the recognition and enforcement of foreign child support orders are discussed. In addition, a summary of comparative findings between the two countries' laws is provided. Based on the findings of the mini-dissertation, recommendations are also made at the end.

5.2 Summary of Findings

5.2.1 Eritrea

In Eritrea, recognition and enforcement of foreign child support orders are governed by the Transitional Civil Procedure Code of Eritrea (TCPCE hereinafter) and based on treaty.⁴⁰¹ The High Courts decide whether foreign judgments should be recognised or not in Eritrea.⁴⁰² However, since the law does not stipulate any court that has exclusive jurisdiction to enforce foreign judgments, it can be concluded that the lower courts can also enforce foreign judgments.⁴⁰³

Some of the material requirements under the TCPCE are hindrances to the effectiveness of the proceedings. The finality criterion is one. The issue of appeal, judgments given in default, and whether a foreign judgment can be varied or not affect the finality criterion. Under the TCPCE, unless an appellate court makes an order for suspension of the proceedings, an appeal shall not suspend execution proceedings as a rule.⁴⁰⁴ Hence, it is concluded that a foreign judgment is final and conclusive under the TCPCE even if the time for appeal has not expired or even if an appeal lies against the order.⁴⁰⁵

⁴⁰¹ See paras 2.2. and 2.3 of the mini-dissertation.

⁴⁰² See para 2.2 of the mini-dissertation.

⁴⁰³ See para 2.2 of the mini-dissertation.

⁴⁰⁴ See para. 2.3.5 of the mini-dissertation.

⁴⁰⁵ See para. 2.3.5 of the mini-dissertation.

Foreign judgments given in default can be recognised and enforced in Eritrea only if a period of one month has elapsed from the day when the judgment debtor became aware of the judgment because, according to article 78 of the TCPCE, the debtor has a period of one month to rescind the judgment.⁴⁰⁶

Even though foreign child support orders can be recognised and enforced based on treaty, this mechanism is not applicable because Eritrea has not concluded any bilateral or multilateral treaties yet.⁴⁰⁷ Hence, recognition and enforcement of foreign child support orders in the country are based on reciprocity.⁴⁰⁸ However, reciprocity victimises innocent individuals.⁴⁰⁹ The matter becomes worse in cases of child support orders since the victims of the reciprocity impediments are children who should otherwise be protected by every country.

Hence, based on the research, it is concluded that recognition and enforcement of outstanding arrears, future, and provisional foreign child support orders are almost impossible in Eritrea because: (a) the finality requirement contradicts the variable feature of child support orders;⁴¹⁰ (b) the reciprocity requirement victimises innocent children who should otherwise be protected by the state;⁴¹¹ (c) the country has not yet concluded any bilateral or multilateral treaties on the issue.⁴¹²

If the formal and material requirements under the TCPCE are satisfied, the mechanisms used to enforce domestic child support orders can be applied to enforce foreign child support orders as well.⁴¹³ The mechanisms applied to enforce child support orders are civil and criminal methods.⁴¹⁴ However, the mechanisms are not effective because:⁴¹⁵ (a) the law does not provide a solution if the employer of a debtor employee fails to withhold the income of the debtor after a court ordered the

⁴⁰⁶ See para. 2.3.5 of the mini-dissertation.

⁴⁰⁷ See paras 1.2 and 2.5 of the mini-dissertation.

⁴⁰⁸ See para. 2.3.4 of the mini-dissertation.

⁴⁰⁹ See para. 2.3.4 of the mini-dissertation.

⁴¹⁰ See para. 2.3.5 of the mini-dissertation.

⁴¹¹ See para. 2.3.4 of the mini-dissertation.

⁴¹² See paras 1.2 and 2.5 of the mini-dissertation.

⁴¹³ See para. 2.4 of the mini-dissertation.

⁴¹⁴ See para. 2.4 of the mini-dissertation.

⁴¹⁵ See para. 2.4 of the mini-dissertation.

employer to withhold the wages of the employee; (b) if a court ordered the imprisonment of a debtor for not more than six months, the law has no solution if the debtor still fails to pay his debt after the six-month period has passed; (c) imprisonment of the debtor indirectly aggravates the problems of the child, since imprisonment renders the debtor unable to work and hinders the child from getting what is due to him; (d) imposing a fine on the debtor does not benefit the child because the money which should have been given to the child goes to the government instead; (e) pensions and alimonies of a debtor, and more than half of the income of seamen cannot be attached to satisfy a debt, and these exemptions restrict the chance of the child getting what is due to him.

