

MAINTENANCE

A Study of the Operation of Namibia's Maintenance Courts



Dianne Hubbard

LEGAL ASSISTANCE CENTRE

Republic of Namibia 1995

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*The author would like to dedicate this study to
Ms Dina Kisting, whose maintenance of her family
made this research possible.*

MAP OF STUDY AREA

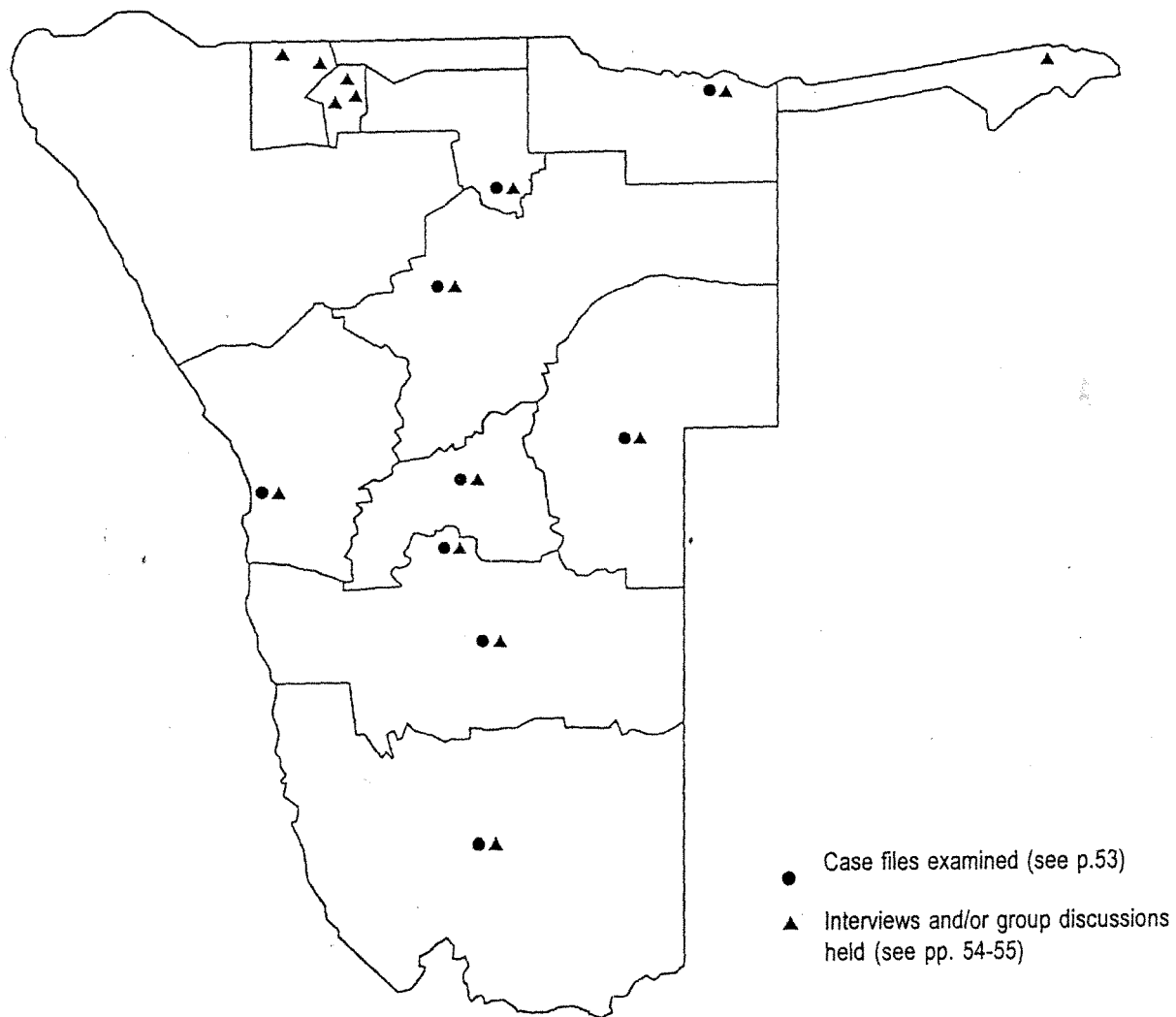


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EDUCATIONAL MATERIALS



Booklets and pamphlets explaining the law on maintenance in simple language are available from the Legal Assistance Centre and its affiliated advice offices.

SUMMARY OF FINDINGS AND RECOMMENDATIONS

Data gathered from court files in nine locations in Namibia during 1993 and 1994 produced the following picture of the typical maintenance case:

A PROFILE OF THE TYPICAL MAINTENANCE CASE

The maintenance court procedure is used almost exclusively by mothers seeking contributions towards the costs of child-rearing from the fathers of their children. The typical mother requests maintenance of N\$150/month for 1 child -- thus exploding the myth which is still prevalent in some quarters that women have lots of babies to increase their income.

The child is likely to be about 6 years old at the time when the mother first approaches the maintenance court, and the father probably ceased to provide maintenance before the child turned 4 -- or even before the child's first birthday, as was the case in over half of all the cases studied.

In Windhoek, the maintenance court is used most often by Afrikaans-speaking women (48% of all Windhoek complainants), followed by Damara/Nama-speaking women (26% of all Windhoek complainants). It would not be at all surprising if the father was from a different language group, as this was the case in about 25% of the cases in the survey.

Once a complaint is made, the father is ordered to appear in court on a given date by means of a summons or a subpoena. There is about a 75% chance that the first subpoena which is issued will be successfully served. If it is not successfully served, this is probably because the father cannot be located, although there appear to be a worrying number of cases in which the police do not carry out their task of serving subpoenas effectively.

The vast majority of maintenance cases are resolved by a consent agreement between the mother and the father which is made into an order of court. If consent cannot be reached, a decision on maintenance will be made by the maintenance court at the conclusion of an enquiry.

If an enquiry is held, it is unlikely that either the mother or the father will have legal representation. There will probably be one or two postponements, with the most common reason for postponement being the failure of the father to appear in court. The cause of the postponement may be the man's request for a blood test in an attempt to prove that he is not the father of the child, or it may be because the father has neglected to bring proof of his income or means.

It is likely that the mother will succeed in obtaining maintenance for the child, as this was the outcome for about 73% of all maintenance complaints in the survey. In most cases, the mother will receive about N\$78 per child in terms of the maintenance order.

Payments will probably begin within three months or less of the date on which she first approached the maintenance court for assistance.

If the father falls into arrears with the maintenance payments -- as happened in about 26% of all the cases in the survey -- this will probably happen within one year of the date of the maintenance order. Enforcement is a difficult matter.

By the time the typical arrears case comes to court, arrears will be about N\$750, although the amount of arrears could range from N\$70 to more than N\$10 000. It is important to understand the implications of these amounts for the financial situation of the mother. When the father of the children does not pay, the children must still eat and the rent must still be paid.

For some fathers, falling into arrears is an habitual practice. It would not be unusual for a father who falls into arrears to miss payments on seven different occasions, and there are a significant number of cases in which fathers fell into arrears up to 10 times -- indicating that the existing mechanisms for dealing with the problem are inadequate.

Criminal proceedings take place in only about half of the cases in which the father falls into arrears. In some cases, no court action can proceed because the father cannot be located. Payments may have resumed in some cases, thus eliminating the need for criminal proceedings.

Most men who appear before the court on charges of failure to pay maintenance admit their guilt. Punishment for failure to comply with a maintenance order is seldom severe. The most common punishment is a suspended sentence of 2-6 months suspended for 1-5 years, which means that the man in question serves no time in prison at all unless he repeats the offence. The courts are understandably reluctant to impose sentences of imprisonment which might cause the father to lose his job and then be unable to continue with the required maintenance payments. However, there are a range of other options, such as periodical imprisonment which can be served on weekends.

If the father is found guilty of non-payment, the court is likely to issue an order for the payment of the arrears which are owing. Such orders typically require the gradual repayment of the arrear amount in small monthly instalments, meaning that it is likely that the mother will have to wait about a year before the full amount is paid off.

Orders for attachment of wages can issued by the court any time a defendant is found guilty of failure to make payments as required. This means that the court orders the employer to deduct the required maintenance payment from the man's wages and pay the money directly into court. Employers are bound by law to comply with such a court order. This is probably one of the most effective ways to ensure compliance with a maintenance order, but it is seldom utilised. Attachment orders were issued in only about 10% of all cases in the sample where the defendant was found guilty of a failure to pay.

SUMMARY OF FINDINGS AND RECOMMENDATIONS

In general, the maintenance court system is not working badly. However, the data which was gathered from court files, interviews and group discussions indicates that there is certainly room for substantial improvement. The recommendations which emerged from the study are summarised below. These recommendations are discussed more fully in Chapter 4.

Overall, it is important to try to move away from a conceptualisation of maintenance as a tug-of-war between the sexes. Reforms in every area should be considered in light of the idea that maintenance is primarily an issue of children's rights. The guiding principle should be that parents, family members and society at large share responsibility for the welfare of Namibia's children. Where this responsibility is neglected, it is most likely to be the children who suffer.

LAW REFORM

A draft Maintenance Amendment Act is appended to this report. It suggests detailed amendments to the Maintenance Act 23 of 1960 which governs the operation of the maintenance courts.

The following points highlight some of the major amendments proposed in the draft amendment act, as well as suggested reforms to other laws. (The recommendations refer to the person who brings a complaint as the "complainant", and to the person against whom the complaint is made as the "respondent".)

1. Maintenance officers should be required to institute an enquiry whenever a complaint is made to the court and is not resolved by a consent agreement between the parties, rather than having the discretion to decide summarily whether or not an enquiry is warranted.
2. The Maintenance Act should empower the courts to make maintenance orders retroactive.
3. The power of the courts to make maintenance orders should be expanded, to allow the courts to order the respondent to share pregnancy and birth-related expenses already incurred. The courts should also have the power to order respondents to pay medical expenses, or to name the persons in question as dependants on their medical aid schemes.
4. The Act should set forth guidelines as to what expenses should be considered in calculating maintenance, to establish more uniformity in the way that this task is carried out by different courts.
5. The Act should be amended to make it easier to obtain evidence of the respondent's income and means. This would expand the courts' powers to make maintenance orders against a respondent who is unemployed but has substantial assets.

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6. The Act should make it possible for a complainant or a respondent to be assisted by the person of his or her choice, such as a paralegal or a supportive friend, along the lines of representation in the district labour court in terms of the Labour Act 6 of 1992.
7. Where a respondent ignores a summons to appear in court, the court should be authorised to make an order -- or at least an interim order -- in the respondent's absence, as is the case in ordinary civil cases.
8. The provisions designed to protect the privacy of persons involved in maintenance cases should be strengthened.
9. The Act should be amended to allow payments to be made directly to complainants, or directly into accounts at banks or building societies.
10. The Act should allow for the attachment of wages as an administrative measure, without requiring a criminal conviction for arrears first. Where there has been a criminal conviction for arrears, the court should be *required* to issue such an order.
11. The maintenance court should be authorised to order automatic increases or decreases in maintenance orders, on the basis of rises and falls in the consumer price index.
12. Provisions should be added to facilitate the attachment of property in appropriate cases.
13. Where payments are made into the maintenance court, the Act should require that the court take direct action on arrears, without waiting for charges to be filed by the complainant.
14. The Act should make it possible for arrears to be recovered with interest.
15. The provisions requiring that a respondent who is subject to a maintenance order give notice of his or her change of address should be strengthened.
16. The court should be authorised to take photographs of a respondent who is subject to a maintenance order, to facilitate enforcement if the respondent falls into arrears.
17. Penalties for the various offences covered by the Act should be increased.
18. All fines collected under the Act should be paid into a Maintenance Fund which could be used to make emergency payments to beneficiaries of maintenance orders in cases where the payments have fallen into arrears. These amounts could then be repaid if the arrears were recovered from the respondent.

SUMMARY OF FINDINGS AND RECOMMENDATIONS

19. The Act should require that the maintenance officer and the Prosecutor-General's office assist complainants with appeals in all cases where maintenance for children is involved.
20. The Act and the rules should specify the procedure to be used to transfer files from one court to another in order to minimise the problem of lost files.
21. The rules issued under the Act should be expanded to set forth standardised procedures for administrative matters, such as summoning respondents to court, guidelines for consent negotiations, steps which can be taken when the respondent alleges misuse of maintenance money, procedures for getting in touch with complainants who have not come to court to collect their payments, and filing systems.
22. The Income Tax Act 24 of 1981 should be amended to make it impossible for a person who is in arrears with a maintenance order to utilise tax deductions for child support.
23. Law reform on maintenance should be accompanied by law reform which addresses current legal discrimination against single fathers. A draft Children's Status Act dealing with this issue has been proposed to the Ministry of Health and Social Services. Parental rights should be coupled with parental responsibilities.
24. The maintenance court system should be backed up by a more effective system of state maintenance grants to provide for situations where an absent parent cannot be located, or where the resources of the entire family are inadequate to provide for the child's basic needs. Although a state maintenance grant system is already in place, it discriminates on the grounds of race and sex. The existing system also needs revision in order to target assistance to the most needy families, as well as to allow for short-term emergency assistance in times of crisis.
25. The relationship between traditional courts and the maintenance courts on issues of maintenance should be considered in the context of the proposed Community Courts Act.

COURT ADMINISTRATION

1. There is a shortage of personnel to deal with maintenance cases in many locations. If it is not feasible to add additional personnel dedicated to this task alone, it would be useful to set aside specific days of the week or month for maintenance problems and to make these days widely known to the public.
2. There appears to be a serious need for in-service training on certain aspects of the Maintenance Act.
3. Training in standardised administrative procedures should also be conducted at all maintenance courts.

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4. Maintenance officers need to be encouraged to use their powers of investigation more assertively, to help locate respondents or to obtain accurate information about respondents' income and means.
5. There is a need to sensitise court personnel to the fact that maintenance most directly concerns the rights of children rather than the competing rights of mothers and fathers. This would help to combat the biases against female complainants on the part of both male and female maintenance officers and magistrates in some courts.
6. There is also a need to sensitise court personnel about the effects of rude behaviour. If more court personnel took the time and trouble to explain procedures carefully to those not familiar with the maintenance courts, this would help to alleviate public misunderstanding and encourage members of the public to approach the maintenance courts for help.
7. The possibility of extended court hours should be investigated, to enable complaints to be reported after working hours, as well as to make it more convenient for recipients of maintenance payments to collect their money from the court.
8. Summonses and subpoenas which are used to order respondents to come to court should include a simply-worded directive translated into all the major Namibian languages which explains: the consequences of failing to attend court; the importance of bringing a recent pay slip and other relevant evidence to court; and the possibility of returning a signed consent form instead of coming to court in person.
9. Liaison between the police and maintenance court personnel could be improved through closer communication with the police officers responsible for serving court documents.

POLICE ASSISTANCE

1. A senior officer in the Head Office of the Namibian Police should be given responsibility for supervising the service of summonses, subpoenas and warrants of arrest in maintenance cases. This person should also be responsible for following up complaints from maintenance court personnel and members of the public.
2. Careful records should be kept of the individual police officers who assume responsibility for serving court documents, and sanctions should be imposed on those individuals who do not carry out this task properly.
3. Court documents in maintenance cases should be given a higher priority than they seem to enjoy at present.
4. The police should make more assertive efforts to locate respondents.

SUMMARY OF FINDINGS AND RECOMMENDATIONS

5. Liaison between the police and maintenance court personnel is in need of improvement.
6. Cases involving the service of court documents in a jurisdiction other than that of the maintenance court handling the complaint seem to encounter problems with police response more frequently and thus are in need of special attention.

PUBLIC EDUCATION

There is unquestionably a general need for continuing efforts to provide public education on the operation of the maintenance court. Areas of misunderstanding which should be given special attention include the following:

1. The public needs to be informed that the maintenance courts are available to parents who are single, married, divorced or separated as well as to extended family members such as grandmothers who are caring for the children of their sons or daughters.
2. Parents should be educated on the usefulness of formalising private agreements as court orders, in order to provide access to enforcement mechanisms.
3. Both women and men need to be informed of the possibility of requesting an increase or a decrease in a previous maintenance order in light of changed circumstances.
4. More public information is needed on the procedure to be followed when the respondent falls into arrears.
5. There should be more public education for men on their responsibilities to maintain their children. For example, public attitudes might be affected if prominent men such as politicians, sports stars and musicians spoke out on this point.
6. As many maintenance problems are tied to the expenses of school fees and school uniforms, there is a need for more public education on the possibility of being excused from paying school fees on the grounds of lack of means, and on the arrangements which some schools offer for paying off school fees gradually during the school year.
7. Public education should emphasise maintenance as an issue affecting children's rights rather than as a dispute between men and women.

FURTHER RESEARCH

1. There is a need for further research on maintenance in the context of divorce cases.

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2. There is a need for further research on maintenance as it relates to inheritance.
3. There is a need for further research on community attitudes about maintenance and other parental responsibilities, particularly with respect to children born outside of marriage.
4. If a new system of state maintenance grants is introduced, this system should be periodically assessed to determine whether it is effectively targeting resources at the most needy families.

Chapter 1

INTRODUCTION AND RESEARCH OBJECTIVES

WHY MAINTENANCE?

A public priority

Maintenance means financial and material support for a dependent. This study is particularly concerned with one form of maintenance -- the financial support provided to children by an absent parent, in terms of a maintenance order issued by a maintenance court under the Maintenance Act 23 of 1963.

We chose this topic to study because it was identified by members of the public as an urgent priority. In the Legal Assistance Centre's advice offices in Windhoek, Ongwediva, Rundu, Walvis Bay and Keetmanshoop, maintenance comes second only to labour issues as the topic on which clients most often seek help. Maintenance was also identified as a pressing issue by the Department of Women Affairs, by the Women & Law Committee of the Law Reform & Development Commission, and by numerous women's groups throughout the country.

The public interest in maintenance is understandable. The 1991 census classified 39% of all households nationwide as "female-headed households".¹ Although the definition of "household head" used in the census, as well as in other studies, is not without problems, it is undeniable that there are many families in Namibia in which children do not live with both of their parents.

Although the Maintenance Act is completely gender-neutral, it creates a procedure which is used almost exclusively by women raising the children of absent fathers. Thus, the effectiveness of the maintenance court procedure is an important factor in determining the household resources of households headed by single mothers. More broadly, providing effective assistance to mothers raising children on their own is a step towards the social and economic empowerment of women.

The shortage of existing information on maintenance

Another motivation behind the study was the dearth of information about maintenance. The 1991 *Population and Housing Census* did not include any questions about maintenance, and the questions on household income in other surveys -- such as the *Health and Daily Living Survey of Windhoek, Namibia* (1988-89) (NISER, 1990) and the *Household Health and Nutrition Survey* (UNICEF, 1990) -- were not structured to allow for the isolation of maintenance payments.

¹ The census defined the head of household as the person, male or female, who was recognised as such by the household members. If this head of household was absent on census night, the person (male or female) who took charge of the household during his/her absence was regarded as the head of the household. Republic of Namibia, 1991 *Population and Housing Census, Statistical Tables, Volume I* at xiv-xv.

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There is a brief discussion of maintenance grants (incomes supports provided by the Ministry of Health and Social Services) in *A Situation Analysis of Children and Women in Namibia* (UNICEF/NISER, March 1991). A short overview of the Maintenance Act and maintenance grants is also included in D Hubbard, *Women and Children in Namibia: The Legal Context*, Niser Discussion Paper No. 3 (NISER, March 1991) and in *A Commitment to our Children: Namibia's Country Report under the United Nations Convention on the Rights of the Child* (Republic of Namibia, September 1992). However, neither of these sources include any empirical data on the operation of the maintenance courts, other than estimates of the total number of cases and the amount of maintenance which is usually granted.

Some information on maintenance under customary law can be found in the *National Safe Motherhood Task Force: Report of the Subcommittee on Legal Matters* (Ministry of Health and Social Services, mimeo, September 1992). Issues of guardianship and custody which are related to maintenance are discussed in H Becker and MO Hinz, *Marriage and Customary Law in Namibia* (CASS, Working Document No. 30, February 1995).

Information from discussions about maintenance problems in certain communities in the north is included in Namibia Development Trust *Improving the Legal and Socio-Economic Situation of Women in Namibia: Uukwambi, Ombaluntu and Uukwanyama Integrated Report* (NDT, January 1994). Attitudes about maintenance in the south are discussed in A Iken, M Maasdorp & C Solomon, *Socio-Economic Conditions of Female-Headed Households and Single Mothers in Namibia's Southern Communal Areas* (UNICEF/SSD, December 1994).

However, none of these sources focus on the effectiveness of the legal mechanisms provided in terms of the Maintenance Act.

Furthermore, the existing legal casebooks and articles on maintenance listed in the bibliography appended to this report leave many practical questions about the application of the Maintenance Act unanswered. Therefore, the Legal Assistance Centre also felt that additional legal research was needed in order to make it possible to answer clients' questions and to facilitate the process of providing effective advice and training to court personnel in the future.

RESEARCH OBJECTIVES

Before beginning the research project, we held discussions with the Women & Law Committee of the Law Reform & Development Commission, with persons in the Ministry of Justice who are involved in the administration of the maintenance courts, with maintenance officers and magistrates and with women and women's groups who are affected by the maintenance issue.

We drew on the input from all of these sources in deciding how to structure and focus our research.

Applied research

The objective of the Legal Assistance Centre was to conduct applied research. By this, we mean research which would provide the information necessary to improve the operation of the maintenance court system, as opposed to academic research which would simply add to our knowledge about maintenance.

INTRODUCTION AND RESEARCH OBJECTIVES

We view law as a dynamic process. A good law on paper is useless in practice unless the public has the knowledge and willingness to use it, and unless the people responsible for administering it are able to do their job fairly and efficiently. Laws must also be appropriate for the prevailing social and economic situation. Legal reform must go beyond looking at what laws are in force; the laws which exist must serve the purposes for which they were intended effectively and without discrimination.

Our goal was to produce research which might lead to legal and administrative reforms. We also hoped that the research would help us to pinpoint areas where more public education was needed, as well as topics which should be included in training programmes for officials who administer the laws on maintenance.

Activist research

By activist research, we mean research which makes changes -- not just changes inspired by the research results, but also changes brought about through the research process itself.

We believe that the research process on maintenance has been particularly successful in achieving a number of changes along the way.

Firstly, we always combined our data collection with public education. During the process of gathering information on public attitudes about maintenance, we explained the law on maintenance and how it is supposed to work. We also used this opportunity to pre-test educational material on maintenance, which was incorporated into a series of educational materials on women's and children's rights that was launched by President Sam Nujoma in September 1993. The demand for the material on maintenance has been enormous, and the Legal Assistance Centre is still in the process of translating the booklets into different languages to make them more widely accessible.

During the course of the research, we also assisted with legal aspects of a script for a film on maintenance. This film, entitled "Whose Children?" and produced by New Dawn Video, starred a member of the Legal Assistance Centre staff. The film has proved to be a useful springboard for discussion in community workshops, thus providing another important resource for public education.

Facts about maintenance were highlighted by Legal Assistance Centre staff in a number of radio and television presentations during 1993 and 1994, as another method of increasing public awareness of the law and stimulating discussion of how it could be improved. In September 1993, we also published some preliminary data compiled from the register of the Windhoek maintenance court, in an effort to provide information which would inspire more public discussion and debate.

The data collection process provided an opportunity to compare the filing and record-keeping systems of different maintenance courts, which enabled us to share useful tips with maintenance court officials about which techniques seemed most efficient. Information-sharing of this sort was almost always well-received, and we hope that we may have played a small role in helping some courts to expedite their handling of cases and to reduce the number of lost documents.

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During the research process, we held ongoing discussions with officials in the Ministry of Justice and in the Windhoek maintenance court, which handles the largest number of maintenance cases in the country. In July 1993, we arranged a meeting between Ministry officials and a group of women who had approached our office with complaints about the maintenance court. One purpose of the meeting was to give the women an opportunity to state their complaints directly and in person. We believed that this might be more empowering than a process whereby the Legal Assistance Centre acted as an intermediary to articulate complaints on behalf of the women. Another purpose of the meeting was to bring the Ministry officials face-to-face with their clientele, to provide them with an opportunity to clarify certain issues and to gain a clearer understanding of public perceptions.

This meeting was considered to be a success by all parties concerned. Ministry officials were able to explain some issues which had been causing confusion, and they were successful in following through on certain administrative matters which were in need of improvement. Legal Assistance Centre clients subsequently reported a noticeable improvement in the attitudes of maintenance court personnel in Windhoek.

Another issue which led to action during the course of the research process was the problem of men who were liable to pay maintenance absconding to South Africa. After independence, it was necessary for Namibia to enter into an agreement with South Africa for the reciprocal enforcement of maintenance orders between the two countries. However, negotiations around this agreement were protracted. On behalf of its clients, the Legal Assistance Centre lobbied the Ministry of Justice to expedite the conclusion of this agreement, pointing out the hardships which individual women were experiencing in its absence. Other individuals and groups also spoke out on this issue, and Namibia concluded an agreement with South Africa on this point in August 1993.²

While the research was being conducted, attorneys at the Legal Assistance Centre represented clients in several maintenance cases, both in the maintenance court and in related High Court matters. These cases helped to provide additional information on shortcomings in the maintenance court procedure. For example, representations on behalf of one client led to official confirmation in October 1994 that the policy of the Windhoek maintenance court to wait for three months before acting on arrears had no basis in law and would be discontinued.

Research on the Maintenance Act also led to action on other aspects of the issue of maintenance. Maintenance grants which provide a back-up system to families without resources are available in terms of the Children's Act 33 of 1960. The Legal Assistance Centre was invited to sit on a Steering Committee convened by the Ministry of Health & Social Services to discuss the reform of this law. The criteria for maintenance grants were discussed at a Children's Act Workshop held in June-July 1994 and attended by social workers and other people who work with children throughout Namibia.

The Legal Assistance Centre and the Human Rights and Documentation Centre of the Faculty of Law at the University of Namibia were commissioned by the Ministry of Health & Social Services to draft a new Child Care and Protection Act on the basis of the recommendations from this workshop. This draft act includes a detailed set of regulations which would revise

² See, for example, "'A step in the right direction': Women respond to new maintenance agreement", *The Namibian*, 19 August 1993.

INTRODUCTION AND RESEARCH OBJECTIVES

the guidelines for maintenance grants, in hopes of providing a more effective income support to families who are unable to provide the basic necessities of life for their children. The new act and regulations would also eliminate the existing racial variations in maintenance grant amounts, which is one of the few remaining statutory vestiges of the apartheid years. The draft proposals were forwarded to the Ministry in December 1994.

The position of single fathers was also a prominent topic at the Children's Act Workshop, as well as in many of the interviews and group discussions conducted by the Legal Assistance Centre. Many women have complained that they want emotional support for their children in addition to financial support, while single fathers argue that they should not be expected to provide financial contributions when they have no legal rights in respect of their children. At the request of the Ministry of Health & Social Services, the Legal Assistance Centre drew on these inputs to formulate a draft Children's Status Act which would provide a basis for a better coupling of the rights and responsibilities of single fathers. This draft legislation addresses access, guardianship and custody of children born outside of marriage. It was presented to the Ministry in December 1994.

Thus, this report is only one of a number of outcomes of the Legal Assistance Centre's research on maintenance, and we do not expect it to be the final result.

Our public education efforts will continue. We hope that some of the report's suggestions for legal and administrative reforms will be taken up by the appropriate government bodies. We have held discussions with the Justice Training Centre about the possible production of a training manual for maintenance officers and magistrates who staff maintenance courts. We also hope to carry out further research in the future which will incorporate other aspects of the issue of maintenance -- such as maintenance in the context of divorce orders.

This report should be seen as part of an ongoing effort to make the law more accessible and responsive to the needs of the public, and to ensure that Namibia's laws are adequate and effective for both women and men.

Chapter 2

LEGAL BACKGROUND

THE CONCEPT OF MAINTENANCE

MAINTENANCE UNDER COMMON LAW

The concept of "maintenance" means provision for the basic needs of life, including food, shelter, clothing, medical care and, in the case of children, education. The scope of maintenance is normally determined on the basis of the family's standard of living.

Parents and children have a reciprocal legal duty to support each other. This duty also extends to grandparents and grandchildren and other blood relatives, although maintenance must normally be sought from parents and closer relatives before more distant relatives will be expected to contribute. In the case of children born outside of marriage, the reciprocal duty of maintenance under existing law applies only to relatives on the mother's side of the family.¹

Adoptive parents and adoptive children have a mutual duty of support, but there is no duty of support between step-parents and step-children.

The duty of support owed by parents to their children is determined on the basis of their respective financial means -- which may in theory include their respective assets as well as their respective incomes. This principle applies equally to children born inside and outside of marriage, regardless of whether or not the parents have ever shared a home. In addition to their responsibility to share the costs of child rearing, parents also have a duty to share the expenses associated with the child's birth.

Spouses have a mutual duty to support each other which is also apportioned on the basis of their means. There is, however, no mutual duty of support between a man and a woman who are cohabiting without being married, no matter how long the relationship has lasted.

At common law, a parent who has contributed more than his or her fair share to the support of a child has a right to recover the excess from the other parent.² However, this applies only to past expenditures, whereas maintenance orders issued in terms of the Maintenance Act apply only to the future and cannot be retroactive.

¹ A draft Children's Status Act prepared for the Ministry of Health and Social Services would amend the common law on this point to make the rules concerning the mutual duty of support identical for children born inside and outside of marriage.

² L van Zyl, "Maintenance" in ID Schäfer, ed., *Family Law Service* (Butterworth's: 1988), as updated to December 1994, at 4.

THE CHILDREN'S ACT

Failure to maintain a child under the age of 18 is a criminal offence in terms of the Children's Act 33 of 1960³, although lack of means which is not due to default or negligence is a good defence to this charge.⁴

A person who is unable to provide for a child and fails to take reasonable steps to obtain maintenance from any other person who is legally liable to maintain the child, or fails to seek assistance from any available authority or organisation, is also guilty of a default.⁵ Thus, in theory, a parent who was unable to provide adequately for his or her child, but failed to use the maintenance court procedure to secure financial contributions from the other parent, would be guilty of a criminal offence. However, the Children's Act has not actually been applied this way in Namibia in practice.

THE MAINTENANCE ACT

The Maintenance Act 23 of 1963 provides a simple procedure whereby persons who are entitled to maintenance from any other person can obtain a court order requiring that regular maintenance payments be made.

GENERAL

Background

The Maintenance Act is a piece of South African legislation which was made applicable to Namibia in 1970.

The administration of the Act was transferred to "South West Africa" in 1977⁶, which had the effect of "freezing" the Act as it stood at that date. As in the case of all such South African statutes, South African amendments after the date of transfer applied to "South West Africa" only if this was explicitly stated. In the case of the Maintenance Act, the only South African amendment to the Act after the date of transfer and prior to Namibian independence -- the Special Courts for Blacks Abolition Act, No. 34 of 1986 -- was not made expressly applicable to "South West Africa".

³ Section 18(2) states: "Any person legally liable to maintain a child who, while able to do so, fails to provide that child with adequate food, clothing, lodging and medical aid, shall be guilty of an offence." "Child" is defined in section 1.

⁴ Children's Act 33 of 1960, section 18(3).

⁵ Children's Act 33 of 1960, section 18(4), which reads as follows: "Omission by the person charged to take reasonable steps to obtain for the child from any other person legally liable to maintain him or from any available authority, association or establishment whose object is the relief of indigency, such food, clothing, housing or medical aid as he is himself unable to provide, shall for the purposes of subsection (3) be deemed to be a default on his part."

⁶ In 1977, the Act was administered in part by the Minister of Justice and in part by the Minister of Bantu Administration and Development. Therefore, the administration of the Act was transferred to SWA by both the Executive Powers Transfer Proclamation (AG. 3/1977, as amended), dated 28 September 1977, and the Executive Powers (Justice) Transfer Proclamation (AG. 33/1979, as amended), dated 12 November 1979.

LEGAL BACKGROUND

The Act has been amended in South Africa several times since Namibian independence.⁷ These amendments will be discussed below for comparative purposes.

Rules providing more detail about the operation of the Maintenance Act were published in South Africa in 1970 and became effective from 1 January 1971.⁸

Purpose

As noted above, the purpose of the Maintenance Act is to create a simple and effective procedure to assist individuals in obtaining maintenance from persons who are legally liable to maintain them. As one court put it:

*... the Maintenance Act creates a tribunal for the inexpensive adjudication of maintenance disputes by means of a sui generis [unique] procedure, which is more akin to procedure in the civil courts than in the criminal courts.*⁹

According to another court:

*The Act creates machinery for the inexpensive adjudication of maintenance disputes in which the State subsidises litigation which financially vulnerable persons might otherwise be unable or reluctant to bring.*¹⁰

Maintenance courts and maintenance officers

Every magistrate's court in Namibia can also function as a maintenance court.¹¹ In Windhoek, because of the volume of maintenance cases, there is a maintenance officer who bears no duties other than dealing with maintenance and a magistrate is designated especially to hear maintenance cases. In other parts of the country, prosecutors double as maintenance officers and the same magistrates who handle other cases preside over maintenance enquiries.¹²

The function of the maintenance officer is to investigate the complaint, and to assist the person who has made the complaint to present his or her case. The maintenance

⁷ Substantial amendments were made to the Act in South Africa by the Maintenance Amendment Act 2 of 1991, and sections 4 and 8 were amended by the General Law Sixth Amendment Act 204 of 1993.

⁸ RSA Government Notice R. 2331 of 24 December 1970 (Government Gazette 2958), issued in terms of section 15 of the Maintenance Act 23 of 1960. In South Africa, this initial set of rules was amended by RSA Government Notice R. 348 of 22 February 1991 (Government Gazette 13029) and by RSA Government Notice R. 732 of 28 February 1992 (Government Gazette 13802). Neither of these amendments to the rules applies to Namibia.

⁹ *Nodala v The Magistrate, Umtata* 1992(2) SA 696 (Tk), at 699I; see also *Dreyer v Dreyer* 1984(2) SA 480 (O) at 486 on the purpose of the Act.

¹⁰ *Cordiglia v Watson* 1987(3) SA 685 (C) at 687G.

¹¹ Maintenance Act 23 of 1963, section 1.

¹² See Maintenance Act 23 of 1963, section 2.

officer is expected "to take an active but even-handed part in getting at the truth of each matter".¹³

The magistrate presides over the case and decides the dispute.

Who can use the maintenance courts?

The Maintenance Act is completely gender-neutral. In theory, the maintenance court procedure is available to *anyone* who is legally entitled to maintenance. For example:

- * a mother could seek maintenance for her children from the children's father;
- * a father could seek maintenance for his children from the children's mother;
- * a child could seek maintenance from his or her parents;
- * a grandmother could seek maintenance for the children in her care from one or both of the children's parents; and
- * a man or a woman could seek maintenance for him- or herself from a spouse.¹⁴

There is no legal reason why the maintenance court procedure cannot be utilised by married couples who are still living together as husband and wife. However, it has been observed that maintenance court personnel are sometimes reluctant to act on complaints in such circumstances. For example, there have been instances when married couples have been referred by the court to a social worker for counselling. While such referrals may be of benefit to the parties, married persons should not be denied their legal right to make use of the maintenance court.

The maintenance court procedure is also available to persons who are married in terms of customary law. In this sense, the Maintenance Act overrides customary law on the subject of maintenance. Even if the principles of customary marriage in a particular community do not require the maintenance of a wife and children by the husband, the principles on maintenance which cover men and women in civil marriages are to be applied.

Thus, for the purposes of the Maintenance Act, a husband in a customary marriage owes a legal duty of support to his wife and to the children of the marriage. This duty of support is not mutual to both spouses because the wording of the relevant provision of the Act is based on the old assumption that husbands are the breadwinners. (This is the only provision of the Act which contains overt sex discrimination.)¹⁵

¹³ *Cordiglia v Watson* 1987(3) SA 685 at 687I; see also ID Schäfer, "Family Law Procedures" in ID Schäfer, *Family Law Service* (Butterworth's: 1988), as updated to December 1994, at 33-34.

¹⁴ The mutual duty of support between spouses has traditionally been thought of as a duty owed only by the husband to his wife. However, this perception has arisen from the fact that men have in the past usually been in a stronger financial position than women. The duty of support between spouses actually applies equally to both husband and wife. See van Zyl (n2) at 9.

¹⁵ Maintenance Act 23 of 1963, section 5(6), which states in relevant part: "For the purposes of determining whether a Black or a native.... is legally liable to maintain any person, he shall be deemed to be the husband of any woman associated with him in a customary union".

LEGAL BACKGROUND

In practice, the maintenance court procedure is primarily used in both Namibia and South Africa by mothers seeking maintenance for their children from absent fathers.¹⁶ A few cases have also been observed in Namibia during the course of the research in which children came to the court on their own to claim maintenance from their parents.

It is not necessary for a child seeking maintenance to be assisted by a parent, a guardian or a *curator ad litem* [someone appointed by the court to ensure that the interests of the child are adequately protected]. However, if special circumstances exist which make it possible that a minor might be prejudiced by the absence of a parent or guardian, the maintenance officer or the magistrate should ensure that the parent or guardian attends the proceedings. Similarly, if a minor could establish in an appeal that he or she suffered substantial prejudice because of the lack of assistance from a parent or guardian, the minor might succeed in having the decision of the maintenance court set aside.¹⁷

The reason why the rules applied to minors in ordinary civil proceedings are not extended to maintenance cases is the unique role which is played by the maintenance officer in terms of the Maintenance Act; in essence, this officer performs the functions which would usually be carried out by a legal representative.¹⁸ In the cases which were observed during the course of the research, children who approached the court on their own seemed to receive thorough and adequate assistance from the maintenance officer attached to the court.

Powers of the maintenance court

The maintenance court is empowered to perform several basic functions:

- (1) To impose or refuse to impose maintenance orders. This includes the power to make a consent agreement between the relevant parties into a binding court order.
- (2) To vary an existing maintenance order, commonly referred to as a "substitution".
- (3) To discharge [cancel] an existing maintenance order.¹⁹

Where a respondent falls into arrears, this is a criminal offence which can be dealt with by any competent court. However, under certain circumstances, a criminal prosecution for failure to comply with a maintenance order can be converted into a new maintenance enquiry.

¹⁶ Information on the operation of the maintenance courts in South Africa has been compiled in Sandra Burman and Shirley Berger, "When Family Support Fails: The Problems of Maintenance Payments in Apartheid South Africa: Part I" 4 SAJHR 194 (1988) and "When Family Support Fails: The Problems of Maintenance Payments in Apartheid South Africa: Part II" 4 SAJHR 334 (1988).

¹⁷ *Govender v Amurtham & Others* 1979(3) SA 358 (N).

¹⁸ See Schäfer (n13) at 33.

¹⁹ Maintenance Act 23 of 1963, section 5(4).

These various different types of maintenance proceedings will be discussed in detail below.

INITIAL MAINTENANCE COMPLAINTS

Initial complaint and investigation

A person seeking maintenance makes a complaint to the maintenance officer. This party is referred to as the *complainant*, and the person against whom the maintenance order is sought is referred to as the *respondent*.

Once a complaint has been made, the maintenance officer then has a duty to investigate the matter. For example, as one court has pointed out, if the respondent's income is in dispute, the maintenance officer should exercise his or her power to obtain a statement of earnings signed by the respondent's employer.²⁰ The maintenance officer's duty to conduct an active investigation is particularly important in cases where the parties to the dispute do not have legal representation.²¹

Instituting an enquiry

According to the Maintenance Act, "the maintenance officer may, after investigating such complaint, institute an enquiry in the maintenance court".²²

Court cases interpreting the Act do not agree on whether the maintenance officer has a *duty* to institute an enquiry. A 1965 South African case stated that the maintenance officer is *required* to institute an enquiry after making the investigation.²³ However, a 1967 South African case stated that the maintenance officer has the discretion to decide whether to institute an enquiry on the basis of what the investigation reveals.²⁴ This view seems to have been accepted in a 1979 case which states that "it is the function of the maintenance officer to investigate any complaint and then to decide whether or not to open an enquiry in the maintenance court," and that "this is his decision alone and not that of the complainant."²⁵

Legal commentators do not agree on the proper interpretation of the Act with respect to this point.²⁶ Thus, this is an area of the law which seems to be in need of clarification.

²⁰ *Pieterse v Pieterse* 1965(4) SA 344 (T) at 346E.

²¹ *Pieterse v Pieterse* 1965(4) SA 344 (T) at 346A-C; *Perumal v Naidoo* 1975(3) SA 901 (N) at 903.

²² Maintenance Act 23 of 1963, section 4(1).

²³ *Pieterse v Pieterse* 1965(4) SA 344 (T).

²⁴ *Buch v Buch* 1967(3) SA 83(T) at 86H: "It seems, therefore, that if the maintenance officer is not satisfied that sufficient cause exists, he need not institute the enquiry."

²⁵ *Govender v Amurtham and Others* 1979(3) SA 358 (N).

²⁶ Spiro states that "'may' it is considered, means here 'must'". E Spiro, *Law of Parent and Child 4th edition* (Juta & Co: 1985) at 421. Schäfer also seems to interpret "may" as "must". Schäfer (n13) at 33. Boberg, however, seems to disagree. PQR Boberg, *Law of Persons and the Family* (Juta & Co, 1977) at 294, n24.

Consent negotiations

The normal practice in maintenance courts in Namibia is to bring the parties together to see whether it is possible to negotiate an agreement about maintenance payments before a formal enquiry begins.²⁷ In Windhoek, this generally happens as a separate step, before a court date is set for the enquiry, usually at least two weeks after the negotiations. In other parts of the country, the consent negotiations more often take place outside the courtroom before the enquiry begins, or at most a day before the enquiry is scheduled. The Maintenance Act is silent on the issue of such negotiations. Therefore, it appears that a complainant or a respondent would have a right to refuse to enter into such discussions, without prejudice to his or her case.

If the parties are able to reach agreement about maintenance payments, this agreement is embodied in a written consent agreement. It then becomes a maintenance order with exactly the same force and effect as a maintenance order which is imposed by the court at the conclusion of an enquiry.

The enquiry

If the parties are unable to reach agreement, the enquiry proceeds. The Maintenance Act specifies that the enquiry must be held in the jurisdiction where the person to be maintained resides -- or, in the case of a child, in the area where the person who takes care of the child resides -- thus making the enquiry convenient for the complainant.²⁸

The maintenance officer has the power to summon any person to court to give evidence at the enquiry, including the respondent. Witnesses are to be summoned in the same manner in which a person would be subpoenaed to appear before a magistrate's court in a criminal trial. The respondent can be required to present a statement signed by his or her employer as proof of income.²⁹

A unique type of proceeding

A maintenance enquiry is not considered to be a civil proceeding or a criminal proceeding. Instead, it is a unique hybrid of these two types of cases.

*On the one hand the maintenance officer conducts the case for the complainant in the same manner as the prosecutor does for the State, and the complainant, in a criminal trial; on the other hand, the tribunal has no punitive jurisdiction. It performs, essentially, within its limited sphere, the functions of a civil trial court ...*³⁰

²⁷ South African practice seems to be similar. Burman and Berger report that the applicant and the respondent are both required to attend a joint interview with the maintenance officer before the case is referred to court for a formal hearing of the dispute. Burman & Berger, "Part I" (n16) at 198.

²⁸ Maintenance Act 23 of 1963, section 4(1).

²⁹ Maintenance Act 23 of 1963, section 4(1) - (2).

³⁰ *Nodala v The Magistrate, Umtata* 1992(2) SA 696 (Tk) at 699F-G. See also, for example, *Kruger v Ferreira* 1979(1) SA 915 (NC).

Although witnesses are summoned to court in the same way as they would be subpoenaed in a criminal case³¹, the regulations issued under the Act provide that the law relating to evidence in civil actions in magistrate's court shall apply to enquiries held under the Maintenance Act.³² Thus, the maintenance enquiry is more closely related to civil proceedings than to criminal ones.³³

Another difference between a maintenance enquiry and other judicial proceedings is that the structure set up by the Maintenance Act contemplates a high degree of participation by the magistrate and the maintenance officer in assembling the information which is necessary to decide the case. Judicial decisions have described the nature of the proceedings as follows:

*The proceedings in terms of the said Act are inquisitorial in character. The court is enjoined to hold and conduct the necessary enquiry, which has as its object the determination of important questions relating to the duty to support.*³⁴

*The responsibility of placing evidence before the court no longer rests only on the parties concerned, but is shared by the maintenance officer and the presiding judicial officer. Thus where the parties are legally represented the maintenance officer and the presiding officer may have to call relevant evidence not called by the legal representatives.*³⁵

In keeping with this view of the role of the magistrate in a maintenance enquiry, case law also shows that the magistrate has a wide degree of discretion to act *ex meru moto* [at his or her own initiative]. For example, it has been noted that a magistrate can decide to decrease an excessive maintenance order even in a case where none of the parties have requested a decrease.³⁶

Legal representation

The Maintenance Act specifies that a respondent is entitled to legal representation at a maintenance enquiry. This legal representative has the right to take full part in the proceedings, including the right to present evidence, to cross-examine witnesses and to address the court.³⁷

³¹ See, for example, *Foster v de Klerk NO en Andere* 1993(1) SA 596 (O).

³² Rule 9, Government Notice R.99 of 22 January 1965, highlighted in *Nodala v The Magistrate, Umtata* 1992(2) SA 696 (Tk) at 699G-H.

³³ *Nodala v The Magistrate, Umtata* 1992(2) SA 696 (Tk), at 699I (quoted above). See also *Maguma v Ntengento* 1979(4) SA 155 (C).

