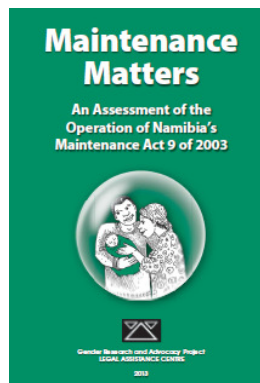


**PRESS RELEASE  
ON THE LAUNCH OF THE REPORT**

# *Maintenance Matters*



**Gender Research & Advocacy Project  
Legal Assistance Centre  
10 October 2013**

The LAC report *Maintenance Matters: An Assessment of the Operation of the Maintenance Act 9 of 2003* is being launched in Windhoek on Thursday 10 October 2013, 4pm at the Supreme Court of Namibia (Rev. Michael Scott Street, city centre).

The report is available in hard copy (N\$100), on CD, or on the LAC website ([www.lac.org.na](http://www.lac.org.na)). Free copies of the report will be available at the launch.

## 1. WHY DID WE CONDUCT THIS RESEARCH?

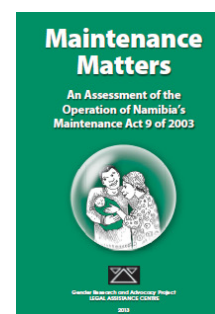
The study assesses the application of the Maintenance Act 9 of 2003 with a view to assessing whether the law is serving its intended purpose effectively. It is the first study to assess the operation of the Maintenance Act. No one can anticipate exactly how laws will work in practice, and it is unlikely that any new law will ever be perfect. Therefore it is always vital to study laws in action, to see if they are serving their intended purposes.



The study is the third in a series conducted by the Legal Assistance Centre on the operation of key gender laws in Namibia.<sup>1</sup> Many of the recommendations in *Rape in Namibia* and *Seeking Safety* have been considered by stakeholders and we hope that our new study can similarly enable refinements in the law on maintenance to improve its implementation.

The study is also a follow-up to a study published by the LAC in 1995 on the operation of the previous Maintenance Act (the Maintenance Act 23 of 1963).

Therefore this study differs from the previous two in the series as it is the only one in the set which is able to compare the operation of a pre-independence law with a post-independence law.



## 2. HOW DID WE DO THE STUDY?

Data was collected from maintenance files opened during the years 2005 to 2008. During this four-year period, nearly 19 000 maintenance complaints were opened nationwide. The study presents the findings of the field research from:

- **1 687 court files** opened in the period 2005-2008 from 19 of the 31 magistrates' courts in place at the time of the study, located in 12 of Namibia's 13 regions;<sup>2</sup>

<sup>1</sup> Legal Assistance Centre (LAC), *Rape in Namibia: An Assessment of the Operation of the Combating of Rape Act 8 of 2000*, Windhoek: LAC, 2006.

Legal Assistance Centre (LAC), *Seeking Safety: Domestic Violence in Namibia and the Combating of the Domestic Violence Act 4 of 2003*, Windhoek: LAC, 2012

<sup>2</sup> In mid-2013 the government split Kavango Region into two regions, naming them Kavango East and Kavango West. As the analysis for this report was completed before this change and all contextual data (eg number of people per region) is still based on 13 regions rather than 14, we have not amended our reference to 13 regions. This is also why the report refers to Caprivi Region and Karas Region rather than the new names of Zambezi and ǀKaras which were given in 2013.

- **34 interviews with magistrates, maintenance officers and clerks** from 11 regions;
- **6 focus group discussions** with a total of 62 people;
- an examination of **reported and unreported cases** that cite the Maintenance Act; and
- relevant statistics, **judicial developments** and **examples from other countries**.

The study also contains **a review of the importance of maintenance** and a summary of how the Maintenance Act was developed, an analysis of some of the Act's key provisions and **recommendations for fine-tuning the law and regulations**, and for improving the implementation of the law.

### **3. WHY DOES MAINTENANCE MATTER?**

**The provision of maintenance is a human rights issue.** Children have a constitutional right to be cared for by their parents, and parents have a duty to act in the best interests of their children under the international agreements which Namibia has ratified.

**The social context of maintenance is particularly relevant in Namibia.** According to the 2006-2007 Demographic and Health Survey, approximately two-thirds of children live apart from one or both parents while the absent parent or parents are still living – these children may be in particular need of support.

**The economic context of maintenance is also important.** For example, children are more likely than adults to live in poverty – and according to the 2006-2007 Demographic and Health Survey, only 50% of children between 5 and 17 years of age have a pair of shoes, two sets of clothing and a blanket; many of these children might be able to acquire such bare necessities of life through an absent parent's payment of maintenance.

However, many parents may struggle to provide for their children – the difference between income and expenditure is small for all households, which suggests that many people live on a survival basis. Furthermore, approximately 50% of the population do not receive a regular salaried monthly income. This may explain why so many women are in need of maintenance, but it may also explain why many fathers struggle to pay maintenance.