Although effective enforcement of child support orders was necessary during the Covid-19 pandemic, the enforcement proceedings were more problematic in Eritrea since the courts which are authorised to enforce child support orders were not functioning for about seven months.⁴¹⁶ Furthermore, in some parts of the country they were not fully functioning until mid-2021 after they were closed on 26 March 2020.⁴¹⁷

5.2.2 South Africa

Recognition and enforcement of foreign child support orders in South Africa are governed by the rules of the common law and by the Reciprocal Enforcement of Maintenance Orders Act 80 of 1963 (REMOA hereinafter).⁴¹⁸ The common law imposes material requirements before a foreign judgment is recognised in South Africa.⁴¹⁹ The finality criterion is one of the requirements which should be satisfied. Due to the finality requirement, only final arrears which have accumulated before registration in the local courts can be recognised and enforced under the South African common law.⁴²⁰ Future and provisional foreign child support orders cannot be recognised and enforced because they fail to satisfy the finality requirement.⁴²¹ Unlike

⁴¹⁶ See para. 2.4 of the mini-dissertation.

⁴¹⁷ See para. 2.4 of the mini-dissertation.

⁴¹⁸ See paras 1.1 and 3.1 of the mini-dissertation.

⁴¹⁹ See para. 3.2 of the mini-dissertation.

⁴²⁰ See paras 3.3 and 3.4 of the mini-dissertation.

⁴²¹ See para. 3.2 of the mini-dissertation.

Eritrean law, however, recognition and enforcement of foreign child support orders under South African common law is not based on reciprocity but on comity.⁴²²

The REMOA empowers the Minister of Justice and Correctional Services to designate countries for the purpose of recognition and enforcement of foreign child support orders.⁴²³ Designation eases the difficulty of recognition and enforcement of foreign child support orders because decisions that originate in designated countries are registered and enforced directly in the local courts after they pass through some diplomatic channels.⁴²⁴ No formal requirements are stipulated for judgments originating from designated countries.⁴²⁵ In addition, a foreign provisional child support order that originates in a designated country can be recognised and enforced under the REMOA after an inquiry has been made by local maintenance officers.⁴²⁶ Further, designation reduces expenses on the part of the creditor, as the confirmation and enforcement processes are completed by the authorities of the country where the judgment originates and the authorities of the enforcing country.⁴²⁷ However, few countries have been designated under the REMOA.⁴²⁸

After foreign child support orders have been recognised either in terms of the rules of the common law or the REMOA, enforcement takes place through the mechanisms applied to enforce domestic child support orders.⁴²⁹ Civil and criminal mechanisms as well as credit bureau reporting are applied to enforce child support orders.⁴³⁰ However, the enforcement mechanisms are not effective because:⁴³¹ (a) maintenance creditors are not allowed to apply for alternative enforcement mechanisms; instead they can only choose one remedy at any given time; (b) maintenance debtors can easily avoid attachment orders by registering their properties in the names of other persons, and since the cost of storage of properties

422 See para. 3.2 of the mini-dissertation.
423 See para. 3.3 of the mini-dissertation.
424 See para. 3.3 of the mini-dissertation.
425 See para. 3.3 of the mini-dissertation.
426 See para. 3.3 of the mini-dissertation.
427 See para. 3.3 of the mini-dissertation.
428 See para. 3.3 of the mini-dissertation.
429 See para. 3.3 of the mini-dissertation.
430 See para. 3.3 of the mini-dissertation.
431 See para. 3.4.1 of the mini-dissertation.

is paid by the creditor it aggravates the financial woes of the creditor; (c) attachments of emoluments are not effective if the maintenance debtor is self-employed, employers are uncooperative in deducting the amount of emolument orders from the salaries of their employees, or employers charge administrative fees to maintenance creditors instead of to maintenance debtors; (d) attachments of debts are not effective because proper investigation is not made whether a maintenance debtor has present or future debts accruing to him, and maintenance debtors may close their bank accounts to frustrate the enforcement process and open another account easily; (e) fines and imprisonment are not effective because they indirectly restrict the interest of the child;⁴³² (f) the law fails to provide a correlative responsibility to credit bureaus to receive default orders.⁴³³