³⁴ *Perumal v Naidoo* 1975(3) SA 901 (N) at 903. See also *Foster v De Klerk NO en Andere* 1993 (1) SA 596 (O) at 601.

³⁵ *Buch v Buch* 1967(3) SA 83 (T) at 87. See also *S v Ward* 1992(1) SA 271 (B) at 273H-274B.

³⁶ *Van Zyl v Steyn* 1976(2) SA 108 (O) at 110G.

³⁷ See, for example, *Knight v Die Voorsittende Beampste, Onderhoudshof, Schweizer-Renecke en 'n Ander* 1978(3) SA 572 (T).

LEGAL BACKGROUND

The Act is silent on the complainant's right to legal representation, probably because it contemplates that the complainant will normally be represented by the maintenance officer. However, it has been held that the complainant is also entitled to legal representation, as there is nothing in the Act to indicate that the legislature intended to exclude the ordinary common law right of any person who may be affected by a court order to be represented by a legal practitioner.³⁸

A party to a maintenance enquiry who could not afford legal representation could apply for legal aid. However, in practice, such an application is likely to succeed only if there appears to be some special difficulty with the case. Legal aid was given to only three persons in Namibia in respect of maintenance cases during the period 1 April 1994-31 March 1995.³⁹

As noted above, the duty of the maintenance officer and the magistrate to play an active role in the maintenance enquiry applies especially strongly in cases where the parties are unrepresented.⁴⁰

Privacy

Maintenance enquiries are held in private. The Act specifies that "No person whose presence is not necessary shall be present at an enquiry, except with the permission of the court."⁴¹ Although this provision was designed to protect the privacy of the complainant and any minors involved, it raises some problems in practice. Firstly, although privacy at the enquiry is protected, privacy during the course of the *investigation* is not. In Windhoek, for example, investigations and consent negotiations (which sometimes involve acrimonious discussions) have been held in rooms with open doors, within earshot of the long queues of people waiting outside, while other court personnel walked in and out of the room. Women have also complained that the "privacy" provision works against them, as it has been used to forbid them to bring along a paralegal or a supportive friend to the enquiry or sometimes, ironically, even to the investigation. Thus, this is another area where greater clarity on the Act's intentions is needed.

The Act provides additional protection for the privacy of children involved in maintenance cases. It is a criminal offence to publish the name, address, school or any other identifying information about a child under the age of 18 who is involved in an enquiry, unless written permission for such publication has been obtained from the Minister of Justice or the magistrate presiding at the enquiry. Violation of this rule can be punished by a fine of up to N\$500 or imprisonment for up to two years, or both.⁴²

³⁸ See *Buch v Buch* 1967(3) SA 83 (T); *Katzen v Presiding Officer, Maintenance Court, Johannesburg & Another* 1975(1) SA 805 (T) at 807; *Knight v Die Voorsittende Baeampt, Onderhoudshof, Schweizer-Renecke en 'n Ander* 1978(3) SA 572 (T); and *Govender v Manikum* 1981 (1) SA 1178 (N) at 1182H-1184C.

³⁹ Information from Mr Ndjoze, Director, Legal Aid Board, March 1995.

⁴⁰ See n21 above.

⁴¹ Maintenance Act 23 of 1963, section 5(3).

⁴² Maintenance Act 23 of 1963, section 5(11).

In South Africa, the maximum fine for this offence has been increased from R500 to R8000. (The maximum term of imprisonment remains two years.)⁴³

Evidence

At any stage of the enquiry, the maintenance court has the power to summon any person as a witness or to put questions to any person who is present, even though that person may not have been summoned as a witness. The court may also recall and re-examine any person who has already been questioned.⁴⁴ This rule reinforces the idea that the court is expected to play an active role in eliciting the relevant facts.

All laws in force relating to evidence in civil actions in magistrates' court apply to maintenance enquiries "in so far as they are appropriate and can be applied". This includes the common law as well as statutory rules relating to the competence of witnesses to give evidence, the question of whether or not witnesses can be compelled to give evidence on particular matters, and the examination and cross-examination of witness.⁴⁵ The flexible wording of this directive regarding evidence gives the maintenance court considerable discretion, which is consistent with the relative informality of the maintenance enquiry.

The general civil rules relating to privilege apply to maintenance enquiries.⁴⁶ The Act also specifically provides that a respondent cannot be compelled to give evidence on his or her legal liability to maintain another person.⁴⁷ For example, a respondent could not be forced to give testimony establishing paternity. However, once it is established that the respondent has a legal duty to maintain the person for whom maintenance is being sought, he or she can be compelled to give evidence on his or her income and means so that the appropriate amount of maintenance can be determined.⁴⁸

This protection against giving testimony on the legal liability to maintain another person parallels the right not to be compelled to give evidence incriminating oneself, but this prohibition seems out-of-place since it is not a criminal offence in terms of the Maintenance Act merely to be liable to maintain another person -- only to fail to obey a maintenance order issued on the basis of that liability.

Witnesses, including the respondent, are entitled to the same witness allowances as in criminal proceedings.⁴⁹

⁴³ RSA Maintenance Act 23 of 1963, section 5(11)(b), as substituted by section 2(f) of the Maintenance Amendment Act 2 of 1991.

⁴⁴ Rule 8.

⁴⁵ Rule 9.

⁴⁶ Maintenance Act 23 of 1963, section 8(3).

⁴⁷ Maintenance Act 23 of 1963, section 8(4).

⁴⁸ *Govender v Amurtham and Others* 1979(3) SA 358 (N) at 361H.

⁴⁹ Maintenance Act 23 of 1963, section 8(1)-(2). These provisions have been interpreted to mean that a respondent who is subpoenaed as a witness can therefore claim pre-payment of travel expenses under section 181 of the Criminal Procedure Act, No. 51 of 1977. *Foster v de Klerk NO en Andere* 1993(1) SA 596(O). After this case was decided, the Maintenance Act was amended in South Africa to explicitly exclude respondents from the operation of section 181. General Law Amendment Act 204 of 1993, section 3.

LEGAL BACKGROUND

In South Africa, there have been several amendments to the Maintenance Act relating to evidence:

1. A new provision has been added to establish a simple procedure whereby written statements can be admissible as evidence to the same extent as oral evidence. This does not apply, however, to statements by the respondent.

This provision has the potential to streamline enquiries and save time and money. For example, if the question at issue is paternity, a written report on the blood tests would be admissible without accompanying oral evidence by the lab technician. Similarly, a written statement from an employer about the wages of the person in question could be accepted as evidence in the absence of the employer.

The amended Act requires that a copy of the written statement to be tendered as evidence be submitted to the respondent 14 days in advance. The respondent may then object to the statement, up until 7 days before the enquiry is scheduled to begin. If the respondent agrees, then a written statement which was not submitted in advance can still be admitted as evidence.

The prohibitions on perjury which apply to oral evidence apply to such written statements as well.⁵⁰

2. The Act has been amended to give the magistrate in the maintenance court the power to summon anyone who can furnish information to the maintenance officer about the identification, location or earnings of the respondent. One of the primary purposes of this amendment is to give the court tools for tracing a respondent who cannot be located. The amendment also gives the court greater power to investigate the respondent's financial position.

If the person who is summoned provides the necessary information to the maintenance officer before the stated court date, he or she will no longer be required to appear. This provision will encourage those with relevant information to co-operate with the maintenance officer. Interrogation of witnesses for this purpose may take place in private at a place designated by the magistrate.⁵¹

3. Section 236 of the Criminal Procedure Act 51 of 1977 is made applicable to maintenance enquiries. Section 236 sets forth the conditions in which an entry in an account book kept by a bank shall be *prima facie* proof of the transactions recorded in the account book. This provision already applies to criminal proceedings for arrears by virtue of its inclusion in the Criminal Procedure Act.

⁵⁰ RSA Maintenance Act 23 of 1963, section 5(7A), inserted by section 2(d) of the Maintenance Amendment Act 2 of 1991. See also RSA Rule 4A, which sets forth the procedures relating to the certification of such written statements as true and prescribes the form which must be sent to the respondent in advance of the enquiry along with such written statements.

⁵¹ RSA Maintenance Act 23 of 1963, section 7A, inserted by section 5 of the Maintenance Amendment Act 2 of 1991. The amended Act provides that certain specified sections of the Criminal Procedure Act, No. 51 of 1977 shall apply to such subpoenas: sections 162-165, 179-181, 187-189, 191 and 204.

However, if it were applicable to enquiries as well, it would be easier for the maintenance court to draw upon bank account balances as indications of the means of the respondent.⁵²

4. The South African Maintenance Act has been amended to provide that the provisions of section 181 of the Criminal Procedure Act 51 of 1977, which provides for the pre-payment of travelling and accommodation expenses for witnesses who are required to travel from out of town, are not automatically applicable to the respondent. This exclusion is appropriate, given the fact that respondents often fail to obey summonses. However, the court retains discretionary power to pay the necessary travelling and accommodation expenses to a respondent in an appropriate case.⁵³

Burden of proof

Neither party before a maintenance court bears the burden of proving that there should or should not be a maintenance order. Instead, the magistrate bears the responsibility of ensuring that justice is done between the parties on the basis of their relative means and ability to pay. This is in line with the inquisitorial nature of the maintenance enquiry.⁵⁴

The standard of proof to be applied by the court appears to be the usual civil standard of a balance of probabilities, as opposed to the higher criminal standard of proof beyond a reasonable doubt.⁵⁵

Paternity

Paternity is relevant to the question of whether or not a respondent is in fact legally liable to maintain the children in question. Paternity must be proved on a balance of probabilities for the purposes of a maintenance enquiry, as in the case of civil proceedings. Even though failure to comply with a maintenance order can lead to a criminal prosecution, proof of paternity beyond a reasonable doubt is not required.⁵⁶

A husband is presumed to be the father of a child born within a marriage, unless there is proof to the contrary. In the case of children born outside of marriage, a man is presumed to be the father of an extra-marital child if the mother can prove that she had sexual intercourse with him at any time.⁵⁷ Once a presumption of paternity has been

⁵² RSA Maintenance Act 23 of 1963, section 8A, inserted by section 2(e) of the Maintenance Amendment Act 2 of 1991.

⁵³ RSA Maintenance Act 23 of 1963, sections 4(3) and 8(2), as amended by sections 3-4 of the General Law Sixth Amendment Act 204 of 1993. See *Foster v de Klerk NO en Andere* 1993(1) SA 596 (O), which appears to have given rise to the amendment.

⁵⁴ Schäfer (n13) at 34.

⁵⁵ See Spiro (n26) at 424.

⁵⁶ *Moodley v Gramani* 1967(1) SA 118 (N). See also Boberg (n26) at 294.

⁵⁷ In South Africa, the Children's Status Act 82 of 1987 has amended the common law on this point so that a presumption of paternity is established only if the mother can prove that she had sexual intercourse with the man in question *at a time when the child could have been conceived*. A similar change has been proposed in Namibia by a draft Children's Status Act submitted to the Ministry of Health and Social Services.

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established, the man in question bears the burden proving that he is not be the father -- by means of a blood test, for example, or by showing that he is sterile.

In the past, a woman's testimony in cases involving paternity required corroboration before it could be accepted by the court. However, the 1981 South African case of *Mayer v Williams* held that no corroboration is required in order to establish a presumption of paternity. Instead, the court held that the cautionary rule which is applied to the complainant's evidence in sexual offence cases should be similarly applied to the testimony of a complainant in paternity cases.⁵⁸ However, in the 1991 Namibian case of *S v D and Another*, the court stated that "the cautionary rule evolved in cases of rape has no rational basis for its existence and should therefore not form part of our law and is probably contrary to the provisions of the Namibian Constitution."⁵⁹ Thus, the treatment of the evidence of a woman in a paternity dispute at common law is in need of clarification.⁶⁰

Scientific advances have made modern-day blood tests extremely reliable.⁶¹ However, anecdotal evidence points to some procedural problems, such as a case in which a respondent fraudulently arranged to have blood drawn from a friend in order to ensure that paternity was disproved. The rules issued under the Maintenance Act could set forth standard procedures which would prevent such situations -- such as requiring that all the parties to the case undergo the blood test at the same time, or requiring certain identification and verification procedures.

Since the respondent bears the burden of disproving paternity once the complainant has presented enough evidence to establish a presumption of paternity, the costs of the blood test (up to N\$1 000) are normally borne by the respondent. The expense of the procedure thus tends to guard against frivolous challenges to paternity. However, there should perhaps be some provision for an award of the costs of the test against a complainant who *knowingly* makes a false claim that a particular man is the father of the children in question.

A draft Children's Status Act prepared for the Ministry of Health and Social Services on the basis of recommendations made at the Children's Act Workshop held in July 1994 proposes a number of changes in the law regarding proof of paternity.⁶² These

⁵⁸ *Mayer v Williams* 1981(3) SA 348 (A).

⁵⁹ *S v D and Another* 1992(1) SA 513 (NmHC) at 516H.

⁶⁰ A proposal for clarifying the law on this point is included in the proposed draft Children's Status Act. See draft section 8(2), quoted in note 62 below.

⁶¹ See *Van der Harst v Viljoen* 1977(1) SA 795(C).

⁶² The draft Children's Status Act proposes the following provisions on proof of paternity:

8. Presumption of Paternity

- (1) *A rebuttable presumption that a man is the father of a child exists if--*
- (a) *he was at the time of the conception or birth of the child, or at anytime between, married to the mother of the child;*
 - (b) *he cohabited with the child's mother throughout the year preceding the child's birth;*
 - (c) *he is registered as the father of the child in accordance with the provisions of the Births, Marriages and Deaths Registration Act 81 of 1963;*

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proposed changes accompany a scheme under which single fathers would have increased rights to their children -- a step which would, it is hoped, increase the willingness of single fathers to carry out the corresponding responsibilities of financial and emotional support. If this draft were enacted into law, the Maintenance Act should incorporate the same approach to paternity.

-
- (d) *both he and the mother acknowledge that he is the father of the child; or*
 - (e) *he admits or it is otherwise proved that he had intercourse with the mother of such child at any time when such child could have been conceived.*
 - (2) *Corroboration of evidence led to establish a presumption of paternity shall not be required, nor shall any special cautionary rules be applied to such evidence.*
 - (3) *Nothing contained in subsection (1)(a) shall be construed as preventing a man other than the husband of a married woman from seeking to have himself declared as the natural father of a child conceived by or born to the woman during her marriage.*
9. **Presumption on refusal to submit to scientific tests.**
- (1) *At any legal proceeding at which the parentage of any child has been placed in issue, the refusal by either party--*
 - (a) *to submit himself or herself, or*
 - (b) *to cause any child over whom he or she has parental authority to be submitted**to any physical procedure which is required to carry out scientific tests relating to the parentage of such child, shall establish a presumption, until the contrary is proved, that such refusal is aimed at concealing the truth concerning the parentage of that child.*
 - (2) *Notwithstanding anything contained in subsection (1), the High Court as the upper guardian of all minor children shall have the power to order that a child be submitted to a physical procedure referred to in subsection (1) if this is in the opinion of the Court in the best interests of the child.*

The common law presumption of paternity shifts the onus of proof to the alleged father, while the draft bill proposes a rebuttable presumption, which is not the same thing. Under the common law at present, proof that the mother of the child had sexual intercourse with another man or men at a time when the child could have been conceived is not, on its own, sufficient to overcome a presumption of paternity. The alleged father would have to prove that he could not possibly be the father -- on the basis of a blood test or by proving that he is sterile, for example. However, a rebuttable presumption of paternity would be rebutted if the alleged father proved that the mother of the child had intercourse with others around the time of conception. This is more fair to men who are wrongly identified as fathers. Furthermore, it does not unfairly disadvantage the mother or the child when considered in combination with the draft's presumption that a refusal to submit to blood tests is aimed at concealing the truth regarding parentage.

For example, suppose that a woman proved that she had intercourse with a certain man around the time of conception. A rebuttable presumption is established. He rebuts the presumption by showing that she also had intercourse with another man around that time. She requests a blood test. If he refuses, the court must presume that he is trying to hide the fact that he is the father. If he submits, then the true father of the child can be identified with certainty. If both parties refuse to submit to tests, the High Court can still order the tests to be conducted if the court believes that this is in the best interests of the child.

The draft section on the presumption created by the refusal to submit to scientific tests is modelled on section 2 of the RSA Children's Status Act 82 of 1987, which was based on a recommendation of the South African Law Commission. SALC, *Report on the investigation into the legal position of illegitimate children* (1985).

Balancing the needs of the children against the respondent's ability to pay

As noted above, in the case of children, the duty of support is apportioned between the parents on the basis of their respective means, regardless of whether the children were born inside or outside of marriage.⁶³

In determining the needs of the children for maintenance, the maintenance court is expected to consider the obligation of the parents "to provide the children with everything that they reasonably require for their proper living and upbringing according to the means of the parents, their standard of living and station in life".⁶⁴ This can include the cost of accommodation, services such as electricity and water, food, clothing, medical care and educational requirements. In some circumstances, the duty of support may extend to a university education.⁶⁵

One question which is often asked is whether the respondent's duty to support other family members should be taken into account in determining what amount he or she should contribute to the support of the complainant or the children in the complainant's care. For example, interviews and group discussions indicate that maintenance problems often arise because the absent father has remarried or entered into another relationship, with other children to support.

On the one hand, it can be argued that "the second nest should not be feathered at the expense of the first". On the other hand, a single individual may have a legal liability to support children of different mothers, and it can be argued that none of the children should be prejudiced.

The courts have taken different approaches to this question in the past. The issue has arisen most often in the context of requests for variations of divorce orders which include orders for maintenance, but the same principles apply to maintenance orders in terms of the Maintenance Act.⁶⁶ For example, it has been asserted that the parties to a second marriage must adapt their standard of living so that the children of a prior marriage do not suffer.⁶⁷ It has also been held that a duty of support arising from a second marriage is not on its own sufficient to establish the defence of lack of means to make maintenance payments in respect of a prior marriage.⁶⁸

However, other cases have held that although a first wife and children are a "prior charge", subsequent commitments are a grounds for the reduction of maintenance to

⁶³ See, for example, *Lamb v Sack* 1974(2) SA 670 (T).

⁶⁴ *Vedovato v Vedovato* 1980(1) SA 772 (T) at 774 (in a case dealing with a request for substitution of a maintenance order). See also *Herfst v Herfst* 1964(4) SA 127(W) at 130C-D, where it was stated (in the context of a divorce) that parents are obliged to provide their child "with everything that it reasonably requires for its proper living and upbringing according to their means, standard of living and station in life" on the basis of their respective "financial resources and circumstances."

⁶⁵ *Mentz v Simpson* 1990(4) SA 455 (A).

⁶⁶ See *S v Walraven* 1975(4) SA 348 (TPA).

⁶⁷ See, for example, *Scott v Scott* 1946 WLD 399 at 403-4; *Van der Walt v Van der Walt* 1961(4) SA 854 (O).

⁶⁸ See, for example, *S v Walraven* 1975(4) SA 348 (TPA).

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the first family -- meaning that the standard of living of all the parties may have to be reduced.⁶⁹

The following judicial statement presents what is perhaps the most realistic approach to such situations:

*Where the former guilty spouse's financial position has, since the date of the maintenance order, deteriorated as a result of circumstances beyond his control -- e.g. illness -- the court will manifestly be more favourably disposed towards granting a reduction of the maintenance previously ordered than it will be if the deterioration of his financial position has been brought about as a result of the "guilty spouse's" voluntary action or inaction. The situation which in practice frequently presents itself in applications for reduction is where the husband has remarried and then finds himself unable to implement both his existing legal obligations to his former spouse and what he conceives to be his duty to himself and to his present wife and family; The de facto situation thus created almost invariably renders it a difficult task for the Court both to have regard to the realities of the situation and, at the same time, to do justice between all concerned. On the one hand, the Court cannot overlook that, with full knowledge of his obligations to his first wife, the husband has taken upon himself additional obligations by again venturing into matrimony: the Court cannot countenance an attempt by the guilty husband of a former marriage to depreciate the payment to his former wife by the amount he is spending to "feather another nest" (see *Jacobs v Jacobs* 1955(1) SA 235 (W) at p. 238). On the other hand, the Court must also look to what the result of declining to vary the existing maintenance order is likely to be. A rigid and uncompromising rule that the rights of the first wife are to be regarded as absolutely preferent might perhaps in a sense be logical enough; but that ... would certainly in some cases lead to great hardship, particularly where children of the second marriage have to be supported. Considerations such as these may sometimes render it necessary for the court to cut down the maintenance payable to a former spouse even though the Court ... would prefer to see that maintenance remain unreduced.*

In all applications of this nature the Court must, in the ultimate analysis, make such order as, having regard to all the circumstances, appears to the Court to be just. The existence or otherwise of "good cause" for ordering a reduction of a spouse's maintenance depends on the facts of the particular case.⁷⁰

⁶⁹ See, for example, *Chizengeni v Chizengeni* 1989(1) SA 454 (ZHC).

⁷⁰ *Hancock v Hancock* 1957(2) SA 501 (CPD) at 502H-503E (dealing with maintenance in the context of divorce); see also *Benecke v Benecke* 1965(1) SA 855 (TPD).

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In the cases observed by the researchers, magistrates tended to take into account the total financial responsibilities of the respondent, allowing for the obligations of support owed to all children he has fathered, particularly in the context of an initial maintenance enquiry.

It has been held that it is not proper for the court to make a maintenance order in the absence of evidence about the earnings or financial position of the respondent.⁷¹ However, the maintenance officer is entitled to enquire fully into the respective means of both parties and to ensure that relevant evidence on this point is placed before the court.

Many members of the public and court officials seem to be under the impression that it is impossible to make a maintenance order against a respondent who is unemployed. The reported maintenance cases tend to speak of "earnings and financial position" or "means". Thus, there would appear to be no barrier to a court making a maintenance order against a respondent who is unemployed but has substantial assets. Practically, the assumption that an unemployed respondent will not have the means to pay maintenance is often true. However, this assumption should not discourage complainants or the court from proceeding against respondents who are able to pay even in the absence of regular income.

Making an order in the absence of the respondent

A maintenance order may be made against a person who is not present at an enquiry only if it is made in accordance with a written consent produced at the enquiry by the maintenance officer.⁷²

The existence of this provision is the reason that some maintenance courts post consent forms to respondents along with a notice to attend court on a particular date, to give the respondent the option of submitting a written consent to comply with the complainant's request rather than attending court.

The restrictions on making an order in the respondent's absence are not consistent with other analogous legal provisions. For example, it is possible to make a contribution order in the absence of the respondent in terms of the Children's Act 33 of 1960.⁷³ (A contribution order is a court order requiring a contribution towards the maintenance of a child who has been placed outside the home by the children's court -- for example, with foster parents or a children's home.)

Similarly, in terms of the usual procedure in civil matters before a magistrate's court, where a respondent fails to appear at the appointed time, default judgement may be

⁷¹ *S v Bedi* 1971(4) SA 501 (N).

⁷² Maintenance Act 23 of 1963, section 5(7).

⁷³ Regulations issued in terms of the Children's Act allow for an *ex parte* contribution order or an *ex parte* order for the attachment of wages to be made against a respondent who fails to reply to a summons. See Regulation 11(4) and 12(4), GN R.2433 of 10 December 1976, RSA Government Gazette 5357.

awarded against this party in his or her absence.⁷⁴ Furthermore, while it is true that failure to obey a maintenance order is a criminal offence, failure to comply with a judgment in a civil case could similarly expose the respondent to a criminal charge of contempt of court.⁷⁵

Thus, although the Maintenance Act is designed to create a favourable mechanism for the recovery of maintenance, ironically, a person bringing a civil action for maintenance under the normal rules of procedure would have certain advantages which are not available under the Act.

One of the biggest problems with the existing system is the failure of respondents to show up in maintenance court. Therefore, the possibility of expanding the conditions under which a maintenance order can be awarded in the absence of the respondent should be considered. The primary concern should be that the interests of the child do not suffer because of a protracted maintenance procedure.

Record of proceedings

Minutes of a maintenance enquiry must be kept, in the form of notes taken by the presiding officer, or in the form of shorthand or by means of a mechanical recording. The only persons who are allowed access to the records of the enquiry are a party, a legal representative of a party or an officer in the public service. These persons may have access to the record of the enquiry only with the permission of the officer currently presiding over the court, and only after paying the fees prescribed for the inspection of the records of civil proceedings in magistrates' courts.⁷⁶

In South Africa, the rules issued in terms of the Maintenance Act have been amended to make it possible for a person in whose favour a maintenance order was made to have access to the records of the case, even if that person was not a party to the case. For example, this rule might apply to a child who was represented at the enquiry by his or her mother or father.⁷⁷

Costs

A maintenance court does not have the power to award costs against any party to the proceedings.⁷⁸

In South Africa the Maintenance Act has been amended to empower the maintenance court to make any order which it considers to be just in respect of the costs of service of process, "having regard to the conduct of the persons concerned."⁷⁹ Such an amendment would make it possible for the court to charge a respondent for the costs

⁷⁴ See Magistrate's Court Rules, Rule 32. If the applicant fails to appear, the action can be dismissed with costs.

⁷⁵ See, for example, Magistrate's Courts Act 32 of 1944, sections 65A, 65F and 106.

⁷⁶ Maintenance Act 23 of 1963, section 5(10) and Rule 4.

⁷⁷ RSA Rule 4(3).

⁷⁸ See, for example, *Reid v Reid* 1992(1) SA 443 (E).

⁷⁹ RSA Maintenance Act 23 of 1963, section 14B, inserted by section 11 of the Maintenance Amendment Act 2 of 1991.

of repeated service of process in a case where the respondent failed to attend court on the appointed day -- and might thereby encourage respondents to take summonses from the maintenance court more seriously.

Offences relating to enquiries

There are several offences relating to maintenance enquiries:

1. Any person who is summoned to give evidence commits an offence if he or she fails to attend; fails to remain in attendance until excused; refuses to be sworn or to make affirmation as a witness; fails to answer questions fully and satisfactorily; or fails to produce any book, document or statement in his or her possession, custody or control which he or she was summoned to produce. The penalty for these offences is a fine of up to N\$50 or imprisonment for a period of up to 3 months.⁸⁰
2. Any person who knowingly gives false evidence at a maintenance enquiry commits an offence and is liable to the same penalties as are prescribed by law for perjury.⁸¹
3. Any person who wilfully interrupts or obstructs the proceedings commits an offence and is liable to a fine of up to N\$100 or imprisonment for a period of up to 6 months, or both.⁸² In South Africa, the maximum fine for this offence has been increased to R2000.⁸³
4. As noted above, publication of any identifying information about a person under the age of 18 years who is concerned in a maintenance enquiry is a offence punishable by a fine of up to N\$500 (raised to R8000 in South Africa) or imprisonment for up to two years, or both.⁸⁴

Maintenance orders

As noted above, both a consent agreement and an order made at the conclusion of a maintenance court enquiry are normally made into maintenance orders with equally binding effect.

⁸⁰ Maintenance Act 23 of 1963, section 9(1), which makes sections 211 and 212 of the Criminal Procedure Act 56 of 1955 (now replaced by sections 188 and 189 of the Criminal Procedure Act 51 of 1977) applicable to maintenance enquiries. See MG Cowling, "Maintenance Offences," in JRL Milton and MG Cowling, *South African Criminal Law and Procedure, Volume III: Statutory Offences, 2nd edition* (Juta & Co: 1988) at 17.

⁸¹ Maintenance Act 23 of 1963, section 9(2). Perjury is a common law crime with no set penalties. However, it has been described as a serious crime which is frequently severely punished. JRL Milton, *South African Criminal Law and Procedure, Volume II: Common Law Crimes, 2nd edition* (Juta & Co: 1982) at 123.

⁸² Maintenance Act 23 of 1963, section 10.

⁸³ RSA Maintenance Act 23 of 1963, section 10, as substituted by section 7 of the Maintenance Amendment Act 2 of 1991.

⁸⁴ Maintenance Act 23 of 1963, section 5(11).

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No retrospective effect

A maintenance court does not have the power to make an order with retrospective effect. This means, for example, that where no maintenance order was previously in existence, the court cannot order the respondent to pay his or her fair share of the expenses incurred since the birth of the child.⁸⁵

This does not mean, however, that the parent who has been bearing the costs of raising the child alone has no recourse against the other parent. The parent who paid more than his or her fair share can bring a civil action to recover the proportion due from the other parent. However, this would not be a proceeding in terms of the Maintenance Act.⁸⁶ Thus, there is an anomaly between the Maintenance Act and the civil law.

In South Africa, the Maintenance Act has been amended to empower maintenance courts to award maintenance retrospectively. This may include contributions for expenses incurred since the birth of the child, or for expenses associated with the birth, regardless of the date of the complaint.⁸⁷

Potential expansion of the court's powers in respect of maintenance orders

In South Africa, the maintenance court is now empowered to order the respondent to share in the medical expenses of any person he or she is liable to maintain, or to register such a person as a dependent in a medical scheme.⁸⁸

Payments to be made to court

The Maintenance Act does not allow payments to be made directly to the beneficiary of the maintenance order. Payments must be made to the court and collected by the appropriate person.

Some women have complained about the inconvenience and expense of having to collect money in person, while men have also suggested that other methods of payment might be more convenient. Some courts in Namibia are already approaching the issue of payment mechanisms with as much flexibility as possible. For example, stop orders on the respondent's bank account have been utilised in some cases. In other cases, court personnel have agreed to post money to complainants who live far from the court. Some people have suggested that post offices could be utilised as collection points.

⁸⁵ This contrasts with the common law on maintenance, which does allow for the award of retroactive maintenance. See, for example, *Harwood v Harwood* 1976(4) SA 586 (C); Schäfer (n13) at 35, n54.

⁸⁶ See *S v Frieslaar* 1990(4) SA 437 (C); van Zyl (n2) at 4.

⁸⁷ RSA Maintenance Act 23 of 1963, section 5(4)(a), as substituted by section 2(a) of the Maintenance Amendment Act 2 of 1991. The South African amendment is flawed, however, because it is not gender-neutral. It provides for the retroactive award of expenses incurred since the date of the child's birth against the child's father, but it does not allow for the possibility that a *father* might have cared for a child from birth and therefore be entitled to claim maintenance retroactively from the *mother*.

⁸⁸ RSA Maintenance Act 23 of 1963, section 5(4)(a), as substituted by section 2(a) of the Maintenance Amendment Act 2 of 1991.

LEGAL BACKGROUND

In South Africa, the Maintenance Act has been amended to allow payments to be made directly to the recipient of the maintenance order, or into an account at a bank or building society.⁸⁹

Duration of maintenance orders

A maintenance order remains valid until it is varied or cancelled. If the respondent believes that there are grounds for the discharge of the maintenance order, these must be presented in an application to the maintenance court.⁹⁰

For example, the maintenance order does not fall away automatically if it appears that the child has become self-supporting; the correct procedure is for the respondent to request a decrease or a discharge of the order from the court on these grounds.⁹¹

Prohibition on unilateral adjustments

A person who is subject to a maintenance order does not have the right to make unilateral decisions to alter the amount of the payments.

For example, if the maintenance order is silent on the issue of visits to the non-custodian parent, the respondent is not entitled to make a *pro rata* decrease in the maintenance payment in respect of the period of the visit.⁹²

Similarly, a respondent cannot claim that the duty to make payments has automatically ended because the complainant has waived the right to receive any further payments.⁹³

Notice of change of address

A person against whom a maintenance order has been made is required to give written notice to the court of any change in residential address or employment. Failure to do so is a criminal offence which can be punished by a fine of up to N\$100 of imprisonment for up to 6 months.⁹⁴

The purpose of this provision is to try to prevent people from avoiding the duty to make maintenance payments by changing jobs or residences. However, it would not

⁸⁹ RSA Maintenance Act 23 of 1968, section 5(4)(a)(i), as substituted by section 2(b) of the Maintenance Amendment Act 2 of 1991.

⁹⁰ See, for example, *Wright v Wright* 1978(3) SA 47 (E) at 51G; *Strime v Strime* 1983(4) SA 850 (C) at 852B.

⁹¹ See *S v Olivier* 1976 (3) SA 186 (O) at 191F-G. Such an allegation would also be grounds for the conversion of a criminal proceeding for failure to pay maintenance into a new enquiry. See *S v Dannhauser* 1993(2) SACR 398 (O).

⁹² See *S v Olivier* 1976 (3) SA 186 (O) at 191H, criticising the approach taken in *S v Monamme* 1968(1) SA 63 (GW). In *S v Monamme*, the court held that if a respondent takes custody of the children in respect of whom the maintenance order is to be paid, the order is temporarily inapplicable. However, *S v Olivier* and other more recent cases have emphasised that the correct procedure would be for the respondent to present this fact as a grounds for substitution. (See the discussion of "substitution proceedings" at page 32 below.

⁹³ See, for example, *S v Rahman* 1974(3) SA 280 (RA).

⁹⁴ Maintenance Act 23 of 1963, section 14.

seem to be sufficiently effective, as people who are hoping to hide from a subpoena for failure to pay will also hope to hide from a subpoena for failure to give proper notice of change of address. Furthermore, the problem of people hiding from their responsibilities often arises *before* the maintenance enquiry has been held.

There are several approaches which could be taken to strengthening this provision. For example, in South Africa, whenever a maintenance order is made, the court is empowered to order that two photographs must be taken of the person in question to facilitate enforcement. This provision is designed to assist the police in locating the respondent in the event of a failure to pay.⁹⁵

The penalty for failure to give the required notice of change of address or employment has also been increased from R100 to R2000 in South Africa. (The maximum term of imprisonment remains six months.) Furthermore, new evidentiary provisions have been added to make it easier to prove failure to give such notice. An affidavit from the relevant landlord or employer is sufficient to establish a *prima facie* case of failure to comply, whereupon the accused bears the burden of proving compliance with the notice requirement.⁹⁶

It has been suggested that anyone with a legal liability to maintain another person should have a legal duty to notify that person (or the person's custodian) of his or her whereabouts at all times -- even if no dispute about maintenance payments arises.

Enforcement of maintenance orders

Where maintenance owed in terms of a maintenance order is not paid, the possibilities for recovery of arrear maintenance include criminal proceedings brought in terms of the Maintenance Act (which may include an order for the payment of arrear maintenance), criminal proceedings for contempt of court, or recovery by means of writ of execution.⁹⁷

The status of a maintenance order has been clarified in South Africa, where a new provision states that any order or direction of maintenance court has the effect of an order or direction of a court in a civil action.⁹⁸ This makes it clear that the procedures for enforcement of a civil judgment would apply to maintenance orders as well. The South African amendment would thus make it possible for maintenance payments to be secured by the attachment of the respondent's wages at any stage.⁹⁹ A similar amendment to the Maintenance Act in Namibia would greatly facilitate enforcement.

⁹⁵ RSA Maintenance Act 23 of 1968, section 5(5), as substituted by section 2(b) of the Maintenance Amendment Act 2 of 1991. If the maintenance order is discharged, the photographs must be destroyed.

⁹⁶ RSA Maintenance Act 23 of 1968, section 14(2)-(3), as substituted by section 10 of the Maintenance Amendment Act 2 of 1991.

⁹⁷ *Strime v Strime* 1983(4) SA 850 (C); see also Schäfer (n13) at 35.

⁹⁸ RSA Maintenance Act 23 of 1968, section 14C, as inserted by section 11 of the Maintenance Amendment Act 2 of 1991.

⁹⁹ See, for example, Magistrate's Court Act 32 of 1944, sections 65J and 72.

Effect of no order

If the maintenance court declines to make an order because of insufficient evidence, this does not prevent the complainant from approaching the court again in the future.¹⁰⁰

APPEALS AND REVIEWS

Appeal procedure

Any party who is aggrieved by the decision of a maintenance court -- including a decision granting or denying a request for a maintenance order, a decision varying or refusing to vary an existing maintenance order, or a decision to discharge a maintenance order -- may appeal to the High Court.¹⁰¹

Appeals must be noted within 21 days of the date of the order being appealed against, and cross-appeals must be filed within 7 days of the notice of appeal.

The presiding officer in the initial enquiry must transmit to the clerk of the maintenance court a statement of the facts found to be proved, the reasons for any finding of fact specified in the notice of appeal, and the reasons for any ruling on any question of law or question of the admissibility of evidence being appealed against. This statement must be transmitted within 14 days of the noting of the appeal if the presiding officer took the minutes of the enquiry, or within 14 days of receiving the transcript of the enquiry if it was recorded by shorthand or mechanical means. This statement becomes a part of the record of the enquiry.

The clerk of the maintenance court must transmit the record of the enquiry to the clerk of the appeals court within 7 days of receiving a notice that the matter has been set down for hearing.

Appeals are prosecuted as if they were appeals of the decision of a magistrate's court in a civil matter, under the rules which apply to such civil appeals.¹⁰²

The appeals court has the power to make any order in the matter that it deems fit, including the power to remit the case for a new maintenance enquiry before a different presiding officer.¹⁰³ However, as is the case with other appeals, the appeals court will generally interfere with the judgement of the maintenance court only if there was a mistake of law or some irregular conduct, and not merely because the appeals court would have arrived at a different sum -- unless the amount calculated by the appeals court as the appropriate sum differs substantially from the amount which was actually

¹⁰⁰ *Sewnarain v Budha & Others* 1979(2) SA 353 (N).

¹⁰¹ Maintenance Act 23 of 1963, section 7(1); Spiro (n26) at 424. Only an order as defined in section 7(3) of the Maintenance Act can be appealed. A finding of paternity which was not accompanied by an order for the payment of maintenance is not by itself appealable. *Salojee v Tsukudu* 1985(2) SA 889 (O).

¹⁰² Rules 4(4) and 5; *Govender v Manikum* 1981 (1) SA 1178 (N).

¹⁰³ Maintenance Act 23 of 1963, section 7(2); Spiro (n26) at 427.

awarded.¹⁰⁴ A maintenance order based strictly on the consent of the parties will not, in the absence of fraud, be lightly set aside on appeal.¹⁰⁵

Generally, the execution of a civil judgment is automatically suspended when an appeal is noted, unless an application for execution of the judgment in the interim is approved by the court which granted the judgment.¹⁰⁶ No cases have been located on this point which involve maintenance orders. However, it should be noted that the Maintenance Act has been amended in South Africa to provide that the noting of an appeal against a maintenance order shall *not* have the effect of suspending maintenance payments unless the appeal is noted against a finding that the respondent/appellant is legally liable to maintain the person in question.¹⁰⁷

It is submitted that the new South African approach is an appropriate way to protect the interests of children who are the beneficiaries of maintenance payments, and that a similar amendment should be made to the Maintenance Act in Namibia.

Legal assistance for complainant

It was suggested in a 1980 case in the Appellate Court of "South West Africa" that the legislature should consider charging the Attorney-General [the equivalent of Namibia's Prosecutor-General] with the duty of appearing for complainants in cases where an appeal against the maintenance order was brought by the respondent, provided that the complainant wishes to take advantage of the offer of assistance.¹⁰⁸

This was followed by a 1981 South African case which included an even stronger argument for the involvement of state prosecutors where appeals are made against maintenance orders by the respondent. Although state prosecutors would not have standing to note and prosecute appeals against maintenance orders independently, the court recommended that it should be state policy to make the services of a state prosecutor available to the complainant free of charge in appeals:

[Counsel] suggested further that as a matter of practice the clerk of the court should furnish the Attorney-General with a copy of the court record when an appeal against a maintenance order is noted. This would enable the Attorney-General to make arrangements, where necessary, to appear as amicus curiae. [An amicus curiae is a "friend of the court" who intervenes in a case in the public interest rather than as a direct representative of a party.] it does not seem to be in keeping with the spirit of the Maintenance Act that a complainant for whose benefit the machinery of the Maintenance Act has been created should be left to her own devices like a respondent in an ordinary civil appeal when an appeal against a maintenance

¹⁰⁴ See Spiro (n26) at 426; *Vedovato v Vedovato* 1980(1) SA 772 (T) at 776C; *Mentz v Simpson* 1990(4) SA 455 (A) at 456-7.

¹⁰⁵ *Holtzhausen v Linde NO* 1978 (3) SA 27 (O).

¹⁰⁶ See, for example, *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977(3) SA 534 (A).

¹⁰⁷ RSA Maintenance Act 23 of 1963, section 7(4), added by section 4(b) of the Maintenance Amendment Act 2 of 1991.

¹⁰⁸ *Fernandes v Laubscher* 1980(3) SA 765 (SWA).

order is noted (see *Fernandes v Laubscher* 1980(3) SA 765 (SWA) where it was pointed out that the Act was silent on the question of the right of a complainant to be represented on appeal). The Court there suggested that the legislature should consider charging the Attorney-General with the duty of appearing for complainant/respondents who so request but the Court did not consider the question which we have to consider as to whether the Attorney-General should appear as *amicus curiae*. There is nothing in the Act which either expressly or by necessary implication prevents us from acceding to the Attorney-General's request and I have already indicated that to do so would be in keeping with the spirit of the Act. Moreover the proceedings in the maintenance court are initiated by the maintenance officer who is a government official and a civil servant. Children may be involved and a complainant may be an indigent person seeking to obtain some money to support herself and/or her children. It seems to me that it would be unjust and unfair if as a respondent she were left high and dry when an appeal has been noted against the decision of a maintenance court in her favour. Considerations of public policy persuade me that the Court should accede to the request of the Attorney-General and should hold that, where a complainant/respondent does not engage her own legal representative or wish to appear in person, the services of the Attorney-General should be made available *amicus curiae*. I think, too, that the further suggestion by [counsel] should be accepted, namely that, as a matter of practice, the clerk of the court should furnish the Attorney-General with a copy of the court record when an appeal against a maintenance order is noted. This will enable the Attorney-General to make arrangements, whenever they are necessary, to appear as *amicus curiae*. This ruling applies only to the position of a complainant/respondent on appeal, which arises in this case, without closing the door to the position of a complainant/appellant on appeal.¹⁰⁹

Consistent with these ideas, it has also been suggested that where an appeal involves the issue of paternity the rights of the children would be better protected if a complainant without the financial means to engage legal representation could either be granted legal aid or otherwise enabled to prosecute her appeal at state expense.¹¹⁰

Non-appearance by appellant

If the complainant who is also the appellant does not appear at an appeal against a finding of an enquiry, and no one appears on the complainant's behalf, then the appeal should be struck off the roll.¹¹¹

¹⁰⁹ *Govender v Manikum* 1981(1) SA 1178 (N) at 1182A-G. See also *S v Ward* 1992(1) SA 265 (BGD) at 274-275.

¹¹⁰ *Johnson v Tiger* 1979(1) SA 920 (NC).

¹¹¹ *Ibid.*

Although no analogous cases have been located involving a respondent who is the appellant, the same principle would presumably apply.

Costs

The appeal court has the power to award costs in an appeal against the decision of a maintenance court.¹¹² However, it has been held that the court should beware of awarding costs in a way which might reduce the complainant to the very situation which the maintenance proceedings were designed to relieve.¹¹³

It has been suggested that the legislature should provide that no order of costs may be made on appeal (particularly against the complainant), since the interests of children are often involved and since the purpose of the Maintenance Act is to provide a mechanism for securing maintenance at state expense.¹¹⁴

Reviews

A "maintenance order" is not in itself a "sentence" for the purposes of section 302 of the Criminal Procedure Act 51 of 1977, meaning that it is not subject to automatic review by a higher court.¹¹⁵ However, the High Court has jurisdiction to review the proceedings of any lower court in Namibia on the motion of any party to the proceedings.¹¹⁶

A review, unlike an appeal, generally examines only the legality of the lower court's action, rather than questioning the merits of the case or the wisdom of the decision which was made.

SUBSTITUTION PROCEEDINGS

Powers of maintenance court

The power to vary an existing maintenance order includes the power to vary an order made by the High Court, such as a divorce order which provides for maintenance of an ex-spouse or the children of the marriage.

It also includes the power to vary a maintenance order which takes the form of a sentence of imprisonment suspended on the condition that periodic payments are made towards the maintenance of another person. For example, a respondent who fell into arrears with maintenance payments might be convicted and sentenced to a term of imprisonment suspended on the condition that he or she resume regular payments plus a monthly sum to pay off the arrears. This condition would be treated as a

¹¹² See, for example, *Buch v Buch* 1967(30 SA 83 (T); *Reid v Reid* 1992(1) SA 443 (E).

¹¹³ *Govender v Manikum* 1981 (1) SA 1178 (N).

¹¹⁴ *Fernandes v Laubscher* 1980(3) SA 765 (SWA).

¹¹⁵ *Maguma v Ntengento* 1979 (4) 155 (C).

¹¹⁶ Supreme Court Act 15 of 1990, section 16(a); Rules of the High Court of Namibia, Rule 53, GN 59/1990 (Government Gazette 90 of 10 October 1990). See also *Holtzhausen v Linde NO* 1978(3) SA 27 (O) on the court's inherent powers of review.

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maintenance order which could be increased or decreased if circumstances warranted.¹¹⁷

Variations of maintenance orders most often take the form of increases or decreases in the amount to be paid. They also sometimes involve a variation in the person who is to receive the payments -- for example, if a mother of a child leaves the child in the care of the grandmother, a maintenance order in favour of the mother could be changed to make the grandmother the recipient of the maintenance payments.

The maintenance court also has the power to discharge [cancel] a maintenance order completely if circumstances warrant.

A request for substitution is considered at a maintenance enquiry which takes the same form as the enquiry which follows an initial complaint.

When a maintenance court substitutes or discharges a maintenance order, the previous order ceases to be of force and effect.¹¹⁸

Increases and decreases

The respondent has the right to request a decrease, while the party who receives maintenance has the right to request an increase.