### **4. KEY FINDINGS**

**On average, someone makes a maintenance complaint in Namibia every thirty minutes during working hours**, since 4000-5000 complaints are filed at the maintenance courts each year.

However, **only approximately two-thirds of complaints ever result in an order being made.** This is despite the fact that all children need maintenance and most claims for maintenance present a clear need for financial support.

**Overall, the findings show that if the maintenance complaint is a simple one and the absent parent is willing to pay maintenance, the process of making an order will be as quick and easy as the law intends it to be.**

**However, if there are challenges along the way, the outcome is very different – the process will probably take much longer with numerous causes for delay, and an order may not even be made.** Problematic areas may be where the complainant does not have details of the absent parent's whereabouts or financial position, where there are repeated postponements resulting from evasions on the part of the absent parent, or some other reason that complicates the process.

**When an order is made, it is typically for low monthly payments, averaging N\$250/month for a single pre-school age child.** This is typically half the amount the complainant requested and one quarter of the estimated costs of caring for the child. In many cases, the amount of maintenance ordered is not a realistic reflection of need but rather a generic amount that changes little according to rural or urban residence or other factors. This appears to be in part due to the lack of thorough investigation of the financial situation of defendants, a problem that is mostly due to the fact that not a single maintenance investigator has been appointed to the courts in the ten years since the Act came into force

It therefore comes as no surprise that **one key concern arising from this report is the critical need to hire maintenance investigators.** In South Africa, the improved operation of the country's maintenance courts has been attributed primarily to the appointment of maintenance investigators. Amongst other things, the provision of maintenance investigators will allow the maintenance courts to ensure that defendants and witnesses are found and that the financial status of the parties is properly investigated, resulting in a higher success rate for maintenance complaints and the making of orders that reflect the real situation of the complainant and defendant.

**Another major concern identified in this report is that many of the innovative options included in the 2003 Act are not being utilised.** For example, the options of making payments

#### **What can N\$250/month buy?**

The majority of beneficiaries were aged 0-12.

**For a child under the age of 1** who has been weaned onto solid foods but is still breastfeeding, N\$250 per month could probably cover most of the monthly cost of disposable nappies but not the cost of fruit and vegetables for purees and would probably not cover any unexpected medical expenses. (It is harder to estimate the cost of using cloth nappies, and it appears that most people prefer to use disposables.)

**For a child aged 4,** if the child is living in Windhoek and attending a private day care centre, the average monthly cost to attend may be approximately N\$200-500. The maintenance provided may cover this cost but would not then leave any money for food, clothing or medical expenses.

**For a child aged 12,** the maintenance will contribute to the cost of monthly groceries but will not be enough and will not leave any money for clothing, medical expenses, education-related costs or any other needs of the child.

directly to the complainant, or into the complainant's bank or post office savings account rather than to the court, are seldom utilised. Concerns about proof of payment and perceptions about what will be most likely to influence the defendant to comply seem to have influenced the low uptake of alternative methods of payment, despite the fact that no form of payment is more "official" than another. Also, few courts use the innovation of default orders in cases where a defendant who was properly summoned fails to appear in court. Another problem is that few complainants or defendants are utilising the option for substitution, suspension or discharge of a maintenance order to deal with changed circumstances.

**Probably the greatest failure of the new Act has been the infrequent use of the available civil enforcement mechanisms.** The Act allows the court to attach wages or debts or order the sale of property if the defendant has breached a maintenance order but these options are rarely used, despite the fact that such mechanisms could result in the immediate payment of arrears or ensure reliable future payments. The reason behind their infrequent use seems to be a lack of knowledge of their availability combined with a lack of confidence in the law on the part of both maintenance court officials and the public. The implementation of the law could be improved by the provision of information on civil enforcement mechanisms, and the law itself could be improved by providing for the attachment of wages in respect of any maintenance order rather than only after a breach. This could ensure reliable payments from the start and prevent large amounts of arrears from accumulating.

### **Complaint to conclusion: The typical maintenance case in Namibia**

Complaints are usually made by a mother against a father. Most complainants are made in urban areas, and 40% involve complainants and defendants who live in same town or village.

The majority of maintenance complaints are made for a single pre-school age child. On average complainants request N\$500 for the maintenance of their child – approximately half the estimated cost of caring for the child.

The typical defendant does not have a history of providing any maintenance voluntarily.

Few maintenance complaints are withdrawn.

The vast majority of maintenance orders are consent orders, meaning that they result from an agreement between the complainant and defendant before a court enquiry is held.

Most maintenance enquiries are completed without postponements. Both parties usually represent themselves without the help of legal practitioners.

The paternity of the child for whom maintenance is requested is not usually disputed.

A typical maintenance order will be made for N\$250 per month. This is typically half the amount the complainant requested and one quarter of the estimated costs of caring for the child.