5.2.3 Comparative findings

Comparing the Eritrean and the South African laws on the issue of receiving and processing applications for recognition and enforcement of foreign child support orders, the position under South African law is better. The procedure under Eritrean law creates delay and unnecessary costs to the parties as well as congestion in the High Courts since parties could be obliged to file a case for recognition in the High Courts and then to file another case for enforcement in the lower courts.⁴³⁴ In addition, as there are few High Courts in Eritrea, they are not easily accessible.⁴³⁵ Under the South African common law, on the other hand, there is no court that has exclusive jurisdiction either to recognise or enforce foreign child support orders.⁴³⁶ Therefore, access to the courts is better under the South African law. On the other hand, since receiving and transmission of foreign child support orders are performed through diplomatic channels under the REMOA, the proceedings are more accessible and cost effective though few countries have been designated under the REMOA.⁴³⁷

⁴³² See para. 3.4.2 of the mini-dissertation.

⁴³³ See para. 3.4.3 of the mini-dissertation.

⁴³⁴ See paras 2.2 and 4.2 of the mini-dissertation.

⁴³⁵ See para. 4.2 of the mini-dissertation.

⁴³⁶ See para. 4.2 of the mini-dissertation.

⁴³⁷ See paras 3.3 and 4.2 of the mini-dissertation.

Eritrean and South African law require that foreign judgments and other accompanying documents should be certified.⁴³⁸ In addition to certification, the South African common law requires that foreign judgments should be authenticated and should be translated into the working language of the courts.⁴³⁹ However, since authentication is done by an officer other than the person who first issued the original document, it exposes the creditor to extra costs and delay. On the other hand, the TCPCE requires a certificate that confirms the finality and enforceability of a foreign judgment.⁴⁴⁰ Apart from certification, however, the REMOA does not impose any criteria which foreign judgments should satisfy and this benefits creditors since the imposition of more criteria could cause delay and extra costs.⁴⁴¹

The TCPCE and the South African common law impose material criteria which must be satisfied before foreign judgments are recognised and enforced. Under both laws, the requirements are cumulative.⁴⁴² However, there are no material requirements under the REMOA.⁴⁴³

Except for the reciprocity criterion, which is imposed under the TCPCE, the material requirements under the TCPCE and under the South African common law are more or less the same.⁴⁴⁴ Reciprocity, however, victimises innocent children for the failure of their states to enter into reciprocity agreements.⁴⁴⁵ Hence, the South African common law seems to better serve the interest of children on this issue.

Finality is one of the other requirements that must be satisfied before a foreign judgment is recognised and enforced under the TCPCE and under the South African common law.⁴⁴⁶ Hence, under both laws, foreign provisional child support orders and

438 See para. 4.3. of the mini-dissertation.

439 See paras 3.2 and 4.3 of the mini-dissertation.

440 See paras 2.2 and 4.3 of the mini-dissertation.

441 See paras 3.3 and 4.3 of the mini-dissertation.

442 See para. 4.4 of the mini-dissertation.

443 See paras 3.3 and 4.4 of the mini-dissertation.

444 See para. 4.4 of the mini-dissertation.

445 See paras 2.3.4 and 4.4 of the mini-dissertation.

446 See para. 4.4 of the mini-dissertation.

future child support orders cannot be recognised and enforced as they cannot satisfy the finality requirement.⁴⁴⁷

Appeal and judgments decided by default affect the finality of judgments in many jurisdictions.⁴⁴⁸ However, appeal does not affect the finality of a judgment under the Eritrean and the South African common law, unless suspension of an execution process is granted by an appellate court.⁴⁴⁹

Under the TCPCE, foreign judgments decided by default are not final until one month has lapsed from the day when the debtor became aware of the judgment.⁴⁵⁰ Under South African law on the other hand, default foreign judgments are not enforced unless the debtor waives his right to contest the judgment or until the period to contest the judgment under the foreign law has expired.⁴⁵¹ On this issue, the Eritrean law seems to be better because the South African law may cause problems if a foreign law has no specific time limit as to when a debtor can contest a judgment decided by default.