It is also possible for competing requests to be made simultaneously. For example, if a complainant approaches the court to request an increase, the respondent can present a motivation for a decrease or a discharge at the same proceeding. The magistrate can also raise the possibility of a decrease in the course of an enquiry based on a request for an increase, or vice versa.¹¹⁹

Sufficient cause

In a request for substitution of a maintenance order, the party requesting the substitution must show a sufficient cause for requesting the variation.¹²⁰

There is no set time limit which must elapse between the original maintenance order and a request for substitution, although it would obviously be more difficult to demonstrate sufficient cause for requesting the variation in most cases if the request came right on the heels of the original order.

It has been noted (in the context of variation of a divorce order) that substitutions should not be made lightly because of the importance of certainty for financial planning:

¹¹⁷ See the definition of "maintenance order" in Maintenance Act 23 of 1963, section 1. See also *S v Morris* 1992(2) SACR 365 (C).

¹¹⁸ Maintenance Act 23 of 1963, section 6.

¹¹⁹ *Van Zyl v Steyn* 1976(2) SA 108 (O).

¹²⁰ See *Vedovato v Vedovato* 1980(1) SA 772 (T).

*In my opinion a divorced wife in whose favour such a maintenance order has been made is entitled, particularly when the custody of a minor child or children has in addition been awarded to her, to an expectation of reasonable stability as regards the monthly income of her new household, so as to enable her to plan ahead and even to effect such savings as may be prudent and reasonable with a view to the future of herself and the child or children; and she would be deprived of this most important benefit if some change or changes in the relative financial position of the parties were too readily to be acceded to as justification for a complete revision of the maintenance arrangements.*¹²¹

The same principle could reasonably be applied to maintenance cases.

Additional family responsibilities

As noted above, the courts have been reluctant to prejudice the interests of the beneficiaries of a maintenance order because of additional family responsibilities taken on by the respondent. However, there has also been an acknowledgement that the rights of the “second family” cannot be ignored, with the most practical view being that such situations must be dealt with on a case-by-case basis in an effort to do justice to all parties in the particular circumstances of the case.¹²² Thus, in some cases, a respondent’s duty to support subsequent children or a second household might be treated as sufficient cause for a reduction of the original maintenance order.

Inflation

Inflationary increases in the cost of living have been found to constitute a sufficient cause for an increase in the amount of maintenance to be paid, although case law is not entirely consistent on this question.

The cases addressing this issue have arisen primarily in the context of requests for substitution of maintenance orders which are part of divorce decrees. One view is that where maintenance is between spouses, rises in the cost of living must be borne equally by both of them, but that where maintenance of children is involved the children’s needs “must inevitably be assessed against the rising cost of making provision for them”.¹²³ A 1976 Zimbabwe case articulated this view particularly strongly:

In my view, there can be no doubt at all that if, as a result of inflation or an increase in the cost of living, it proves impossible for a custodian parent to maintain his or her child on the maintenance ordered, that is a circumstance which would justify an application under [Zimbabwe’s Maintenance Act] for an increase in maintenance. If, on investigation, it is shown that the other parent is

¹²¹ *Loubser v Loubser* 1958(4) SA 6870 (CPD) at 684F-G.

¹²² See “Balancing the needs of the children against the respondent’s ability to pay” at page 21 above.

¹²³ *Vedovato v Vedovato* 1980(1) SA 772 (T) at 775F. See also *Grasso v Grasso* 1987(1) SA 48 (C) at 60.

*able to make a contribution which will make it possible for the custodian parent properly to maintain the child, the court may make an order increasing the maintenance. In my view, it is unthinkable that the law could possibly be that although the maintenance payable under an order is insufficient for the reasonable needs of a child, the custodian parent is denied the right to approach the court for an increase in maintenance when such an increase is made necessary by the fact that money has lost its value or an increase in the cost of living. It is difficult to think of a circumstance which would offer greater justification for such an application.*¹²⁴

Another view is that a predictable level of inflation would not on its own constitute a sufficient cause for an increase in maintenance payments because this should have been taken into account at the time maintenance was decided upon; however, an unforeseeable rise in the cost of living would constitute a sufficient cause for an increase.¹²⁵ The weakness of this approach is that there is no evidence that the maintenance courts consistently take anticipated increases in the cost of living into account when making initial maintenance orders. Divorce orders, on the other hand, often incorporate an automatic increase in maintenance payments based on rises in measures of inflation such as the consumer price index.¹²⁶

A third view is that inflation alone should not be treated as a grounds for an increase in maintenance because this would result in a flood of court applications for substitutions.¹²⁷

It has been suggested by many women in Namibia as well as by researchers in South Africa that the Maintenance Act should empower the court to incorporate automatic annual increases linked to the rate of inflation into maintenance orders, thus eliminating the need for claimants to return to the court repeatedly to ask for increases on this basis.¹²⁸

Other grounds for variation

It has been held (in the context of a divorce case) that the fact that the recipient of maintenance payments works diligently to supplement his or her financial resources is not, on its own, sufficient grounds for reducing the maintenance order.¹²⁹

It also appears that the fact that the recipient of the maintenance payments is able to put aside some savings is not on its own a sufficient basis for a variation.¹³⁰

¹²⁴ *Green v Green* 1976(3) SA 316 (RAD) at 318C-F.

¹²⁵ *Levin v Levin* 1984(2) SA 298 (C).

¹²⁶ See *Davis v Davis* 1992(1) SA 621 (C) and *Luttig v Luttig* 1994(1) SA 524 (O).

¹²⁷ *Louis v Louis* 1973(2) SA 597 (T) at 599 (n16).

¹²⁸ See Burman and Berger, Part II (n16) at 353.

¹²⁹ *Pieterse v Pieterse* 1965(4) SA 344 (T).

¹³⁰ See *Loubser v Loubser* 1958(4) SA 6870 (CPD) at 684F-G, quoted above.

Allegations of abuse of maintenance monies

The Maintenance Act is silent on the issue of misuse of maintenance payments. However, the maintenance officer's powers of investigation appear to be wide enough to encompass an investigation of allegations by the respondent that the money is being abused. It is submitted that the proper course of action would be for a respondent who had reason to suspect abuse to approach the maintenance court to request a reduction or a discharge on this basis, which would lead to an investigation and an enquiry into the allegation.

As will be discussed in more detail below, an allegation that the recipient of maintenance payments is misusing the money is not a defence to the charge of non-payment,¹³¹ but such an allegation might serve as a basis for the conversion of a criminal proceeding into a new enquiry.

In practice, allegations of abuse are sometimes referred to the Ministry of Health and Social Services, which assigns a social worker to investigate the situation. Maintenance court personnel have also suggested that the recipient of maintenance payments could be asked to give a simple accounting of expenditures to counter an accusation that the maintenance money is being misspent.

Furthermore, since the Maintenance Act empowers the court to make an order for the payment of maintenance to any "officer, organisation or institution"¹³², the court could order that the respondent pay money for school fees directly to a child's school, or money for electricity and water charges or house rental directly to a municipality, in a case where there was reason to believe that maintenance money was not being properly used for the benefit of the children in question.

Retroactive effect of substitutions

It has been held that a maintenance court has the power to substitute or discharge a maintenance order with retrospective effect, although this should not be lightly done since the respondent has a duty to seek the assistance of the court promptly instead of allowing arrears to accumulate.¹³³

MAINTENANCE COURT PROCEEDINGS AFTER A DIVORCE

Under Namibia's existing divorce law, divorces may be granted only by the High Court. One party must be identified as the "guilty party" and the other as the "innocent party", and only the "guilty party" may be ordered to contribute to the maintenance of the other spouse. However the court may make any order it deems fit for the maintenance of the children of the marriage, against a "guilty" or an "innocent" party.

¹³¹ See *S v Gunya* 1990(4) SA 282 (Ck) at 285C-D.

¹³² Maintenance Act 23 of 1963, section 5(4).

¹³³ *Strime v Strime* 1983(4) SA 850 (C).

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As noted above, the maintenance court's power to vary an existing maintenance order includes the power to vary a High Court divorce order which provides for maintenance of an ex-spouse or the children of the marriage. This applies also to a consent agreement for maintenance between the spouses which is made into an order of court at the time of the divorce, and would seem to include an agreement in which the "innocent spouse" undertakes to pay maintenance to the "guilty spouse".¹³⁴

Where no order is made for maintenance between the spouses at the time of the divorce, it is not possible for either of them to approach the maintenance court later to request maintenance for him- or herself. The reason for this is that, in the absence of a court order for continued maintenance, the spouse's mutual duty of support ends when the marriage ends and there is no longer any basis for finding that one spouse is "legally liable" to support the other.

The parents' legal obligation to support their children, on the other hand, is not affected by a divorce. Even if the High Court did not make an order for the maintenance of the children of the marriage at the time of the divorce, the parent with custody of the children could approach the maintenance court at any stage to seek a maintenance order in respect of the children.

When a maintenance court varies a divorce order made by the High Court, the original provision concerning maintenance ceases to be of any force and effect.¹³⁵

It has been held that a declaration in a divorce order in which the spouses waive any further claim against each other is not broad enough to prevent the spouse who is obligated to pay maintenance from approaching the maintenance court to request a substitution.¹³⁶ However, where the parties to divorce have made an agreement that one of them will pay maintenance to the other and that such maintenance payments shall not subject to any increase or decrease, and this agreement is made into an order of court, this appears to preclude the power of the maintenance court to make a substitution.¹³⁷ (However, such an agreement would presumably not prevent the High Court from amending the order if this was necessary to protect the best interests of the children, since the High Court functions at all times as the upper guardian of all children.)

Where the parties to a divorce approach the maintenance court in respect of maintenance for the children of the marriage and this issue was not dealt with in the

¹³⁴ See, for example, *Strauss v Strauss* 1974(3) SA 79 (A); *Rubenstein v Rubenstein* 1992(2) SA 709 (T); *Davis v Davis* 1993(1) SA 621 (C).

In the past the courts took the view that an agreement between the spouses for maintenance of an "innocent spouse" by the "guilty spouse" was not a "maintenance order" for the purposes of the Maintenance Act (*S v Loubser* 1969(2) SA 652 (C)), but held that an agreement between the spouses for maintenance of a child did qualify as such a "maintenance order" (*S v Miller* 1976 (1) SA 12 (C)). This distinction has more recently been rejected by the South African courts (see, for example, *Rubenstein v Rubenstein* 1992(2) SA 709 (T) and *Davis v Davis* 1993(1) SA 621 (C)), although the change in approach may have been affected by the South African Divorce Act 70 of 1979 which does not apply to Namibia.

¹³⁵ *Purnell v Purnell* 1993 (2) SA 663 (A).

¹³⁶ *Luttig v Luttig* 1994(1) SA 523 (O).

¹³⁷ See *Schutte v Schutte* 1986(1) SA 872 (A); *Davis v Davis* 1993(1) SA 621 (CPD) at 626; see also Cowling (n80) at 10-11.

divorce order, it will be treated as any other initial complaint to the maintenance court. Where the request is for substitution of any aspect of a maintenance order which was made part of the divorce decree, this will be dealt with in the same manner as a request for substitution of any other maintenance order.

When a complainant comes to the maintenance court after a formal divorce, he or she may be complaining that a maintenance order made by the High Court for the maintenance of a spouse or a child of the marriage is not being obeyed. This would be analogous to an arrears proceeding following a maintenance order issued by the maintenance court. However, where a respondent falls into arrears under a divorce order of the High Court, rather than under a maintenance order of a maintenance court presided over by a magistrate, different complaint forms are used.

ARREARS

When a person who is subject to a maintenance order fails to make a payment, that person is said to be in arrears. Arrear maintenance may be recovered by way of contempt proceedings or by writ of execution.¹³⁸ However, the most common method of enforcement is by way of criminal proceedings which are specifically provided for under the Maintenance Act.

Maximum penalties

Failure to make a maintenance payment in terms of a maintenance order is punishable by a fine of up to N\$200, or by imprisonment for up to 1 year. As will be discussed in more detail below, in addition to criminal sanctions, the court may also make an order for the payment of arrear maintenance.¹³⁹

In South Africa, the maximum fine for failing to comply with a maintenance order has been increased to R4 000.¹⁴⁰

Criminal Proceedings

Initiating the criminal trial

The law does not set forth specific directions regarding the procedure to be followed in respect of the offence of failure to pay.

In practice, since payments are made directly into the court and recorded in a payment register, the court is always aware of the fact that a respondent has failed to make a payment. However, action is not usually taken unless the intended recipient of the maintenance payments goes to the maintenance officer in person to make a complaint about the arrears.

¹³⁸ *Strime v Strime* 1983(4) SA 850 (C); see also Schäfer (n13) at 35.

¹³⁹ Maintenance Act 23 of 1963, section 11(1).

¹⁴⁰ RSA Maintenance Act 23 of 1963, section 11(1), as substituted by section 8 of the Maintenance Amendment Act 2 of 1991.

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Some women have complained about the extra time and expense involved in taking this step and have asked whether it would be possible for the state to initiate action against persons who have fallen into arrears independently. Although the recipient's testimony might be needed to counter a defence that payments were made directly to the recipient instead of into court, there would seem to be no legal reason why the state could not take the initial steps to institute the criminal proceeding independently and then subpoena the recipient to testify if necessary. The process could also be streamlined by allowing the recipient to sign a form authorising the court to institute criminal proceedings when he or she comes to the court to collect a payment which has not arrived.¹⁴¹

Some courts follow a practice of sending a warning letter to the respondent after a payment has been missed. Some women have complained that this step is completely ineffective and merely delays the enforcement process. However, court personnel in some areas have reported that a warning letter or telephone call will sometimes result in the respondent coming forward to pay off arrears in a lump sum to avoid prosecution. In other areas, it is common practice for the criminal proceeding to be postponed before the trial actually begins, to allow the respondent to settle the arrears.¹⁴²

In Windhoek, it was standard policy until recently that criminal prosecutions would not be initiated until the respondent was at least three months in arrears. The reasoning behind this approach was that a criminal prosecution might be a waste of time if it began before it was clear that the respondent was not going to come forward with late payments. However, this policy created unnecessary hardship for the recipient of the maintenance payments, as this waiting period allowed arrears to amount to accumulate to such an amount that it was unlikely that they could be paid off promptly.

Following a complaint from the Legal Assistance Centre in October 1994, the Chief Magistrate for the Central Region abolished the three-month waiting period and directed maintenance officers to cause criminal prosecutions to be commenced against respondents after any one payment was missed.¹⁴³

A respondent who has failed to pay for more than one month should be charged with one count of failure to pay, not with one count of failure to pay in respect of each payment that has been missed.¹⁴⁴

Trial procedure

When the criminal proceeding commences, the appropriate procedure is as follows. The court should identify the maintenance order in question, when it was issued, by what court, in what circumstances, in favour of whom, in what amount and whether it is still operative. Production of a copy of the maintenance order certified by the

¹⁴¹ This is a reform which has also been suggested in South Africa. Burman and Berger, Part II (n16) at 353.

¹⁴² Interviews with court personnel, 1994.

¹⁴³ Communication from Mr Myburgh, Chief Magistrate, Central Region, Ministry of Justice, 21 October 1994.

¹⁴⁴ *S v Dadabhai* 1969(3) SA 520 (N).

maintenance officer or a clerk of the court or any other appropriate official constitutes *prima facie* proof of the fact that a maintenance order has been made against the accused.

The court should find out if the accused admits the failure to comply with the order, and the reasons for failure to comply. If the accused is unrepresented, the court should ask him or her why the maintenance obligations were not met, and from the reasons advanced reach a legal conclusion as to the accused's plea.¹⁴⁵

Burden of proof

The state bears the burden of proving that there was a failure to pay maintenance, as well the burden of proving the amount of arrears.¹⁴⁶

The accused bears the burden of proving any defence which he or she raises, on a balance of probabilities. Where the accused is unrepresented, the court has a duty to explain the potential defences and the onus and standard of proof.¹⁴⁷

In South Africa, where the Maintenance Act has been amended to allow payments to be made directly to the recipient or into an account at a bank or building society, this change may make it harder for the state to prove non-payment. To counter this problem, a presumption has been added to the Act providing that whenever it is alleged that the respondent has failed to make a maintenance payment to the person or institution specified in the order, it shall be presumed until the contrary is proved that the respondent actually failed to make the required payment.¹⁴⁸ In other words, if failure to pay is alleged, the burden of proof is shifted to the respondent to show that he or she did make the payment in question.

If the law in Namibia were amended to allow payments to be made directly to maintenance recipients or into bank accounts, such a presumption would certainly be helpful in proving that payments are in arrears. However, it is likely that such a presumption would be unconstitutional in terms of Article 12 of the Namibian Constitution (the right of all persons to be presumed innocent until proven guilty).

In terms of section 11(1) of the Maintenance Act, failure to make a prescribed payment constitutes a criminal offence. There are no other elements of the crime. Thus, it can be argued that the presumption in the South African Act has the effect of shifting the entire onus of proof to the accused. This would probably be constitutionally unacceptable in Namibia, where it has been held that, while it may be permissible to create presumptions relating to scientific or technical matters, or to certain elements of a crime which only the accused can possibly know, a presumption

¹⁴⁵ See *S v Malgas* 1987(1) SA 194 (Tk); *S v Nylstroom en Andere* 1993(1) SACR 543 (C).

¹⁴⁶ *S v Cronje* 1968(1) SA 186 (O).

¹⁴⁷ See *S v Malgas* 1987(1) SA 194 (Tk); *S v Nylstroom en Andere* 1993(1) SACR 543 (C).

¹⁴⁸ RSA Maintenance Act 23 of 1963, section 14A, as inserted by section 11 of the Maintenance Amendment Act 2 of 1991.

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criminal proceedings into an enquiry if it appears that the maintenance payments required by the maintenance order are excessively high with regard to the accused's income, assets and obligations to all dependants at the time of the criminal case.¹⁶²

Conversion would also seem to be appropriate whenever circumstances have arisen since the original order was made which would have an effect on the appropriateness of the order -- such as the fact that a child who was the beneficiary of a maintenance order has become self-sufficient -- although it would obviously be more appropriate in such a case for the respondent to approach the maintenance court to request a substitution or a discharge of the order instead of falling into arrears.¹⁶³

Conversion into an enquiry would also seem to be appropriate in a situation where the accused challenges the validity of the original maintenance order by arguing that he is not the father of the children in question, provided that this issue was not actually adjudicated at the original maintenance enquiry (in which case an appeal would be the appropriate forum to challenge the finding of paternity). While the criminal trial itself may not be used to re-evaluate the duty of maintenance or to determine the correctness of the original order, it would be permissible for the court to convert the criminal proceedings into a maintenance enquiry in order to address these issues.¹⁶⁴

¹⁶² Maintenance Act 23 of 1963, section 13; *S v Cloete* 1977(4) SA 90 (C).

¹⁶³ See Cowling (n80) at 7.

¹⁶⁴ See *S v Olivier* 1976 (3) SA 186(O) at 191C-D; *S v Sephiri* 1981(2) SA 837 (B); *S v Gunya* 1990(4) SA 282 (Ck) at 288C-G; *S v Pieterse* 1993(3) SA 275 (CPA) at 285C (where "section 18" appears to have inadvertently been substituted for "section 13").

Cowling (n80) at 7 appears to draw a different conclusion, but states at 11 that challenges to the order itself should be raised either on appeal or by conversion of criminal proceedings into an enquiry.

S v Sephiri took the view that it is appropriate for a criminal proceeding for failure to pay maintenance to be converted into "an enquiry to establish whether the maintenance order should stand as it is", including a challenge on the issue of paternity. However, the holding in this case appears to have been influenced by several facts specific to the case at hand. The respondent did appeal the original maintenance order, but the appeal was struck off the roll for non-appearance, and the court felt that it would not be reasonable to require the respondent to incur the expense of litigating maintenance issues in two different courts. There was also an independent basis for the conversion of the criminal proceeding into an enquiry, since the respondent was obligated to pay maintenance for five children, three of whom had been transferred into his custody since the maintenance order was made. Thus, the court was disposed to interpret the Maintenance Act to allow a conversion into an enquiry at which the issue of paternity could be raised as a matter of practicality.

S v Gunya also set forth the opinion that it would be appropriate for criminal proceedings to be converted into an enquiry in order to adjudicate the issue of paternity. This holding seems to be limited, however, to a situation in which paternity was not actually raised at the initial enquiry; the facts of the case involved new evidence which came to light after the maintenance order had been made (the complainant came to the respondent and informed him that he was not the father of her children, saying that she had lied to the magistrate in the original maintenance enquiry). Furthermore, since paternity was not debated at the original enquiry, there would have been no basis in the record for an appeal on this point. It would perhaps have been more appropriate for the respondent in this case to approach the maintenance court with a request to discharge the order on the basis of the new information rather than discontinuing payments, but the court felt that justice could be done in the context of the criminal proceedings only by means of a conversion.

S v Pieterse disagreed with *S v Gunya* on the question of whether paternity could be raised as a defence in the course of the criminal proceedings, thus placing an onus on the state to prove paternity in order to obtain a conviction. However, there does not seem to be any disagreement between the two cases on the question of whether criminal proceedings may be converted into an enquiry for the purposes of adjudicating paternity in appropriate circumstances. This approach seems to be consistent

Appropriate sentences

As noted above, the Maintenance Act provides for fines or sentences of imprisonment. The court is also empowered to impose a term of periodical imprisonment, in lieu of the sanctions prescribed by the Act.¹⁶⁵ Any of these sentences may be suspended. A magistrate's court has the authority to summarily impose any penalty authorised by the Act.¹⁶⁶

Suspended sentences

The purpose of sanctions under the Maintenance Act is not purely to punish offenders, but to ensure that persons entitled to maintenance payments receive them.¹⁶⁷ It has been pointed out that sentences of imprisonment are not appropriate in cases of failure to pay, since this would be analogous to imprisonment for civil debt.¹⁶⁸

In line with this understanding of the Maintenance Act, numerous cases have held that a suspended sentence is the most appropriate punishment for first offenders.¹⁶⁹

The reasoning behind this approach is that, even if the failure to comply with the maintenance order was deliberate, it will be of no assistance to the beneficiaries of the maintenance order if the convicted offender is sent to prison. In prison, it will be impossible for the offender to make maintenance payments, and it is likely that the children will be prejudiced in the longer term if the offender loses his or her employment as a result of the imprisonment. On the other hand, the offender is more likely to comply with maintenance obligations in future if the threat of a suspended sentence is hanging over his or her head.¹⁷⁰

It has also been held that the need for general deterrence of defaulters is not a sufficient reason to imprison a first-time offender.¹⁷¹

The courts have taken the view that imprisonment is an appropriate sentence only in exceptional cases, although there has been little articulation of what circumstances would justify a term of continuous imprisonment.¹⁷² However, it is clear that a

with the overall framework of the Maintenance Act as well, since a respondent would be entitled to approach the maintenance court with a request for discharge on the basis of evidence that he was not the father in a case where this issue was not adjudicated in the original enquiry.

¹⁶⁵ Criminal Procedure Act 51 of 1977, section 285.

¹⁶⁶ Maintenance Act 23 of 1963, section 11(4).

¹⁶⁷ *S v Siebert* 1972(1) SA 351 (NC); *S v Fernandes* 1973(3) SA 136 (RA).

¹⁶⁸ *S v Fernandes* 1973(3) SA 136 (RA) at 139F-H.

¹⁶⁹ See, for example, *S v Petersen* 1966(4) SA 675 (C); *S v Dadabhai* 1969(3) SA 520 (N); *S v Botha* 1988(4) SA 402 (C); and *S v Adams* 1991(1) SACR 400 (C).

¹⁷⁰ See, for example, *S v Botha* 1988(4) SA 402 (C); *R v Becker* 1951 (2) SA 162 (T) at 165.

¹⁷¹ *S v Grosch* 1993(2) SACR 373 (C).

¹⁷² See, for example, *R v Becker* 1951(2) SA 162 (T); *R v Moss* 1959(2) SA 738 (SR); *S v Barnes* 1967(4) SA 706 (N); *S v Dadabhai* 1969(3) SA 520 (N).

sentence of imprisonment would be appropriate in a case where the accused repeatedly disregards his responsibilities to his family.¹⁷³

Maintenance court personnel in some areas report that the threat of a suspended sentence is often sufficient to prevent the respondent from falling into arrears again, while it is reported in other areas that suspended sentences are seldom taken seriously by the offenders -- and the courts are reluctant to enforce the suspended sentence since this will be unlikely to assist the beneficiaries of the maintenance payments. In some areas, the possibility of periodical imprisonment had not been considered until it was raised in interviews conducted by the researchers, and this option was viewed as a useful alternative in some circumstances. Some magistrates and prosecutors expressed the opinion that there should be greater use of attachments of wages and property and suggested that the law should be amended to facilitate this.¹⁷⁴

Periodical imprisonment

Periodical imprisonment means that the offender is held in prison from time to time for periods of not less than 24 hours. Its purpose is to provide a form of punishment as an alternative to continuous imprisonment so that the offender can maintain his employment and family links.¹⁷⁵ The Criminal Procedure Act provides for periodical imprisonment for a period of not less than 100 hours and not more than 2000 hours. According to the case law on periodical imprisonment, it is inappropriate to impose periodical imprisonment in conjunction with a suspended sentence of imprisonment, or with a fine (other than a compensatory fine).¹⁷⁶

It has been held in the context of a failure to pay maintenance that, before a sentence of periodical imprisonment is imposed, "the court should investigate all the personal circumstances of an accused person in order to decide whether such a sentence is appropriate". For example, weekend imprisonment would be inappropriate for a person who was obliged in the course of his or her employment to work on weekends.¹⁷⁷

Recovery of arrears

Any court with civil jurisdiction may, on the application of the public prosecutor, make an order for the recovery of arrear maintenance in addition to or in lieu of any penalty. Such an order has the effect of a civil judgment and can be executed in the same way. The Act also specifically provides that such orders are executable against

¹⁷³ See, for example, *S v Kelder* 1980(4) 747 (Z).

¹⁷⁴ Interviews with court personnel, 1994.

¹⁷⁵ See E Du Toit *et al*, *Commentary on the Criminal Procedure Act*, Juta & Co, 1993, at 28-20B-ff.

¹⁷⁶ See Du Toit *et al* at 28-21.

¹⁷⁷ *S v Barnes* 1967(4) SA 706 (N) at 711. In this case the appeal court reduced a suspended sentence of 600 hours of periodic imprisonment to a sentence of a R50 fine or one month's imprisonment, suspended for three years on the grounds that the magistrate failed to consider the accused's personal circumstances. The appeal court was influenced by the fact that the accused had paid regularly for 6 years, that he had made some efforts to get the maintenance order reduced when he ran into financial difficulties, and that he had already paid all the arrears owing.

pensions, annuities, gratuities and other benefits which are normally immune from attachment for civil debt.¹⁷⁸

It has been held that a magistrate in a criminal proceeding does not have the power to "write off" the arrear maintenance which may be owing, on the grounds that the complainant has a right to this amount which cannot be summarily removed.¹⁷⁹ Similarly, it has been held that the magistrate in a criminal proceeding is not empowered to alter the amount of maintenance payable to the complainant.¹⁸⁰

However, where a criminal proceeding is converted into an enquiry, the magistrate does have the power to alter the maintenance order, and to decrease the amount of maintenance payments with retrospective effect.¹⁸¹

In South Africa, the Maintenance Act has been amended to empower the court to make an order for the payment of arrear maintenance *with interest*. The amended Act also empowers the court to issue a warrant of execution against movable or immovable property to satisfy an order for the payment of arrear maintenance, after a summary enquiry which takes into account:

- * the existing and prospective means of the convicted person;
- * the financial needs and obligations of the person being maintained;
- * the conduct of the convicted person, in so far as this is relevant to the failure to pay;
- * any other circumstances which the court considers relevant.

The amendment also gives the court leave to disseminate information about non-compliance with a maintenance order to persons seeking information in respect of credit ratings.¹⁸²

Similar amendments to the Maintenance Act in Namibia would respond to some of the most consistent criticisms of the maintenance system by increasing the court's options in respect of enforcement.

Orders for the attachment of wages

Where a respondent has been convicted of failure to comply with a maintenance order, the court which convicted the accused has the power to make an order for the attachment of the respondent's salary, wages or other remuneration. In terms of such an order, the respondent's employer is obligated to subtract the amount of the

¹⁷⁸ Maintenance Act 23 of 1963, section 11; Rule 6; see also Boberg (n26) at 298. This provision was reinforced in the past by the Statutory Institutions Act 3 of 1980, which stated that no pension or benefit was liable to attachment or subject to any form of execution under any judgment or order of court *except as* provided in section 11(2) of the Maintenance Act 23 of 1963. However, the Statutory Pensions Act was repealed in its entirety by the Pension Matters of Government Institutions Proclamation, AG. 56 of 1989.

¹⁷⁹ *S v Dickenson* 1971(3) SA 922 (E); see also Cowling (n80) at 16.

¹⁸⁰ *S v Jacobs* 1973(4) SA 302 (O).

¹⁸¹ *Strime v Strime* 1983(4) SA 850 (C) at 854B-G.

¹⁸² RSA Maintenance Act 23 of 1963, section 11, as substituted by section 8 of the Maintenance Amendment Act 2 of 1991.

LEGAL BACKGROUND

monthly maintenance payment from the respondent's remuneration and transmit it directly to the maintenance court. Such an order has precedence over any other court order for deductions from remuneration.

Employers have no choice but to comply with such an order. Failure to comply on the part of the employer is a criminal offence which is punishable by a fine of up to N\$100 or imprisonment for a period of up to 6 months.¹⁸³ (In South Africa, the maximum fine for non-compliance by an employer has been increased to R2 000.¹⁸⁴)

According to the rules issued under the Maintenance Act, notice of an order for the attachment of wages must be served on the employer by a police officer.¹⁸⁵ It might be asked whether this form of notification is really necessary, as it might call undue attention to the situation or cause unwarranted alarm to the employer or embarrassment to the employee. Instead, notice by registered post might be adequate if the rules were amended accordingly. (In South Africa, the rules have been amended to make it possible for a sheriff as well as police officer to deliver notice of such an order to an employer.¹⁸⁶)

The provisions of the Maintenance Act regarding deductions from an employee's remuneration are consistent with the corresponding provisions of the Labour Act, which allow for such deductions whenever they are authorised by a court order or by a legal provision.¹⁸⁷ This is an area where there appears to be some misunderstanding, as several magistrates who were interviewed in the course of the research erroneously stated that the Labour Act did not allow maintenance payments to be deducted from wages.

It should also be noted that it would be an unfair dismissal in terms of the Labour Act if an employee were dismissed because of the imposition of a court order for the attachment of wages.

There were other points of confusion amongst court personnel about the role of orders for the attachment of wages. Many magistrates and prosecutors appear to believe that these orders are primarily for the convenience of the respondent. For example, it was stated in interviews that such orders can be used *only* where they are requested by the respondents, or that such orders were appropriate *only* where the respondent resided in a different jurisdiction and therefore could not easily make payments into court in person. Other magistrates who had a clear understanding of the legal procedure regarding attachment of wages reported without explanation that they never utilise this mechanism. Thus, there is much scope for more effective enforcement of maintenance orders through better use of the existing law on attachment of wages.

It has also been suggested that the Maintenance Act should be strengthened by an amendment which would make it possible for a magistrate to issue an order for the

¹⁸³ Maintenance Act 23 of 1963, section 12.

¹⁸⁴ RSA Maintenance Act 23 of 1963, section 12, as substituted by section 9 of the Maintenance Amendment Act 2 of 1991.

¹⁸⁵ Rule 7.

¹⁸⁶ RSA Rule 7.

¹⁸⁷ Labour Act 6 of 1992, section 37(g)(i).

attachment of wages on the advice of the maintenance officer, *regardless of whether the person subject to the maintenance order has fallen into arrears*. For example, the maintenance officer might recommend this where the respondent requests it, or where the complainant provides convincing reasons to fear that regular payments will not be forthcoming. This approach should not be seen as a penalty, but merely as an administrative measure which could be utilised to aid compliance with maintenance orders.¹⁸⁸

TRANSFERS

A transfer may be necessary when the recipient of maintenance payments moves to another jurisdiction, or when a substitution proceeding changes the recipient of the payments to another person in another jurisdiction.

At present, the law does not set forth any specific procedures for transfer, and there have been cases where files have been lost when cases were transferred from one court to another, as well as several cases where files were successfully transferred from one court to another but the maintenance order itself went missing in the process.

In South Africa, specific provisions regarding the procedure to be followed when a maintenance file is transferred from one court to another have been added to the Maintenance Act, and a new rule sets forth specific procedures for the administration of transfers.

Procedures which appear to be designed to prevent lost files in the course of transfers require that certified copies of all relevant documents be made and filed by the clerk of the court which made the order *before* the transfer takes place. The original documents are then to be transferred to the new court by registered post, where they are to be registered in the same register as maintenance cases being handled by that court during the year in which the documents are received.¹⁸⁹

RECIPROCAL ENFORCEMENT OF MAINTENANCE ORDERS

The Maintenance Act is supplemented by another piece of South African legislation, the Reciprocal Enforcement of Maintenance Orders Act, which allows for the enforcement of maintenance orders between Namibia and countries with which Namibia has concluded an agreement on this issue.¹⁹⁰

Prior to independence, the reciprocal enforcement of maintenance orders between Namibia and a number of other countries was possible by virtue of agreements entered

¹⁸⁸ This seems to be the effect of an amendment to the RSA Maintenance Act 23 of 1963 which provides that any order of a maintenance court shall have the effect of an order of a court in a civil action. See the discussion of "Enforcement of maintenance orders" at page 28 above.

¹⁸⁹ RSA Maintenance Act 23 of 1963, section 6(2)-(4), as substituted by section 3 of the Maintenance Amendment Act 2 of 1991; RSA Rule 4B.

¹⁹⁰ Reciprocal Enforcement of Maintenance Orders Act 80 of 1963.

into between these countries and the Republic of South Africa. According to the Ministry of Justice, these agreements no longer apply to Namibia since independence.¹⁹¹ However, maintenance orders have been enforceable between Namibia and South Africa since 10 September 1993.¹⁹²

The South African Act was replaced by a Namibian Reciprocal Enforcement of Maintenance Orders Act on 27 February 1995.¹⁹³ This new Act is similar to the previous one. However, it incorporates simplified and streamlined procedures for transmitting maintenance orders from one country to another.

In terms of the new Act, whenever it appears to any court in Namibia that a person against whom a maintenance order has been made is resident in a country which has been designated for the purposes of the Act, the court must transmit a certified copy of the maintenance order to the Permanent Secretary of the Ministry of Justice for transmission to the administrative head of the Department of Justice of the country in question for enforcement.¹⁹⁴ A similar procedure applies to an order for the attachment of wages made against a person who is resident in Namibia but receives remuneration in a designated country.¹⁹⁵

Maintenance courts in Namibia also have the power to hold an enquiry in terms of the Maintenance Act in the absence of a respondent who is resident in a designated country. After recording the evidence of all witnesses at the enquiry, the court may make a provisional maintenance order against the absent respondent. If the respondent supplies written consent, a final order can be made in his or her absence. Otherwise, the provisional maintenance order, together with the depositions of the witnesses at the enquiry and any information which may help to identify or locate the respondent, is sent to the Department of Justice in the designated country for confirmation by an appropriate court.¹⁹⁶

Looking at the converse operation of the procedure, where a maintenance order has been made in a designated country against a person resident in Namibia and a certified copy of this order is transmitted to the Permanent Secretary of the Ministry of Justice, the order is registered in the maintenance court with jurisdiction over the person in question for enforcement.¹⁹⁷ Orders for the attachment of wages made in a designated country may be similarly transmitted to Namibia and registered for enforcement by the appropriate maintenance court.¹⁹⁸

¹⁹¹ Interview with Mr Truter, Ministry of Justice, March 1994.

¹⁹² Government Notice 124/1993 (Government Gazette 727).

¹⁹³ Reciprocal Enforcement of Maintenance Orders Act 3 of 1995.

¹⁹⁴ Reciprocal Enforcement of Maintenance Orders Act 3 of 1993, section 3. The previous Act required that the maintenance order be transmitted through diplomatic channels.

¹⁹⁵ Reciprocal Enforcement of Maintenance Orders Act 3 of 1993, section 8.

¹⁹⁶ Reciprocal Enforcement of Maintenance Orders Act 3 of 1993, section 5.

¹⁹⁷ Reciprocal Enforcement of Maintenance Orders Act 3 of 1993, section 4. There is no right of appeal against the fact of registration, as this is purely an administrative act, although a respondent could make application to have the registration set aside on the grounds that it was not properly carried out. See *Marendaz v Marendaz* 1955(2) SA 117 (C) and Schäfer (n13) at 41.

¹⁹⁸ Reciprocal Enforcement of Maintenance Orders Act 3 of 1993, section 9.

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Where a final maintenance order made in a designated country has been transmitted to Namibia for enforcement, the Namibian maintenance court does not have the power to discharge the order or to decide that it has lapsed. The Namibian court's powers in this case are limited to enforcement. The respondent in such a case should seek to have the order varied or discharged in the country where it was made.¹⁹⁹

If the order which is transmitted to Namibia is a provisional maintenance order rather than a final one, it must first be confirmed at an enquiry held in a Namibian maintenance court following procedures similar to those applicable to enquiries held in terms of the Maintenance Act. However, if the respondent has received reasonable notice of the enquiry but fails to attend, the enquiry is limited to a determination of the amount of maintenance which should be paid. At the conclusion of the enquiry, the Namibian maintenance court may confirm the provisional maintenance order, with or without a variation; remit the case to the court which made the provisional maintenance order for further evidence; or refuse to make an order.²⁰⁰

A provisional maintenance order which has been confirmed by a Namibian maintenance court can be varied or discharged by the Namibian court in question at any time.²⁰¹

Appeals from such confirmation proceedings operate in the same way as appeals made in terms of the Maintenance Act.²⁰²

Payments which are made in terms of a maintenance order which has been registered or confirmed in Namibia, or in terms of an order for the attachment of wages which has been registered in Namibia, must be made to the clerk of the maintenance court which registered or confirmed the order.²⁰³

A maintenance order from a designated country which has been registered or confirmed in a Namibian maintenance court can be enforced in the same way as an order made in Namibia in terms of the Maintenance Act, with one difference. Where a final maintenance order from a designated country has been registered in a Namibian maintenance court, the Namibian court does not have the power to convert a criminal proceeding in respect of non-payment into an enquiry which may result in a variation or discharge of the order.²⁰⁴ This restriction seems appropriate, since the recipient of the maintenance payments will not be available in Namibia to give evidence on this point.

¹⁹⁹ See *S v Dolman* 1970(4) SA 467 (T). *S v Simpson* 1964(1) SA 61 (N) held that a local court could discharge a foreign order registered with that court, but the holding was based on a provision of the Reciprocal Enforcement of Maintenance Orders Act 15 of 1923 which specified that an order registered in RSA would be of the same force and effect as an order obtained in RSA. There is no analogous provision in either the current RSA Act or the Namibian Act.

²⁰⁰ Reciprocal Enforcement of Maintenance Orders Act 3 of 1993, sections 6 and 11.

²⁰¹ Reciprocal Enforcement of Maintenance Orders Act 3 of 1993, section 6(4)(d).

²⁰² Reciprocal Enforcement of Maintenance Orders Act 3 of 1993, section 6(5).

²⁰³ Reciprocal Enforcement of Maintenance Orders Act 3 of 1993, section 10.

²⁰⁴ Reciprocal Enforcement of Maintenance Orders Act 3 of 1993, section 7.

Thus it appears that good faith lack of means is perhaps the only defence to a charge of non-payment of a foreign order registered in Namibia,²⁰⁵ although absence of the necessary *mens rea* [state of mind] might also qualify as a defence.²⁰⁶

It has been held that a local court has no power to order the recovery of arrears which accrued in terms of a foreign order prior to the date of registration.²⁰⁷

If amendments are made to the Maintenance Act to increase its effectiveness, the Reciprocal Enforcement of Maintenance Orders Act may require corresponding adjustments.

STATE MAINTENANCE GRANTS

A limited amount of financial assistance is available to assist families with maintenance in terms of the Children's Act 33 of 1960. The criteria for obtaining financial assistance and the grant amounts are still governed by racially-based regulations inherited from South Africa.

For all race groups other than Whites, state maintenance grants are targeted at single mothers, including unmarried mothers, widows, and women whose husbands are imprisoned or disabled. In the case of Whites, this system was replaced in 1988 by a "family allowance" available to a husband and wife who are caring for a child born to one or both of them; a father is caring for his child but has no wife or whose wife is not living with him; or a woman who is single, divorced, widowed, or for some other reason functioning as a single parent.

The usual practice of the Ministry is to require documentary proof of eligibility for maintenance grants. For example, a single parent will be asked to provide proof that he or she has approached the maintenance court to seek support from the absent parent. A person who is unemployed will sometimes be asked to produce letters showing that he or she is actively seeking work. Proof that the children in question are attending school is also usually required.

Grants are available in respect of differing numbers of children with respect to different race groups. For example, Blacks, Basters, Namas and Whites can obtain grants for a maximum of 4 children; Hereros for a maximum of 6 children; and Coloureds for a maximum of 10 children.

All state maintenance grants are paid on a sliding scale, with the grant amounts varying according to the family's income. Like the grant amounts, the cut-off incomes vary for the different "race groups", ranging from a low of NS\$650/year for a Nama family to a

²⁰⁵ *S v Walraven* 1975(4) SA 348 (T).

²⁰⁶ See *S v Mngxaso / S v Polo* 1991(2) SALR 647 (Ck).

²⁰⁷ *Marendaz v Marendaz* 1955(2) SA 117 (C) at 129; see also *S v Jones* 1987(3) SA 823(N)

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high of N\$11136/year for a Baster family or a White family with 4 children. Families who earn more than the maximum income are not eligible for financial assistance.²⁰⁸

Data on grant recipients during 1992-1994 is shown in the following table:

RACE GROUP	MARCH 1992	MARCH 1993	AUGUST 1994
Coloureds	582	573	440
Basters	503	561	606
Namas	212	199	532
Blacks	915	1 244	927
Whites	20	79	9
Race unknown	0	0	74
Total	2 232	2 656	2 588

Source: Ministry of Health and Social Services

The table below illustrates the degree of disparity in the grant amounts currently prescribed for the different "race groups":

STATE MAINTENANCE GRANTS	
Comparison of maximum grant amounts: Single mother with three children	
September 1994	
Namas	N\$ 58,20/month
Blacks, excluding Hereros	N\$ 58,91/month
Hereros	N\$ 63,41/month
Basters	N\$182,50/month
Coloureds	N\$288,00/month
Whites	N\$582,00/month

Source: Calculated by the Legal Assistance Centre from information provided by the Ministry of Health and Social Services

In July 1994, a Children's Act Workshop convened by the Ministry of Health and Social Services recommended that all racial disparities in the grant system should be eliminated as a matter of urgency. Workshop participants also recommended that grants should be aimed at households with the lowest household income, regardless of family composition, and that the criteria for grants should be re-defined to remove sex distinctions which might unfairly discriminate against fathers raising children on their own.

At the request of the Ministry of Health and Social Services, a draft law and regulations were prepared by the Legal Assistance Centre and the Human Rights and Documentation Centre of the Law Faculty at the University of Namibia to give effect to the workshop recommendations. This proposal includes the possibility of temporary emergency assistance to a parent who is awaiting the outcome of a maintenance enquiry under the Maintenance Act, or in a situation where a maintenance order is in force but the respondent has fallen into arrears.

A more effective system of state maintenance grants would be a crucial back-up system to the maintenance court procedure. The Maintenance Act, even at its best, is only a procedure for shifting family resources to persons who are entitled to maintenance. Thus, improvements in the maintenance court system alone can never be sufficient to address situations where total family resources are inadequate to provide for the needs of the children in question.

²⁰⁸ Information provided by the Ministry of Health and Social Services, 1994.

Chapter 3

FIELD RESEARCH

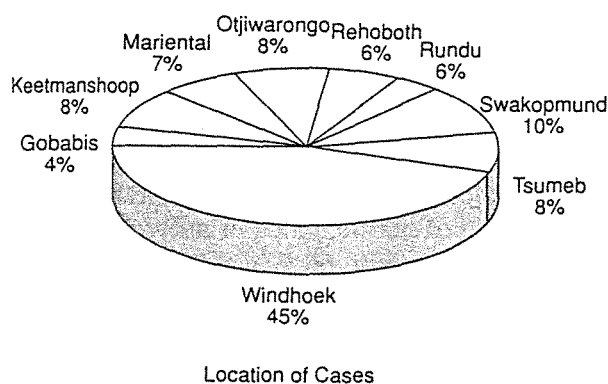
METHODOLOGY

Examination of case files

The field researcher examined a randomly-selected sample of 618 case files from maintenance courts in nine locations in north, south, east, west and central Namibia:

TABLE 1
Location of Cases

	# CASES	%
Gobabis	25	4
Keetmanshoop	49	8
Mariental	45	7
Otjiwarongo	52	8
Rehoboth	36	6
Rundu	27	4
Swakopmund	59	10
Tsumeb	47	8
Windhoek	278	45
Total	618	100



Every 10th file over a five-year period from 1989-1993 was selected in each court, so that the number of files for which information was recorded in each location reflects the relative number of cases handled by each court. However, in Swakopmund, where the number of case files was particularly small, data from every fifth file was recorded -- a methodological adaptation which was necessary in order to include this location in the study in a statistically valid manner.

The sample included all files which had been active during the five-year period studied. For example, if a complaint regarding arrears or a request for substitution was made during the five-year period in question, the case file was included, even though the initial complaint may have been made prior to the period studied. The case files studied included initial complaints from the years 1988-1993.