Although the 2003 Act allows payments to be made directly to the beneficiary, or paid to an organisation or institution such as a bank or a post offices savings account, approximately 90% of payments are still made directly to the court and collected each month by the complainant.

The time between the date of an initial complaint and the date on which maintenance payments begin in terms of an order is typically 2-3 months.

Appeals of maintenance orders are rare.

There is no indication that complainants have a tendency to misuse maintenance money.

Neither the complainant nor the defendant is likely to ask for the order to be substituted or discharged. If a change is requested, it will usually be made by the complainant over one year after the initial order. If a request for an increase in maintenance payments is made, it will usually be granted and will usually be for double the amount of maintenance awarded in the initial order - which is typically similar to the original amount of maintenance requested.

Two-thirds of the requests for a decrease were granted but this figure is based on just 12 cases.

The typical defendant will not be reported to the court for defaulting on maintenance payments, whatever the reality may be. If the defendant does breach the maintenance order, he will usually be in arrears for 6-9 months before the complainant informs the court. Once the defendant breaches an order, the typical complainant will not receive a positive resolution to the problem.

Civil enforcement mechanisms, such as orders for the attachment of property or wages, are rarely applied requested or utilised.

Criminal proceedings are also rarely invoked to deal with breaches. In the rare cases where a criminal trial is held (only 5% of all cases in the sample), the defendant will not usually receive any punishment.

## 5. RECOMMENDATIONS

**This report provides a number of recommendations for improving the implementation of the Act.** Six key suggestions for action are summarised below:

**1. Maintenance investigators:** The Maintenance Act allows the Minister of Justice to appoint maintenance investigators. To date, not a single maintenance investigator has been appointed despite the clear need. We recommend that the Ministry of Justice appoint maintenance investigators to the maintenance courts most in need as soon as possible, particularly in light of the provision in section 8(4) of the Maintenance Act which states: *“The Minister must take all reasonable steps within the available resources of the Ministry of Justice to achieve the progressive realisation of the appointment of at least one maintenance investigator for each maintenance court.”*

**2. Full utilisation of existing powers of investigation:** As recommended in the 1995 maintenance study, maintenance officers need to be encouraged to use their powers of investigation more assertively to help locate defendants or to obtain accurate information about the defendants' income and means, utilising their ability to summon witnesses to court for this purpose if necessary. Otherwise, defendants in maintenance cases will be able to get away with hiding themselves or their assets to avoid contributing towards the support of their children. However, this recommendation is likely to be effective only if maintenance investigators are appointed to support maintenance officers.

**3. Providing trained volunteers to assist with maintenance cases:** NGOs can provide volunteers to assist complainants to make maintenance complaints, or to give information to defendants who lack means on how to present information to the court or request a substitution or discharge where appropriate. Such volunteers will reduce the burden on court staff and help to make the process more child-centred, particularly in cases where the parents are in conflict with each other. If, as in South Africa, there can be a progression from volunteer to employed court staff member, the role of volunteers would not only have altruistic benefits for the community, but would also provide economic benefits for the volunteers in the long term.

**4. Preventing large amounts of arrears:** Maintenance officers should inform complainants at the time the order is granted that arrears can be reported as soon as a single payment has been outstanding for 10 days, to prevent arrear amounts from piling up. Defendants should also be fully informed about the implications of not paying maintenance, including the various civil and criminal enforcement possibilities which may be utilised in the event of non-payment. Parents need to remember that maintenance should not be viewed as a tug-of-war between the mother and the father; when maintenance is not paid, it is the child who suffers.

**5. Information about the Maintenance Act:** The study suggests that there are aspects of the Act that are not well-understood or well-utilised by either maintenance court officials or the public. For example it would be helpful to ensure that all maintenance court officials are aware of the fact that the minor children can claim maintenance on their own, and familiar with the process and mechanisms for the enforcement of maintenance orders. There is also a need for more information on maintenance aimed at the general public. Such information could be disseminated by the Ministry of Justice, or by NGOs working in partnership with the Ministry, by means of radio and television, news articles or advertisements, and pamphlets or posters placed at popular public places and at maintenance courts.

**6. Amendments to the Maintenance Act and regulations:** We recommend that the Law Reform and Development Commission and the Ministry of Justice consider amendments to the Maintenance Act to clarify and fine-tune some issues, including revision of some of the key forms used under the Act. These recommendations for amendment do not introduce new principles or innovations, since the Act already provides the key tools required for a successful maintenance system.

## **6. CONCLUSION**

The Maintenance Act 9 of 2003 has introduced positive changes in the application of maintenance and many people are benefiting from the new law. However the study has shown that the Act is not being as effectively implemented as it could be. This means that we have the situation often encountered in respect of gender-related laws, where the law is providing the legal framework intended to support a strong system but efficient practical application is lacking. We hope that this study helps to improve the operation of the Maintenance Act so that children may receive the support that they so vitally need.

**Questions may be directed to**

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