The prescription period is another requirement that must be addressed before foreign child support orders are recognised and enforced. However, both the Eritrean and South African laws fail to determine whether the period of prescription should be governed by the *lex causae* or the *lex fori*.⁴⁵²

After all the procedural and material requirements under the Eritrean and South African laws have been satisfied, the mechanisms applied to enforce domestic child support orders in each law are also applied to enforce foreign child support orders.⁴⁵³ The mechanisms applied to enforce child support orders are civil and criminal. Under the South African Maintenance Act 99 of 1998, if a debtor fails to pay his debt within 10 days, the creditor can sue him in the maintenance court.⁴⁵⁴ Under Eritrean law,

447 See paras 2.3.5 and 3.2 of the mini-dissertation.

448 See para. 2.3.5 of the mini-dissertation.

449 See para. 4.4 of the mini-dissertation.

450 See paras 2.3.5 and 4.4 of the mini-dissertation.

451 See paras 3.2 and 4.4 of the mini-dissertation.

452 See para. 4.4 of the mini-dissertation.

453 See para 4.5.1 of the mini-dissertation.

454 See para 4.5.1 of the mini-dissertation.

however, there is no specified time after which a creditor can sue the debtor if the latter failed to pay maintenance on time.⁴⁵⁵ The time limit under the South African law is important because it gives the creditor a fixed time within which he can institute a claim, and limits the courts' discretion to wait indefinitely if the debtor can pay the arrears voluntarily.

Both Eritrean and South African law fail to provide a sequence as to when to apply each mechanism.⁴⁵⁶ Under the South African Maintenance Act the creditor is required to choose one mechanism at a time while the practice in the courts in Eritrea is that a creditor can specify some or all of the mechanisms at a time and the courts choose to apply one or more of the mechanisms they consider appropriate to effectively enforce a judgment.⁴⁵⁷

Under the Eritrean law, some properties are excluded from attachment to satisfy a debt.⁴⁵⁸ Exclusion of properties from attachment could be wise because it helps the debtor and other dependant family members not to be jeopardised by the process. However, exclusion of properties from attachment, in specific circumstances, could hamper the interest of the debtor.⁴⁵⁹ Under South African law, however, there are no properties which are excluded from attachment.

Another civil enforcement mechanism under Eritrean and South African law is income withholding. Unlike South African law, however, Eritrean law fails to grant a remedy if an employer fails to deduct the amount owed from the salary of the debtor employee and to send it to the maintenance creditor.⁴⁶⁰

Civil contempt proceedings is another civil enforcement mechanism under the Eritrean law.⁴⁶¹ However, contempt of court under South African law is a criminal

⁴⁵⁵ See para 4.5.1 of the mini-dissertation.

⁴⁵⁶ See para 4.5.1 of the mini-dissertation.

⁴⁵⁷ See para. 4.5.1 of the mini-dissertation.

⁴⁵⁸ See para. 2.4 of the mini-dissertation.

⁴⁵⁹ See para. 4.5.1 of the mini-dissertation.

⁴⁶⁰ See para. 4.5.1 of the mini-dissertation.

⁴⁶¹ See para. 4.5.1 of the mini-dissertation.

offence regardless of whether the contempt is committed in the context of a civil or a criminal case.⁴⁶²

Another civil enforcement mechanism under Eritrean law is enforcement through a surety.⁴⁶³ However, the researcher did not find any law or case that imposes enforcement of child support orders through a surety under South African law.⁴⁶⁴

The criminal sanctions for nonpayment of child support orders under South African law are either a fine or imprisonment or both, while under Eritrean law, a maintenance defaulter is punished either by a fine or imprisonment but not both.⁴⁶⁵ On the other hand, Eritrean law specifies the amount of the fine whereas South African law fails to specify the amount.⁴⁶⁶

To avoid the negative consequences of a fine and imprisonment, courts in South Africa impose periodical imprisonment and correctional supervision on maintenance defaulters.⁴⁶⁷ In Eritrea, though correctional supervision is available as a punishment, it is not applicable for failure to pay maintenance.⁴⁶⁸ However, periodical imprisonment is not available as a punishment under Eritrean law.

In addition to the criminal and civil enforcement mechanisms discussed above, credit bureau reporting is another mechanism available for enforcement of child support orders in terms of the Maintenance Act of South Africa.⁴⁶⁹ Although it has not yet been implemented, this mechanism is expected to have a positive impact because debtors do not want to have bad credit records.⁴⁷⁰ However, the credit bureau reporting mechanism is not known to Eritrean law.

Although hearings were seriously affected because of restrictions on international and domestic travel, and many of the enforcement mechanisms were suspended during

⁴⁶² See para. 4.5.1 of the mini-dissertation.

⁴⁶³ See para. 4.5.1 of the mini-dissertation.

⁴⁶⁴ See para. 4.5.1 of the mini-dissertation.

⁴⁶⁵ See para. 4.5.1 of the mini-dissertation.

⁴⁶⁶ See para. 4.5.2 of the mini-dissertation.

⁴⁶⁷ See para. 3.4.2 of the mini-dissertation.