Although we had hoped to include case files from the Oshakati and Ongwediva maintenance courts in the survey, the data in these files was too incomplete to be used.¹ Thus, since this is the most heavily-populated area of Namibia, the results of the study may not reflect the national treatment of maintenance cases as accurately as the treatment of maintenance cases in the areas from which information was collected. However, interviews with court officials and users of the maintenance courts in the north were conducted in an effort to identify any major differences in the treatment and outcome of maintenance cases in these regions.

The questionnaire was tested on files in the Windhoek Maintenance Court and revised several times before the beginning of the survey. It aimed to extract all relevant information which is kept on file with respect to:

- (a) initial complaints (persons who came to the maintenance court for the first time to seek assistance in obtaining maintenance);
- (b) substitutions (requests by the complainant or the respondent that the amount to be paid in terms of a maintenance order be increased or decreased);
- (c) maintenance proceedings following a divorces (proceedings following on a divorce order issued by the High Court); and
- (d) arrears (complaints that payments due in terms of an order issued by a maintenance court were not being made).

One file sometimes involved several of these proceedings. For example, an initial complaint which resulted in a maintenance order might have been followed by a proceeding in respect of arrears, or a request for a substitution. Similarly, a request for substitution of maintenance in a divorce order might have been followed by an action in respect of arrears, or by a subsequent request for substitution.

After the questionnaires were complete, the data was entered onto computer and analysed by means of SPSS (Statistical Package for the Social Sciences). The data entry and analysis was carried out by the Social Sciences Division of the Multi-Disciplinary Research Centre at the University of Namibia.

Interviews and group discussions

Interviews were conducted with maintenance court personnel in Gobabis, Katima Mulilo, Keetmanshoop, Mariental, Oshakati, Ombalantu, Ondangwa, Otjiwarongo, Rehoboth, Rundu, Swakopmund, Tsumeb and Windhoek.

Women -- and men, where possible -- were interviewed individually in Keetmanshoop, Swakopmund, Tsumeb and Windhoek. In the smaller towns, it was sometimes difficult to find appropriate opportunities to interview individuals if there were no people waiting at the maintenance court to bring a complaint or to collect monthly

¹ The researcher found, for example, that complaint forms were not used during certain years, and that complaint forms and copies of subpoenas were not filed before 1993. Documents on arrears proceedings were not filed together with information on the maintenance court enquiries. Factors such as these made it impossible to draw an accurate picture of past cases from these courts. Ideas on more efficient filing systems utilised at other maintenance courts were shared with the court personnel in Ondangwa and Oshakati.

payments during the researcher's visit. We discovered that people were more reluctant to talk about maintenance outside the court, perhaps because of concerns about the confidentiality of the discussion.

Some interviews were taped, but this technique was eventually abandoned because the tape-recorder seemed to scare many people, who were convinced that the researcher was really a journalist. Many of the interviews were conducted in languages other than English and translated by the researcher.

Information was collected from group discussions and public meetings in Keetmanshoop (41 women and men), Onamula (58 women and men), Oniimwandi (31 women and men), Oshikuku (18 women and men), Mariental (57 women), Windhoek (over 200 women) and Uukwangula (47 women and men). These meetings were primarily educational forums in which information-gathering played a secondary role.

Because case files from the Oshiwambo-speaking regions of Namibia could not be included in the study, there was a special emphasis on discussions with court personnel and community members in these areas. These discussions led us to believe that the maintenance courts operate similarly here as in other parts of Namibia.

Information was also recorded from a meeting organised by the Legal Assistance Centre in July 1993 to facilitate communication between women who were experiencing problems with the maintenance court, and officials from the Ministry of Justice and the Namibian Police. This meeting was attended by approximately 11 women from Katutura, and by 4 government officials.²

The information collected through these methods was also compared with the maintenance problems brought to the Legal Assistance Centre by clients in different parts of Namibia.

Limitations of data

Our choice of locations for data collection was influenced partly by the location of the advice offices of the Legal Assistance Centre. Constraints relating to personnel, time and transport prevented us from including other courts in the survey. As noted above, our inability to collect data from courts in Namibia's heavily-populated northern regions created a particular gap in the data, which we tried to redress to some extent through interviews and group discussions. However, we believe that the selection of locations which we were able to include is broad enough to give a reasonably reliable overview of the operation of Namibia's maintenance courts. Further research could attempt to give greater emphasis to regional variations.

Our findings are limited by the kind of data which was available from the court files. For example, it was not possible to extract any information about urban/rural distinctions, because a single maintenance court almost always includes both urban and

² Mr Truter and Mr du Pisani, Ministry of Justice; Mr Schimming, Police Public Relations Office; and Ms Gawanas, Women & Law Committee, Law Reform & Development Commission.

rural areas within its jurisdiction and the files did not normally record the residential addresses of complainants.

We also found that many files were incomplete, so that key data about the history of a particular case was often missing. This limited our ability to analyse some aspects of the work of the maintenance courts which we visited.

Mean, median and mode

The text and the tables refer at times to three different measures: the mean (or average), the median and the mode. The mean, or average, is the value which results from adding all the statistics in the set together and dividing by the total number of cases. The "average" is a measure which is commonly used for statistical purposes. However, where there are a small number of very large or very small numbers in the set, the average may not provide a good idea of the "typical" case.

The median is the value which divides the cases in the set exactly in half. In other words, half of the cases in the sample involve a value which is larger than the median value, and half of the cases involve a value which is smaller than the median value. Comparing the median with the mode helps to show if values are crowded at one or another end of the spectrum.

The mode is the value which occurs most often in the set of cases. Thus, depending on the degree of variation in the spread of values which are being measured, the mode may be the measure which best illustrates the "typical" case.

It is not possible to identify any one of the three measures as being the "best", or the most accurate, since the usefulness of each measure in describing the "typical situation" depends on the pattern of variation in each set of values which is being analysed.

For each set of data in this chapter, the entire range of values has been examined in order to determine which of the three different measures should be highlighted as being the best indicator of the situation.

Rounding off

Throughout this section of the report, we have attempted to provide graphs and tables to convey the results of the study as clearly as possible. All percentages have been rounded off to the nearest percentage, with the result that the totals in some tables will add up to more or less than 100%.

GENERAL FINDINGS

TABLE 2
Type of Complaint Lodged

	# CASES	%
Maintenance	588	73
Substitution	35	4
Divorce	25	3
Arrears	159	20
Total	807	100

Overview

The majority of the case files examined (360) concerned only proceedings for maintenance, while a substantial number (129) dealt with both initial maintenance proceedings and proceedings in respect of arrears. There were very few cases involving substitution (35) or proceedings following on a divorce order (25), meaning that it is difficult to draw any conclusions about what is "typical" in these sorts of proceedings.

Total number of cases

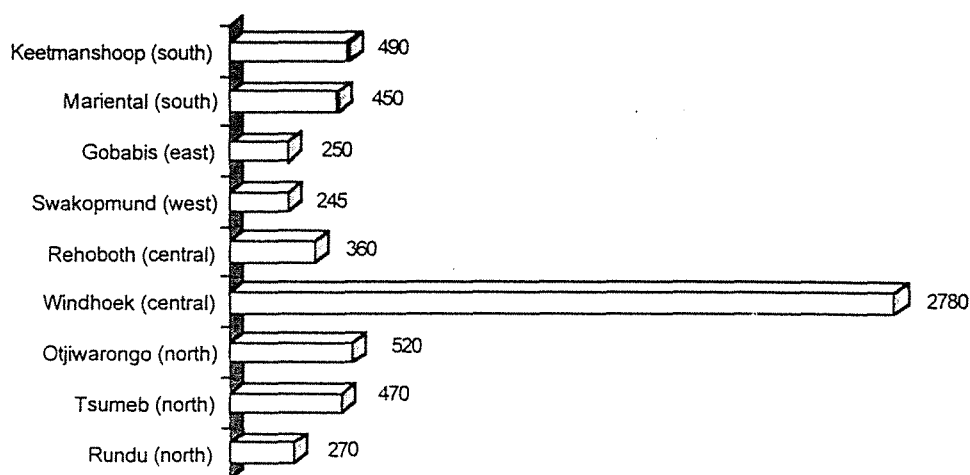
The sampling method gives a rough indication of the total number of maintenance cases which were dealt with by the courts studied during the years 1989-1993.

However, this number should not be confused with the total number of maintenance *complaints* brought to the court during the years in question, since some of the active case files for the years in question dealt with subsidiary proceedings such as substitutions or complaints about arrears. An approximation of the total number of active cases in the respective courts over the relevant period would be as follows:

TABLE 3
Multiple Proceedings Recorded in Case Files

	# CASES	%
Maintenance only	360	58
Main/Sub	11	2
Main/Arr	129	21
Main/Wid	53	9
Main/Trans	2	0
Main/Sub/Arr	12	2
Main/Sub/Wid	4	1
Main/Arr/Wid	7	1
Main/Arr/Trans	1	0
Main/Wid/Rein	4	1
Main/Sub/Wid/Rein	2	0
Main/Arr/Wid/Rein	3	0
Divorce only	14	2
Div/Sub	1	0
Div/Arr	3	0
Div/Wid	3	0
Div/Trans	1	0
Div/Sub/Arr	2	0
Div/Sub/Wid	1	0
Substitution only	1	0
Sub/Arr/Trans	1	0
Arr/Trans	1	0
Transfer only	2	0
Total	618	100

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Approximate Number of Active Cases in Respective Courts (1989-1993)

The demand on maintenance courts seems to be increasing rapidly, at least in Windhoek. According to the Ministry of Justice, in the years immediately preceding independence, the Windhoek maintenance court handled about 400 cases a year. In 1990, it reportedly dealt with about 750 cases.³ In 1994, the total number of initial maintenance complaints received in Windhoek was estimated by the court to be about 890, with 343 maintenance orders being issued during 1994 and a total of 624 cases being withdrawn or removed from the roll in that year.⁴

Sex of complainants

The procedures set forth in the Maintenance Act are equally available to men and to women. However, the survey did not reveal a single request for maintenance initiated by a male, and there were only 4 cases in the entire sample in which there was a request for a decrease in the amount of maintenance payments required by the order (a request which would have certainly come from a male, since all the respondents in the sample were male).

With respect to initial complaint and arrears proceedings, it is not surprising that complaints are normally brought by women. This is most likely a function of the fact that, when mothers and fathers in Namibia do not live together, it is common for the mother or another female relative to take custody of the children.

However, it is somewhat surprising that so few men take advantage of the substitution proceeding to request a decrease in the amount due under the maintenance order if they are having financial difficulties, rather than falling into arrears because they are unable

³ D Hubbard, *Women and Children in Namibia: The Legal Context*, Niser Discussion Paper No. 3 (NISER, March 1991) at 13-14.

⁴ Information provided by the Windhoek Maintenance Court to UNICEF Namibia, March 1995. Some of the maintenance orders and remands apparently involved complaints which were initiated in earlier years.

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to pay. This may be a sign that men need more education about the procedures available to them.

Although the sample of case files did not include any cases where children acted as complainants on their own, our interviews and observations indicated that this does happen -- although rarely.

During 1994, a group of three schoolchildren were encountered at the Windhoek maintenance court on their own -- a 16-year-old, a 15-year-old, and a 13-year-old, all children of the same mother and father. Their mother had remarried, while their father was still single. They reported that their mother does not want to have anything to do with their father now that he is married to someone else. She prefers that the children deal directly with their father, as she is worried about what her current husband will think if she gets involved.

Their father agreed to maintain them but gives them only N\$100/month, which is not enough for all three of them. They approached the father, who promised to increase the payments when he receives his bonus. This turned out to be an empty promise. Therefore, the children were at the maintenance court to request a substitution. The maintenance officer promised to summon the father immediately.

Information from interview conducted at the Windhoek maintenance court, 1994.

The magistrate in Swakopmund reported that children sometimes approach the court to lay maintenance complaints on their own. While he believes that it is better for children to be accompanied by a parent or guardian, he is prepared to deal with the complaints of children who approach the court on their own.

Information from interview conducted at the Swakopmund maintenance court, 1994.

Information from interviews and group discussion indicates that there is some public misunderstanding of who can use the maintenance courts. For example, there was a widespread misapprehension in the Oshiwambo-speaking communities where group discussions were held that the maintenance courts were only for single mothers. Extended family members, such as grandmothers who are caring for the children of their sons or daughters, also do not seem to realise that they have a right to utilise the maintenance courts.

This interview with a grandmother was conducted in February 1994 at the Swakopmund maintenance court:

I am the grandmother, guardian and custodian of the child in question. The two parents had a problem of finding each other because the father was a truck driver between Johannesburg and Windhoek, while the mother did not have a fixed address too.

In order to solve this problem, the child's mother, who was staying in Swakopmund at that time, agreed with the father that he should send money to me and the only central place to do that would be the magistrate's office.

Eventually the problem was solved when the mother laid the complaint, the father was subpoenaed, they appeared before the prosecutor and the man signed the consent to the tune of R60 per month. He is punctual with his payments and I have never experienced a problem so far.

The problem I am having is that the father of my other grandchild has stopped maintaining the child in September 1993. Normally he sends me money or collects the child for the holidays, during the December holidays, but this time he is quiet. He works for the government in Windhoek, but every time the mother calls him, she is told that he is not in the office. Going to Windhoek in person is again a very costly exercise. The child changed schools this year and that means new uniforms and school fees, which were increased countrywide.

The mother of the child and I, we are both unemployed. The mother does not want to lay a complaint at the magistrate's offices, maybe she is proud.

What can and should I do? Can I as the custodian lay the complaint?

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The researcher informed the grandmother that she could lay a maintenance complaint. The clerk of the court disputed this fact, however, until she was shown written educational material from the Legal Assistance Centre on this point.

Home language of complainants and respondents

The home languages of the complainant and the respondent were approximated from the surnames given. Although this method is obviously imprecise, it was an attempt to identify broad patterns in order to see if there are any communities in Namibia which are reluctant to resort to the maintenance court. The data on the home language of complainants must be viewed with caution, however, as there are probably an unknown number of cases where the surname given by the women was a married name rather than a maiden name.

This information may have been somewhat skewed by the fact that certain language groups are concentrated in the areas of certain courts. Therefore, data from the Windhoek maintenance court has been analysed separately since the Windhoek population includes most of the nation's language groups.

Complainants

Nationwide, Damara/Nama-speaking complainants were involved in 37% of all cases, followed closely by Afrikaans-speaking complainants (which may include white Afrikaans-speakers, "Coloured" Afrikaans-speakers, and Rehoboth Baster Afrikaans-speakers) who were complainants in 33% of all cases. Oshiwambo-speakers were complainants in only 16% of all cases, although this figure is obviously affected by the study's inability to include case files from the courts in the predominantly Oshiwambo-speaking regions of the country. Rukavango-speakers were complainants in only 5% of all cases, and Herero-speakers were complainants in only 4% of all cases. Only a negligible number of cases involved English-speakers or German-speakers. The figures are almost identical if the data for initial complaints about maintenance is examined separately.

Thus, nationwide, it appears that the maintenance courts are little-utilised by Rukavango and Herero speakers, and perhaps also under-utilised by Oshiwambo-speakers.

TABLE 4

Apparent Home Language of Complainant by Type of Proceeding

	MAINTENANCE	SUBSTITUTION	DIVORCE	ARREARS	TOTAL
	%	%	%	%	%
Afrikaans	32	36	61	30	33
Herero	4	6	0	4	4
Damara/Nama	37	33	9	41	37
Oshiwambo	16	15	9	15	16
Rukavango	5	6	0	4	5
Cther	6	3	22	6	6
Total	100	100	100	100	100

A 1991 survey of the population of Katutura (the area where most of Windhoek's black population resides), indicated that approximately 42% of the Katutura population is Oshiwambo-speaking, 29% either Damara or Nama-speaking and 19% Herero-speaking.⁵ The population of Khomasdal, historically the centre of Windhoek's "Coloured" community, remains predominantly Afrikaans-speaking, while central Windhoek, which was set aside for whites under the old apartheid regime, is still dominated by a white population which speaks Afrikaans, German and English.

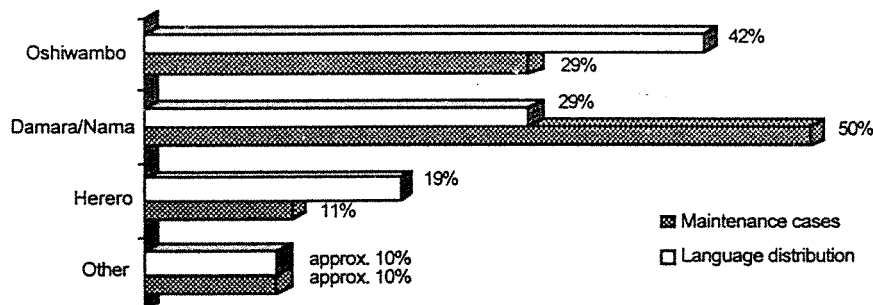
Looking at initial maintenance complaints made in Windhoek during the period covered by the study, the apparent home language of the complainants was as follows:

TABLE 5

Apparent Home Language of Complainant by Case (Windhoek cases only)

	%
Afrikaans	48
Herero	5
Damara/Nama	26
Oshiwambo	15
Rukavango	0
Other	5
Total	100

Comparing the home languages which predominate in Katutura to the number of complaints made by these language speakers produces the following result:



Thus, it appears that in Windhoek a disproportionately large number of Damara/Nama speakers utilise the maintenance court procedure, while a disproportionately small number of Oshiwambo-speakers approach the court for assistance.

The reasons for ethnic differences in the utilisation of the maintenance court may stem from differences in cultural attitudes about child maintenance, from differences in the adequacy of family and community back-up systems to ensure that children are sufficiently maintained, or from different levels of need or awareness.

⁵ Wade C Pendleton, *Katutura: A Place Where We Stay* (Gamsberg Macmillan: 1994) at 46.

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However, it is important to ensure that the maintenance court procedures are equally accessible to all Namibian communities, to ensure that the failure of members of a particular language group to use the court is a matter of informed choice. It is also important to make sure that the courts are adequately served by interpreters. For example, several women interviewed in Windhoek complained that they had not received adequate assistance at the maintenance court because of language barriers.

This information was related at a group discussion in Katutura in June 1993:

I have a baby who was born before the marriage. Because the father was not employed at that time I brought him up on my own. Later I found another matriculated guy, and was very excited. At first I was using contraceptives. After some time he told me to stop using the contraceptives, and to get a baby because he loves me and would marry me. I agreed, got a baby daughter, and still the marriage did not come. A boy child came and still there was no marriage. Later he parted with me and went to another young girl. I asked him to help as I was only getting R150 and could not afford on my own. He referred me to his wife (but they were not really married), and said that if I want, I can go and report him at the maintenance office.

I reported at the maintenance office and he was summoned. We went in there and the officer told me that she does not understand any other language except English. My former boyfriend who was matriculated could speak English so the two started to discuss because they could understand each other. The conversation went on and I was asked how much I wanted. I said R300. They said I can only get R80 and the uncle who interpreted said R150, but they said no because he was working at [a large local company] and was paying for his house and supported the other children who were with his mother. We agreed for the R150 and since then, no money has ever come my way. He gave me permission to go and see his girlfriend which I did. She told me about all the expenses the man was having and therefore he could not afford the R150.

In this case, the language barrier between the complainant and the maintenance officer operated to give her the impression that she was negotiating against the combined forces of the maintenance officer and the respondent.

Respondents

Nationwide, the distribution of respondents amongst different language groups does not differ dramatically from the distribution of complainants. Afrikaans-speaking respondents were involved in 31% of all cases, followed closely by Damara/Nama-speaking respondents, who were also involved in about 31% of all cases. Oshiwambo-speakers were respondents in only 18% of all cases, while Herero-speakers were respondents in only 7% of all cases and Rukavango-speakers were respondents in only 5% of all cases. As in the case of complainants, there were very few English-speakers or German-speakers amongst the respondents in the sample.

TABLE 6
Apparent Home Language of Respondent by Case

	%
English	1
Afrikaans	31
Herero	7
Damara>Nama	30
Oshiwambo	18
Rukavango	5
German	1
Other	8
Total	100

The distribution follows an almost identical pattern if initial maintenance complaints are considered separately.

Language correlation between complainant and respondent

It is interesting to note that about one-fourth (25%) of all cases involved complainants and respondents with different home languages. For example, about one-third of all maintenance complaints brought by Damara>Nama-speaking persons involved respondents from another language group, while about one-fourth of all complaints brought by both Oshiwambo-speaking and Herero-speaking persons involved respondents from another language group.

Moving the focus to respondents, the majority of maintenance complaints involving Herero-speaking respondents were brought by complainants from a different language group (55%). In addition, about one-third (31%) of all complaints brought against Oshiwambo-speaking respondents were made by complainants from a different language group. (Most of the cases involving English or German-speaking respondents were also brought by complainants of different language groups, but this sample was too small to allow for meaningful conclusions.)

TABLE 7
Home Language of Complainant by Home Language of Respondent

COMPLAINANT	RESPONDENT					
	Afrikaans	Herero	Damara>Nama	Oshiwambo	Rukavango	Other
	%	%	%	%	%	%
Afrikaans	89	13	6	4	0	16
Herero	1	45	1	2	0	2
Damara>Nama	6	35	82	22	10	36
Oshiwambo	2	5	5	69	7	13
Rukavango	0	0	1	0	83	2
Other	2	3	5	4	0	31

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This study did not produce any information on the reasons for the relatively high incidence of cases involving complainants and respondents from different language groups. Perhaps community mechanisms (such as family and community opinion) which might ensure adequate care for children born outside of marriage operate less strongly in relationships which cross ethnic boundaries. It is also possible that persons in relationships within a single ethnic group are more likely to resort to customary law, formally or informally, although interviews in different regions indicate that maintenance problems are seldom taken to traditional forums. Perhaps relationships between members of different language groups are more likely to occur in urban environments, where norms may differ from those in rural areas. The dynamics of cross-cultural relationships should be explored more fully in future research on family life in Namibia.⁶

⁶ More information on the connection between family dynamics and approaches to maintenance problems may emerge from studies of intrafamily relations which the Gender Research Unit at the University of Namibia is planning to carry out in the future.

MAINTENANCE COMPLAINTS

There seems to be a shortage of court personnel to deal with maintenance complaints in some areas, particularly outside of Windhoek. The prosecutors and magistrates who deal with maintenance outside of Windhoek are charged with other duties. Thus, in many instances, complainants are turned away because the appropriate official is busy with something else and has no time to take complaints or to respond to queries. In many areas, questions and investigations seem to be handled primarily by court clerks and interpreters rather than by prosecutors.

The overlapping duties of prosecutors who also serve as maintenance officers also leads to scheduling problems which sometimes produce confusion and frustration on the part of the complainants. Some courts try to reserve particular days of the week for maintenance complaints, and this procedure may be effective if it is sufficiently well-advertised in the community.

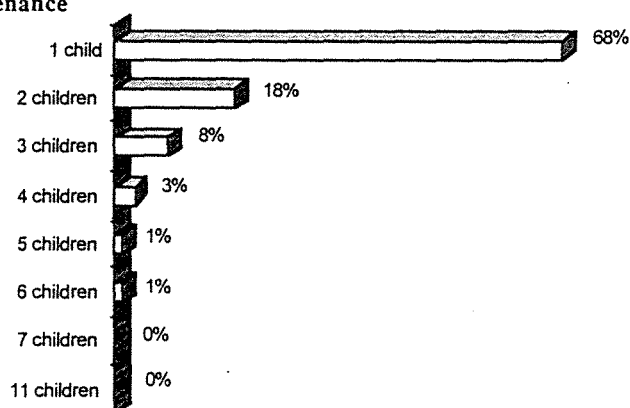
Number of children for whom maintenance is sought

In the majority of maintenance cases in the research sample, women sought maintenance for only one child, thus debunking the myth prevalent in some quarters that women conceive additional babies in order to get more maintenance from men. Maintenance was sought for one child in almost 68% of all cases, and for two children in 18% of all cases.

Very few cases involved more than two children: 8% involved three children; 3% involved four children and about 2% involved 5 or more children. There was a single case in which maintenance was sought for 11 children.

TABLE 8
Number of Children for Whom Maintenance
is Sought

	%	CUMULATIVE %
1 Child	68	68.0
2 Children	18	86.3
3 Children	8	94.5
4 Children	3	97.4
5 Children	1	98.8
6 Children	1	99.5
7 Children	0	99.8
11 Children	0	100.0
Total	100	100.0



However, it must be kept in mind that the complainants in question may have had more children in total than the maintenance files indicate. The files record data only for those children for whom maintenance is being sought. For example, a woman might have one child who was fathered by the respondent, as well as additional children of a subsequent relationship; in such a case, the maintenance file would include *only* data about the child fathered by the respondent.

As the case studies below show, women may seek maintenance from more than one father and men may have responsibility for maintaining the children of a number of different mothers.

Ages of children for whom maintenance is sought

The average age of the single or oldest child in the family at the date of the maintenance complaint was 6 years old (73 months).

Looking at the age groupings of all children for whom maintenance was sought, the data shows that 31% of them were infants aged two years or younger. Only 6% of all children for whom maintenance was sought were aged 16 years or older. There is a fairly even spread between these two extremes, as the following table shows.

TABLE 9
Age Groups of all Children at Date of Complaint

AGE		%
Infant:	0-2 years	31
Toddler:	3-4 years	16
Young child:	5-7 years	18
Child:	8-11 years	18
Adolescent:	12-15 years	12
Young adult:	16 years and older	6
Total		100

This information also shows that most (about 65%) children for whom maintenance was sought were roughly pre-school age (age 7 or below).⁷

There were only a tiny number of cases (about 1%) in which maintenance was sought for a child before the child's birth -- even though the law allows a woman to request contributions towards the costs of ante-natal care and the expenses associated with childbirth.

Interviews and group discussions indicated that many maintenance problems in respect of older children are tied to the expenses of school fees and school uniforms. Thus, it appears that there is a need for more public education on the possibility of being excused from paying school fees on the grounds of lack of means, and on the arrangements which some schools offer for paying off school fees gradually during the school year.

Relationship between complainant and respondent

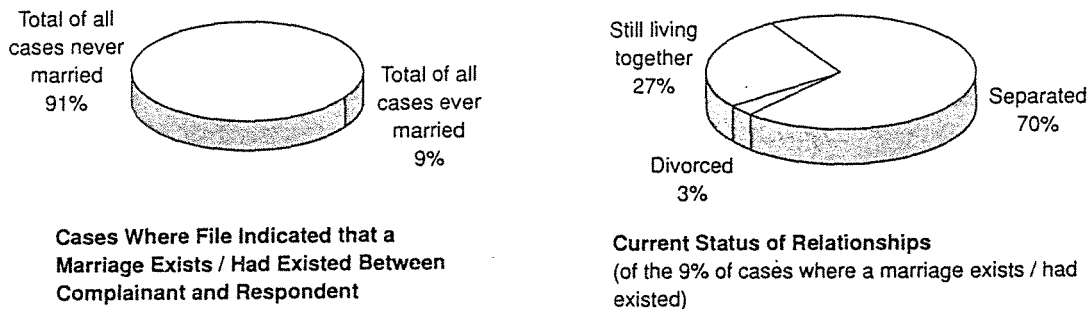
The complainant and the respondent were at some time married to each other in about 9% of all cases. This data supports the perception that the maintenance court is utilised primarily by single mothers.

⁷ This is a rough approximation, based on the fact that children begin first grade in government schools in the year that they turn seven.

However, as noted above, there seems to be a misperception on some parts of the country -- especially in the north -- that the maintenance procedure is available only to single mothers. Thus, public education may increase the use of the maintenance courts by person who are married, divorced or separated.

In the vast majority (98%) of the cases in the sample where a marriage existed between the complainant and the respondent, it was a civil marriage as opposed to a marriage in terms of customary law.

Of the cases where a marriage had existed at some point between the complainant and respondent, 70% stated that they were separated, 3% divorced, and 27% still living together.



Where the complainant and the respondent are divorced, it is not possible for an initial maintenance complaint to arise out of a divorce order. Where maintenance for children or spouses was dealt with in the course of the divorce proceedings in the High Court, the maintenance court proceedings follow a different form. These cases are discussed below.

It should also be kept in mind that in Namibian communities couples sometimes refer to themselves as "divorced" when they mean only that the relationship has come to an end, not necessarily that they have gone through the legal process of obtaining a divorce order.

When does financial support cease?

In most cases (55%), the father ceased to provide support for the child's maintenance sometime between the birth of the child and the child's first birthday. Support ceased when the child was between the ages of 1 and 4 in another 13% of all cases. Support ceased in respect of children aged 4 years or older in about 23% of all cases, and in respect of children aged 11 years or older in only about 9% of all cases.

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TABLE 10

Age Group of Child at Date Respondent Ceased to Provide Support

	%
Born after support ceased	7
Born in month support ceased	47
1-6 months	8
7-12 months	3
1-2 years	3
2-3 years	5
3-4 years	5
4-7 years	8
7-11 years	6
11-15 years	7
15 years and older	2
Total	100

This pattern is obviously influenced to some extent by the size of the family. In cases involving more than one child, the relationship between the mother and the father obviously tended to continue longer, making the average age of the eldest children in such families higher at the time that support ceased.

Some ethnic differences were evident in the cessation of support by the child's father. Support by the father tended to cease when the only child or the youngest child was less than one year old more frequently in the case of Herero-, Damara/Nama- and Oshiwambo-speaking fathers, while child support by fathers in other language groups tended to continue longer.

When do women seek assistance from the maintenance court?

The maintenance court seems to be used as a last resort. The average time which elapsed between the date the father ceased to provide financial support and the date on which the mother made a complaint to the maintenance court was almost 3_ years (41 months).

Looking at the case files which included sufficient data to draw conclusions on time frames, only about one-quarter (24%) of complainants went to the maintenance court within a year of the date on which maintenance ceased. About 37% of complainants waited more than 2 years from the date on which support ceased to seek help from the maintenance court. This number includes the approximately 11% of complainants who sought assistance from the maintenance court *10 years or more* after support ceased.

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TABLE 11

Number of Years Between Date of Complaint and Date Respondent Ceased to Provide Support

	%	CUMULATIVE %
Less than 1 year	24	24.1
1 year	28	52.2
2 years	11	63.2
3-4 years	10	73.6
5-9 years	16	89.3
10 years or more	11	100.0
Total	100	100

As noted above, although a pregnant woman is legally entitled to assistance with antenatal and birth expenses, there were only 6 cases in the entire sample where maintenance was requested in respect of a child who was not yet born.

Furthermore, there were at least 22 cases in which women apparently continued a relationship with a man who had ceased to provide support for the children already born to the couple, falling pregnant by the man months or even years after he had ceased to make financial contributions.

Afrikaans-, Rukavango- and Oshiwambo-speaking complainants were more likely to bring a complaint to the maintenance court within one year of the date on which the respondent ceased to provide support, while complainants of other language groups were more likely to wait longer before seeking assistance from the court.

How much maintenance do women request?

The *total* amounts of maintenance requested ranged from N\$20/month to N\$1100/month, with the mean (average) amount requested being N\$187/month, the median (middle value) being N\$150/month (meaning that half of the cases involved requests above this amount and half below this amount) and the mode (most frequently occurring amount) being N\$100/month.

TABLE 12

Total amount of maintenance requested per month

	MEAN	MEDIAN	MODE	MIN.	MAX.
Amount requested per month	N\$187	N\$150	N\$100	N\$20	N\$1100

TABLE 12A

Amount of maintenance requested per month per child

	MEAN	MEDIAN	MODE	MIN.	MAX.
Amount requested per child	N\$135	N\$100	N\$100	N\$8	N\$1000

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The amount of maintenance requested *per child* ranged from N\$8/month to N\$1000/month. The average amount requested was N\$135/month, with the middle value and the most frequently occurring amount both being N\$100.⁸

The amounts requested are modest in comparison to the actual costs of raising a child. As a point of comparison, a recent study conducted by the Social Sciences Division of the Multi-Disciplinary Research Centre at the University of Namibia calculated the poverty datum line -- the amount of money needed to meet the most basic daily subsistence requirements -- as being N\$115 for an adult male or female in 1992, 75% of that amount (N\$86,25) for a child aged 6-15, and 50% of that amount (N\$57,50) for a child aged 0-5. This amount of money was considered to be the minimum amount needed to provide basic food, clothing and shelter, and to provide for basic personal hygiene and health care. It does not take into account the costs of education for children.⁹

According to the case law on maintenance, payments should be based, not on minimal subsistence levels, but on the standard of living of the members of the family in question. However, it appears that the usual amounts of maintenance requested per child during 1988-1993 (most commonly N\$100) were not far above the 1992 poverty line for children (N\$57,50-N\$86,25).¹⁰

The amounts of maintenance requested have risen somewhat over the years. For example, the total amounts of maintenance requested (which should not be confused with the amount of maintenance requested *per child*) rose from an average of N\$117/month in 1988, to an average of N\$181/month in 1991, to an average of N\$238/month in 1993.

TABLE 13
Total Amount of Maintenance Requested by Year of Complaint

	MEAN	MEDIAN	MODE	MIN.	MAX.
1988	117	100	100	30	600
1989	136	100	100	30	780
1990	185	150	100	30	1000
1991	181	150	150	20	500
1992	214	165	150	50	1100
1993	238	200	100	50	750
Total	187	150	100	20	1100

Not surprisingly, the typical amounts requested are slightly higher in the larger urban centres (Windhoek, Rehoboth and Swakopmund) than in the maintenance courts situated in smaller towns.

⁸ The case files seldom indicated how much maintenance was being requested in respect of each child. These figures have been arrived at by dividing the total amount requested by the number of children in respect of whom the complaint was made.

⁹ G Van Rooy *et al*, *Household Subsistence Levels in Namibia: A Pilot Study in Three Selected Communities* (SSD, University of Namibia, Feb. 1994) at 38-39, 9-12.

¹⁰ A higher number of cases in the sample came from the later years, with 60% of the maintenance complaints having been initiated during 1991-1993. Thus, the 1992 poverty datum line is an appropriate comparison for the sample.

Damara>Nama complainants tended to request slightly lower amounts of maintenance than other language groups.

TABLE 14

Amount of Maintenance Requested by Language Group of Complainant

	MEAN	MEDIAN	MODE	MIN.	MAX.
Afrikaans	205	150	150	30	1000
Herero	229	150	150	60	600
Damara>Nama	151	100	100	20	700
Oshiwambo	218	200	200	30	600
Rukavango	240	200	200	100	1100
Other	158	150	100	30	500
Total	187	150	100	20	1100

Family resources

As discussed in the previous chapter, in terms of the law on maintenance, parents are expected to contribute towards the maintenance of their children in proportion to the financial resources of each.

Thus, the relative financial position of the complainant and the respondent has a bearing on the outcome of the maintenance case. However, although the researchers' observations and interviews indicate that this factor is almost always discussed, little of this information is recorded in the case files.

In the cases which contained information about employment (about 59% of the total sample of maintenance complaints), most (97%) indicated that the respondents were employed. This information is not surprising, since maintenance orders cannot be made against a person lacking in means. The interviews conducted in the course of the research indicate that women know that it will probably be useless to make a complaint against an unemployed man, thus explaining the low incidence of unemployed respondents.

However, this may also be a sign of weakness in the maintenance system, in that the current approach to maintenance fails to take into account the fact that regular employment is not the sole source of wealth. In some cases, the assets of the respondent should be taken into account, regardless of whether or not he is employed.

A woman who attended a group discussion in Mariental in November 1993 told this story:

I am the mother of 4 children. I am separated from my husband and the children are with me. The father is not contributing anything to the maintenance of the children.

When I reported him, he stopped working. The magistrate could not make an order as he was unemployed at the time of the enquiry, then after that he started working again. I found out that he was now working and informed the magistrate. When he received the subpoena, he quit again. I told the magistrate that he is quitting work to avoid paying maintenance, but he is just getting off on the basis of unemployment.

This situation seems to have been exacerbated by an overemphasis on employment as opposed to "means". Members of the public and court personnel need to be informed that employment is not necessarily a requirement for the implementation of a maintenance order, if the respondent has sufficient assets.

About one-third (37%) of all the employed respondents in the sample work for the government. This is not a surprising fact, given the fact that the government is one of Namibia's largest employers.

The respondent's monthly income was evident from the case file in only a small sample of cases -- 30 cases, which is only about 5% of the total number of maintenance complaints. However, this sample indicates that the respondents tend to be low to middle-income wage earners, with monthly wages ranging from N\$80-N\$3199. The average monthly income of respondents in this sample was N\$890.

TABLE 15
Monthly Income of Respondent

INCOME IN N\$	%
1-100	13
200-399	20
400-599	7
600-799	10
800-999	20
1000-1499	10
1500-1999	13
>2000	7
Total	100

As expected, income tended to correlate with the amount of maintenance which was required in terms of the maintenance order, although wage earners at the lower end of the spectrum were often expected to contribute a larger proportion of their income to maintenance than workers with higher salaries. Respondents in 69% of the cases where income information was available were expected to contribute 15% or less of their monthly wages towards child support, thus indicating that maintenance payments are not set at unrealistically high levels.

TABLE 16
Total Amount of Maintenance Paid by Respondent Expressed as Percentage of Monthly Wages

% WAGES	%
1-5 %	14
6-10 %	24
11-15 %	31
16-20 %	17
>20 %	14
Total	100

There were very few case files with enough information to give a more comprehensive picture of the position of the respondent. Of the 27 case files which indicated the respondent's current marital status, about half were married and half were not.

Only 25 case files indicated the number of children currently being supported by respondents, and there was a wide variance in this small sample. The total number of

children being supported by a single respondent ranged from 2 to 21, with most respondents about whom data was available supporting a total of 3-5 children.

Although a standard form is available for recording information on the income and expenses of complainants, there were only 4 case files in the total sample which included any information on this point -- a number which is too small to allow for analysis.

Use and effectiveness of subpoenas

Once a complaint is laid with the maintenance court, the respondent is ordered to appear in court on a given date by means of a summons or a subpoena. Maintenance courts were found to be inconsistent in their use of these two different documents.¹¹ The questionnaires and the text refer to all documents used to inform the respondent that he must attend court as "subpoenas" for the sake of simplicity.

Courts also seem to follow different procedures with respect to the issue of subpoenas. For example, at one court, the standard practice following a complaint is to send a letter to the respondent informing him of the complaint and enclosing a consent form. If there is no response, a second letter enclosing a consent form is sent. If there is still no response, only then is a subpoena issued. According to the maintenance officer, respondents often return the signed consent form, meaning that a maintenance order can be issued in the respondent's absence. However, where no consent form is ever returned, this procedure is likely to make the case take much longer from the complainant's point of view, and it should be asked whether the step of sending a second letter should not be omitted in favour of bringing a speedier conclusion to the case.

If a respondent is not located before the first subpoena expires, subsequent subpoenas may be issued. Subsequent subpoenas may also be issued where the initial ones were successfully served, but ignored by the respondent.

Overall success rates of service of subpoenas

Although anecdotal evidence indicates that some women experience serious problems with the failure of the police to serve subpoenas in cases where the address of the respondent is known, the data collected from the maintenance files indicates a reasonable overall success rate in the service of subpoenas.

In most of the cases studied (82%), only one subpoena was issued. Two subpoenas were issued in only 15% of the cases, and there were only a few cases where three or four subpoenas were issued (12 cases, or 3% of the total).

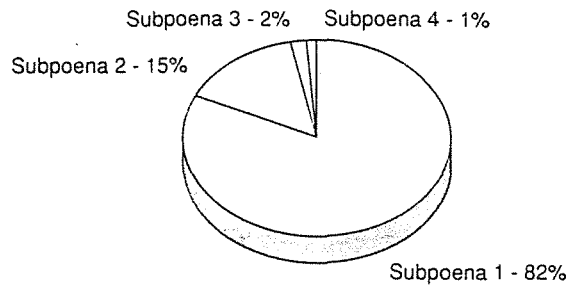
¹¹ The differences in practice probably stem from different interpretations of section 4(2) of the Maintenance Act 23 of 1963 which states: "Any person to be summoned as a witness shall be summoned in the manner in which a person may be subpoenaed to appear before a magistrate's court in a criminal trial". The respondent is also a "witness" for the purposes of the Act. See *Foster v De Klerk en Andere* 1993(1) SA 596 (O).

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TABLE 17

Subpoenas Issued and Served
in Respect of Individual Complaints

SUBPOENAS ISSUED	%
One	82
Two	15
Three	2
Four	1
Total	100



The overall success rate for service of subpoenas was 76% -- out of 624 subpoenas issued, a total of 472 were served. The overall success rate for serving the first subpoena issued was 75%, while the success rate for the second subpoena served was 74%.

The success rate was predictably most impressive in the cases where only one subpoena was issued -- about 97%. This can be explained by the fact that subsequent subpoenas are obviously not required if the first subpoena has been successfully served, and has succeeded in getting the respondent to court.

In cases where a third or a fourth subpoena was issued, the success rate for service was very high (more than 90%). This can probably be explained by the fact that the court would be unlikely to persist in issuing subpoenas where there was no new information about the whereabouts of a respondent who could not be located.

TABLE 18

Number of Subpoenas Issued and Served / Not Served

	SERVED		NOT SERVED		TOTAL ISSUED	
	#	%	#	%	#	%
First subpoena	390	75	127	25	517	100
Second subpoena	68	74	24	26	92	100
Third subpoena	11	92	1	8	12	100
Fourth subpoena	3	100	0	0	3	100
Total	472	76	152	24	624	100

Where subpoenas were *not* successfully served, the files were examined to try to ascertain the reasons for the failure to serve. In 39% of all such cases, the subpoena could not be served because the respondent could not be found at the address given by the complainant, or because the address was insufficient. In 18% of all such cases, the subpoena had expired before it could be served. No reason was recorded on the subpoena for the failure to serve in 17% of these cases.

TABLE 19

Reasons for not Serving Subpoenas on Respondent

	%
Respondent is unknown at work address	22
Respondent is unknown at home address	10
Respondent could not be traced	2
No response to letter sent to respondent	10
Insufficient address	2
Respondent changed work address	1
Respondent changed home address	1
Respondent was hiding	1
Date has expired	18
Not indicated	25
Other	8
Total	100

* NOTE: The category of "other" includes reasons such as respondent passed away, respondent on leave, subpoena cancelled, and all copies of subpoena still in file.

Comparative success rates in different locations

There were some significant regional differences in the success rate of service of subpoenas. Of the nine locations where data was collected, the success rates for service of first subpoenas was highest in Gobabis, Otjiwarongo and Rundu (89%-100%) and lowest in Mariental and Tsumeb (54%-56%). Windhoek, Rehoboth and Swakopmund fell in the middle, with first-subpoena success rates of 75%-79%. These differences may be due to the attitude and efficiency of the police in the different locations, or to the ability of the complainants in the different locations to accurately identify the respondent's address.

TABLE 20

Subpoenas Successfully Served by Location

	1ST %	2ND %
Windhoek	75	72
Mariental	54	88
Tsumeb	56	100
Keetmanshoop	69	57
Otjiwarongo	93	-
Rehoboth	75	75
Gobabis	100	-
Swakopmund	79	50
Rundu	89	67

In Mariental in particular, the data points to problems with the performance of the police rather than with the information provided by the complainant, since second subpoenas were issued in a large number of cases where service of the first subpoena was unsuccessful, with a much higher rate of successful service.

Problem cases

The cases in which more than one subpoena were required can be categorised as "problem cases", because the respondent was either not located or else ignored the subpoena. (It is possible that proceedings were postponed for some reason and that a

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subpoena. (It is possible that proceedings were postponed for some reason and that a subsequent subpoena was issued to compel a further attendance by the respondent in court; however, it is more likely in such circumstances that the respondent would simply be warned to return on the later date.)

Overall, about 16% of all the maintenance complaints (92 cases) involved the issue of more than one subpoena.

TABLE 21

Problem Cases: Cases in which More than One Subpoena was Issued

	%
Two subpoenas issued	87
Three subpoenas issued	10
Four subpoenas issued	3
Total issued	100

A total of 199 subpoenas were issued in these problem cases, of which 55% were served. Of this 55%, 17% were successfully served and yet followed by a subsequent subpoena, indicating that respondents may have ignored the demand to appear in court.

The typical "problem case" involved the service of only two subpoenas. In these cases, the success rate of service was low (25%) for the first subpoena, and high (80%) for the second subpoena -- thus pointing to a possibility that the efficiency of the police may be a factor in these cases. This supposition is supported by the fact that the reason given for failure to serve the first subpoena was cited as failure to locate the respondent in only about one-third of these cases.

In the typical "problem cases", 20% of first subpoenas were not served because the date expired, while this was the reason for failure to serve 13% of second subpoenas. Again this pattern points to problems with the efficiency of the police, or possibly to problems with liaison between the maintenance court and the police to facilitate timely service.

It should also be noted that 23% of first subpoenas in this group of cases were not served because the respondent did not respond to a letter - indicating that no effort was made to serve these subpoenas personally. This factor suggests that subpoenas in maintenance cases are not being taken very seriously by the police in some instances.

TABLE 22

Problem Cases: Number of Subpoenas Issued and Served / Not Served in Cases Involving Two Subpoenas

	SERVED	NOT SERVED
	%	%
First Subpoena	25	75
Second Subpoena	80	20

TABLE 23

Problem Cases: Reasons for Not Serving Subpoenas

	%
FIRST SUBPOENA	
Respondent unknown at home address	10
Respondent cannot be located	2
Insufficient address	5
No response to letter	23
Date has expired	20
Other	7
No reason given	8
Total	100
SECOND SUBPOENA	
Respondent unknown at work address	25
Respondent unknown at home address	13
Insufficient address	6
Date has expired	13
Other	13
No reason given	31
Total	100

* NOTE: The category of "Other" includes such reasons as respondent on leave and respondent away for military training.

Thus, although the overall success rate for service of subpoenas is fairly high, there are indications that improved police response or police-court communication could reduce the number of "problem cases".

It is also clear that the issue of a warrant for the arrest of respondents who ignore subpoenas is ineffectual. The data available in the court files does not provide a reliable indication of the number of cases in which warrants for the arrest of the respondent would have been an appropriate response. However, warrants were issued in a total of 26 cases. There were only three arrests, and there was only one case in which a warrant for arrest was re-issued.

These figures would seem to indicate that a respondent who ignores a subpoena to come to a maintenance court has very little to fear, and that police need to be encouraged to take this violation of the law more seriously.

Time lapses

Although women have complained about the amount of time which lapses between the complaint and the resolution of the maintenance dispute, the evidence indicates that the majority of subpoenas are being issued and served promptly. The data indicates that subpoenas were issued within about one month of the complaint in roughly 95% of all cases.¹²

¹² The method of data collection utilised did not allow for accurate differentiation of the difference between cases where subpoenas were issued within the same month as the date of complaint, and cases where subpoenas were issued after a lapse of at least one month.

The reason for this is that only the month and the year were recorded on the questionnaire, not the day of the month. Thus, to take an example, where a complaint was made on the last day of June and a subpoena issued on the first day of July, the time difference would have been recorded as one

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Where the first subpoena issued was successfully served, this occurred in most cases during the same month as the issue of the subpoena. Thus, in most cases where only one subpoena was required, the time which elapsed between the date of the complaint and the service of the subpoena was one month or less.

TABLE 24

Number of Months Between Date of Complaint and Date First Subpoena was Issued

	%
Within same month	79
1-2 months	16
2-3 months	4
3-4 months	1
4-5 months	0
5-6 months	0
6-7 months	0
8 months	0
17 months	0
Total	100

* The number of cases in which longer periods of time lapsed between the date of complaint and the date the first subpoena was issued was small enough to amount to less than 0,5% of the total number of cases. These percentages were therefore rounded down to zero.

However, despite the fact that the process tends to run smoothly in the majority of cases where one subpoena is sufficient, there are also clearly cases in which the processes break down, giving rise to legitimate cause for complaint. In about 2% of all cases, 3 months or more elapsed between the date of complaint and the successful service of the first subpoena -- including one case where this time lapse was almost a year and a half.

TABLE 25

Number of Months Between Date of Complaint and Date First Subpoena was Served Successfully

	%
Within same month	49
1-2 months	41
2-3 months	7
3-4 months	2
4-5 months	0
5-7 months	0
7-9 months	0
17 months	0
Total	100

* The number of cases in which four months or more lapsed between the date of complaint and the date the first subpoena was successfully served was small enough to amount to less than 0,5% of the total number of cases. These percentages were therefore rounded down to zero.

The process slows down considerably in the problem cases. In cases where multiple subpoenas were required, the time lapse between the date on which the complaint was made and the date on which the last subpoena was successfully served ranged from 1 month to 3 years. Windhoek had the largest number of aberrant cases with extremely long delays, but this is probably due to the fact that the Windhoek maintenance court handles a much larger volume of cases than any other court. However, the worst cases are still the exception to the rule: most complainants in cases where two subpoenas

month -- the same as in a case where the complaint was made on the first day of June and the subpoena issued only on the last day of July. Thus, these figures are approximations which allow for a variation of one month, more or less.

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were required waited only 2-3 months between the date of complaint and successful service of the last subpoena.

TABLE 26

Number of Months Between Date of Complaint and Date Second Subpoena was Served Successfully

	%
1-2 months	19
2-3 months	39
3-4 months	19
4-5 months	5
5-6 months	2
6-7 months	3
7-8 months	3
9-10 months	3
10-11 months	3
19 months	2
36 months	2
Total	100

In cases where multiple subpoenas were required, successful service tended to occur in less than 2 months from the date of issue of each subpoena, and there were no cases in which more than three months elapsed between the date of issue and the date of service -- a fact which would be influenced in part by the expiry date of the subpoena.

TABLE 27

Number of Months Between Date Subpoena was Issued and Date Subpoena was Served

	%
FIRST SUBPOENA	
1 month	38
2 months	2
Total	100
SECOND SUBPOENA	
Within same month	59
1 month	34
2 months	3
3 months	4
Total	100
THIRD SUBPOENA	
Within same month	27
1 month	73
Total	100
FOURTH SUBPOENA	
1 month	67
2 months	33
Total	100

This would seem to indicate that the place where the system breaks down to cause long delays is in the time lapse before subsequent subpoenas are issued in problem cases. In some cases, the maintenance officer may wait until the complainant returns to court on the appointed day before issuing another subpoena, in order to question her more closely on the respondent's whereabouts. However, it would be possible for a maintenance officer to utilise his or her powers of investigation to make independent enquiries which might help to locate the respondent and speed up the process.

Problems with police response

Many court personnel reported problems with the police in regard to service of subpoenas. Problems seemed to be particularly common when the respondent resides in another jurisdiction. Court personnel also alleged that police tend to protect their colleagues and friends -- for example, by keeping a subpoena until after the date has expired and then returning it to the maintenance court. In several areas, the police have reportedly stated that they could not serve subpoenas because they lacked transport.

- * *In Mariental, the maintenance officer reported that he posted a summons to the Windhoek police by registered mail on 14 September 1993. The case was scheduled for 14 November 1993. There was still no response from the police by 17 November 1993, even though the respondent is a member of the police force in Windhoek.*
- * *The maintenance officer in Mariental also reported that he issued a summons on 3 June 1993 which was sent by registered mail to the Windhoek police. The complainant works in the finance department at police headquarters. The summons was returned on the grounds that it could not be served in time and the case was removed from the roll.*
- * *A third example of problems with the police reported in Mariental involved a summons to a respondent who works for an insurance company in Windhoek. The summons was served, but ignored. A warrant of arrest was issued on 24 February 1993. The maintenance officer made enquiries to the police about this warrant in March and July, but as of November 1993 there was still no response.*
- * *In Rundu, the clerk of the court showed the researcher documentation on a maintenance case in which eight summonses had been issued between June 1991 and February 1994. There was no return of service for the first four summonses, and the date had expired on the last four. Yet the man in question was employed at the post office in Grootfontein.*
- * *In Katima Mulilo, court personnel reported serious problems with police not serving summonses. There was a dramatic improvement in this problem when a new station commander was appointed in February 1994, although summonses still sometimes go unserved. The prosecutor stated that when a summons is not served by the police, he sometimes writes letters to the respondents directly to inform them of the court date, and that this informal procedure has been effective.*

The experiences of clients of the Legal Assistance Centre are similar. The following are only a few examples of cases brought to the Centre involving problems with police response to maintenance complaints:

- * *In October 1993, a woman contacted the Legal Assistance Centre in connection with a case involving the maintenance of her younger brother. Her mother had reported the case in 1992, but the man could not be located by the police. The woman gave both work and home addresses, and the man was at work when the Legal Assistance Centre telephoned his employer. Enquiries to the police indicated that they had been searching for the man only at his home address, without trying the work address.*
- * *Similarly, another client complained to the Legal Assistance Centre in 1994 that the police could not seem to locate a man who was working for a local company, yet our office had no difficulty in contacting him at his workplace.*
- * *A client approached the Keetmanshoop Advice Office of the Legal Assistance Centre in 1994, stating that she had made a complaint to the court in April 1992 seeking maintenance for her two children, aged 5 and 3. The respondent, who was known to LAC staff, was employed by the Keetmanshoop Municipality and had been working there for more than five years. But he had never appeared in the maintenance court.*
- * *A client who came to the Walvis Bay Advice Office of the Legal Assistance Centre in 1994 reported that she had laid a maintenance complaint against her estranged husband at the Swakopmund maintenance court in September 1993, seeking maintenance for their two children, aged 7 and 8. When she enquired about the case in January 1994, she was told that the police had not been able to serve the summons. The respondent was employed by the Ministry of Local Government and Housing in Oshakati. After the matter was taken up with the District Commissioner of the Namibian Police in Swakopmund, the summons was successfully served.*
- * *A client who approached the Legal Assistance Centre in February 1994 gave the following statement:*

"I am a resident of Katutura. I have two children, 14 years old and 17 years old. Their father is a policeman based at Oshakati Police Station. He fails to support the children. I reported the man to the maintenance court for the first time during September 1993 and I have been going there as follows: 15 November 1993, first week in December 1993, end of December 1993, 3 January 1993, 27 January 1993.

On 27 January 1993 I was referred by the court to the Legal Assistance Centre for help because they have issued a warrant of arrest but the man was never arrested and has not appeared in court once. They don't know whether the police assigned to arrest him is a friend or not. They said they don't know what to do because the police are not bringing such a man to court.

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Please, I need your assistance so that this man can come to court and pay the children's maintenance. I cannot afford to pay school fees."

A number of similar problems with the failure of police to serve subpoenas have been reported to the Legal Assistance Centre's Human Rights Centre at Ongwediva.

Some courts notify the local station commander when such problems occur, and this approach has been fairly successful in remedying such problems in some areas. However, in other locations, maintenance officers reported that even complaints to senior officials had produced no improvement. The Legal Assistance Centre has also attempted to deal with such problems by notifying senior police officials, with mixed success.

The police have suggested that the best procedure at present is to notify the station commander in question of any problems, and if this is not successful, to contact the police public relations officer.¹³ It has also been pointed out that the task of the police is sometimes made more difficult by men who try to hide, or men who pretend to be someone else when the police arrive with a subpoena.¹⁴

In some cases, women wrongly blame the maintenance courts alone for problems with the service of subpoenas. This gives rise to a public perception that the courts are "toothless" or uninterested, which discourages women from approaching the maintenance court or from seeing complaints through. For example, one woman came to the Legal Assistance Centre's advice office in Keetmanshoop to discuss the possibility of obtaining maintenance for her two children. One of the fathers was a police officer in Windhoek and the other a police officer in Walvis Bay. She had not approached the maintenance court, however, because she had been told by a friend that it was useless to bring a maintenance case against police officers.

One prosecutor suggested that the police should identify specific personnel to take responsibility for maintenance subpoenas, especially in respect of those cases where more than one jurisdiction is involved. The Legal Assistance Centre also believes that it would help to alleviate such problems if one central police officer were made responsible for supervising police action on maintenance cases, and for following up complaints from court personnel, legal representatives and members of the public.

Maintenance orders resulting from consent agreements

In most maintenance courts, the maintenance officer attempts to see if the parties can reach an agreement regarding maintenance before the enquiry begins. It is also possible for consent to be reached at any stage prior to the making of an order by the magistrate.

The researchers' observations are that this procedure is often treated as a separate step in the Windhoek maintenance court, in the sense that where the parties are unable to

¹³ Advice from Mr Schimming, Police Public Relations Office, 1993; reiterated by Mr Geyser, Police Public Relations Office, 1994.

¹⁴ This point was raised, for example, at a group discussion that included a police representative. Legal Assistance Centre, 1 July 1993.

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reach agreement, the enquiry is often scheduled for a later date and the parties are warned to return. Women have complained that this two-step approach is problematic in several respects: (1) It necessitates extra time and expenditure by the complainant if agreement is not reached. (2) It delays the process unnecessarily. (3) It opens the door to the possibility that the respondent will fail to return to court on the appointed day.

In other courts visited, the consent negotiations take place shortly before the maintenance enquiry is scheduled to begin, meaning that the parties proceed directly to court if no agreement is reached, without further delay.

If agreement is reached, the respondent signs a consent paper which is then made into a maintenance order with the same binding effect as a maintenance order made by the court after an enquiry takes place.

The following is a summary of a consent negotiation observed by the researchers in May 1993 in the Windhoek maintenance court. The woman had approached the maintenance court with a complaint that the father of her 3 children had not paid maintenance since 1990. The couple had never been married.

After some discussion, the maintenance officer suggested an amount of N\$300/month (N\$100 per child), which both parties refused to accept. The man reported that his wages were N\$330/month. The woman argued that he gets additional overtime pay. She reported that her own wages were N\$200-N\$300/month, depending on weekend work.

The maintenance officer first challenged the woman to prove that the man earns overtime, then asked the man about overtime pay. The man conceded that he earns N\$31 extra for Sunday work, which usually gives him N\$62 extra each month.

The woman suggested that the man could try to get a better job so that he could pay more maintenance, and the maintenance officer warned of the dangers of letting go of a "bird-in-the-hand". However, the maintenance officer also explained that it would be possible to postpone the case while the man searched for a better job.

The woman then asserted that the man could pay more if he spent less money on alcohol. At this stage the man offered to pay N\$150/month (N\$50 per child), which the woman accepted.

This consent negotiation was also observed in May 1993 in the Windhoek maintenance court. The parties had to wait at the court for some time while the clerk struggled to locate the file. The mother had brought the 16-year-old child in question with her to the court, and the child was asked to wait outside the room while the discussion took place.

The man, who has 4 other children, stated that he earns N\$1 000/month. At first he said that he did not have a pay slip with him, but he produced a pay slip as the discussions proceeded.

The woman analysed her monthly expenses, attempting to itemise them in greater detail at the maintenance officer's request. She had difficulty estimating the monthly costs of food for the child.

The man complained that the woman did not consult him on decisions related to the child, such as which school the child should attend. He suggested that he could give the child gifts in addition to maintenance.

The woman stated that she earned N\$300/month, and that she would accept a minimum of N\$150/month as maintenance payments.

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The maintenance officer repeatedly encouraged the parties to make a reasonable settlement. He asked the man if the child was listed as a dependent on his medical aid plan. The man first replied yes, then said no. The maintenance officer then examined the man's pay slip and noted that he appeared to have an unusually large number of deductions for insurance, suggesting that he could consolidate his insurance schemes. The maintenance officer also pointed out that he might regret it someday if he neglected his child by not paying maintenance, and the child misbehaves, by falling pregnant for example.

The interpreter who was translating the negotiations suggested that the man should add the child to his medical aid scheme.

The man suggested maintenance payments of N\$100/month, which the woman refused to accept. The man then promised that he would buy clothes and other gifts for the child. The maintenance officer warned the woman that such promises are seldom kept.

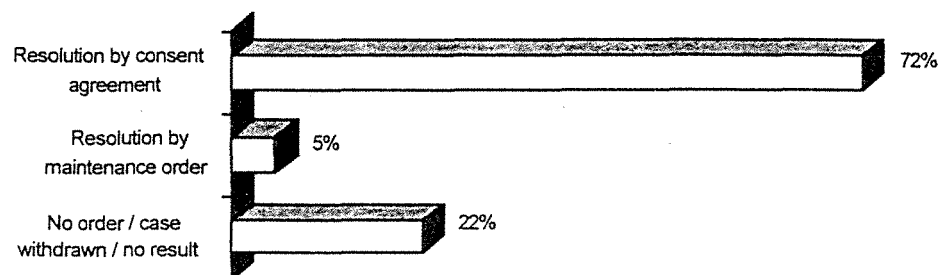
It seemed as if no agreement could be reached, so a court date was set for the enquiry. Then, at the last minute, the woman agreed to accept N\$100/month if the man supplied gifts as promised. The maintenance officer explained that this kind of promise would not be legally enforceable, but that the woman would have the right to return to the court to ask for a substitution at a later date.

A consent agreement was signed for maintenance payments of N\$100/month. The man complained about the fact that the agreement required that payments be made between the first and the seventh of the month, explaining that he was paid on the twentieth of each month. The maintenance officer stated that it was not possible to alter the date of payment.

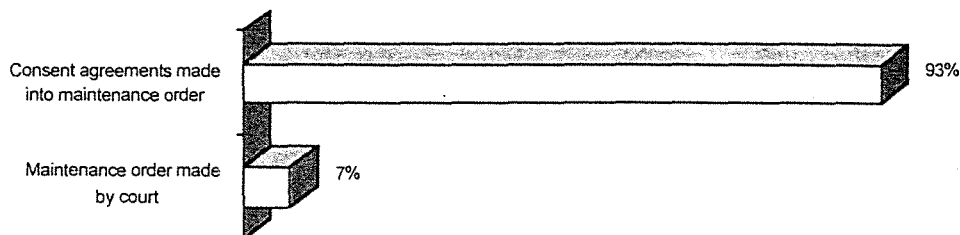
The high incidence of consent agreements

One surprising result of the research is how often such negotiations result in the signing of a consent agreement: 93% of the 460 cases in which the file indicates that consent negotiations took place resulted in a maintenance order by consent. Where such negotiations were unsuccessful, the most common reason was simply that the parties could not reach agreement.

Of all the case files which involved maintenance complaints, 72% were resolved by consent agreements and only 5% by maintenance orders resulting from enquiries, while 22% of the cases did not result in maintenance orders -- because the court decided that an order was not warranted, because the case was withdrawn or struck off the roll (which accounted for 32% of the cases in which no maintenance was ordered), or because no conclusive result was reached.



Looking at the data from another angle, of the cases which resulted in maintenance payments for the complainant, 93% (426) were consent agreements which were made into maintenance orders while only about 7% (30) were maintenance orders made by the court at the conclusion of an enquiry.¹⁵



The high proportion of consent agreements points to a need to formalise and standardise this process, to make sure that parties are not pressured into agreements. The researchers' personal observations indicate that maintenance officers sometimes play a very active role in attempting to secure an agreement. While this is not a negative factor in and of itself, it may be perceived by some complainants and respondents as undue pressure.

Comparison between consent agreements and orders resulting from enquiries

Are consent agreements which are made into maintenance orders taken as seriously as maintenance orders which result from court enquiries? Of the cases involving consent agreements, respondents fell into arrears in 34%. Of the cases involving maintenance orders at the end of court enquiries, respondents fell into arrears in 20%. Although the difference is not dramatic -- particularly given the relatively small sample size of maintenance orders resulting from court enquiries -- it may point to a need to emphasise to respondents that the consequences of a maintenance order reached by consent are exactly the same as the consequences of a maintenance order resulting from an enquiry.

Do women feel pressured in consent negotiations to settle for less than the amount of maintenance which they have requested? The answer is possibly yes. Of the cases involving consent agreements, the complainants settled for less than they had initially requested 79% of the time. Consent was reached on the requested amount in 17% of the cases, while the consent negotiations resulted in maintenance payments of *more* than the amount initially requested in 4% of the cases.

¹⁵ It is possible that this balance may be shifting somewhat, at least in Windhoek. According to information provided by the Windhoek maintenance court to UNICEF Namibia in March 1995, 207 cases (60% of all the cases which resulted in maintenance orders) were resolved in 1994 by consent agreements, as compared to 136 cases (40%) which resulted in maintenance orders by the court at the end of an enquiry.

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TABLE 28

Comparison Between Amount Requested and Amount Obtained

	CONSENT	MAINTENANCE	TOTAL
	%	%	%
Received less	79	97	80
Received amount requested	17	3	16
Received more	4	0	4
Total	100	100	100

* "Consent" refers to consent agreements which are made into maintenance orders. "Maintenance orders" in the tables refer only to orders made by the maintenance court at the conclusion of an enquiry.

In those cases where women "settled for less", the maintenance payments agreed upon were N\$93/month less than requested on average, with the majority of cases involving a N\$50/month reduction. Most complainants who "got more than they asked for" received payments of N\$100/month more than they requested, but it must be kept in mind that the number of cases in this category was small.

So it is possible that women agree to less than they think they are entitled to in an effort to resolve the maintenance complaint without going through the process of an enquiry.

But would they fare better if they proceeded with an enquiry and allowed the court to make the decision? Not necessarily. Looking at the maintenance orders which resulted from court enquiries, the complainants received less than they had initially requested in 97% of the cases, and did not receive more than the initial request in a single case. The maintenance payments ordered were N\$169/month less than requested on average, with the majority of cases involving a N\$100/month reduction.

TABLE 29

Comparison Between Amount Requested and Amount Obtained

	MEAN	MEDIAN	MODE	MINIMUM	MAXIMUM
CONSENT					
Received less	-93	-70	-50	-850	-5
Received amount requested	0	0	0	0	0
Received more	108	50	100	10	800
MAINTENANCE ORDER					
Received less	-169	-100	-100	-550	-20
Received amount requested	0	0	0	0	0
TOTAL					
Received less	-99	-70	-50	-850	-5
Received amount requested	0	0	0	0	0
Received more	108	50	100	10	800

Therefore, although complainants may feel pressured to accept less than they have requested in consent negotiations, there is no evidence that the consent procedure

tends to result in a less advantageous result for complainants than a maintenance enquiry.

Private consent agreements

It was reported by court personnel in Swakopmund and Otjiwarongo that women often withdraw maintenance complaints because a private agreement is reached with the father outside of the court and not made into a formal maintenance order. The same women often approach the court with a new complaint later on, however, because the private agreements are not complied with.

This indicates a need for public education on the usefulness of formalising consent agreements as court orders, in order to provide access to enforcement mechanisms.

Maintenance enquiries

If consent cannot be reached, or if consent negotiations do not take place for some reason, an enquiry into the complaint is heard by a magistrate.

Legal representation

In the vast majority of cases, neither the complainant nor the respondent was represented at the enquiry by a lawyer. However, where there was legal representation, this was more often on behalf of the respondent (6% of all cases) than on behalf of the complainant (1% of all cases). Complainants had legal representation *only* in situations where the respondent had legal representation as well, whereas in 5% of all cases the respondent had legal representation while the complainant was assisted only by the maintenance officer.

TABLE 30
Representation by Lawyer

	%
Both	1
Respondent only	5
Neither	94
Total	100

The maintenance procedure is designed to be a simple, low-cost process in which legal representation is unnecessary. Although the maintenance officer's function is to assist the complainant, it is apparent from the experience of the Legal Assistance Centre that maintenance officers in some maintenance courts do not have adequate knowledge of the law on maintenance, while others are not very vigorous in their efforts to fulfil their duties. Furthermore, in cases where the complainant does receive satisfactory assistance from the maintenance officer, the respondent may feel disadvantaged.

Although the parties to a maintenance dispute would be entitled to seek legal aid, there is probably limited scope for obtaining legal assistance through this channel. As noted

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above, legal aid was given to only three persons in Namibia in respect of maintenance cases during the period 1 April 1994-31 March 1995.¹⁶

Therefore, in the interests of both parties, it is submitted that the Maintenance Act should be amended to allow representation by paralegals or other persons of the parties' choice, along the lines of permissible representation in the district labour courts in terms of section 19(3) of the Labour Act, No. 6 of 1992.

Postponements

A postponement is when the maintenance enquiry does not proceed on the scheduled date. For example, common reasons for a postponement are because one of the parties did not show up in court; because the respondent denies that he is the father of the child in question and requests a blood test; or because the court does not have access to the necessary information to decide the case (for example, because the respondent did not bring proof of his wages).

Postponements seem to be the primary cause of the long delays which so many women complain of. The average number of postponements was two, while most cases involved at least one postponement. Looking only at the cases which involved postponements, there was one postponement in 52% of these cases, two postponements in 26% of these cases, three postponements in 12% of these cases, and four postponements in 10% of these cases.

TABLE 31
Number of Postponements

	%
One	52
Two	26
Three	12
Four	10
Total	100

TABLE 32
Average Number of Postponements

	MEAN	MEDIAN	MODE	MIN.	MAX.
Postponements	2	1	1	1	4

¹⁶ Information from Mr Ndjoze, Director, Legal Aid Board, March 1995.

Reasons for postponements

TABLE 33

Reasons for Postponements

	%
Respondent did not attend	21
Complainant did not attend	4
Both parties failed to attend	4
Respondent to bring additional proof	6
Complainant to bring additional proof	1
Blood tests / paternity disputed	10
Respondent to seek employment	6
Parties could not reach agreement	6
Other	23
Not indicated	18
Total	100

* NOTE: The category of "other" included reasons such as respondent in hospital, complainant attending funeral, parties seeking legal advice, magistrate unavailable, and parties to reconcile.

The most common reason for postponements was the failure of the respondent to appear in court, which was the cause of 21% of all postponements. Again, this may be a sign that subpoenas to appear in maintenance court are not being taken seriously. These postponements may also have been necessitated by the fact that the subpoena could not be successfully served because the respondent could not be located.

Where an enquiry must be postponed because the subpoena has not been served, the maintenance court should be aware of this in advance of the scheduled date. Anecdotal evidence indicates that complainants in these situations would suffer less inconvenience if more effort was made by maintenance officers to contact them in advance, to let them know that there is no need to take time off work and incur the expense of transport to come to court on the scheduled date.

More vigorous investigation by maintenance officers -- in the form of questions put to the complainant about the respondent's home and work addresses and contact addresses of close family members, or telephone calls to the respondent's last-known place of employment, for example -- might make it possible for the police to increase their ability to successfully serve the initial subpoena and thus decrease the number of postponements.

Another 10% of all postponements resulted from requests for blood tests to prove paternity, or from disputes about paternity which may have involved blood tests or other evidence. Postponements will always be necessitated where blood tests are carried out. However, in this regard, it should be noted that postponements for the purpose of obtaining blood tests occurred more frequently in cases which had already experienced delays; postponements for blood tests were requested in at least 12% of all cases which involved three or four postponements. This may be an indication that requests for blood tests are sometimes utilised as a delaying factor.

However, as blood tests were requested in only a small number of cases out of the total set of cases, this problem does not appear to be a widespread one. The high cost

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of the blood test probably acts as a built-in check on the irresponsible use of such tests by most respondents.

Another 6% of postponements resulted from a request to the respondent to provide additional proof. Court observations indicate that postponements to obtain additional proof most frequently involve the respondent's failure to bring along a pay slip as proof of income. This problem might be reduced if subpoenas routinely included a notice in simple language, with translations into the most common Namibian languages, stating that the respondent should bring his most recent pay slip to court.¹⁷

Complainants were responsible for very few postponements: the complainant failed to appear in only 4% of all postponed cases, and had to be requested to bring additional proof in only 1% of all postponed cases.

In about 4% of all postponed cases, both of the parties failed to appear in court -- possibly because the problem had been privately resolved.

Delay caused by postponements

Most cases which were postponed were re-scheduled within the same month, and the average length of postponement was 1-2 months.¹⁸ There were extreme cases -- for example, in one case the enquiry was re-scheduled after a postponement of 17 months -- but these were clearly unusual aberrations. The vast majority of cases which were postponed were postponed to a date within two months of the initial date set for the enquiry.

However, this overall picture should not obscure the fact that a significant number of complainants experienced considerable delay. In roughly 24% of all cases in which there were postponements, the enquiry was not re-scheduled for more than one month after the first postponement, and the time lag resulting from postponements was more than two months in 9% of all delayed enquiries.

TABLE 34

Postponements: Number of Months Elapsed Before Case Resumed

	POSTPONEMENTS				
	1st	2nd	3rd	4th	Total
	%	%	%	%	%
Within same month	33	35	35	36	34
1-2 months	43	48	30	46	42
2-3 months	14	15	17	18	15
3-4 months	5	2	9	0	4
4-5 months	3	0	9	0	3
5-6 months	1	0	0	9	1
17 months	1	0	0	0	1
Total	100	100	100	100	100

¹⁷ It has been similarly suggested in South Africa that all documents and correspondence should include translations into languages which will be more likely to be understood by the respondents. Sandra Burman and Shirley Berger, "When Family Support Fails: The Problems of Maintenance Payments in Apartheid South Africa: Part II" 4 SAJHR 334 (1988) at 353.

¹⁸ As explained in note 12 above, the method of data collection made the precise measure of months elapsed impossible.

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The first postponement resulted in a time lag of two months or more in about 24% of all cases. The second postponement resulted in a delay of up to two months or more in 17% of the cases which were postponed a second time. The third postponement resulted in a delay of up to two months or more in 35% of the cases which were postponed a third time, and the fourth postponement resulted in a delay of up to two months or more in 27% of the cases which were postponed a fourth time. Thus, the cumulative postponements can add up to considerable time periods.

About 10% of all cases which involved postponements involved a total of four postponements. Therefore, for some women, the maintenance process dragged on and on. It should be kept in mind that even a relatively brief postponement can create hardships for women who are struggling to support their children with meagre financial resources.

The data also provided another signal that the courts' records regarding postponements can be improved. Of the cases which involved multiple postponements, the respondent tended to appear in court on at least one occasion, showing that inability to locate the respondent was not the sole reason for the delays. Thus, particularly in these kinds of problem cases, the data supports the theory that legal and procedural changes, combined with more aggressive investigation by maintenance officers (for example, through alternative approaches to proving the respondent's income where no pay slip is provided) have a real potential to decrease the number of long and drawn-out enquiries.

Paternity

The data shows that paternity is seldom raised in maintenance enquiries. Only 9 case files (1.5% of the total number of maintenance complaints) contain any indication that paternity was raised as an issue. However, in all 9 of these cases, the issue of paternity was resolved by a blood test, which invariably involved a postponement of the maintenance enquiry.

In 6 of these 9 cases, paternity was established by a blood test, being disproved in only 3 cases.

TABLE 35
Outcome of Blood Test

	# CASES
Paternity proved	6
Paternity not proved	3

Thus, there is no basis for the myth that women abuse the maintenance court by trying to obtain maintenance from men who are not really the fathers of their children. If this were the case, paternity disputes would logically appear in a much higher percentage of maintenance complaints.

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The following case was brought to the Keetmanshoop Advice Office of the Legal Assistance Centre in June 1994:

The client, who resides in Lüderitz, had made a maintenance complaint to the maintenance court in Lüderitz in March 1994. The respondent, who is Oshiwambo-speaking, asserted in court that the child could not be his because the child's surname was that of the mother, whereas according to Owambo tradition the child should have borne his surname if he was the father. The presiding magistrate reportedly accepted this statement and informed the complainant that the respondent could bring a civil action against her to clear his name if she continued to insist that the child was his.

This case points to a need for increased education of magistrates on the procedures for proving paternity.

Results

As noted above in the comparison with consent agreements, 97% of all maintenance enquiries which resulted in maintenance orders resulted in complainants being awarded maintenance payments which were less than they had initially requested. The maintenance payments ordered were N\$169/month less than requested on average, with the majority of cases involving a N\$100/month reduction. There was only one case where the complainant was awarded the exact amount requested, and no cases in which the complainant was awarded more than the amount initially requested.

Amounts of maintenance received

Total maintenance payments in the case files studied ranged from N\$15/month to N\$1200/month, averaging N\$109/month. There were only three cases in which these total amounts included any maintenance for the complainants, meaning that the total amounts were normally intended to cover only the basic needs of the children in the family.

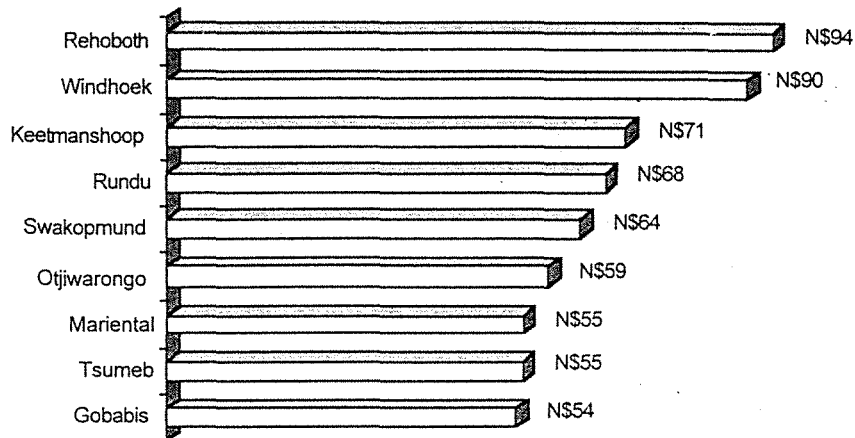
Maintenance for children

The maintenance orders recorded in the case files do not specify the amount which is to be paid for each individual child. Thus, the figures for maintenance ordered in respect of individual children is calculated by dividing the amount of the total monthly payment by the number of children for whom maintenance was requested.

Maintenance payments in the case files studied ranged from a minimum of N\$10/month per child to a maximum of N\$400/month per child. The average monthly maintenance payment per child was about N\$76.

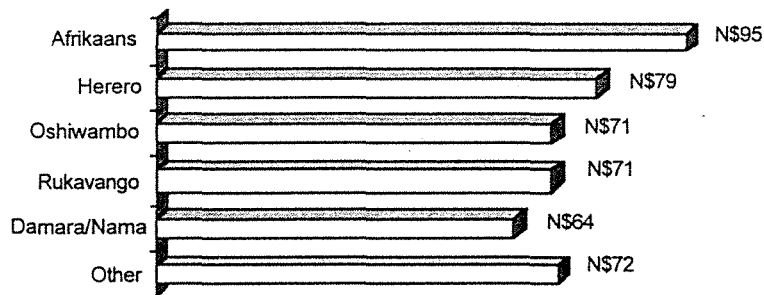
There were significant differences by location in the amount of maintenance received, which may be related to differences in the cost of living or in wages in the different areas. The average maintenance payments per child were highest in Rehoboth and Windhoek (N\$94/month and N\$90 respectively), and lowest in Otjiwarongo, Mariental, Tsumeb and Gobabis (N\$59/month to N\$54/month).

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Maintenance Received (Mean N\$) per Child per Month by Location

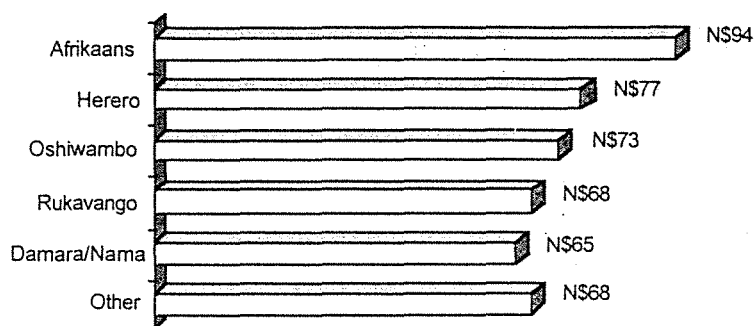
Looking at the amounts per child by language groups, the average amounts were substantially higher in respect of Afrikaans-speaking complainants -- most likely as a result of higher wage levels and a higher standard of living amongst members of this language group. The lowest monthly payments per child were for children of Damara/Nama-speaking complainants, averaging only N\$64/month per child.



Maintenance Received (Mean N\$) per Child per Month by Language Group of Complainant

The pattern looks similar when the amounts per child are compared with the language group of the respondents. The average monthly payments per child are lowest when the respondent is Damara/Nama-speaking and highest when the respondent is Afrikaans-speaking.

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Maintenance Received (Mean N\$) per Child per Month by Language Group of Respondent

The average maintenance payments per child did not differ substantially in respect of children in different age groups. However, it must be kept in mind that the cases which involved more than one child recorded only a total amount of maintenance to be paid each month, rather than specific amounts per child. The researchers' observations also indicated that maintenance officers and magistrates tended to balance the total needs of the complainant and her children against the amount which the respondent could afford to pay, rather than focusing discussion on the specific needs of the individual children in the family. Thus, detailed analysis of this factor is not really possible on the basis of the available data.

The average amount of maintenance received in respect of each child was considerably less than the amount requested. The average amount requested was N\$135/month per child, as compared with the average amount of N\$76/month per child which was actually received. This amount is close to the poverty datum line which has been calculated for children in 1992 -- (N\$57,50 for children aged 0-5 and N\$86,25 for children aged 6-15).¹⁹ Although the complainant may also be in a position to make independent contributions to the maintenance of the children in question, this indicates that even families who receive help from the maintenance courts may be just barely managing to stay afloat.

Comparison of payments resulting from consent agreements and maintenance enquiries

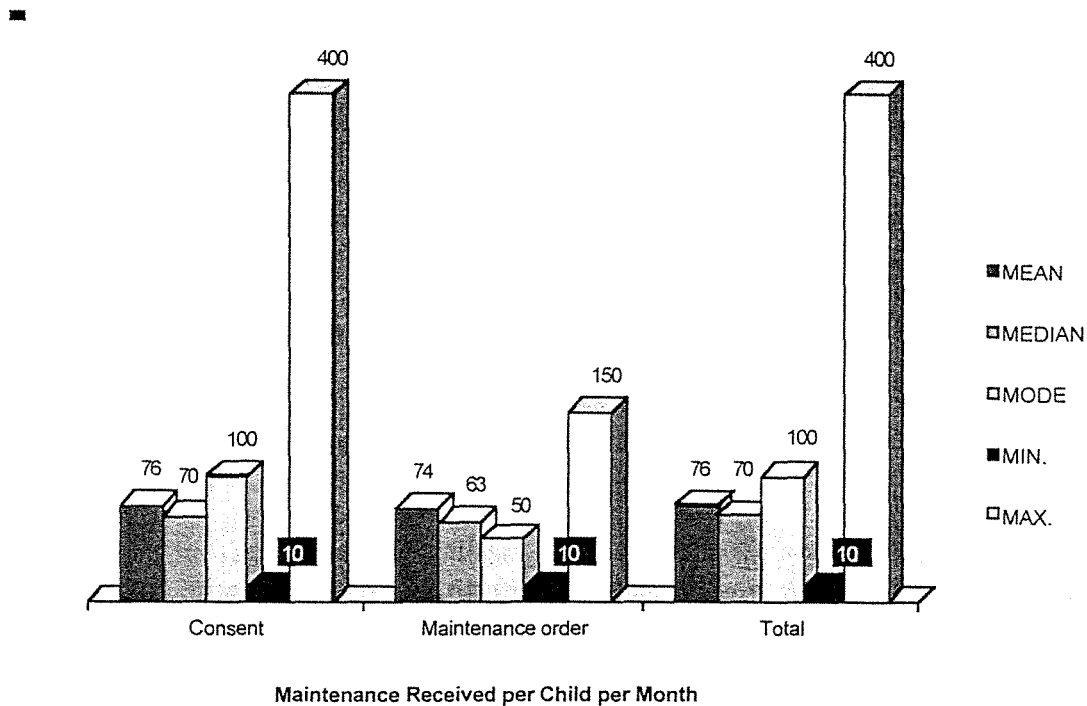
The maintenance payments resulting from maintenance enquiries tended to be smaller than those resulting from consent agreements in the majority of cases. However, this comparison may be skewed by the fact that there were so many more maintenance orders resulting from consent agreements than from maintenance enquiries.

Maintenance payments resulting from consent agreements ranged from N\$10/month to N\$400/month per child, as compared to a range of N\$10/month to N\$150/month per child in respect of orders resulting from court enquiries. The majority of cases resolved through consent agreements produced maintenance payments of N\$100/month per

¹⁹ See page 69 above.

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child, while the majority of cases resolved through maintenance enquiries produced maintenance payments of N\$50/month per child.



This distinction should not be taken to mean that complainants are likely to receive higher amounts if they persist in consent negotiations, however, nor does it indicate that the courts are biased against the needs of the children involved. It is just as likely that respondents who have lower overall earnings or greater strains on their financial resources are less likely to consent to maintenance payments, which would mean that cases involving respondents with less ability to pay result in maintenance enquiries more frequently than cases involving respondents with more resources.

Maintenance for complainant

It is not possible to tell from the information in the case files how many cases involved a request for maintenance for the complainant herself. However, there were a total of only 3 maintenance cases in which maintenance for the complainant was made part of a maintenance order.

There were two cases in which complainants received amounts for their own maintenance as a result of consent agreements -- one case in which a complainant was awarded N\$40/month, and another in which a complainant was awarded N\$200/month.

There was only one case adjudicated by a maintenance court in which a complainant was awarded an amount for her own maintenance. In this single case, the maintenance order included N\$250/month in respect of the complainant.

It should be emphasised in this context that a complainant would only be entitled to ask for maintenance for herself if a marriage exists or had at some point existed

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between herself and the respondent. Otherwise, the respondent would not have a legal duty to maintain her.²⁰

Time lapse between complaint and resolution of case

In the cases where maintenance orders were issued, this took place within 1-2 months of the date of the initial complaint in the majority of cases (51%). In 25% of the cases, the maintenance order was issued 2-3 months after the date of the initial complaint, and in another 15% of the cases, 3-4 months elapsed between the date of the initial complaint and the maintenance order. In 8% of the cases which resulted in maintenance orders, the date of the maintenance order was 5 months or more after the date of the initial complaint, including one aberrant case in which more than 4 years intervened.

Maintenance orders which resulted from maintenance enquiries took about one month longer than maintenance orders which resulted from consent agreements.

The typical maintenance order directed that maintenance payments must begin one month later, meaning that most women (55%) actually began to receive maintenance payments 2-3 months or less after the date on which they made their initial complaints.

TABLE 36

Number of Months Between Date of Complaint and Date Maintenance Payment Must Begin

	CONSENT	MAINTENANCE	TOTAL
	%	%	%
Less than 1 month	5	0	4
1-2 months	18	4	16
2-3 months	34	36	33
3-4 months	21	32	21
4-5 months	8	21	9
5 months or more	15	7	16
Total	100	100	100

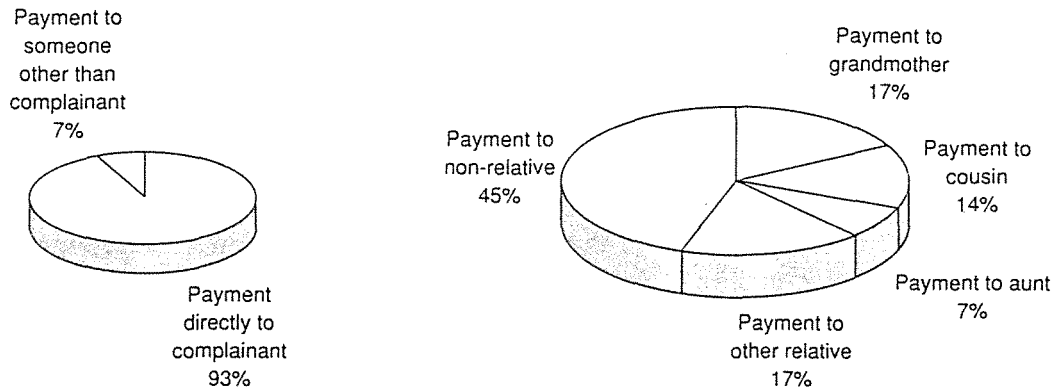
This data indicates that the unusual cases which involve long delays have created an erroneous public perception that the typical maintenance case takes a long time to resolve. In fact, the time frame involved is reasonably speedy in the majority of cases. This fact should be given publicity to ensure that women are not dissuaded from approaching the court by false ideas about the amount of time which will be entailed.

At the same time, every effort should be made to expedite procedures so that long delays affect fewer women and children. For example, time lapses could be minimised by more efficient service of subpoenas, by more aggressive investigation by maintenance officers into matters such as the current address or the income of the respondent, and by eliminating delays between consent negotiations and maintenance enquiries.

²⁰ In theory, there are a few other situations which could give rise to a legal duty of support between the complainant and the respondent -- for example, a legal duty of support might exist where the complainant is the child's grandmother (the respondent's mother) or the child's aunt or uncle (the respondent's sister or brother). However, there were no such cases in the sample.

Maintenance paid to someone other than complainant

In 93% of all cases, the maintenance order directed that maintenance payments be made directly to the complainant. In the remaining 7% of cases, a little more than half (55%) directed that payments be made to relatives (17% to grandmothers, 14% to cousins, 7% to aunts and 17% to other relatives) and a little less than half (45%) to non-relatives.



Who Received Maintenance Payments

Maintenance Payment to Someone Other than Complainant
(of the 7% of cases where not paid to complainant)

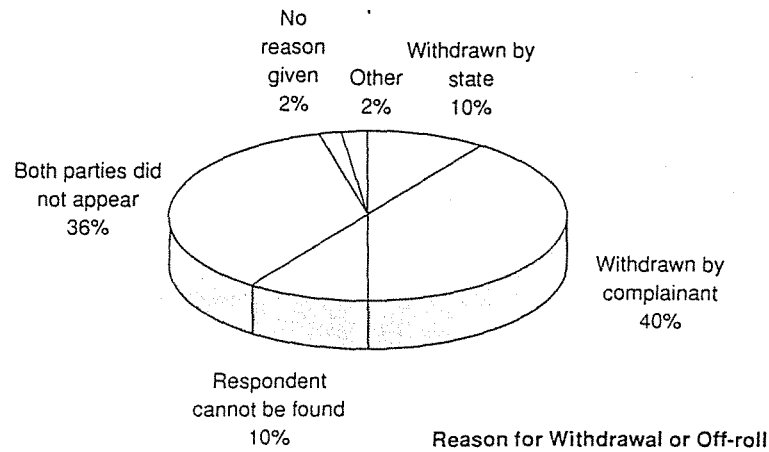
It is possible for complainants themselves to be relatives of the child other than a parent. Therefore, the only conclusion which can safely be drawn from this data is that maintenance orders seldom direct that payments be made to someone other than the complainant.

It is important to ensure that complainants and maintenance officers are aware of this possibility, to ensure that maintenance payments are directed to the most appropriate recipient -- who would in most cases be the person who is the actual caretaker of the child on a day-to-day basis.

Withdrawals

In about 7% of all maintenance complaints, no result was reached because the case was withdrawn or stuck off the roll -- with 40% of these being withdrawn by the complainant for unknown reasons and 10% being struck off the roll by the state for unknown reasons. In 36% of these cases, the complaint did not proceed because neither party appeared (possibly because a private agreement had been reached), and the complaint was discontinued in 10% of these cases because the respondent could not be found.