⁴⁶⁸ See para. 4.5.2 of the mini-dissertation.

⁴⁶⁹ See paras 3.4.3 and 4.5.2 of the mini-dissertation.

⁴⁷⁰ See para. 4.5.2 of the mini-dissertation.

the Covid-19 lockdown, matters relating to enforcement of maintenance orders continued to be heard in courts in South Africa during the Covid-19 pandemic.⁴⁷¹ In Eritrea, however, enforcement of child support was not possible during the Covid-19 lockdown since the courts which are authorised to enforce child support orders were not functioning for about seven months and in some parts of the country, they were not fully functioning until mid-2021 after they were totally closed on 26 March 2020.⁴⁷² Hence, it can be concluded that child support creditors in Eritrea were more vulnerable during the pandemic than their counterparts in South Africa.

Generally, comparing the Eritrean and South African laws on the recognition and enforcement of foreign child support orders, Eritrea has a lot to learn from South Africa. For instance, the promulgation of a separate law on the enforcement of child support orders, establishment of special maintenance courts, giving power to the Ministry of Justice to designate countries so that child support orders originating in the designated countries could be automatically enforced in Eritrea, and using credit bureau reporting and periodical imprisonment for an effective enforcement of child support orders etc. However, seeing the Eritrean and South African laws through the prism of the Hague Convention of 2007, both countries' laws need improvements.⁴⁷³ For instance, establishment of a special authority responsible for the process of receiving and transmitting of foreign child support orders, promulgation of new enforcement mechanisms such as denial of different licenses and passports to maintenance debtors, and avoiding the criminal enforcement mechanisms are required.

5.3 Recommendations

Based on the findings of the research, the following recommendations are made.

1. Eritrea should promulgate a separate law on the recognition and enforcement of foreign child support orders so that support orders would be enforced effectively without much cost and without unnecessary delay. For instance, the

⁴⁷¹ See para. 3.5 of the mini-dissertation.

⁴⁷² See para. 2.4 of the mini-dissertation.

⁴⁷³ See chapter 5 of the mini-dissertation.

finality requirement, which is difficult to satisfy due to the fact that child support orders can be varied, and causes more delay and cost, could be removed. In addition, the law should be promulgated in such a way that provisional maintenance orders would be recognised and enforced in Eritrea.

2. As a short-term solution, Eritrea should give power to one of its ministries (the Ministry of Justice for instance) to designate countries whose child support orders can be recognised and enforced in Eritrea without any requirements. In the meantime, the country should conclude treaties with some countries on the issue. However, as a long-term solution, the country should start to investigate how it could adopt international conventions and protocols on the issue. In addition, the country should launch research on how it can become a member of the Hague Conference on Private International Law.
3. A special authority responsible for the recognition and enforcement of foreign child support orders should be established so that the process of recognition and enforcement of foreign child support orders would be more simplified and may reduce costs and avoid delay. In addition, it would be better if special maintenance courts or administrative authorities could be established so that maintenance orders could be enforced effectively.
4. The domestic enforcement mechanisms should be amended in such a way that new and effective enforcement mechanisms such as credit bureau reporting, periodical imprisonment, and denial of various licences and passports would be added. In addition, the lacunas in the current law, such as the measures that could be taken and the punishment that could be imposed on an employer who fails to fulfil a court order to deduct maintenance from the salary of a debtor employee and to send it to the creditor should be fixed. Further, if a court orders the imprisonment of a debtor for non-payment of child support, the law has no solution if the debtor still fails to pay his debt after imprisonment. Furthermore, the three-month period of limitation to claim maintenance arrears should be amended so that the period of limitation would be longer. Hence, the law should be amended to address these lacunas.

5. To minimise the problems of enforcement of child support orders, Eritrea should promulgate a special law on how to handle the issue during times of emergency such as the Covid-19 pandemic.
6. As a concluding remark, the laws of the rendering country indirectly affect the recognition and enforcement of such judgments in the enforcing country, because criteria such as reciprocity affect the issue. In addition, if the laws of the requesting country are not favourable for effective recognition and enforcement of foreign child support orders, other countries may not be motivated to conclude treaties with the requesting country on the issue because they may believe that their judgments could not easily be enforced in the requesting country. For instance, instead of recognising and enforcing foreign child support orders made only by courts, Eritrea could amend its law so that foreign child support orders made by administrative authorities could be recognised and enforced in the country. This could motivate countries where child support orders are decided by administrative authorities to conclude bilateral or multilateral treaties with Eritrea.

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