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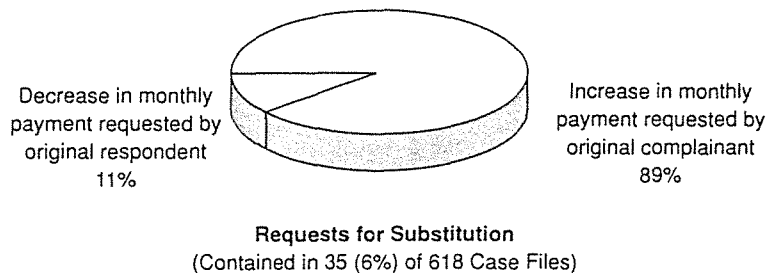
The data probably under-represents the number of cases which were discontinued because the respondent could not be located, because this may have been the reason why some cases were withdrawn by the complainant or struck off the roll by the state even where no reason was indicated in the case file.

REQUESTS FOR SUBSTITUTION OF ORIGINAL MAINTENANCE ORDER

Occurrence of substitution requests

Requests for substitution were contained in 35 out of the 618 case files examined, indicating that requests for substitution occur in only about 6% of all cases. Our interviews indicated that there is a need for more public education on the possibility of requesting substitutions. However, in some courts, complainants and respondents are informed of their rights to request substitutions at the time when the initial maintenance order is finalised.

The vast majority of substitutions (89%) were requests by the original complainant for increases in the monthly maintenance payment. There were only 4 cases in the entire sample (11%) in which the original respondent requested a decrease in maintenance.



Many of the files which involved substitution proceedings did not contain complete data. Therefore, few reliable conclusions can be drawn about this area of the maintenance court operation.

Language group of person making substitution request

The language groups of persons who approached the maintenance court with substitution requests followed the same broad patterns as the language groups involved in all maintenance complaints, indicating that there is no particular community which is more or less informed about this procedure, or more or less likely to utilise it.

Amounts of original maintenance orders

In cases where substitutions were requested, the amount of maintenance being paid under the original order ranged from NS20/child/month to NS300/child/month, with the original monthly payment averaging about NS75/child/month. This average is virtually identical with the average monthly maintenance payments per child in all maintenance complaints, meaning that substitution cases do not seem to be more common where monthly payments are particularly low or particularly high.

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TABLE 37

Amount of Original Maintenance Order per Child per Month

	# CASES	MEAN	MEDIAN	MODE	MIN.	MAX.
Maintenance per child	32	75	73	40	20	300

Most of the cases where a substitution was requested involved only one child. A breakdown of the age groups of the children involved indicates that requests for increased maintenance payments most often occur when the only (or oldest) child in the family reaches school age (6_ years old), thus suggesting that the need for increases may be prompted by the extra expenses of school fees, uniforms and supplies.

TABLE 38

Substitutions: Age of Child at Date of Request for Increase

	%
FIRST CHILD	
Infant: 0-2 years	7
Toddler: 3-4 years	14
Young Child: 5-7 years	38
Child: 8-11 years	17
Adolescent: 12-15 years	14
Young Adult: 16 years and older	10
Total	100
SECOND CHILD	
Infant: 0-2 years	10
Toddler: 3-4 years	30
Young Child: 5-7 years	10
Child: 8-11 years	20
Adolescent: 12-15 years	20
Young Adult: 16 years and older	10
Total	100
THIRD CHILD	
Infant: 0-2 years	25
Young Child: 5-7 years	25
Child: 8-11 years	25
Adolescent: 12-15 years	25
Total	100
FOURTH CHILD	
Young Child: 5-7 years	50
Child: 8-11 years	50
Total	100
FIFTH CHILD	
Infant: 0-2 years	50
Child: 8-11 years	50
Total	100

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TABLE 39

Substitutions: Age of Child at Date of Request for Increase - All Children

	%
Infant: 0-2 years	11
Toddler: 3-4 years	15
Young Child: 5-7 years	30
Child: 8-11 years	21
Adolescent: 12-15 years	15
Young Adult: 16 years and older	9
Total	100

Time lapse between initial order and request for substitution

There was a wide range of time frames between the date of the initial maintenance order and the date of the request for substitution. Requests for substitution occurred as early as one month after the date of the original maintenance order, or as late as five years afterwards. Most requests for substitution (50%) were made about 1 year after the date of the original maintenance order. Only 10% of all requests for substitutions occurred within one year of the date of the original order.

TABLE 40

Number of Years Between Date of Original Maintenance Order and Date of Request for Increase

	%
Less than 1 year	10
1 year	50
2 years	13
3 years or more	27
Total	100

These time lapses indicate that requests for substitution are not being improperly used as "appeals" against the decision of the maintenance court, or as a means to alter a consent agreement into a more favourable arrangement, but rather as genuine responses to changes in expenditure caused by inflation, by the changing needs of the child, or by changes in circumstances of either the complainant or the respondent.

The data was examined for relationships between the amount of maintenance being received, and the time which elapsed between the original order and the date on which substitution was requested, but no clear patterns were discernible.

Amount of substitution requested

Most of the requests for both increases and decreases involved relatively modest amounts. The average difference between the initial order and the substitution request was N\$151 in the case of a request for an increase, and N\$50 in the case of a request for a decrease.

TABLE 41

Amount of Substitution Requested per Month - Total Maintenance Payment

	MEAN	MEDIAN	MODE	MIN.	MAX.
Reduction	-50	-50	-50	-50	-50
Increase	151	150	150	63	300

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The average request for an increase worked out to be about N\$77 per child, while the average request for a decrease worked out to be about N\$38 per child.

TABLE 42

Amount of Substitution Requested per Month - per Child

	MEAN	MEDIAN	MODE	MIN.	MAX.
Reduction	-38	-35	-30	-50	-30
Increase	77	70	50	28	200

There was only one case in the sample where the request for substitution included a request to substitute a different recipient (an aunt) for the person named in the original maintenance order.

Subpoenas

Many case files involving substitution proceedings did not contain any information about subpoenas, meaning that the data about subpoenas comes from a very small sample and must be treated with caution. However, it can be said that most of the substitution cases which were examined involved the issue of only one subpoena, and that the success rates for service of subpoenas appeared to be slightly lower for substitutions than for initial complaints.

Where the first subpoena could not be served, no pattern was discernible in the reasons which were recorded. However, where subsequent subpoenas could not be served, the reason given was invariably that the respondent was unknown at his work address.

Agreement on substitution request reached by consent

Although the data in the case files does not distinguish clearly between the number of substitution requests which were resolved by consent and the number which necessitated enquiries, it appears from evidence about factors such as postponements and legal representation that very few of these cases were resolved by consent between the parties, in contrast to the prominent role of consent agreements in initial maintenance complaints.

It is not surprising that parties are likely to resist a change that reopens a dispute which has already been resolved, making the higher degree of court involvement at this stage of proceedings understandable.

Enquiries

As in the case of initial complaints, if no agreement is reached between the parties on the request for substitution, an enquiry into the matter is conducted by the maintenance court.

Legal representation

As in the case of initial complaints, there were few cases in which the parties in substitution cases had legal representation. However, the incidence of legal

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representation appears to have been slightly higher in substitution proceedings than in the case of initial complaints -- perhaps because fewer substitution disputes are resolved by consent. As in the case of initial complaints, there were no cases in which complainants had legal representation but respondents did not.

Postponements

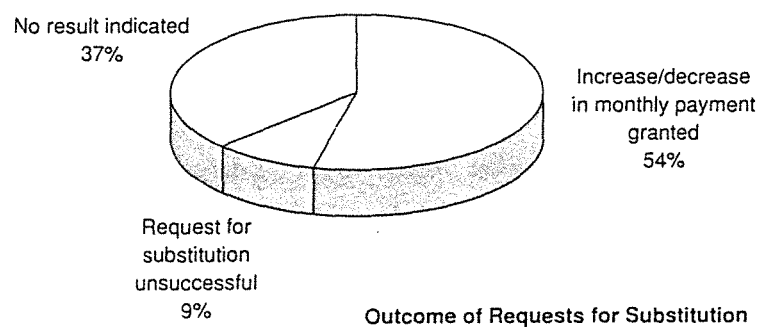
As noted above, a postponement is when an enquiry does not proceed to its conclusion on the scheduled date. There were not enough case files containing data on postponements in respect of substitution cases to allow for detailed analysis.

Looking at the files which did contain information on postponements, there was no clear pattern in the reasons for postponement in substitution cases. There were very few cases in which the respondent failed to appear, and also few cases in which the respondent was asked to bring additional proof. However, there were several cases in which the reason given for a postponement was a request for blood test -- indicating that the respondent must have had new evidence which placed paternity into question.

Overall outcomes

Amount of increase or decrease

Increases or decreases in monthly maintenance payments were granted in 54% of the substitution cases. Requests for substitution were unsuccessful in 9% of the substitution cases, while no result was indicated in 37% of the cases. There was no significant difference in the success rate of requests for increases or requests for decreases -- about half of both kinds of requests were successful.



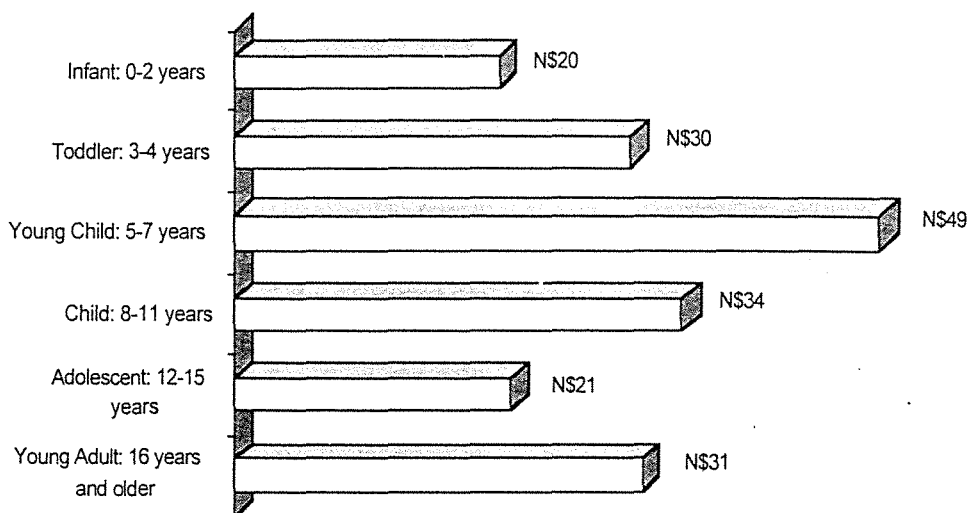
The increases which were substituted for the original maintenance orders were slightly less than those requested -- an average increase of N\$42 per child, as contrasted to the average request of N\$77 per child.

However, where requests for decreases were successful, these were closer to the requested amounts -- an average decrease of N\$35 per child, as compared to the average request of N\$38 per child.

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Increases related to age group of child

Increases in maintenance payments were highest in respect of children in the age group 5-7 (averaging N\$49 per child), again suggesting that the increase in expenditure necessitated by the onset of school fees, school uniforms and related expenditures may be an influential factor.



Change in recipient

There were only two cases in which the amended order changed the recipient of the maintenance payment.

Time lapse between request for substitution and resolution of case

The data on the time frames involved in the resolution of substitution cases was too incomplete to allow for reliable analysis.

MAINTENANCE COURT PROCEEDINGS AFTER A DIVORCE

As noted in the previous chapter, proceedings in the maintenance court involving a previous divorce order would take the form of either requests for variation or complaints about arrears.

If a divorce order did not include an order for maintenance of the children of the marriage, a request for such maintenance would be dealt with in the same manner as an initial maintenance complaint, without reference to the divorce order. Such cases were not captured in this portion of the research, but would form part of the sample of initial maintenance complaints.

General characteristics of cases following on a divorce order

There appear to be about 25 maintenance cases following on a divorce order in the sample. Because this is a very small number of files, only the broad characteristics of the cases have been examined.

All of these complaints were brought by women. Most of the complainants and respondents (60% or more) in these cases were Afrikaans-speaking, which may simply be an indication that members of this language group are more likely to obtain a formal divorce.

Like other maintenance complaints, these cases usually involved only one child, although there were cases with up to 4 or 5 children.

The cases following on divorces seemed more likely to involve older children than other maintenance complaints, with the average age of the oldest child in the family being 10 at the date of complaint. This is probably because relationships which involved a marriage were more likely to have been stable and long-term relationships.

Time lapse between divorce and complaint

Although data was not available in all of the cases in the sample on this point, it appears that the majority of complaints following divorces were made to the maintenance court within one year or less of the divorce.

Type of proceedings

At least half of the cases following on divorces appear to have been complaints that maintenance payments which were due in terms of divorce orders were in arrears. Another 16% involved requests for substitutions, with the precise procedural course of the remainder being unclear.

The number of criminal proceedings involved is too small to allow for an assessment of whether a violation of a High Court order tends to be treated any more seriously than a violation of a maintenance order issued by a maintenance court.

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This interview was conducted with a woman at the Swakopmund maintenance court in February 1994. She had approached the court to complain about non-compliance with a divorce order.

Our relationship started at school and we got married immediately after we finished our schooling. One child was born from the marriage, which lasted for 8 months until he fell in love with another woman and divorced me. We did not even discuss the divorce, he only brought the finalised divorce order to me in which he was ordered to pay money towards the maintenance of the child.

He never maintained the child and whenever I went to his house to get the money he was ordered to pay, I ended up fighting with the girlfriend. I gave up making efforts to get the money out of him, but as time went on, it became too costly to do it all by myself. I work for [a shop] where I am being paid a very low salary, while he works for [a mining concern] where he is getting a very good salary and my child is his only child. Therefore, I know he can afford to maintain him.

I reported in November last year and he was ordered to pay N\$150 per month. I am very thankful that we have resolved this matter as it will eliminate quarrels and conflicts between the two of us as parents and will ensure that the child is maintained properly.

This interview was conducted in 1993 at the Windhoek maintenance court with a 57-year-old Nama-speaking man who earns about N\$3700/month. He had been paying maintenance for two children as a result of a divorce order.

I have reasonable access to the children, who visit me during the holidays, in which case I give them extra money. Their mother is married to someone else who does not want me to visit them at home.

I came to the court to cancel the maintenance order because one of the children is above 21 years and is at university and the other one is working. The maintenance officer wanted me to give the address of the mother so that she could be summoned to sign whether she would agree to that or not.

Conclusion

Perhaps the most important conclusion which can be drawn from the cases following on divorces is that parties who have obtained a formal divorce from the High Court seldom approach the maintenance court for assistance of any kind.

Research on the treatment of maintenance in divorce cases should be carried out separately, on the basis of information in the High Court case files.

ARREARS

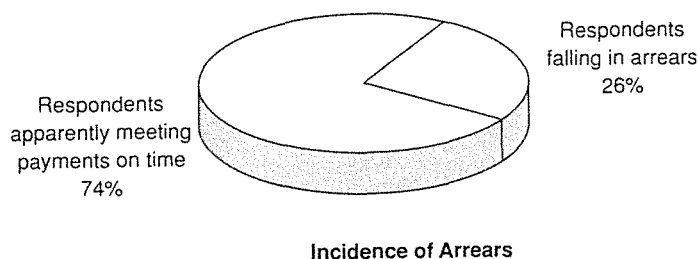
As detailed in the previous chapter, where a person is required to make maintenance payments in terms of a court order and fails to do so, this person is in "arrears". Failure to make payments on time is a criminal offence, although a good faith lack of means to pay is a good defence to the charge.

The expected legal response when a man violates a maintenance order by falling into arrears is to issue a warrant for his arrest. However, many maintenance courts issue a warning first, and until recently the Windhoek maintenance court followed a policy of taking action on arrears only after payments were missed for three consecutive months.

If the defence to the charge of failure to make payments in terms of a maintenance order is good faith lack of means, the criminal proceedings can be converted into a new maintenance enquiry to enable the court to re-calculate the maintenance payments at a level which the respondent can realistically afford. Conversion into a new enquiry is also appropriate in other situations where there is evidence that circumstances have changed since the initial order was granted.

Incidence of arrears

The respondents fell into arrears in 159 cases -- 26% of all the cases in the sample.



It is possible that this figure may underestimate the actual number of arrears cases. It is usual court practice to take action on arrears only if this is specifically requested by the complainant. The same approach is used in South Africa, where a 1986 study observed that "interviews with women in whose favour maintenance orders had been made indicated that many women did not report non-payment. This was most frequently ascribed by the women to being 'too tired' to start the whole procedure required, as well as their exasperation with the bureaucratic hurdles with which they would have to deal, especially as they doubted the effectiveness of the procedure in finally obtaining the money. Several also expressed fear of what the man might do to them if they laid a criminal charge."²²

There also seems to be some public misunderstanding regarding arrears. For example, it is not clear that complainants know that most maintenance courts will take action on

²² Burman and Berger (n17) at 339.

arrears only if they specifically request it. It also appears from the interviews that some women do not know that they can lay a charge of non-payment if the man makes only a partial payment and does not pay the full amount.

Characteristics of arrears cases

In 3% of the 159 arrears cases, the respondent fell into arrears following a substitution proceeding.

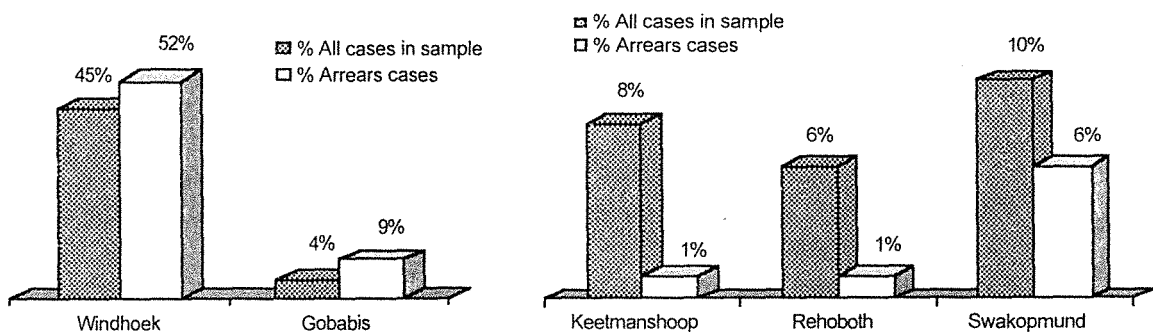
In 5% of the arrears cases, the criminal proceeding was converted into a maintenance enquiry which resulted in a new maintenance order.

In another 3% of the arrears cases, the arrears proceeding was followed by a subsequent substitution proceeding -- which may have been a request by the respondent for a decrease to make the payments more affordable.

Geographical distribution of arrears cases

The distribution of arrears cases generally followed the overall distribution of cases. However, there was a proportionately higher incidence of arrears cases in Windhoek (with 45% of all cases in the sample compared to 52% of all arrears cases) and Gobabis (with 4% of all cases in the sample compared to 9% of all arrears cases).

There was also a proportionately lower incidence of arrears cases in Keetmanshoop (with 8% of all cases in the sample compared to only 1% of all arrears cases), Rehoboth (with 6% of all cases in the sample compared to only 1% of all arrears cases) and Swakopmund (with 10% of all cases in the sample compared to 6% of all arrears cases).



Date of arrears

The average arrears case involved a complaint about arrears made 13 months after the date on which maintenance payments began in terms of the original maintenance order. However, more than one-third (35%) of all arrears cases involved respondents who fell into arrears within six months of the date on which maintenance payments were to

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begin, and 61% of all respondents who fell into arrears did so within the first year following the maintenance order.

TABLE 43

Number of Months Between Date Maintenance Payments Began and Date of Arrears

	MEAN	MEDIAN	MODE	MIN.	MAX.
Time lapse	13	9	3	0	59

TABLE 44

Number of Months Between Date Maintenance Payments Began and Date of Arrears

	%
0-6 months	35
7-12 months	26
1-2 years	21
2-3 years	9
3-5 years	9
Total	100

* NOTE: Zero means that the respondents fell into arrears in the same month in which maintenance payments were supposed to begin

Where the respondent fell into arrears following a successful substitution proceeding by the complainant, this did not tend to happen right away, but about 10 months afterwards on average. This indicates that the increase in the monthly payment was not in itself to blame for the respondent's failure to pay.

Amount of arrears

Amounts of arrears tended to be very high. The outstanding amounts ranged from NS\$70 to NS\$11 200, with the average amount outstanding being NS\$756. In most of the arrears cases, the outstanding amount was NS\$200-500.

TABLE 45

Amount of Arrears Outstanding

	MEAN	MEDIAN	MODE	MIN.	MAX.
Arrears	NS\$756	NS\$450	NS\$300	NS\$70	NS\$11200

TABLE 46

Amount of Arrears Outstanding

ARREARS IN NS	%
1-100	2
101-200	12
201-300	23
301-500	24
501-700	10
701-900	9
901-1100	3
1101-1500	5
1501-2000	6
2001-2500	3
>2500	3
Total	100

These amounts seem particularly high when it is kept in mind that the average maintenance payment totals only NS\$109/month.

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It is important to understand the implications of these amounts for the financial planning of the mother. When the father of the children does not pay, the children must still eat and the rent must still be paid. Furthermore, allowing arrears to add up reduces the likelihood that the respondent will be able to pay them off within a reasonable time period. Thus, it is particularly important to ensure that arrears proceedings are commenced promptly and concluded expeditiously.

Number of times respondent fell into arrears

For some men, falling into arrears is an habitual practice. About two-thirds of the arrears cases in the sample included information on the date of arrears. The average number of occasions on which the respondent fell into arrears in these cases was seven. In 23% of these cases, a single respondent fell into arrears *more than 10 times!*

TABLE 47
Number of Times Defendant was in Arrears *

	MEAN	MEDIAN	MODE	MIN.	MAX.
Incidence of arrears	7	5	3	1	28

TABLE 48
Number of Times Defendant was in Arrears *

	%
Once	8
Twice	9
3 times	17
4 times	11
5-7 times	22
8-10 times	9
11-13 times	12
14-16 times	5
17-28 times	6
Total	100

* Tables 47 and 48 are based on 108 cases out of the total sample of 159 arrears cases.

This data shows that present techniques for dealing with arrears are clearly inadequate. As suggested in the previous chapter, there is a need for new approaches to enforcement, such as greater use of orders for the attachment of wages.

Warrants and arrests

Warrants were issued in 89% of the cases in which the respondent fell into arrears. While this percentage is relatively high, there would seem to be no reason why warrants are not issued in *all* cases in which there are arrears. However, it is possible that there were cases in which payments resumed before a warrant could be issued.

On the other hand, although respondents fell into arrears more than 4 times in more than one-third (37%) of all arrears cases, there were only 2 cases in which more than 4 warrants were issued.

Arrest rate

The arrest rate is relatively low -- arrests occurred in respect of only about 51% of all warrants (101 arrests, compared to a total of 220 warrants issued).

TABLE 49
Warrants Issued and Arrests Made

	ARREST MADE	NO ARREST MADE
	%	%
First warrant	52	48
Second warrant	52	48
Third warrant	36	64
Fourth warrant	40	60

With respect to about one-third (32%) of the warrants issued, the failure to make an arrest appears to have been due to difficulties in locating the man in question. This provides support for the possibility of authorising the court to obtain photographs of persons who are subject to maintenance orders, to facilitate later identification.²³

However, with respect to about another one-third (30%) of the warrants issued, no reason was given for the failure to make an arrest -- indicating either poor record-keeping or else a failure on the part of the police to make reasonable efforts to arrest the offender.

The date on the warrant expired in the cases of 10% of all warrants issued, providing another indication that efforts at making an arrest may have been unsatisfactory. Another 11% of all the warrants issued were cancelled, perhaps because the amount owing was paid into the court voluntarily.

TABLE 50
Reasons for Not Arresting Respondent

	%
Changed work address	5
Changed home address	4
Unknown at work address	6
Unknown at home address	5
Unknown at home and work address	10
Date has expired	10
Court date given	6
Warrant cancelled	11
No arrest / no reason given	30
Other	12
Total	100

In cases where third and fourth warrants were issued, inability to locate the respondent was not often cited as a reason for the failure to arrest, probably because the court would not continue to issue warrants if the current work and home addresses for the respondent were unknown.

²³ This idea is based on an amendment to the Maintenance Act in South Africa discussed in the previous chapter at page 28.

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TABLE 51
Reason for No Arrest After Warrant Issued

	%
FIRST WARRANT	
Changed work address	6
Changed home address	4
Unknown at work address	6
Unknown at home address	4
Unknown at work and home address	12
Date has expired	7
Court date given	7
Warrant cancelled	9
No arrest / no reason given	32
Other	12
Total	100
SECOND WARRANT	
Changed work address	5
Changed home address	5
Unknown at work address	5
Unknown at home address	10
Unknown at work and home address	10
Date has expired	15
Warrant cancelled	10
No arrest / no reason given	20
Other	20
Total	100
THIRD WARRANT	
Unknown at work address	14
Date has expired	14
Warrant cancelled	43
No arrest / no reason given	29
Total	100
FOURTH WARRANT	
Date has expired	33
Court date given	33
No arrest / no reason given	33
Total	100

Time lapse between arrears and issue of first warrant

Data on the time lapse between the date on which the respondent first fell into arrears and the date on which the first warrant was issued shows that while 70% of all warrants were issued within 1-2 months of the date of arrears, 14% were issued 2-4 months after the date of arrears, 11% were issued 5-10 months later, and 5% were issued more than 10 months later.

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TABLE 52

Number of Months Between Date of Arrears and Date the First Warrant was Issued

	%
Within same month	56
1-2 months	14
2-4 months	14
5-10 months	11
>10 months	5
Total	100

These figures must be treated with caution, however, because the relationship between the date of arrears and the issue of warrants shows that the court records are not always consistent about which date is recorded as the date on which the respondent fell into arrears.²⁴

Nevertheless, it can be said that the time lag between the date of arrears and follow-up action by the court appears to be a key factor behind the accumulation of arrears.

Time lapse between issue of warrant and successful arrest

Although the majority of successful arrests were made within one month of the issue of the warrant, there were a significant number of problem cases which entailed longer delays. In the case of the first warrant issued, 2-6 months passed before an arrest was made in 10% of the cases. In the case of the second warrant issued, 30% of the cases involved a time lapse of 3 months or more between the issue of the warrant and the arrest.

TABLE 53

Number of Months Between Date Warrant was Issued and Date Arrest was Made *

	%
FIRST WARRANT	
Within same month	73
1-2 months	16
2-3 months	5
3-4 months	3
4-5 months	1
5-6 months	1
Total	100
SECOND WARRANT	
Within same month	30
1-2 months	40
2-3 months	10
3-4 months	10
10 months	5
14 months	5
Total	100
THIRD WARRANT	

* This data is drawn from only 59 of the 79 cases involving criminal proceedings.

²⁴ For example, there were cases where a warrant for arrears was issued *before* the date on which the respondent fell into arrears, indicating that the date which was recorded in the case file was not the date of the first occasion of arrears. All of the cases which involved warrants dated before the date of arrears have been excluded from the calculations of the percentages which are cited, but these cases point to the possibility of further inconsistencies which may be harder to detect.

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Within same month	75
5-6 months	25
Total	100

This may point to another area in which the efficiency of the police response, or the communication between the maintenance court and the police, can be improved.

Problems with police response

Anecdotal evidence indicates that the same kinds of problems experienced in respect of service of subpoenas for initial maintenance complaints apply to the service of subpoenas and warrants of arrest in arrears cases. Therefore, these problems could probably also be improved if the police identified a senior official who could take responsibility for follow-up on such cases.

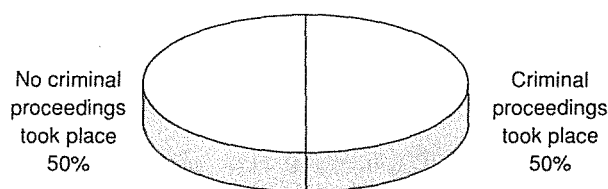
In June 1994, the following case was brought to the Legal Assistance Centre in Windhoek:

The complainant, who resides in Katutura, lodged a complaint with the Windhoek maintenance office in 1985 in respect of a child who was born in that year. She was granted a maintenance order for N\$60/month. She went to the court several times to collect her money, but in vain. She was told that the respondent could not be found, although he is employed by the Ministry of Home Affairs.

The client was advised to approach the maintenance court again to lay a charge for the non-payment of maintenance. She appeared on 2 August 1994, but no return of service had been received from the police. When the Legal Assistance Centre raised the matter with the police directly, we were informed that the summons had been issued on 21 June 1994. After investigating the matter, the police reported that at least 2 months were required to serve summonses in maintenance cases because of the large number of summonses which must be dealt with by the police. The police then requested the maintenance court to re-issue summons in the case at hand.

Criminal proceedings

Out of the 159 cases in which arrears were reported, criminal proceedings took place in only 79 cases (50%).



Criminal Proceedings in Arrears Cases

The data on service of warrants indicates that the respondent could not be located in about one-third of the 89% of arrears cases in which warrants were issued. Payments may have resumed in some cases, thus obviating the need for criminal proceedings. However, it seems clear that there are an unacceptably high number of cases where the respondent falls into arrears with no consequences.

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As discussed in the previous chapter, one factor involved here may be the usual court procedure of taking action against a respondent who is in arrears only after the complainant expressly approaches the court to request this -- a procedure which is likely to take longer than if the court instituted criminal action against defaulters automatically.

Time lapse between date of arrears and date of criminal proceedings

Data on this point was available in respect of only 59 out of the 79 cases which involved criminal proceedings. Thus, the conclusions on this point must be treated with caution.

The available data indicates that where criminal proceedings did take place, they began in most cases three months or less after the date on which the respondent fell into arrears. However, the criminal proceedings began 4 months or more after the date of arrears in at least 45% of all the criminal cases in the sample, and criminal proceedings did not begin until more than 6 months later in at least 31% of all the criminal cases.

TABLE 54

Number of Months Between Date of Arrears and Date of Criminal Proceedings

	%	CUMULATIVE %
Within same month	20	20
1-3 months	36	56
4-6 months	14	70
7-12 months	19	89
>13 months	12	100
Total	100	100

Thus, it is clear that there were a significant number of cases where the time lag was long enough to allow arrears to amount to a high level.

Some of these long delays may have been due to the difficulty experienced in locating the respondent. However, the fact that criminal proceedings did eventually take place in all of these cases indicates that the respondent was ultimately located. Furthermore, as noted above, in a majority of cases where warrants were not successfully served, the reason was *not* reported as difficulty in locating the respondent. Thus, perhaps it would have been possible for the police to make more aggressive efforts to serve warrants promptly.

This assumption is supported by the fact that the pattern of delays was similar, regardless of whether one or two warrants were issued; criminal proceedings did not begin until more than 6 months after the date of arrears in 21% of all cases where one warrant was issued, and in 27% of all cases where at least two warrants were issued. Delays of more than six months were more common in cases where a third or a fourth warrant was issued, but as noted above, failure to locate the respondent was seldom cited as a problem after the second warrant.

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TABLE 55

Number of Months Between Date of Arrears and Date of Criminal Proceedings by
Number of Warrants Issued

	ONE	TWO	THREE	FOUR
	%	%	%	%
Less than 6 months	79	73	25	0
More than 6 months	21	27	75	100

Here again, one cause of delay may be the fact that maintenance courts typically wait until the recipient of the maintenance payments has come in person to make a complaint about arrears. However, the data indicates that date of issue of the first warrant was within 1-2 months of the date of arrears in 70% of the cases in which warrants were issued.

There may have been cases where delays were caused because the respondent was arrested and released on bail, but then failed to appear in court on the appointed day. However, the data indicates that this was not a major factor behind delays, as the pattern of delay in the start of criminal proceedings does not seem to be correlated with the number of arrests which were made. If the problem in a large number of cases was the failure of the respondent to appear in court after being released on bail, then delays would logically be consistently longer in cases where this behaviour necessitated a second arrest.

TABLE 56

Number of Months Between Date of Arrears and Date of Criminal Proceedings by
Number of Arrests Made

	ONE	TWO	THREE
	%	%	%
Less than 6 months	67	50	0
More than 6 months	33	50	100

Furthermore, there were very few cases in which more than one arrest was made -- indicating either (a) there were few cases in which the respondent failed to show after being located and arrested; (b) respondents who failed to appear in court after an initial arrest hid themselves from the police successfully enough to avoid a second arrest; or (c) appropriate follow-up action was not always taken when a respondent failed to appear.

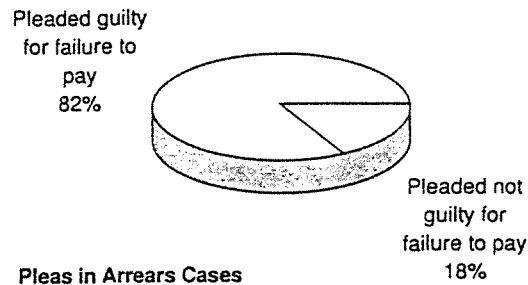
The data in the court files is not sufficient to pinpoint the reasons for delays in criminal proceedings precisely. However, the information which can be gleaned from the records indicates that there seem to be problems with the procedures which are utilised for getting respondents into court promptly.

Legal representation

There were no cases in which the respondent -- who is now an accused in a criminal trial -- was represented by a lawyer.

The plea

Most men who appeared before the court on charges of failure to pay maintenance admitted their responsibility; at least 82% of all the defendants in the sample pleaded "guilty" to the charge of failure to comply with a maintenance order.

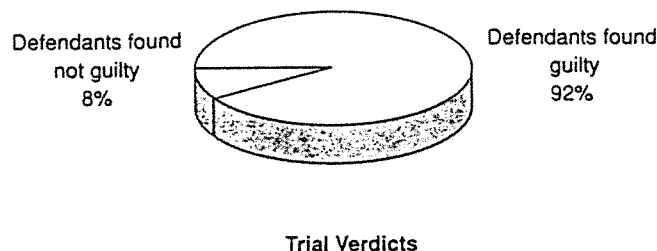


Because the monthly maintenance payments must be paid into the court, the state faces little difficulty in proving that payments have been missed. Therefore, except for the possibility of an administrative error, there are few defences other than a good faith lack of means which would warrant a plea of "not guilty".²⁵

It is standard practice in any criminal case where an accused pleads "guilty" for the court to question the defendant to make sure that this plea is made knowingly. Therefore, it is unlikely that defendants who pleaded guilty were unaware of the possibility of raising the defence of inability to pay.

The verdict

The vast majority -- 92% -- of all defendants who went to trial were found guilty.



If most men who fell into arrears did not lack the means to make the maintenance payments, why did they fail to pay on time? One possibility is that maintenance orders are simply not being taken seriously -- in part because of the failure of enforcement mechanisms.

²⁵ See discussion of defences at page 41-ff above.

This is another strong argument for increasing the use of orders for the attachment of wages.

Sentencing

Possible sentences

The courts are understandably reluctant to impose sentences of imprisonment which might cause the defendant to lose his job and then be unable to continue with the required maintenance payments. As discussed in the previous chapter, suspended sentences are considered to be the most appropriate sanctions for convictions on a charge of failure to comply with a maintenance order.²⁶

A suspended sentence is a sentence which is imposed, but suspended [postponed] on the condition that there are no further failures to make payments on time. If a person subject to a suspended sentence is convicted on a charge of falling into arrears again, within a time period set by the court, then the suspended sentence becomes a sentence of imprisonment which must be served in addition to any penalty which is imposed for the second offence.

There are other options. One alternative is periodical imprisonment, which can be imposed in the form of weekend imprisonment so as not to interfere with the defendant's ability to continue earning wages. However, some magistrates report that they do not like to impose a sentence of periodical imprisonment because if the defendant fails to appear at the prison at the required times, the only logical option is arrest and a sentence of continued imprisonment -- which would lead to the undesirable result of interfering with the defendant's capacity to continue work.

Fines and warnings are also competent sentences.

Sentences imposed

The most common outcome in the cases where the accused was found guilty was, predictably, a sentence which was totally or partially suspended. Suspended sentences of 2-6 months suspended for 1-5 years were imposed in 71% of the cases -- in a few cases in combination with a fine. The most frequently imposed sentence was three months imprisonment suspended for three years, which was the outcome in 37% of the cases involving suspended sentences.

²⁶ See discussion of appropriate sentences at page 44-ff above.

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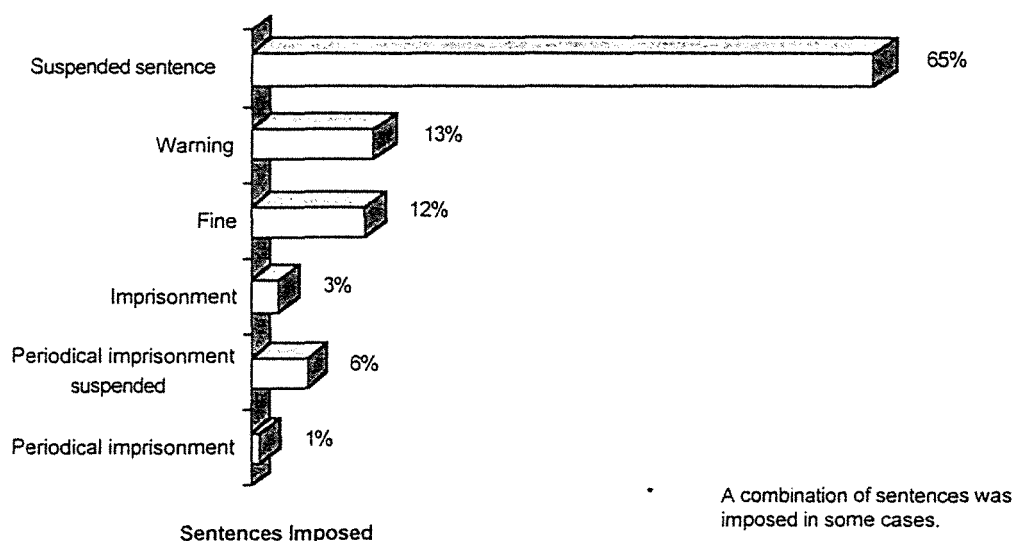


TABLE 57

Total Imprisonment Imposed by Total Imprisonment Suspended

	3 YEARS	4 YEARS	5 YEARS	TOTAL
IMPRISONMENT IMPOSED	%	%	%	%
2-3 months	14	0	0	7
3-4 months	71	50	10	51
4-5 months	10	20	10	12
5-6 months	0	0	20	5
6 months or more	5	30	60	24
Total	100	100	100	100

Actual imprisonment was very rare. Men served time in prison in only 3% of all cases where they were convicted of non-payment, including one case in which a sentence of 2 months' continuous imprisonment was combined with a sentence of periodical imprisonment for one hour. The highest sentence of imprisonment which was imposed without suspension was 6 months.

In 13% of the cases, only a warning was given. Fines ranging from N\$50 to N\$500 were imposed in 12% of cases, with N\$200 fines being the most common. In two-thirds of the cases where fines were imposed, they were imposed in conjunction with suspended sentences.

TABLE 58

Amount of Fine

	%
50	11
150	11
190	11
200	33
250	11
300	11
500	11
Total	100

Periodical imprisonment was seldom utilised, appearing as a result in only about 7% of the cases. There was one case in which a sentence of periodical imprisonment for one hour was imposed, in combination with a sentence of two months' continuous imprisonment.²⁷ In every other case involving periodical imprisonment, a sentence of 200-600 hours of periodical imprisonment was suspended in its entirety for 4-5 years.

To put this in perspective, a sentence of periodical imprisonment for 600 days would equal 25 24-hour days. If 48 hours were served in prison each weekend, this would be equivalent to spending every weekend in prison over a period of about three months. By the same measure, periodical imprisonment for 200 hours would be equivalent to spending every weekend in prison over a period of about one month.

Although some magistrates and prosecutors who were interviewed thought that periodical imprisonment was an option which could be more frequently utilised, others doubted that it would be possible to get the necessary degree of cooperation from the police to make weekend imprisonment workable.

Looking at an overview of all the cases, there were only 2 cases in the entire sample (about 3% of all the cases) where the convicted men spent time in prison, and only 9 cases (about 13%) where fines were imposed. In the remaining 84% of cases involving convictions, suspended sentences or warnings were the only outcomes -- meaning that, unless some of the suspended sentences were served at a later date, no actual punishment was experienced.

While these outcomes are consistent with legal precedent, it is necessary to ask what can be done to send out stronger signals that defaulting on maintenance payments will be taken seriously by the courts. It was not possible to extract data from the case files on the follow-ups to suspended sentences, which should be promptly implemented once it is clear that the respondent has no intention of improving his record of compliance. It might also be helpful if suspended sentences were utilised in combination with more assertive approaches to the recovery of arrear maintenance, such as the attachment of property or wages.

Recovery of arrear maintenance

Orders for the payment of the amount in arrears were issued in 82% of the cases where the accused was found guilty of a failure to pay.

Some cases may have failed to include an order for the payment of arrear maintenance because the accused paid the amount owing voluntarily. For example, anecdotal evidence indicates that some magistrates threaten a more severe sentence if the money owing is not paid into court immediately, a tactic which has reportedly produced effective results in some cases.

²⁷ This approach does not seem to be consistent with the law on periodical imprisonment, which authorises periodical imprisonment for periods of not less than 100 hours and not more than 2000 hours. Criminal Procedure Act 51 of 1977, section 285.

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The orders for payment of arrear maintenance covered amounts ranging from N\$120 to N\$2800, with an average of N\$880. Most of the orders (83%) directed that the arrears be paid off in monthly instalments ranging from N\$10 to N\$500, rather than in a lump sum.

TABLE 59
Amount of Arrear Maintenance Awarded

	%
1-299	12
300-599	29
600-999	24
1000-1499	17
1500-1999	12
>2000	7
Total	100

TABLE 60
How Arrears to be Paid Off

	# CASES	%
Monthly	48	83
Lump sum	10	17
Total	58	100

The average order for payment in instalments directed the payment of N\$963 in arrears in monthly instalments of N\$83 (over almost a year).

TABLE 61
Amount of Arrear Maintenance to be Paid Off Monthly

	# CASES	%
1-49	14	30
50-99	14	30
100-149	12	26
150-500	6	13
Total	46	100

There was no clear correspondence between the amount of arrears owing and the payment schedule which was ordered; for example, larger amounts of arrears did not necessarily mean higher monthly instalments. The monthly instalments were probably more strongly influenced by the man's ability to pay.

Orders for lump sum payments covered arrear amounts ranging from N\$200 to N\$900, with an average of N\$439.

In general, the higher the accumulation of arrears, the more likely it is that the court will order payment in relatively small monthly instalments instead of in a lump sum. For example, the average amount of arrears covered by an order for lump sum payment was less than half of the average amount covered by an order for monthly payments (N\$439 for lump sum payments, as compared to N\$963 for monthly instalments). This pattern of response is understandable in one sense; if the payment demanded is totally unrealistic in terms of the man's resources, payments are likely to fall into arrears again. However, the result from the point of view of the children is that the money is not there when it is needed.

This dilemma highlights the importance of encouraging prompter action when a man falls into arrears, both in terms of initial action and in terms of proceeding with the criminal trial. Prompter action would prevent arrears from ever mounting to such high levels, meaning that repayment in a lump sum or over a very short instalment period would be more feasible.

There appear to have been no cases in which property of any sort was attached for the payment of arrears. This seems to be another possible indication that maintenance issues are not taken as seriously by the court as other matters, since it is not so rare for property to be attached for the satisfaction of ordinary civil judgments where payments are in default.

Several courts reported the use of somewhat unorthodox but effective methods in cases where a respondent has fallen into arrears. More than one magistrate stated that even before the accused is asked to plead, the possibility of a prison sentence is emphasised. The defaulter is then given a limited time period to come forth with the total amount of arrears owing. If the arrears are paid off within the appointed time, then the criminal case does not proceed.

For example, in the one case observed by the researcher, the accused was given 45 minutes to come up with the amount owing if he did not want the criminal case to proceed. He hurried away and returned with the money.

Another court used the technique of remands in a similar fashion. Where a respondent has fallen into arrears, the case will be remanded before the trial proceeds to give him a chance to pay the amount owing. If the arrears are high, the case will be remanded at least twice to allow for two "instalments". If the arrears are paid off, the case is removed from the roll.

This anecdotal evidence indicates that the courts themselves are searching for better enforcement mechanisms, supporting the idea that there is a need both to strengthen the law and to encourage more effective use of enforcement techniques available under the existing law.

Orders for attachment of wages

In terms of the existing law, orders for attachment of wages can issued by the court whenever a defendant is found guilty of failure to make payments as required. This means that the court can order that the employer deduct the required maintenance payment from the respondent's wages and pay the money directly into court. Employers are bound by law to comply with such a court order. The Labour Act also makes allowances for such deductions.²⁸

This is probably one of the most effective ways to ensure compliance with a maintenance order. However, it is seldom utilised. Attachment orders were issued in only about 10% of all cases where the defendant was found guilty of a failure to pay.

²⁸ See discussion of orders for attachment of wages at page 46-ff above.

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There were most often used in instances where the defendant was employed by the state.

As discussed above, interviews with magistrates in different areas indicate that the failure to utilise this option often stems from a misunderstanding of the law. For example, magistrates frequently commented that they did not use orders for the attachment of wages because respondents did not request them.

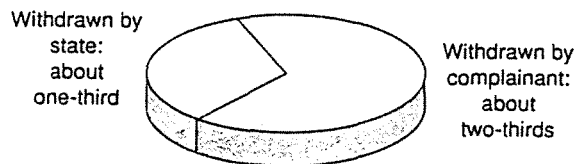
This is probably the single most effective enforcement mechanism available. It is submitted that such orders should be more frequently utilised as authorised by the existing law, and that the Maintenance Act should be amended to allow the use of such orders in advance of default on maintenance payments.²⁹

²⁹ The use of orders for the attachment of wages may be increasing, at least in Windhoek. Court statistics for 1994 show that sentences for failure to comply were handed down in about 95 cases, while orders for the attachment of wages were issued in about 38 cases. Information provided by the Windhoek Maintenance Court to UNICEF Namibia, March 1995.

WITHDRAWALS

About 9% of all maintenance complaints were withdrawn or struck off the roll, with a small percentage of these being subsequently reinstated. Withdrawals and removals from the roll also occurred in other contexts, such as substitution or arrears proceedings.

About two-thirds of all cases which were removed from the roll were withdrawn by the complainant and one-third by the state.



Cases Removed from the Roll

A wide range of reasons were cited for withdrawal. For example, in 30% of the cases, the reason for the withdrawal was that neither party appeared. In 14% of cases the complainant failed to appear, while the reason for the withdrawal in 13% of cases was that the respondent could not be located.

In 6% of the cases the parties reached a private agreement which was not made into an order of court. In 5% of the cases the complaint was withdrawn because the defendant was unemployed, and in another 4% because the parties were reconciled in some way.

In 3% of the cases, the reason for the withdrawal was that the children were taken into the father's custody.

Among the reasons for withdrawal which appeared less frequently were the following: the children were self-supporting; the respondent claimed that he was not the father and the complainant apparently did not choose to contest this claim; the respondent died before the case could proceed; and a divorce action (at which the issue of maintenance would be addressed) was pending.

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TABLE 62
Reasons for Withdrawing Case or Case Being Struck Off Roll

	%
Both parties did not appear	30
Complainant absent	14
Respondent cannot be found	13
No reason given	10
Reached agreement	6
Defendant unemployed	5
Reconciled	4
Case withdrawn	4
Children in father's custody	3
Children self-supporting	1
Defendant is not father	1
Accused passed away	1
Parties separated / divorce pending	1
Other	5
Total	100

About 12% of the cases which were withdrawn were reinstated.

Although some maintenance officers have complained that women come to the maintenance court without being serious about following through with their complaints, the data on withdrawals does not bear this out. The percentage of cases which are withdrawn or struck off the roll is not unacceptably high, and the reasons for withdrawal vary and include many factors which bear no reflection on the complainant's attitude.

TRANSFERS

Transfers of maintenance orders from one magisterial district to another took place in only about 1% of all cases. Because the number of relevant cases was so small, no attempt was made to analyse the data relating to transfers.

This interview was conducted in February 1994 in Otjiwarongo. The woman interviewed resides in Okakarara:

I have 6 children with 3 different fathers, but the fathers do not maintain the children and they do not give any attention to the children at all. I tried to talk to them before I reported but they would not listen. One of the children left school because I could not afford to maintain them all alone.

The father of one of the children passed away and the child is now a problem as he is the one who left school and was once detained for attempted rape. The only consolation I am getting is that there are some family members who give attention to the child in a way.

I am working at a school where I am employed as a cook, but my only salary is food rations and no money.

I reported the father of my 4 children who was ordered to pay N\$50 for all 4 children, which was later raised to N\$100. Although the magistrate always posts the money to me, he did not do it this time, and I had to come from Okakarara by taxi which charges N\$24 per round trip.

There is a now magistrate's court in Okakarara, but this woman made her maintenance complaint before it was in operation. The proper procedure in this case would be for the case to be transferred to Okakarara so that the woman could collect payments there.

CASE STUDIES

Statistics alone do not give a very good picture of the situation of the individuals who use the maintenance court. The following case studies are drawn from interviews, group discussions, and cases which clients have brought to the Legal Assistance Centre.

None of these stories are presented as "typical cases", but rather as the individual experiences of some men and women who have maintenance problems.

Mothers' stories

CASE STUDY # 1

This interview was conducted in February 1994 at the Swakopmund maintenance court, where the mother had come to collect her monthly payment. It shows how women often approach the maintenance court only after private negotiations with the father have failed, or after the relationship between the parents has broken down so completely that rational discussion about the children's needs is no longer possible -- themes which recurred in a number of interviews:

We were living together, but he did not even buy food or give money for food even though he was eating and had his laundry done there. I had no choice than to take my two months old baby to my mother in Uis and we broke up the relationship.

The child started schooling in Uis and is only coming down to Swakopmund during holidays. When the child was due to come for the summer holiday the father kept on asking when the child was coming as if he was eager to see him. He said that we (me and the child) should see him before she went back to Uis so that he could give her something.

The time came for her to go back to school and we went to his house to see him, as he told us to do. Upon our arrival we found his new girlfriend in the house who informed us that he was out and would be back very soon. She offered us coffee and we sat down and waited for him. After a while, he arrived on his bike and when he saw us he pretended as if he did not expect us there. He asked his girlfriend "what are these bitches doing in our house?". I said we are not dogs and that we are here because he said we should see him or contact him when the child was going back. Where should we have contacted him if it was not at his home? Having said that, he pushed me out of the house, I can say that he actually threw us out of his house and told us to go and report him for maintenance if we wished to.

I was left with no alternative but to go to the maintenance court.

Now I have no problem as I am getting the money regularly to assist me in maintaining my child. I am very thankful that there is such a law which can eliminate conflicts which always arise when you approach the man to support his child.

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CASE STUDY # 2

This interview was conducted in February 1994 in Otjiwarongo. The woman interviewed resides in Okakarara:

I am a nurse. the father of my child went into exile in 1980 while the child was hardly a year old. He came back with the UN repatriation programme and was fortunate to find employment in the Government. On his return he wanted to renew the relationship but unfortunately I was living with another man.

While in the process of trying to renew the relationship, he bought the child two dresses, which was the first and the last contribution he has ever made towards the maintenance of his child.

During the December holidays, the child was in Windhoek to visit my brother. As a child she is very keen to be identified with a father and as a result she made several futile efforts to meet her father. Whenever she went to his home her step-mother would tell her that the father was asleep, and at the office he was too busy to meet her until it was time for her to go back to Okakarara. This was against my will as I do not want the child to have anything to do with the father.

Although I admit that it is now too costly to maintain the child alone, I cannot convince myself that I have to go and report the man about his own child. Is it a way of reminding him about the existence of the child, or is it begging?

The researcher tried to convince the interviewee that approaching the maintenance court should not be seen as begging, but as acting in the best interests of the child.

CASE STUDY # 3

A woman who attended a group discussion in Katutura in June 1993 told this story. She stated that her monthly salary was N\$200, out of which she pays N\$80/month in rent:

I have six children of my own, all of whom were never supported by their fathers. The father of three, I do not know where he is, I have not seen him. The father of the last three came to me with his girlfriend while I was pregnant, to show her to me. When I asked him for maintenance, the uncle who was staying with me stopped me, saying that it was not the way to do it.

I went to the maintenance office and reported the case. When I reported it, they never took it up. They said the name of the father is no more in their files, and that I must go and look for him. I found him and asked him whether he received the summons. He told me that he did not and that I can go back and report him for maintenance. I went back to tell them that I found him and that they should send him the summons. I went to him again and asked whether he received it, and again he told me to go and report him.

I was struggling. I ended up at the social welfare office, who told me there was nothing they could do. They advised me to look for people who can pray for me.

This case illustrates how women can become discouraged as a result of problems in serving summonses.

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CASE STUDY # 4

This interview was conducted in March 1994 at the Keetmanshoop maintenance court:

I have 2 children, 8 years old and 6 years old. I am a domestic worker.

The father of my second child does not have a problem with maintaining his child, but I have a problem with the other father. In 1989 he asked the child to visit him in Windhoek when the child was three years old. On the second day the child went missing from his home. We heard the news over the radio and that was a shock to my mother since that was the first grandchild in the family. My mother was very much upset and she and my elder sister went to Windhoek to collect the child.

It is now 5 years that he did not see the child, neither did he give her anything. My mother who was helping me has passed away and my father is unemployed. I have already laid a complaint a month ago and am here to find out what has happened.

The clerk of the court asked this woman to return on the following day for information because the prosecutor was busy in court and there was no return of service from the police.

CASE STUDY # 5

This interview was conducted in March 1994 at the Keetmanshoop maintenance court. In this case, as in many others, the woman did not know the whereabouts of the fathers of some of her children, meaning that she would be unable to utilise the maintenance court to get child support in respect of those children.

I am a mother of 3 children. My first-born is 14 years old and is now in grade 8, while the second child is 5 years old. I do not know where the fathers of my first two children are. The first one went to South Africa and I do not know where to find him. The second one was working for the army and I do not know where he went when the Keetmanshoop base ceased to exist. The father of the third child works here in Keetmanshoop as a builder. I stayed with him here until it was nearly time for the delivery. He used to give money to support the child, but he stopped in February when he started a new girlfriend. He announced the end of our relationship yesterday.

I am a farm labourer and cannot afford to support this child alone, therefore I am here to lay a complaint against the father of my last child.

CASE STUDY # 6

This is the story of a woman who came to the Legal Assistance Centre for help after her efforts to obtain maintenance from the father of her child resulted in violence:

The woman in question returned to Namibia from exile pregnant with her boyfriend's child. The relationship ended, and the father refused to pay maintenance for the child.

The mother made a complaint in April 1992 to the Swakopmund maintenance court. Despite the fact that the father of the child was employed by the government in Ongwediva, it took the police some time to successfully serve a summons on him. He was eventually traced and ordered to pay N\$50/month, which was later increased to N\$100/month. When he failed to make maintenance payments, the mother laid a charge against him.

He responded by coming to her home in Arandis and taking the child away. When she went to the north to get the child back, the father assaulted her in the presence of the child and three other men. As a result of this assault, she developed complications with a cataract operation which she had recently undergone, and her eyesight deteriorated to the point that laser treatment was required.

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When the mother laid a further charge of non-support, the father came to Arandis and beat her with his fists, kicked her and threatened her with a pistol, saying that he would kill her so that she could not report him for maintenance anymore. Her eyes were further injured during the course of this assault, and a further operation was required to repair the damage.

She laid a charge of assault with the police, but the case was dismissed due to insufficient police investigation and because she was unable to attend court on the day of the trial (because the police had not timeously informed her of the date of trial).

The woman then approached the Walvis Bay Advice Office of the Legal Assistance Centre for help. With legal help, she was able to bring a civil claim for damages in the High Court based on the two incidents of assault. The man failed to respond, and in 1994 she was awarded default judgments of N\$5000 and N\$7500 in respect of the two assaults.

CASE STUDY # 7

The following is an excerpt from a letter written to the Permanent Secretary of the Ministry of Justice in January 1993 by a woman residing in Windhoek before she approached the Legal Assistance Centre for help (reprinted with her permission, omitting all names). This correspondence provides a vivid picture of the frustration experienced by some women:

My son had been receiving his R70 maintenance from his father since the beginning of the year. The maintenance file was opened by the state prosecutor in Grootfontein while I was staying there, But then I was transferred to Windhoek, and requested the file to be transferred to here.

Grootfontein clerk of the court told me that she transferred to the file last November, but [the maintenance officer] of the maintenance court here said that he did not receive it. As a result, my son had been without his meagre maintenance for the past four months and this is very inconvenient and a heavy strain to my meagre income.

Under normal circumstances, I would have asked the maintenance court to make my son's father fulfil his obligation. But now that the file got lost between the two magistrate offices in Grootfontein and here, I have no idea of how to handle the situation. Particularly because [the maintenance officer] told me that the defendant would sue if another file was to be opened while there was already the one that got lost.

Could you please advise on how to first of all recover my boy's dues for the past four months, and institute the right action that would enable my son to get his dues monthly as scheduled?

The woman in question was advised by the Ministry to go to the maintenance court and make a affidavit regarding the lost file. The respondent was summoned to come to court on 16 April 1993 to discuss the question of arrears, but there was no return of service -- despite the fact that he was employed by an international agency with offices in the centre of Windhoek. The woman then wrote another letter to the Permanent Secretary of the Ministry of Justice, which read in part as follows:

It would be easy to tell me that my quarrels should be with the police, but I think it should be with your ministry that employed an incompetent clerk who lost my file. I therefore demand that she be brought to book, and immediate steps be taken to ensure the resuming of my child's maintenance...

Meanwhile, I would like to ask your ministry to give me some money, an equivalent of the maintenance in arrears which... will be R470 by the end of this month. Then when the long arm of the law has stretched enough to reach the father of my son, you can refund yourself with the money he owes my son in arrears...

Meanwhile, the same woman was also having difficulties in respect of a second maintenance issue. Her ex-husband and the father of her daughter was ordered to pay maintenance in terms of the divorce order, but had never complied with this order. A date was set for a hearing at the maintenance court, but again there was no return of service. According to the complainant, the man in question was employed by a local NGO. She also addressed this problem in her letter:

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If the police are that uncooperative, I believe your ministry can employ its own messenger of the court to make sure the summons has been served.

In this regard I also request for some R480 which this father of my daughter owes her in arrears of maintenance, when you have reached him than you can refund yourselves with what he owes.

My meagre salary can just no more sustain me and the kids. For the boy, I already have some arrears in hostel funds, and unless if I paid it at the end of this week, my son will be barred from all activities. During the next term of school, I must also pay my son's hostel fees R200 and school fees R50 and buy him all the things like winter clothes and other things he may need at school.

I have to pay a baby sitter for after hours and the kindergarten for my baby which is R200 per month. I am deeply in debt, all because of those incompetent people employed to work but who do not deliver the goods ...

In the case of the lost file, the father was found not guilty on the change of non-payment, apparently because of problems of proof, and there was no order for the recovery of arrear maintenance. A new order for the future payment of maintenance of N\$70/month was instituted, however. The mother was also unable to collect arrear maintenance from the other father, who claimed that he was unemployed.

She subsequently requested an increase in the amount of maintenance payment made by the first father, to N\$150/month. At this stage the complainant was represented by the Legal Assistance Centre. On 6 September 1993, the case was postponed at the respondent's request, to allow him to arrange for legal representation.

The enquiry resumed on 23 September 1993. It was ascertained that the same man was already subject to a maintenance order for N\$150/month in respect of another child. He was responsible for the support of 5 children altogether, and there was evidence that he received N\$550/month as a child allowance from his employer. On this basis, the magistrate ordered that he pay N\$110/month in respect of the complainant's son.

Fathers' stories

CASE STUDY # 8

This interview was conducted in 1993 at the Windhoek maintenance office with a 28-year-old Ciriki-speaking man who has 2 children from 2 different mothers. He earns about N\$882/month. There are several themes in this account which were often raised by men - the belief that the mother has personal motives for bringing a maintenance case, and the fear that the maintenance payments will be used to support other men's children.

One of the mothers of my children, who is Xhosa-speaking and living in Windhoek, sued me for maintenance. Before I was reported I used to buy food and clothing for the children, and I was also prepared to pay for medical expenses.

She reported me for maintenance because she was still in love with me. She came to my house one night and broke the window because I did not allow her in.

There were no negotiations before she went to court.

I have a good relationship with my children. I collect the child for weekends, but there was a time when the mother was refusing to give me access to the child. I reported this to the maintenance officer who talked to the mother, and now I am not having an access problem.

I am not happy with the maintenance order because the mother of my child has two other children who are not being maintained by their fathers, but she did not report them. As a result the mother of my child is using my money to

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maintain all her children. I know this because when we were still having a relationship, I used to maintain all of them. I feel that it is unfair for me to pay while the others do not.

I took the order seriously. When I had a problem I came to the maintenance offices to find out what to do, but I left because the queue was so long and I was not feeling well. Because of my illness I did not pay for two months.

I do not want to have deductions from my wages because I am having other deductions and there will be a lot of administrative work for my employer.

My family is feeling sorry about it.

The maintenance officer explained that his policy is to encourage mothers to allow fathers to have access to their children when there is a maintenance order as a check on the mother's honesty, saying that there were cases where mother continued to collect payments even when the child is dead. However, in terms of existing law, single fathers have no right of access to their children unless this is granted by the High Court.

CASE STUDY # 9

This interview was conducted in February 1994 in Otjiwarongo. It illustrates the fear shared by many men that women abuse maintenance payments.

I have 4 children by 3 different women. The mother of my 2 children and I were living together as husband and wife. At a time one of the children was ill and was taken up in the Windhoek hospital. I used to take money to the mother who was in Windhoek due to the illness of the child.

While in Windhoek, the woman started a new relationship, with the result that when she came back she broke up the relationship with me. Without speaking to me or consulting me, she reported me for maintenance upon her return from Windhoek.

I am now married with 1 child, and another child from another woman.

The mother of the 4th child has heard that the mother of my 2 children has reported me for maintenance and that I pay in money every month towards the maintenance of the 2 children and she is having intentions of laying a complaint too.

How shall I afford all this?

I am having a problem. Although I pay in money every month, one of the children came to me complaining that he did not have shoes. When I approached the mother to find out, she was claiming that the boy lost the shoes she bought in December, while the boy insisted that he did not get shoes in December.

I requested the Ministry of Health and Social Services to investigate the conditions of the children as the mother drinks too much alcohol, but they have not done anything up to now.

I want the law on maintenance to be amended so that women bring receipts of what they buy with the money so as to avoid misuse of money by the women. Also, children who are receiving money through the maintenance law should be visited by a social worker who will assess their conditions from time to time.

CASE STUDY # 10

This interview was conducted in 1993 at the Windhoek maintenance office with a 26-year-old Damara-speaking man who has 2 children, an 8-year-old girl and a 4-year-old boy, from different mothers. The mother of the girl was pregnant with his third child at the time of the interview. He was earning N\$1607/month. The involvement of both of the grandmothers of the child in question makes this account particularly interesting.

I broke off the relationship with the mother of the girl, who was born while I was still at school. While I was in school, my own mother supported the child who was being cared for by its grandmother on the mother's side [the mother's mother]. The granny was staying on the farm.

I left school in 1989 and started work. The mother of the girl then reported me for maintenance.

The grandmother of the child came to my mother to talk about the maintenance but it was too late. I was reported already. The grandmother was not aware that her daughter had already reported me for maintenance.

I took the order very seriously. [The court records showed that he had been paying regularly since the order was instituted. He was sometimes in arrears for a month, but always paid the amount owing within the next month.]

In 1993 I renewed the relationship with the girl's mother and stopped paying. She did not complain about it. When we broke up, she reported me again because I was not paying during that period when we renewed the relationship.

My relationship with the child is very good. My mother is taking care of the child after school. I visit her if she gets ill, and the mother and I have agreed that I will take the child to my mother once I have moved in with her [his mother], which will be in the near future.

I am in favour of having deductions from my wages. I have already collected the forms to take to my employer. My family is not aware about this. It will give me a bad name if they know about it.

CASE STUDY # 11

This case summary is based on an interview conducted at the Windhoek maintenance court in 1993 with a recently divorced Afrikaans-speaking man who is the father of one child and was earning about N\$1000/month. He was at the maintenance court to make his monthly payment:

The divorce was finalised in the man's absence, and he was unhappy with some of the terms of the divorce order. It specifies that he must pay N\$200/month in maintenance, and allows for visits of only one hour each weekend. The child will be allowed to visit him during holidays after she is 12 years old.

The man would like to have more frequent access to the child, so that he can take her for visits to his mother and sister. He feels that this would be fair, since the child is not staying with her mother, but with her grandmother.

He does not think that he should have to pay maintenance at all, on the grounds that it was his wife who left. However, he also thinks that N\$200/month is too high, and the N\$100/month would have been a fairer amount.

This man complained about the time he lost from work when attending the maintenance court for the enquiry, and the time he continues to lose when coming to the court to pay in his money.

He also feels that the maintenance officer was rude to him and that he was not given a chance to state his case properly.

CASE STUDY # 1 2

This is a summary of the story of a client who approached the Keetmanshoop Advice Office of the Legal Assistance Centre in 1995:

The man in question is married and has 4 children, 3 of whom are still minors and attending school. The wife became involved with another man and moved out of the common home to stay with her relatives. Despite the fact that the couple are married in community of property, the house which the husband and wife had previously shared was registered in the wife's name.

The wife, with the assistance of her family, succeeded in evicting the husband from the house. The husband rented another place, where he lives with another woman. Shortly after this, he was reported for maintenance for the children of the marriage, who remained in the custody of their mother. The court ordered him to pay N\$240/month maintenance in total.

The husband feels that it is unfair that he was forced to move out of the couple's joint home, as well as to pay what he considers to be an unfairly high amount of maintenance.

As there have been no changes in the circumstances of any of the parties since the maintenance order was issued, the chances of obtaining a decrease in the maintenance order would be small in this case. The client was advised to institute divorce proceedings in order to obtain finality on the division of the couple's joint property.

Two sides of the same story

CASE STUDY # 1 3

In Tsumeb, the researcher found a couple waiting at the maintenance court who agreed to be interviewed separately. The two interviews took place in April 1994, and tell quite different stories:

Her story: I am a teacher by profession and a mother of 1 child, although I also stay with my brother's 2 children. The father of my child and I separated while I was three months' pregnant in 1991. He contributed towards the payment of hospital fees to the tune of N\$400 and that was the last time he ever contributed something towards the upbringing of the child.

We have a good relationship for the sake of the child, even after I have reported him for maintenance. We reached an agreement that he will pay the N\$50 if he can afford. If he cannot afford, he should inform me well ahead of time for me to make the necessary arrangements. No arrears will be charged against him if he has told me that he cannot afford. If I find out from the court that he did not pay, then that means that he did not tell me in advance that he cannot pay.

His story: I am a father of 4 children, working in Oshakati. I am married to the mother of my 3 children. I used to send money to the mother of the child in question whenever she asked for that. If she did not ask, I took it for granted that she can afford to support the child alone since she is employed and earns more than me.

She phoned me one day and because I did not have money to send to her, she became angry and reported me for maintenance. That was the last day we talked until today when we met in the court. I am not angry with her and will continue to buy things for the child.

COMMUNITY ATTITUDES AND CUSTOMARY LAW

It appears from interviews and group discussions that people's willingness to use the maintenance courts depends to a great extent on community attitudes and dynamics.

There are differences between the attitudes of men and women in the same community in some instances, although this is not always the case. For example, a Nama-speaking man interviewed in Windhoek made the following comments about family and community attitudes about maintenance:

In my family there are illegitimate children, some of whom are not being maintained by their biological fathers. The family is supporting the children themselves. They do not want to report the men for maintenance. Maybe they are too proud to report a man for maintenance. They feel that if the man does not want to maintain the child, the family will do it and he will see.

But that does not mean that the women should carry the responsibility all by themselves. I sympathise with the women who report the men for maintenance. They should not be seen as being greedy. It is the fathers' responsibility to maintain their children.

Community attitudes are influenced to some extent by customary laws and practices, as well as by the social and economic characteristics of different communities. This report will not attempt to provide a comprehensive survey of customary laws on maintenance. However, the following sections will highlight some points about the intersection between customary law and civil law on maintenance in the course of examining attitudes towards the maintenance court procedure in different communities.

Northern regions

Oshiwambo-speaking areas

In the Ombalantu area, one problem which featured prominently in workshop discussions was the issue of absentee husbands who go away to work in the urban centres. These men stay away for many years without visiting their wives, often acquiring a second or even a third family which is supported at the expense of the first. The wives in the rural areas, who are expected to remain loyally at home tending the cattle and working in the fields, often have no information about their husband's earnings.

Workshop participants also felt that men's attitudes about maintenance were influenced by the matrilineal nature of Owambo society, where children are regarded as part of the mother's family regardless of whether they are born inside or outside of marriage.

Some women stated that they had sought help with maintenance problems at traditional courts, but had been told that these are family matters in which the court will not intervene. Other women had gone to the church for help, only to be told that they must be patient and loyal to their husbands until death. Women who had not thought of approaching the

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maintenance court before were open to the idea once the procedure was explained to them, and many of them were surprised to learn that there is now a magistrate's court in Ombalantu.

In Onamula, Oniimwandi and Uukwangula, informants in group discussions explained that in the days of their ancestors, there were no problems with maintenance outside of marriage because women who fell pregnant while single were punished with death. After this practice was abandoned as a result of missionary influence, traditional leaders began to force men who impregnated girls outside of marriage to pay damages.

Participants in the discussions expressed the view that little is done to punish those who do not pay the required damages, and that the system of paying damages does not really accomplish the result of ensuring that children born outside of marriage are properly cared for. Thus, the burden usually falls on the mother's extended family. There seemed to be a general perception that the traditional courts have ceased to be effective in such matters, although community members seemed to have no greater confidence in the ability of the magistrate's courts to deal with maintenance cases.

In Onamula, some women expressed the view that a married man's highest priority should be to take care of his wife and the children of the marriage, with maintenance for children born outside of the marriage being a distinctly lower priority.

In Uukwangula, it was reported that most men believe that women who go to the maintenance court are seeking money for their own use, rather than money for the needs of their children. According to court personnel at Ondangwa, this point of view is frequently encountered.

It is common in cases which are handled by the Ondangwa and Ombalantu courts for men to protest against maintenance orders on the grounds that they would rather take custody of the child than pay money to the child's mother.

Maintenance court personnel in Oshakati reported that when a woman in the area does make a maintenance complaint, sometimes the respondent or his family will offer her some compensation to discourage her from proceeding. They also believe that some women do not follow through with complaints because they have been threatened by the respondent.

Another problem which is specific to the area is difficulty with serving subpoenas due to the long distances which are often involved and, in the view of court personnel, sometimes because of problems with the police. Court personnel in Ondangwa and Ombalantu also report that there are many cases in which no maintenance order is made because the respondent is unemployed and has no other means -- with the result that complainants sometimes blame the court for failing to help them.

A 1992-93 survey of three Oshiwambo-speaking communities in the north carried out under the auspices of the Namibia Development Trust (NDT) found that 18,1% of the households in Uukwambi included someone who was receiving maintenance payments (although not necessarily in terms of a court order). This was the case for 15,4% of the households in Uukwanyama and 6,5% of the households in Ombalantu.³⁰

³⁰ Namibia Development Trust, *Improving the Legal and Socio-Economic Situation of Women in Namibia: Uukwambi, Ombalantu and Uukwanyama Integrated Report* (NDT, January 1994), Part 1 at ES7. For

Households in Receipt of Maintenance Payments in
Three Northern Communities, 1992-93

	%
Ukwambi	18,1
Uukwanyama	15,4
Ombalantu	6,5

Source: Namibia Development Trust, *Improving the Legal and Socio-Economic Situation of Women in Namibia: Uukwambi, Ombalantu and Uukwanyama Integrated Report* (NDT, January 1994), Part 1 at 43.

The comments which emerged in workshops during the course of this study reflected similar problems and attitudes as the ones which emerged during the group discussions organised by the Legal Assistance Centre (LAC). For example, the following statements were recorded:³¹

"There are too many men and migrant labourers who do not support their children" (Ukwambi)

"Men have families and are not supporting them. Some men have a first family in the north and another family where they work in the south. Everything is for the second family." (Uukwanyama).

The NDT study also found, like the LAC study, that priority was given to supporting family members within marriage, while women who were single, divorced or separated seldom received financial assistance from the fathers of their children.³² Women interviewed during the course of the NDT study also noted that, while the concept of maintenance was generally unfamiliar in the area, some absent fathers made occasional gifts of cash or clothing to their children. It was also noted that women who were having difficulties supporting their children sometimes consulted with the father's family, although this was not always successful.³³

Overall, the information which is available on maintenance practices in Oshiwambo-speaking communities in the north indicates that there is a particular need for public education on the concept of maintenance, as well as on the powers and limitations of the maintenance courts. Some people also suggested that traditional courts should be authorised to deal with maintenance issues on a similar basis as the magistrate's courts.

Caprivi

Experience in the Caprivi provides an interesting example of the possibility of cooperation between traditional law structures and civil law structures on the issue of maintenance.

Maintenance court personnel in Katima Mulilo reported that the traditional courts are often more effective in dealing with maintenance cases than the maintenance court. In order to understand how the traditional court deals with maintenance, an interview with the Ngwezi Khuta [traditional court] was carried out in May 1994.

the purposes of this study, maintenance was defined as "contributions made to the household by an absent husband, ex-husband or the father of children born out of wedlock". Part 2 at 30.

³¹ *Ibid*, Part 1 at ES11-ff.

³² *Ibid*, Part 2 at 4.

³³ *Ibid*, Part 2 at 30-36.

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According to the members of this Khuta, children belong to their fathers. If a woman complains that a father is not maintaining his child, the Khuta summons the man in question to appear before it. The man and the woman appear together, and both of them are asked to state their versions of the situation. If the Khuta finds that a father is not properly maintaining his children, a fine is imposed in the form of cattle. This fine goes to the child's mother to refund her for the expenses she has incurred in raising the child since birth. Maintenance cases are normally not reported to the Khuta until the child is at least 1-2 years old.

If this fine is not paid, the case is referred to a larger Khuta which is presided over by the chief. This Khuta may impose an additional fine or imprison the offender in the Khuta cell. If these methods are not successful, the Khuta sometimes refers the case to the maintenance court.

According to some observers, the magistrate's court began to be used for maintenance cases only when maintenance problems involving fathers from outside the community (such as soldiers based in the area during the war years) began to be prevalent.³⁴

Maintenance court personnel reported that, while men in the area are willing to resume the responsibility of maintenance within marriage, outside of marriage they fear that "if they feed the children who are in the custody of the women, the women will use their money to feed other men".

Other northern regions

It was unfortunately not possible to collect information on attitudes towards maintenance in Rukavango-speaking areas or in the north-west for the purposes of this study.

Southern regions

The past treatment of pregnancies born outside of marriage in Namibia's southern communities was apparently similar to the practices reported in Oshiwambo-speaking communities in the north. Participants at a 1994 workshop in Keetmanshoop reported that children born outside of marriage were simply killed in the time of their ancestors, but that this practice stopped under missionary influence.

Workshop participants reported that modern practice is that children born outside of marriage are normally placed in the care of the grandparents of the mother, usually to enable her to carry on working or to complete her education. Men often view this step as releasing them from responsibility for maintenance. A similar view was expressed by participants in a 1993 group discussion in Mariental, who highlighted the unwillingness of fathers to maintain their children unless they were given custody of them.

Women in Keetmanshoop also expressed the view that the mother's parents unwittingly contribute to the man's reluctance to take responsibility for his child through the force of their disapproval; fathers who are warned never to come near the child or the mother again, or threatened with violence, are unlikely to be in a position to establish a relationship with the child. The church and the elders in the community still expect that a couple will marry when a

³⁴ Interview with Mr Truter, Ministry of Justice, March 1994.

child is born to them, and men tend to keep away from the mother and child if they do not intend to enter into marriage, to avoid this kind of pressure.

Some participants believed that if the man is made to feel unwanted, then he will take it for granted that his money is not wanted either. Others expressed the view that if a man is chased away from one relationship, he will simply go to another woman and father another child outside of marriage, thereby repeating the cycle.

Many women argued that they should not bother themselves with a man who is irresponsible about maintenance, stating that it lowers their dignity to lay a complaint against a man in the maintenance court. A number of women stated that their own mothers brought them up without any assistance from their fathers, and felt that they should do the same for their own children.

Participants also stated that a woman who makes use of the maintenance court loses popularity in the community. For example, people will point fingers at her and accuse her of using the money for her own benefit. According to the women at the meeting, local police officers have been known to taunt women who have approached the maintenance court, accusing them of being after self-enrichment.

The participants also suggested that some women are afraid to go to court because they do not have enough information about their rights. Thus, they feel unsure about how much money to request, whether they can request maintenance for themselves or only for the child, and how paternity will be proved if the respondent denies that he is the father.

Some of the male participants raised concerns about the way that maintenance money is used. Men were particularly worried about the situation in which a woman cares for children of different fathers, feeling that their own child might not receive what he or she is entitled to. Female participants challenged this complaint by asking how this problem should be dealt with in practice, since it was not practical to buy different food for one child in a household of many. The women also emphasised that the men should not look for excuses not to maintain their children.

A 1994 study of the socio-economic conditions of female-headed households in the southern communal areas carried out by the Social Sciences Division of the Multi-Disciplinary Research Centre of the University of Namibia (SSD) found that absent fathers seldom contributed to the costs of child maintenance, or maintained contact with the child.³⁵

This study found that the reasons for lack of support varied greatly, from lack of employment to lack of interest. Some fathers simply disappeared and could not be traced. Women who were interviewed stated that men frequently stopped supporting their children when they entered into a new relationship, because of the increased financial burdens, because of the jealousy of the new partner, or because of a desire to break all ties with the past. As in the LAC study, the SSD study also found that the hostility of the relatives of single mothers sometimes drove the father away and thereby discouraged him from providing support. In

³⁵ A Iken, M Maasdorp & C Solomon, *Socio-Economic Conditions of Female-Headed Households and Single Mothers in Namibia's Southern Communal Areas* (UNICEF/SSD, December 1994), Executive Summary at v.

cases where support was provided, women reported that it tended to be irregular and unpredictable.

The men interviewed in the course of the SSD study expressed differing attitudes. For example, the following comments were reported:

"There are some men who do care about their children and there are actually more men who do not care. We discuss the issue of maintenance when we are among men. Some ladies are taking other boyfriends and some feel that if the lady has another boyfriend they do not want to support the child any longer." (25-year-old unmarried father, one child)

"I think it is my child and my children and the children are mine and therefore I support them." (26 year-old unmarried father, two children).

Many men felt that when a woman enters a new relationship, the new partner should assume responsibility for the child. Some fathers emphasised the fact that it is difficult to maintain a relationship with the child once the relationship with the mother has ended. In some cases, the father's mother encourages the father to contribute to the child's needs, and sometimes even looks after the children in question -- although it is more usual for children born outside of marriage to be cared for by the mother and her family.

The SSD study found that most of the women whom they interviewed knew about the possibility of reporting the father of the child to the maintenance court. However, some women felt that this step would be useless if the father is unemployed, while others felt that they should not have to fight to obtain maintenance, preferring to avoid conflict with the father and his family.

Women with higher levels of education were found to be more willing to utilise the maintenance court, probably because they tended to be more knowledgeable about legal procedures and therefore more confident.

Many single mothers in southern communities leave their children in the care of their mothers, giving rise to another type of maintenance problem. The SSD study found that these women often fail to provide regular contributions towards the upkeep of the children, and that grandmothers in this position were often reluctant to pressurise their daughters for assistance.³⁶

The SSD study recommends more public education on maintenance procedures, as well as greater assistance for women who do not feel comfortable with legal procedures.³⁷ The LAC is already attempting to contribute to this process by conducting regular training programmes on maintenance in the area. However, another useful step would be for women to mobilise themselves in an attempt to influence community attitudes.

³⁶ *Ibid* at 36-42.

³⁷ *Ibid* at 67.

Eastern regions

Herero-speaking areas

In Gobabis, the magistrate reported that the attitudes of Herero-speaking men involved in maintenance cases is strongly influenced by traditional practices. Under customary law, a Herero man would not be liable to maintain a child unless that child was in his custody, and men in the area apply this reasoning to the maintenance court system.

According to a key informant who is conducting research on Herero customary law, as in the case of other ethnic groups in Namibia, Herero children born outside of marriage were killed until this practice was dropped under missionary influence. There was a period in history when a child born outside of marriage would normally be adopted by an extended family member, usually from the mother's family, and the real parents of the child would not be mentioned. A custom was gradually introduced whereby a child could be "adopted" in this manner only if compensation in the form of cattle was given to the child's parents. This practice has been discontinued in modern times, as it has become more acceptable for women to bear children outside of marriage.

When parents divorce, it is customary in Herero-speaking communities for very young children to stay with the mother and for older children to remain with the father. It is customary for a mother or a father to maintain only the children who are in their custody, with the help of extended family members.³⁸

Thus, in many ways, civil law concepts of maintenance are inconsistent with Herero tradition, which may be one reason why relatively small numbers of Herero-speaking complainants approach the maintenance courts for assistance.

San communities

According to an anthropologist who has long-term experience of the Ju/'hoan people residing in the Nyae Nyae area of Namibia (previously known as "Eastern Bushmanland"), "maintenance" is not a particular problem in this community.

According to community custom, blood lines do not make a difference in how the material needs of children are met. The prevailing attitude towards children is such that no child would ever go without care. For example, it would be normal for a child (or a woman) in need to be taken in by members of the community, either extended family members or someone else. In fact, women with children are particularly desirable, because children are so highly valued as a source of spiritual companionship as well as a source of labour.

A man who married a woman with a child by another man would be unlikely to distinguish between this child and one whom he had fathered; the concept of "stepfather" and "stepmother" would not apply, but rather something more akin to "blood mother" and "mother" or "blood father" and "father".

³⁸ Interview with Mr Germanus Mate, February 1994.

This approach to children probably stems in part from the fact that the San economy is not cattle-based, meaning that inheritance is treated differently than in other Namibian communities. Furthermore, San communities in the Nyae Nyae area are traditionally non-hierarchical.³⁹

Western regions

Little data on community attitudes about maintenance in Namibia's western regions was collected in the course of this study. This gap will hopefully be filled by future research by the LAC or other groups.

General attitudes

In all the areas visited during the course of the Legal Assistance Centre's research, women who did not have a clear understanding of the workings of the maintenance law and the courts seemed quick to conclude that the maintenance court is weak and cannot help them. For example, if an order was not made against a man because of lack of means, or if the man in question could not be traced, many women seemed to become convinced that the maintenance court was "toothless" and would not be able to help anyone. The attitudes of individual women are important, for one woman's experience often becomes a basis for a more general community perception.

This problem could be addressed in two ways. It would be helpful if maintenance officers took more trouble to explain the maintenance procedure to the people who use the courts, thus helping to educate them as to the court's powers and capacities. It is also important for public education efforts to give publicity to successful outcomes, to encourage more parents to have confidence in the maintenance court procedure.

³⁹ Interview with Megan Bieseke. Nyae Nyae Development Foundation of Namibia, May 1993.

Chapter 4

RECOMMENDATIONS

This chapter lists a number of suggestions for improving the maintenance court system, including recommendations with regard to law reform, court administration, police assistance, public education and further research.

Many of the ideas put forward were suggested by court personnel and members of the community, while others are based on improvements which have been made to the Maintenance Act in South Africa.

Overall, it is important to try to move away from a conceptualisation of maintenance as a tug-of-war between the sexes. Reforms in every area should be considered in light of the idea that maintenance is primarily an issue of children's rights. The guiding principle should be that parents, family members and society at large share responsibility for the welfare of Namibia's children. Where this responsibility is neglected, it is most likely to be the children who suffer.

LAW REFORM

A draft Maintenance Amendment Act is appended to this report. It suggests detailed amendments to the Maintenance Act 23 of 1960 which governs the operation of the maintenance courts. The following points highlight some of the major amendments proposed in the draft amendment act, as well as suggested reforms to other laws.

1. Maintenance officers should be required to institute an enquiry whenever a complaint is made to the court and is not resolved by a consent agreement between the parties, rather than having the discretion to decide summarily whether or not an enquiry is warranted.
2. The Maintenance Act should empower the courts to make maintenance orders retroactive, thus bringing the maintenance law in line with existing common law on this point.
3. The power of the courts to make maintenance orders should be expanded, to allow the courts to order the respondent to share pregnancy and birth-related expenses already incurred. The courts should also have the power to order respondents to pay medical expenses, or to name the persons in question as dependants on their medical aid schemes.
4. The Act should set forth guidelines as to what expenses should be considered in calculating maintenance, to establish more uniformity in the way that this task is

carried out by different courts. Several of the magistrates interviewed suggested an amendment along these lines.

5. The Act should be amended to make it easier to obtain evidence of the respondent's income and means. This would expand the courts' powers to make maintenance orders against a respondent who is unemployed but has substantial assets.

6. The Act should also be amended to provide mechanisms for obtaining evidence about the whereabouts of a respondent who cannot be located.

7. The Act should make it possible for a complainant or a respondent to be assisted by the person of his or her choice, such as a paralegal or a supportive friend, along the lines of representation in the district labour court in terms of the Labour Act 6 of 1992.

8. Where a respondent ignores a summons to appear in court, the court should be authorised to make an order -- or at least an interim order -- in the respondent's absence, as is the case in ordinary civil cases.

9. The provisions designed to protect the privacy of persons involved in maintenance cases should be strengthened.

10. The Act should be amended to allow payments to be made directly to complainants, or directly into accounts at banks or building societies.

11. The Act should allow for the attachment of wages as an administrative measure, without requiring a criminal conviction for arrears first. Where there has been a criminal conviction for arrears, the court should be *required* to issue such an order. This amendment was suggested by court personnel as well as by people who use the maintenance courts, and it was one of the most commonly-mentioned suggestions for reform.

12. The maintenance court should be authorised to order automatic increases or decreases in maintenance orders, on the basis of rises and falls in the consumer price index. This would remove the need for complainants to come into court and start the whole process over again in order to obtain an increase to compensate for the rising costs of living. This alteration was suggested by magistrates as well as by people who use the maintenance courts.

13. Provisions should be added to facilitate the attachment of property in appropriate cases.

14. Where payments are made into the maintenance court, the Act should require that the court take direct action on arrears, without waiting for charges to be filed by the complainant.

15. The Act should make it possible for arrears to be recovered with interest.

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16. The provisions requiring that a respondent who is subject to a maintenance order give notice of his or her change of address should be strengthened.
17. The court should be authorised to take photographs of a respondent who is subject to a maintenance order, to facilitate enforcement if the respondent falls into arrears.
18. Penalties for the various offences covered by the Act should be increased.
19. All fines collected under the Act should be paid into a Maintenance Fund which could be used to make emergency payments to beneficiaries of maintenance orders in cases where the payments have fallen into arrears. These amounts could then be repaid if the arrears were recovered from the respondent.
20. The Act should require that the maintenance officer and the Prosecutor-General's office assist complainants with appeals in all cases where maintenance for children is involved. This would be the case regardless of whether the complainant is the appellant or the respondent in the appeal.
21. The Act and the rules should specify the procedure to be used to transfer files from one court to another in order to minimise the problem of lost files.
22. The rules issued under the Act should be expanded to set forth standardised procedures for administrative matters, such as summoning respondents to court, guidelines for consent negotiations, steps which can be taken when the respondent alleges misuse of maintenance money, procedures for getting in touch with complainants who have not come to court to collect their payments, and filing systems.
23. The Income Tax Act 24 of 1981 should be amended to make it impossible for a person who is in arrears with a maintenance order to utilise tax deductions for child support.
24. Law reform on maintenance should be accompanied by law reform which addresses current legal discrimination against single fathers. A draft Children's Status Act dealing with this issue has been proposed to the Ministry of Health and Social Services. This draft Act would give fathers automatic rights of access, a right of equal guardianship and a right to petition for custody of the child. All decisions would be made on the basis of the best interest of the child, and the Act proposes a number of safeguards to ensure that the child is adequately protected.

The proposed Act, together with a proposal for a new Child Care and Protection Act, would also change the existing law to require the consent of fathers as well as mothers when a child born outside marriage is put up for adoption, although there would be procedures for dispensing with such consent in cases where the father could not be located or where he was unreasonably withholding consent contrary to the child's best interests.

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It is crucial that law reforms in these areas be addressed simultaneously, to couple parental rights with parental responsibilities.

25. The maintenance court system should be backed up by a system of state maintenance grants to provide for situations where an absent parent cannot be located, or where the resources of the entire family are inadequate to provide for the child's basic needs.

Although a state maintenance grant system is already in place, it discriminates on the grounds of race (by providing different grant criteria and amounts for members of different race and ethnic groups) and sex (by focusing on single mothers and excluding the possibility of assistance to fathers raising children on their own in respect of most race groups). The existing system also needs revision in order to target assistance to the most needy families, as well as to allow for short-term emergency assistance in times of crisis, to help families avoid long-term dependency.

A proposal for a revised system has been submitted to the Ministry of Health and Social Services as part of a proposed new Child Care and Protection Act.

26. The relationship between traditional courts and the maintenance courts on issues of maintenance should be considered in the context of the proposed Community Courts Act. While such courts have not traditionally dealt with maintenance cases in the past in many communities, there are some regions (such as the Caprivi) where cooperation between the two court systems to ensure that children are properly maintained seems to have been effective in the past

In rural areas, involving the traditional courts might help to make the maintenance procedure more accessible. It has been suggested that the traditional courts might be empowered to deal with maintenance questions in terms of the Maintenance Act, provided that their decisions are ratified by a magistrate's court.

This possibility warrants further investigation in the context of the ongoing discussion and debate around the role of traditional leaders and community courts.

COURT ADMINISTRATION

The following recommendations emerged from interviews with court personnel, from comments from other interviews and group discussions about experiences at the maintenance court, from the experiences of the attorneys and paralegals of the Legal Assistance Centre, and from the researchers' own observations. Most of these recommendations could be implemented immediately, without waiting for any legal reforms.

1. Women who travel long distances to court lose confidence in the ability of the court to assist them if there is no one available to attend to their problems. This

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is often the case, as prosecutors who double as maintenance officers may be busy with other court cases. The same is true of the court interpreters who sometimes assist with the tasks of maintenance officers.

In most courts outside of Windhoek, services would be improved by adding personnel who are specifically charged with responsibility for maintenance complaints. If this is not feasible because of budgetary constraints, it would be useful to designate particular days of the week or the month for dealing with maintenance complaints and no other business, making sure that the schedule is well-publicised.

2. There appears to be a need for in-service training on certain aspects of the Maintenance Act. Areas of the law about which there were misunderstandings in certain courts included the following:

- * Pre-requisites for accepting complaints

It was reported in group discussions that some maintenance officers refuse to accept a maintenance complaint if the *complainant* is unemployed.

It was also reported by interviewees and court personnel that complaints could not be accepted unless the *respondent* is employed, although the Maintenance Act speaks more broadly of "means", which could include assets or income from a variety of sources.

It was also reported in group discussions that some courts refuse to accept complaints for arrears arising from orders for maintenance which are included in divorce orders, even though the Maintenance Act authorises this.

Some court personnel were also under the mistaken impression that the maintenance court is available only to parents and not to extended family members who are caring for children.

- * The use of orders for the attachment of wages

Some magistrates and maintenance officers seem to be under the impression that such orders may be used only at the request of the respondent. There was also a widespread misperception that the Labour Act forbids such deductions from wages.

- * The appropriate interpretation of the defence of good faith lack of means

It was suggested by some court personnel that the law should be amended to make it possible to act against respondents who spend large amounts on luxury items and then successfully defend a charge of failure to pay maintenance by asserting good faith lack of means; this reflects a misunderstanding of the law as it stands. "Means" was also narrowly interpreted in many courts to refer to employment alone, without taking into account assets and other sources of income.

- * Ways of dealing with allegations that maintenance payments are being abused by the recipient

Some courts treat such allegations as a basis for requesting a social worker visit to monitor the family's situation. Some institute a substitution proceeding on these grounds and ask the recipient to provide an accounting of expenditures. However, some court personnel seemed to be at a loss as to how to deal with such accusations.

3. Court personnel in some areas also appear to need training on administrative matters related to maintenance complaints. Training in standardised procedures should be provided throughout the country:

- * Procedures for summoning the respondent to court

Some courts send summonses or subpoenas immediately, while others send the respondent one or two registered letters containing a consent form first.

- * Procedures for scheduling and conducting consent negotiations

Consent negotiations should wherever possible be attempted immediately before the scheduled enquiry, to reduce the number of times that the parties must attend court. This would help to ensure that complainants do not enter into consent agreements simply to avoid further inconvenience, or out of fear that the respondent may fail to appear on a subsequent court date.

The Ministry of Justice should also provide guidelines on how a consent negotiation should be conducted, as maintenance officers appear to differ greatly in how active a role they play in pushing for a settlement.

- * Procedures for scheduling enquiries

Some court clerks failed to diarise cases properly to keep track of how many cases had been scheduled for a single day. Some prosecutors complained that the clerks scheduled cases without checking on the prosecutor's availability. These administrative hitches can often mean extra time, trouble, expense and discouragement for the parties who must make wasted trips to the court.

- * Procedures for dealing with arrears cases promptly

Procedures differ from court to court. For example, some courts follow a policy of refusing to act on failure to make a payment until payments have been missed for three consecutive months, even though failure to make even one payment is an offence in terms of the Act. This practice has reportedly been discontinued in the magisterial districts in the central region, but may still be occurring in other districts.

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There also appears to be inconsistency between courts as to whether action will be taken on arrears automatically by the court, or only if the complainant comes to the court to lay a charge. Inconvenience to complainants would be minimised if courts took action independently, or if complainants could authorise this step at the time when they come to the court to collect a payment which is not there.

* Procedures for getting in touch with complainants who have not come to court to collect their payments

Radio and newspaper announcements could be utilised as a matter of course if efforts to contact the complainant by telephone or post are unsuccessful. A complainant's failure to collect payments might also be treated as grounds to request a social worker visit to check on the family's situation.

* Effective filing systems

The lack of efficient filing systems was creating serious administrative problems at some courts which were visited. There were also inconsistencies between courts in the way that criminal cases for arrears were filed.

4. Some maintenance officers need to be encouraged to use their powers of investigation more assertively, to help locate respondents or to obtain accurate information about the respondents' income and means.
5. There is a need to sensitise court personnel to the fact that maintenance most directly concerns the rights of children rather than the competing rights of mothers and fathers. The group discussions and interviews indicated that some maintenance officers and magistrates, both male and female, have biases against female complainants. These complaints were supported by the researchers' observations. For example, some court personnel were convinced that women use the maintenance court primarily as a vendetta against men who have left them, while others believed that women are generally prone to misuse maintenance money.
6. There is also a need to sensitise court personnel about the effects of rude behaviour. While some court personnel were observed to be very polite and helpful to both complainants and respondents, unnecessary altercations and derogatory comments were observed at other courts. If more court personnel took the time and trouble to explain procedures carefully to those not familiar with the maintenance courts, this would help to alleviate public misunderstanding and encourage members of the public to approach the maintenance courts for help.
7. The possibility of extended court hours should be investigated, to enable complaints to be reported after working hours, as well as to make it more

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convenient for recipients of maintenance payments to collect their money from the court.

8. Summonses and subpoenas which are used to order respondents to come to court should include a simply-worded directive translated into all the major Namibian languages which explains: the consequences of failing to attend court; the importance of bringing a recent pay slip and other relevant evidence to court; and the possibility of returning a signed consent form instead of coming to court in person. This simple step might help to expedite the resolution of cases and reduce postponements.
9. Liaison between the police and maintenance court personnel could be improved through closer communication with the police officers responsible for serving court documents.

POLICE ASSISTANCE

1. A senior officer in the Head Office of the Namibian Police should be given responsibility for supervising the service of summonses, subpoenas and warrants of arrest in maintenance cases. This person should also be responsible for following up complaints from maintenance court personnel and members of the public.
2. Careful records should be kept of the individual police officers who assume responsibility for serving court documents, and sanctions should be imposed on those individuals who do not carry out this task properly.
3. Court documents in maintenance cases should be given a higher priority than they seem to enjoy at present. While it is understood that the police force already has a large workload, maintenance issues have been identified by women in all parts of Namibia as an urgent priority for them and their children. Furthermore, ensuring that parents have the resources to give their children proper care and education should be seen as one measure which will help to combat crime in the long run.
4. The police should make more assertive efforts to locate respondents. For example, if the respondent cannot be found at the address given, the police could contact the maintenance court to see if the complainant can provide other addresses or information about the whereabouts of family members. Respondents who try to hide by pretending to be someone else could be identified by the complainant, or by an employer

Some of these techniques are already employed by the police in certain areas, but such investigation should become standard practice. -

5. Liaison between the police and maintenance court personnel is in need of improvement. Interviews with court personnel indicate that there are many

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instances where they have had no feedback from the police by the time court dates arrive.

6. Cases involving the service of court documents in a jurisdiction other than that of the maintenance court handling the complaint seem to encounter problems with police response more frequently and thus are in need of special attention.

PUBLIC EDUCATION

There is unquestionably a general need for continuing efforts to provide public education on the operation of the maintenance court. However, the research also highlighted some specific areas of misunderstanding which should be given special attention in educational efforts:

1. There is a need for more public education on who can use the maintenance courts. For example, there is a widespread misperception in the north that maintenance courts can only be used by single mothers, and not by women who are married, divorced or separated. In many communities throughout the country, grandmothers and other extended family members are not aware that they may also use the maintenance courts.
2. Parents should be educated on the usefulness of formalising private agreements as court orders, in order to provide access to enforcement mechanisms.
3. Both women and men need to be informed of the possibility of requesting an increase or a decrease in a previous maintenance order in light of changed circumstances. This should be explained by court personnel to both parties when the initial maintenance order is made (as is already the practice of some maintenance officers).
4. More public information is needed on arrears. For example, some women do not know that they can approach the maintenance court for assistance when the man makes only a partial payment and does not pay the full amount.
5. There should be more public education for men on their responsibilities to maintain their children. For example, public attitudes might be affected if prominent men such as politicians, sports stars and musicians spoke out on this point.
6. As many maintenance problems are tied to the expenses of school fees and school uniforms, there is a need for more public education on the possibility of being excused from paying school fees on the grounds of lack of means, and on the arrangements which some schools offer for paying off school fees gradually during the school year.
7. Public education should emphasise maintenance as an issue affecting children's rights rather than as a dispute between men and women.

FURTHER RESEARCH

1. There is a need for further research on maintenance in the context of divorce cases. This should ideally be combined with proposals to update Namibia's divorce laws and to make divorce cheaper and more accessible, particularly to persons residing outside Windhoek, as this would enable married persons living apart to achieve finality on the division of their property.
2. There is a need for further research on maintenance as it relates to inheritance. Such research should examine the procedure for making claims for maintenance from the estates of deceased persons. It should also explore the possibility of enacting a law which requires that certain assets be set aside for the maintenance of any person or persons whom the deceased was legally liable to maintain before the remainder of the estate can devolve on any other heirs.
3. There is a need for further research on community attitudes about maintenance and other parental responsibilities, particularly with respect to children born outside of marriage. Law reform in these areas is unlikely to be very effective without an understanding of the cultural values which underpin current practices.
4. If a new system of state maintenance grants is introduced, this system should be periodically assessed to determine whether it is effectively targeting resources at the most needy families.

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Appendix 1

MAINTENANCE ACT, NO. 23 OF 1963

as amended by

Maintenance Amendment Act, No. 19 of 1967
Maintenance Amendment Act, No. 39 of 1970

1. **Definitions.** In this Act, unless the context otherwise indicates --

"Court of a Bantu Affairs Commissioner", in relation to the territory, means a court of a native commissioner;

"magistrate's court" includes a court of a Bantu Affairs Commissioner;

"maintenance order" means any order for the periodical payment of sums of money towards the maintenance of any person made by any court (including the Supreme Court of South Africa) in the Republic and, except for the purposes of section eleven, includes any sentence suspended on condition that the convicted person make periodical payments of sums of money towards the maintenance of any other person;

"Minister" in relation to any matter connected with a maintenance court corresponding to a magistrate's court other than a court of a Bantu Affairs Commissioner, means the Minister of Justice, and in relation to any matter connected with a maintenance court corresponding to a court of a Bantu Affairs Commissioner, means the Minister of Bantu Administration and Development;

"prescribed" means prescribed by rules made under this Act;

"Republic" includes the territory

"territory" means the territory of South West Africa.

2. **Maintenance court.** Every magistrate's court shall within its area of jurisdiction be a maintenance court for the purposes of this Act.
3. **Maintenance officer.**
 - (1) Subject to the laws governing the public service, the Minister or any officer in the public service delegated by him may appoint for any maintenance court maintenance officers to appear in such court in

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proceedings under this Act and to perform the functions and duties assigned to maintenance officers by or under this Act.

- (2) Any officer in the public service delegated generally by an attorney-general to conduct prosecutions in any magistrate's court shall be deemed to have been appointed a maintenance officer to the corresponding maintenance court.

4. Maintenance officer may investigate complaints relating to maintenance and institute enquiry in maintenance court.

- (1) Whenever a complaint on oath is made to a maintenance officer to the effect that --
 - (a) any person legally liable to maintain any other person fails to maintain such other person; or
 - (b) sufficient cause exists for the substitution or discharge of a maintenance order,

the maintenance officer may, after investigating such complaint, institute an enquiry in a maintenance court within the area of jurisdiction of which the person to be maintained or the person in whose care such person is, resides, for the purpose of enquiring into the provision of maintenance in respect of the person concerned, and may for that purpose cause any person, including any person legally liable to maintain any other person, to be summoned to appear before such court and give evidence or produce any book, document or statement, including, in the case of a person so liable, a statement giving full particulars of his earnings signed by his employer.

- (2) Any person to be summoned as a witness shall be summoned in the manner in which a person shall be subpoenaed to appear before a magistrate's court in a criminal trial.

5. Enquiry by maintenance court.

- (1) The court holding an enquiry shall administer to any witness appearing before it an oath or affirmation and record his evidence.
- (2) Any person against whom an order may be made under this section may be represented by counsel or an attorney.
- (3) No person whose presence is not necessary shall be present at an enquiry, except with the permission of the court.
- (4) After consideration of the evidence adduced at the enquiry the court may-

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- (a) in the case where no maintenance order is in force, make an order against any person proved to be legally liable to maintain any other person for the payment during such period and at such times and to such officer, organisation or institution and in such manner as may be specified in the order, of sums of money so specified, towards the maintenance of such other person.
 - (b) in the case where a maintenance order is in force, make an order contemplated in paragraph (a) in substitution of such maintenance order or discharge such maintenance order.
 - (c) make no order.
- (5) Any maintenance court which made an order under sub-section (4), may at the request of the maintenance officer, without prior notice to any person, vary such order by designating as the officer, organisation or institution to whom or to which payment is to be made, any other officer, organisation or institution and the maintenance officer shall in the prescribed manner inform the person required to make such payment of any variation of the order.
- (6) For the purposes of determining whether a Black or a native as defined in section 35 of the Black Administration Act, 1927 (Act No. 38 of 1927), or section 25 of the Native Administration Proclamation, 1928 (Proclamation No. 15 of 1928), of South West Africa, respectively, is legally liable to maintain any person, he shall be deemed to be the husband of any woman associated with him in a customary union.
- (7) Any order under this section may be made against any person not present at the enquiry, if it is made in accordance with his written consent produced at the enquiry by the maintenance officer.
- (8) Subject to such rules as may be made under this Act, the court holding an enquiry may take into consideration any evidence in any proceedings in respect of an existing maintenance order or accept as *prima facie* proof any finding of fact in such proceedings.
- (9) A copy of an order made against any person in his absence, shall be delivered or tendered to him by any maintenance officer or any police officer and the return of such officer showing that such copy was delivered or tendered to such person shall be deemed sufficient proof that such person was aware of the terms of such order.
- (10)
 - (a) Such records of the proceedings at an enquiry shall be kept and shall be accessible to such persons upon such condition as to payment of fees or otherwise as may be prescribed.
 - (b) Any such fees shall be prescribed in consultation with the Minister of Finance.

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- (11) (a) No person shall publish in any manner whatsoever the name or address of any person under the age of eighteen years who is or was concerned in any proceedings at an enquiry under this section or the name of his school or any other information likely to reveal his identity: Provided that if the Minister or the officer presiding at the enquiry is of the opinion that such publication would be just and in the interest of any particular person, he may in writing dispense with the prohibition contained in this sub-section to such an extent as he may specify.
 - (b) Any person who contravenes the provisions of paragraph (a) shall be guilty of an offence and liable on conviction to a fine not exceeding two years or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment.
- 6. **Effect of maintenance order on existing orders.** Whenever a maintenance court makes an order under section *five* in substitution of or discharging a maintenance order, such maintenance order shall cease to be of force and effect and the maintenance officer shall forthwith give notice of the making of the order to the registrar or clerk of the court which made the said maintenance order or which imposed the sentence concerned, as the case may be, who shall record the order in the relative records or registers.
- 7. **Appeal against maintenance order.**
 - (1) Any person aggrieved by an order made under section *five* may, within such period and in such manner as may be prescribed, appeal against such order --
 - (a) in the case of an order made by a maintenance court corresponding to a magistrate's court other than a Commissioner's Court, to the provincial or local division of the Supreme Court having jurisdiction;
 - (b) in the case of an order made by a maintenance court corresponding to a Commissioner's Court, to the Appeal Court for the Commissioner's Courts having jurisdiction or, in the case of any such order made in the territory, to the South West Africa Division of the Supreme Court of South Africa.
 - (2) On appeal such division or appeal court may make such order in the matter as it may deem fit.
 - (3) In sub-section (1) "order" includes --
 - (a) any refusal to make such an order;
 - (b) any refusal to make a provisional maintenance order under section *five* in terms of the provisions of any other law.

8. Rights and privileges of witnesses.

- (1) Any person other than a person against whom a maintenance order is made, attending an enquiry under this act as a witness shall be entitled to an allowance as if he were attending criminal proceedings as a witness for the State.
- (2) The officer presiding at such an enquiry may direct that any person against whom a maintenance order is made, shall be paid such allowance as may be paid to a witness for the accused in criminal proceedings.
- (3) In connection with the giving of evidence or the production of any book, document or statement at such an enquiry, the law relating to privilege as applicable to a witness giving evidence or summoned to produce a book, document or statement in criminal proceedings in a magistrate's court shall apply.
- (4) No person at such an enquiry shall be compelled to give evidence relating to his liability to maintain any other person.

9. Offences by witnesses.

- (1) The provisions of sections 211 and 212 of the Criminal Procedure Act, 1955 (Act No. 56 of 1955), shall *mutatis mutandis* apply in relation to a person summoned under section 4 of this Act to appear at an enquiry in a maintenance court, and the maintenance court holding that enquiry may exercise in respect of such person all the powers conferred by the said sections 211 and 212 on the court referred to therein.
- (2) Any person who after having been sworn or having made affirmation, gives false evidence before the court holding the enquiry, knowing such evidence to be false or not knowing or believing it to be true, shall be guilty of an offence and liable on conviction to the penalties prescribed by law for perjury.

10. Hindering or obstructing an enquiry. Any person who wilfully interrupts the proceedings at an enquiry under this Act or who wilfully hinders or obstructs the court in the performance of its functions at any such enquiry shall be guilty of an offence and liable on conviction to a fine not exceeding one hundred rand or to imprisonment for a period not exceeding six months or to both such fine and such imprisonment.**11. Penalties for failure to comply with maintenance order.**

- (1) Subject to the provisions of sub-section (3) any person who fails to make any particular payment in terms of a maintenance order, shall be guilty of an offence and liable on conviction to a fine not exceeding two hundred rand or to imprisonment for a period not exceeding one year or to such imprisonment without the option of a fine and any court with civil

jurisdiction may, in addition to or in lieu of any penalty, on the application of the public prosecutor grant an order for the recovery from the convicted person of any amount he failed to pay in terms of the firstmentioned order, whereupon the order so granted shall have the effect of a civil judgment of that court and shall be executed in the prescribed manner.

- (2) Notwithstanding anything to the contrary in any law contained, any pension, annuity, gratuity or compassionate allowance or other similar benefit shall be liable to be attached or subjected to execution under an order having the effect of a civil judgment under sub-section (1).
- (3) Proof that any failure which is the subject of a charge under sub-section (1) was due to lack of means and that such lack of means was not due to unwillingness to work or misconduct on the part of the person charged, shall be a good defence to any such charge.
- (4) A magistrate's court shall have jurisdiction to impose summarily the full penalty for any offence under sub-section (1).
- (5) A copy of a maintenance order, purporting to have been certified by the maintenance officer or by the registrar or clerk of the court or by any other officer having the custody of the records of the court which made the maintenance order, shall, if the name corresponds substantially to that of the person charged with an offence under sub-section (1), on its mere production be *prima facie* proof of the fact that such maintenance order has been made against the lastmentioned person.

12. Court may authorise payment of maintenance monies by employer on behalf of employee.

- (1) Any court which has convicted any person of any offence under sub-section (1) of section *eleven*, may, whether or not any penalty is imposed or any order is granted under the sub-section make an order authorising any employer of such person to make on behalf of such person any payments required to be made in terms of the maintenance order concerned, from the salary, wages or any other form of remuneration or allowance of such person, whereupon the maintenance officer of the court which made such maintenance order may from time to time in the prescribed manner cause a notice to be served on any such employer requiring him so to make any such payments at such times and in such manner as may be specified in such notice.
- (2) Any notice under this section shall have precedence over any order of court requiring payment to be made from the salary, wages, remuneration or allowance aforesaid.
- (3) Any person who fails to comply with any such notice shall be guilty of an offence and liable on conviction to a fine not exceeding one hundred rand or to imprisonment for a period not exceeding six months.

13. **When proceedings in respect of failure to comply with maintenance order to be converted into enquiry.** If during the course of any proceedings in a magistrate's court in respect of a contravention of sub-section (1) of section *eleven* or in respect of the enforcement of any sentence suspended on condition that the convicted person make periodical payments of sums of money towards the maintenance of any other person, it appears to the court that it is desirable that an enquiry under section *five* be held or when the public prosecutor so requests, the court shall convert the proceedings into such an enquiry.
14. **Person against who maintenance order has been made, to give notice of change of address.**
 - (1) If any person against whom a maintenance order has been made changes the place of his residence or employment during the currency of the order, he shall forthwith give notice thereof in writing to the person, office, organisation or institution to whom or to which payment is to be made in terms of the order, and shall state fully and clearly where the new place of his residence or employment is situate.
 - (2) Any person who fails to comply with the provisions of sub-section (1) shall be guilty of an offence and liable on conviction to a fine not exceeding one hundred rand or to imprisonment for a period not exceeding six months.
15. **Rules.** The Minister may by notice in the *Gazette* make rules--
 - (a) prescribing the procedure and rules of evidence to be followed at or in connection with any enquiry under this Act;
 - (b) as to any matter which may in terms of this Act be prescribed.
16. **Repeal of laws.**
 - (1) Subject to the provisions of sub-section (2) the laws specified in the schedule are hereby repealed to the extent set out in the fourth column thereof.
 - (2) Any order made and any action taken under any provision of any law repealed by sub-section (1), shall be deemed to have been made or taken under the corresponding provisions of this Act.
- 16A. **Application of Act to South West Africa.** This Act and any amendment thereof shall apply also in the territory, including the Eastern Caprivi Zipfel.
17. **Short title.** This act shall be called the Maintenance Act, 1963, and shall come into operation on a date to be fixed by the State President by proclamation in the *Gazette*.

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SCHEDULE

REPUBLIC OR PROVINCE	NO. AND YEAR OF LAW	TITLE	EXTENT OF REPEAL
Cape ...	Act No. 7 of 1895	Deserted Wives and Children Protection Act	The whole
Natal ...	Act No. 10 of 1896	Deserted Wives and Children Protection Act, 1896	The whole
Orange Free State	Ordinance No. 51 of 1903	Deserted Wives and Children Protection Ordinance, 1903	The whole
Transvaal ..	Ordinance No. 44 of 1903	Deserted Wives and Children Protection Ordinance, 1903	The whole
Republic ..	Act No. 38 of 1927	Black Administration Act, 1927	Section <i>ten bis</i> , except in so far as it may impose any liability upon any person to maintain any other person
	Act No. 46 of 1935	General Law Amendment Act, 1935	Section <i>one hundred and ten</i>
	Act No. 37 of 1953	Matrimonial Affairs Act, 1953	Section <i>four</i>

Appendix 2

PROPOSED MAINTENANCE AMENDMENT ACT

To amend the Maintenance Act, 1963, so as to provide for the more efficient and effective enforcement of maintenance orders; to extend the powers of a maintenance court; to provide for the transfer of maintenance orders; to further regulate appeals against maintenance orders; to provide for the issuing of various orders as to costs; to increase certain fines; to repeal and rectify certain obsolete expressions; to substitute the long title; and to provide for matters incidental thereto.

For the sake of convenience, this draft bill reproduces the entire Maintenance Act as it would stand if the bill were implemented, including those sections of the Act which would not be changed. Because of the frequent use of the Reciprocal Enforcement of Maintenance Orders Act 80 of 1963 between Namibia and South Africa, comparisons between the proposed bill and the South African Act as it is currently in force are highlighted in the footnotes.

Material which would be deleted from the existing law is in bold print inside brackets, while proposed new material is underlined.

1. Definitions. In this Act, unless the context otherwise indicates --

"complainant" means any person who makes a complaint relating to maintenance in terms of section 4(1);

The addition of this definition makes it possible to simplify the text of some of the provisions of the Act.

"Consumer Price Index" means the index of that name compiled by the Central Statistics Office;

This definition relates to the new provision which allows automatic inflationary increases (or decreases) to be incorporated into a maintenance order in terms of section 5(4A).

["Court of a Bantu Affairs Commissioner", in relation to the territory, means...]¹

"custodian" means a parent or other person who has legal custody of a child;

This definition is necessary to distinguish between the person who has legal custody of a child and the person who has responsibility for the actual daily care of the child, since these may be different persons. (See the definition of "primary caretaker" below.)

¹ Definition inserted by s.1(a) of Act 39 of 1970 and repealed in RSA (but not Namibia) by s.2 of Act 34 of 1986.

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"financial institution" means any institution which carries on the business of a bank or building society;

This definition relates to the amendment which makes it possible for maintenance payments to be paid directly into accounts at financial institutions.²

["magistrate's court" includes a court of a Bantu Affairs Commissioner;]³

"maintenance order" means any order for the periodical payment of sums of money towards the maintenance of any person made by any court [(including the Supreme Court of South Africa) in the Republic] and, except for the purposes of section 11 [eleven], includes any sentence suspended on condition that the convicted person make periodical payments of sums of money towards the maintenance of any other person;

"Minister" [in relation to any matter connected with a maintenance court corresponding to a magistrate's court other than a court of a Bantu Affairs Commissioner, means the Minister of Justice, and in relation to any matter connected with a maintenance court corresponding to a court of a Bantu Affairs Commissioner, means the Minister of Bantu Administration and Development] means the Minister of Justice;

"prescribed" means prescribed by rules made under this Act;

"primary caretaker" means a person other than a parent who is responsible for the daily care of a child with the permission of the parent who has legal custody of the child, or if there is no such parent, with the permission of the child's guardian;

This definition is necessary to make clear that extended family members who are caring for children have a right to bring a complaint in the maintenance court and to receive maintenance payments directly. (See sections 5(4)(a)(ii)(bb), 5(5)(a)(i), 7(1A) and (1B) and 14D(2) below.

["Republic" includes the territory]

"respondent" means any person legally liable to maintain any other person and in respect of whom an enquiry referred to in subsection 4(1) is instituted

The addition of this definition makes it possible to simplify the text of some of the provision of the Act.

["territory" means the territory of South West Africa]

² The definition of "financial institution" is identical to the one added to the South African Maintenance Act by Act 2 of 1991.

³ Definition from original Act substituted in RSA (but not Namibia) by s.2 of Act 34 of 1986.

2. **Maintenance court.** Every magistrate's court shall within its area of jurisdiction be a maintenance court for the purposes of this Act.

3. **Maintenance officer.**

(1) Subject to the laws governing the public service, the Minister or any officer in the public service delegated by him or her may appoint for any maintenance court maintenance officers to appear in such court in proceedings under this Act and to perform the functions and duties assigned to maintenance officers by or under this Act.

(2) Any officer in the public service delegated generally by the Prosecutor-General [an attorney-general] to conduct prosecutions in any magistrate's court shall be deemed to have been appointed a maintenance officer to the corresponding maintenance court.

4. **Maintenance officer [may] shall investigate complaints relating to maintenance and institute enquiry in maintenance court.**

(1) Whenever a complaint on oath is made to a maintenance officer to the effect that --

(a) any person legally liable to maintain any other person fails to maintain such other person; or

(b) sufficient cause exists for the substitution or discharge of a maintenance order,

the maintenance officer [may] shall, after investigating such complaint, institute an enquiry in a maintenance court within the area of jurisdiction of which the person to be maintained or the [person in whose care such person is] custodian or primary caretaker of such person, resides, for the purpose of enquiring into the provision of maintenance in respect of the person concerned, and may for that purpose cause any person, including any [person legally liable to maintain any other person] respondent, to be summoned to appear before such court and give evidence or produce any book, document or statement, including, in the case of a [person so liable] respondent, a statement giving full particulars of his or her earnings signed by his or her employer.

The change from "may" to "shall" clarifies the conflicts on whether the maintenance officer has the discretion to decide whether or not to institute an enquiry, or whether this is a legal duty. The better view seems to be that the decision on whether there are grounds to proceed should be made by the court rather than by the maintenance officer.⁴

⁴ See *Buch v Buch* 1967(3) SA 83 (T); *Govender v Amurtham and Others* 1979(3) SA 358 (N); *Pieterse v Pieterse* 1965(4) SA 344 (T); E Spiro, *Law of Parent and Child*, 4th edition (Juta &

- (2) Any person to be summoned as a witness shall be summoned in the manner in which a person shall be subpoenaed to appear before a magistrate's court in a criminal trial.
- (3) The provisions of section 181 of the Criminal Procedure Act, 1977 (Act 51 of 1977), are, subject to the provisions of section 8(2), not applicable to any respondent.

Section 181 provides for the pre-payment of travelling and accommodation expenses for witnesses who are required to travel from out of town. Since all provisions of the Criminal Procedure Act relating to witnesses are effectively made applicable to maintenance enquiries by subsection (2), subsection (3) is necessary to rule out pre-payment to the respondent. This exclusion is appropriate since respondents so often fail to obey subpoenas.⁵

5. Enquiry by maintenance court.

- (1) The court holding an enquiry shall administer to any witness appearing before it an oath or affirmation and record his or her evidence.
- (2) Any complainant or respondent [any person against whom an order may be made under this section] may be represented by [counsel or an attorney] a legal practitioner or any other person duly authorised by such complainant or respondent, as the case may be.

This amendment would make it clear that it is possible for any party to an enquiry before the maintenance court to be assisted by a legal practitioner, or by the person of his or her choice, such as a paralegal or a social worker. The wording of the provision parallels section 19(3) of the Labour Act 6 of 1992.

This right may be particularly important for a respondent who cannot afford an attorney but does not succeed in getting help from legal aid, since the maintenance officer has a duty to assist the complainant. Furthermore, even though the maintenance officer is available to assist the complainant, the complainant may be more comfortable with additional advice from a legal representative or a supportive friend. If both the complainant and the respondent feel that they have a right to any assistance which they may need, the entire process is more likely to be respected as one which is fair to all concerned.

The suggested wording also codifies the common law by making it clear that a complainant in a maintenance case is entitled to obtain legal representation even though the present wording of the Act refers only to the respondent.⁶

Co: 1985) at 421; ID Schäfer, *Family Law Service* (Butterworth's: 1988), as updated to December 1994, at 33; PQR Boberg, *Law of Persons and the Family* (Juta & Co, 1977) at 294, n 24.

This provision is similar to section 4(3) of the South African Act, as added by Act 204 of 1993, effective 1 March 1994. See *Foster v de Klerk NO en Andere* 1993(1) SA 596 (O).

⁶ See *Govender v Manikum* 1981 (1) SA (N) at 1182-83; *Knight v Die Voorsittende Beampste, Onderhoudshof, Sweizer-Reneke, en 'n Ander* 1978 (3) SA 572 (T); *Buch v Buch* 1967 (3) SA 83 (T).

- (3) No person whose presence is not necessary shall be present at an enquiry, except with the permission of the court.

The rules issued in terms of the Act should make a similar privacy provision applicable to investigations or consent negotiations conducted in connection with any enquiry, excluding any person whose presence is not authorised by the maintenance officer.

- (3A) (a) In an enquiry, a written statement made in the prescribed manner by any person shall, subject to paragraph (b) and the prescribed conditions, be admissible as evidence to the same extent as oral evidence to the same effect given by the same person at such enquiry.
- (b) No written statement made by a respondent, other than written consent to an order as referred to in subsection (7), shall be admissible as evidence.
- (c) A copy of the statement referred to in paragraph (a), together with a copy of every document referred to in the statement as an exhibit, shall be served in the prescribed manner on the respondent at least 14 days before the commencement of the enquiry.
- (d) The respondent may object to the statement being tendered as evidence, provided that the objection is made in the prescribed manner at least seven days before the commencement of the enquiry.
- (e) A statement referred to in paragraph (a), notwithstanding the fact that it has not been served upon the respondent in terms of paragraph (b), may with the consent of the respondent given before or during such enquiry, be tendered and admitted as evidence.
- (f) If a respondent wishes to submit as evidence at an enquiry a statement referred to in paragraph (a), the respondent shall serve a copy of such statement upon the maintenance officer concerned not less than 14 days before the commencement of the enquiry, and paragraphs (c), (d) and (e) shall apply *mutatis mutandis* in respect to such statement.
- (g) Any document tendered as an exhibit and identified in a written statement tendered and admitted into evidence under this section shall be treated at the enquiry concerned as if such document had been produced at such enquiry by the person who had made the statement.
- (h) Any person who makes a statement for the purpose of having it admitted as evidence under this subsection, whether or not such statement is so admitted, and who in such statement wilfully and falsely makes any allegation which, if sworn, would have amounted to the offence of perjury, shall be deemed to have committed the

offence of perjury and shall be liable upon conviction to the penalties prescribed by law for perjury.

This new subsection governs the admission of written statements into evidence under certain conditions, without the personal appearance of the person making the statement. It might be used, for example, to admit a statement from an employer regarding a person's wages, or evidence about assets other than wages. This innovation is in line with the overriding idea that the maintenance procedure should be as simple and as quick as possible.

The prohibitions on perjury which apply to oral evidence are made applicable to these written statements as well.⁷

If this amendment is adopted, the rules issued in terms of the Act should specify the procedures to be followed.⁸

Whereas the complainant has the benefit of guidance from the maintenance officer, it should be kept in mind that the vast majority of respondents in maintenance cases are unrepresented and may find the procedure for objections difficult to understand or to implement. Therefore, if this amendment is adopted, the rules promulgated under the Act should also require that the directions about how to make an objection be stated in the simplest words possible, in several languages. Furthermore, the respondent should also be given an opportunity to object to the statements proffered, and to give reasons for the objections, at the maintenance enquiry itself.

- (3B) (a) In assessing the total maintenance needs of any person or persons in respect of whom a maintenance order is sought, the maintenance court shall give due consideration to all reasonable expenditure in relation to, but not limited to, the following: housing, water, electricity, food, clothing, transport, toiletries, child care services, education (including pre-school education), and medical, dental and

⁷ This subsection is similar to section 7A of the South African Act, which was inserted by Act 2 of 1991. However, the Namibian draft incorporates the following improvements over the South African model:

(a) Some of the wording is re-organised for greater simplicity, and the new provision is placed at what seems to be a more logical spot in the Act than that chosen for the South African amendment.

(b) The text of the amendments assumes that some of the details regarding the manner in which notice must be served and objections could be placed in the rules rather than in the statute [paragraphs (a), (c) and (d)].

(c) The proposed Namibian amendments make it clear that the prohibition on the admission of written statements made by the respondent does not apply to a written consent to the order in question [paragraph (b)].

(d) The proposed Namibian amendments make it possible for the respondent to have the same rights as the complainant to submit written statements into evidence [paragraph (f)].

(e) The proposed Namibian amendments make it clear that documents identified in a written statement become exhibits only if the written statement is actually admitted into evidence [paragraph (g)].

(f) The proposed Namibian amendments make it clear that a person who lies in a written statement which is tendered as evidence is guilty of perjury even if the statement in question is not actually admitted as evidence [paragraph (h)].

⁸ In South Africa, a new Rule 4A sets forth the procedures relating to the certification of such written statements as true, and prescribes the form which must be sent to the respondent in advance of the enquiry along with such written statements. It is proposed that such procedures, as well as the procedure prescribed in section 5(7A)(c) of the South African Act, be similarly embodied in the Namibian rules.

pharmaceutical services, as well as any other reasonable expenditure incurred in respect of the daily needs of the person in question, including any reasonable expenditures necessitated by a disability or other special condition.

- (b) In calculating the contribution made towards the maintenance of a child by a custodian who is legally liable to maintain such child, the maintenance court shall take into account the value of the labour expended by such custodian in daily care of such child.

This is a new provision based in part on the existing common law. It is codified here to give clear guidance to the maintenance courts, which do not at present always approach maintenance matters consistently.

Paragraph (b) attempts to take into account the fact that the custodian of a child bears responsibilities which go beyond financial contribution to the maintenance of the child.⁹

- (3C) In assessing the ability of the respondent to pay maintenance, the maintenance court shall give due consideration to the following: the respondent's income, including but not limited to income from formal employment; the total value of assets owned by or under the control of the respondent; and the obligations which the respondent bears towards any other person which he or she is legally liable to maintain;

This new provision is an attempt to clarify the fact that it is possible in appropriate circumstances to make a maintenance order against a respondent who is unemployed, if the respondent possesses sufficient assets or informal income.

This appears to be the position under the existing law, but the practice of the maintenance courts indicates that there is a need for greater clarity. Many persons interviewed have also complained that respondents who possess a substantial degree of wealth in assets such as cattle or property have successfully managed to avoid paying maintenance by claiming unemployment.

The new provision would also clarify the legal position on whether it is appropriate for the maintenance court to consider the respondent's obligations to other dependants. While there have been a number of cases which have taken the view that it is wrong to "feather the second nest at the expense of the first", other cases have taken the more pragmatic view that the totality of the circumstances must be taken into account on a case-by-case basis.

If maintenance is viewed from a children's rights angle, then considerations as to which responsibilities are "prior commitments" must give way to the reality that all children are entitled to support from both of their parents, regardless of the order and circumstances of their birth.¹⁰

⁹ There is no similar provision in the South African Act.

¹⁰ See, for example, *S v Walraven* 1975(4) SA 348 (TPA) and *Chizengeni v Chizengeni* 1989(1) SA 454 (ZHC), and, in contrast, *Hancock v Hancock* 1957(2) SA 501 (CPD) and *Benecke v Benecke* 1965(1) SA 855 (TPD).

(4) After consideration of the evidence adduced at the enquiry the court may--

(a) in the case where no maintenance order is in force, make any one or more of the following orders, as the court may deem fit--

(i) an order against any person proved to be legally liable to maintain any other person, whether child or adult, for-

(aa) the payment of specified sums of money for the maintenance of such other person, effective from the date on which the complaint was made to the maintenance court or from the date of the enquiry, as the court sees fit, to be paid during such periods and at such times and in such manner as may be specified in the order;

(bb) the payment of medical expenses for such other person, including an order requiring such other person, if he or she qualifies therefore, to be registered as a dependent of such person in a medical scheme of which such person is a member;

(ii) an order against any person proved to be legally liable to maintain a child, for-

(aa) the payment to the mother of the child, of such sum of money, together with any interest thereon, as the mother is in the opinion of the court entitled to recover in respect of expenses incurred by her in connection with the pregnancy and the birth of the child, including but not limited to medical and hospital expenses;

(bb) the payment to the child's custodian or primary caretaker of such sum of money, together with any interest thereon, as such custodian or primary caretaker is in the opinion of the court entitled to recover in respect of expenditure incurred by him or her in connection with the maintenance of the child for any of all of the period between the date of the child's birth and the date of the enquiry in question;

[make an order against any person proved to be legally liable to maintain any other person for the payment during such period and at such times and to such officer, organisation or institution and in such manner as may be specified in the order, of sums of money so specified, towards the maintenance of such other person.]

(b) in the case where a maintenance order is in force --

(i) make any one or more of the following orders, as the court may deem fit--

(aa) an order contemplated in paragraph (a)(i)(aa) made in substitution for any order previously made in terms of that paragraph, or for any order for maintenance made by the High Court in connection with a divorce order;

(bb) any order contemplated in paragraph (a)(i)(bb) made in addition to any other order previously made in terms of paragraph (a) which does not make explicit provision for medical expenses, or in substitution for any order relating to medical expenses made by any court in Namibia, including the High Court;

(ii) discharge any or all of the orders in force;

[make an order contemplated in paragraph (a) in substitution of such maintenance order or discharge such maintenance order.]

(c) make no order.

This amended subsection makes it possible for the court to make four kinds of orders -- (a) an order for ongoing maintenance expenses, as already provided for in the existing act; (b) an order specifically relating to medical expenses, including an order that a person must be named as a dependent on a respondent's medical scheme; (c) an order in favour of the mother of a child for the retroactive payment of a fair share of pregnancy and birth-related expenses; (d) an order for the retroactive payment of maintenance expenses incurred by a custodian or a primary caretaker prior to the date of the enquiry.

A maintenance order can be increased or decreased at the request of either party. A medical expenses order can be made at any stage, in addition to any other order which is already in force but does not make explicit provision for the medical expenses in question, or in substitution for any other order which relates to medical expenses.

Orders relating to retroactive expenses are not eligible for substitution. Furthermore, it is not possible for a person to request orders relating to retroactive expenses if a maintenance order is already in force. (It seems unfair to the respondent not to address such retroactive expenses at the time of the respondent's first appearance in the maintenance court.)¹¹

¹¹ This draft section is modelled on the amendments made to the South African Act by Act 2 of 1991. However, the proposed draft differs from the South African amendments in the following ways:

(a) The South African Act has no reference to pregnancy-related expenses, but only to "lying-in" expenses. Pregnancy-related expenses might include the costs of pre-natal care, a contribution towards maternity clothes, or a contribution in respect of lost wages because of any inability to work during the pregnancy which was not covered by sick leave or maternity benefits.

(b) The South African Act makes it possible only for *mothers* to recover retroactive expenses related to child care. This seems to constitute unwarranted sex discrimination. A father who has cared

- (4A) The court may specify that a maintenance order made in terms of subsection (4)(a)(i)(aa) shall increase or decrease annually on the date on which the order was made, in accordance with the increase or decrease in the consumer price index for the preceding financial year.

At present, a maintenance order can be increased (or decreased) only by instituting a separate maintenance enquiry to request a substitution of the original order. This new provision would allow the court to provide for automatic cost of living increases (or decreases), by providing for automatic annual adjustments on the basis of the consumer price index. (This technique is sometimes used in maintenance orders which are made part of divorce orders.¹²)

This provision could be used by the maintenance court to ensure that payments keep pace with realistic changes in basic expenses. If automatic increases became too burdensome, the respondent would still have the right to approach the court to request a substitution reducing the amount of the monthly payment. But providing an automatic increase would reduce the burden which is presently placed on the complainant.¹³

- (4B) Any order made in terms of subsection (4) in respect of expenses already incurred on behalf of the person to be maintained shall have the effect of a civil judgment of that court and shall be executed in the prescribed manner.

This section would make it unnecessary to secure a criminal conviction for non-payment before property can be seized to satisfy the order in question. This is consistent with the civil nature of the maintenance proceedings.¹⁴

- (5) Any maintenance court which has made an order under sub-section (4), may --

(a) specify that any order made in terms of subsection (4) be paid--

- (i) directly to the person in respect of whom the order is made, or if such person is a minor or a person under the care of a curator ad litem, to such person's custodian, primary caretaker or curator, as the case may be;

for a child during any period after the child's birth should certainly be entitled to claim maintenance expenses from the mother if the situation warrants.

Furthermore, the actual custodian of the child might be a grandparent or other member of the child's extended family who should be entitled to make a claim for expenses incurred from the child's mother or father or both.

(c) The proposed Namibian amendments empower the court to make a maintenance order effective from the date which the complaint was first filed with the maintenance court, so that respondents will have nothing to gain from trying to delay the enquiry. An order made retroactive to the date of the complaint would be particularly appropriate in a case where the respondent has wilfully delayed the proceedings.

(d) The proposed Namibian amendments adopt a style and format which is simpler to follow than those in the South African Act.

¹² See, for example, *Davis v Davis* 1993(1) SA 621 (C).

¹³ There is no similar provision in the South African Act.

¹⁴ This new provision mirrors the last clause in section 5(4) of the South African Act, as added by Act 2 of 1991.

- (ii) to such officer, organisation or institution as the court may specify; or
- (iii) into such account at such financial institution as the court may specify; or
- (b) at the request of the maintenance officer, without prior notice to any person, vary the specification referred to in subparagraph (a) [such order by designating as the officer, organisation or institution to whom or to which payment is to be made, any other officer, organisation or institution], and the maintenance officer shall in the prescribed manner inform the person required to make payments in terms of the order of such variation.

This provision gives the court the power to specify that payments made in terms of any order issued by the court must be made directly to the person concerned, to an officer of the court, or into an account at any financial institution.

This would be more convenient for recipients by providing a mechanism which makes it possible for them to receive payments without having to collect payments in person at the maintenance court. Women have complained about the extra time and expense involved in collecting the money from the court, and the problem can be particularly acute in rural areas.¹⁵

- (6) For the purposes of determining whether a person [Bantu or a native as defined in section 35 of the Black Administration Act, 1927 (Act No. 38 of 1927), or section 25 of the Native Administration Proclamation, 1928 (Proclamation No. 15 of 1928), of South West Africa, respectively,] is legally liable to maintain any other person in terms of this Act, a customary union shall be deemed to have the same consequences as a civil marriage with regard to the duty to maintain [he shall be deemed to be the husband of any woman associated with him in a customary union].

The wording of this section has been revised so that it is not restricted to "blacks" or "natives", or to "husbands". The basic idea behind the existing provision -- that customary marriages should be treated the same as civil marriages for the purposes of the Maintenance Act -- has been retained.¹⁶

¹⁵ This amended subsection parallels provisions in sections 5(4)(a)(i) and 5(5)(b) of the amended South African Act, with the following differences:

(a) The South African Act makes the different payment options available only in respect of ongoing maintenance orders -- not in respect of maintenance orders for retroactive expenses or medical expenses. The proposed Namibian amendments provide a broad range of payment options for all possible orders, to cover the very real possibility that retroactive payments and contributions towards medical expenses may be paid off in monthly instalments (as is often the case with arrears at present).

(b) The proposed Namibian amendments are more explicit than the South African Act about who can receive payments on behalf of minors and persons who are under the care of a *curator ad litem* (such as persons who are mentally ill).

¹⁶ The corresponding section of the South African Act was amended by Act 2 of 1991, but it still applies only to "Blacks".

- (7) Any order under this section may be made against any person not present at the enquiry, if it is made in accordance with his or her written consent produced at the enquiry by the maintenance officer.

(7A) If a respondent fails to appear before the court at the time appointed in a summons issued under section 4(1), the court, after satisfying itself that the summons has been duly served, may proceed with the enquiry and issue an order in terms of section 5(4) in the absence of the respondent, and the maintenance officer shall give notice to the respondent of such order in the prescribed manner.

This provision parallels the regulations on contribution orders under the Children's Act 33 of 1960.¹⁷ (A contribution order is a contribution towards the maintenance of a child who has been placed outside the home by the children's court -- for example, with foster parents or a children's home.)

This provision is also consistent with the usual procedure in civil matters before a magistrate's court; where a party to the case does not obey a subpoena, default judgement can be awarded against this party in his or her absence. (See Magistrates' Courts Rules, Rule 32.) The Maintenance Act is designed to create a favourable mechanism for the recovery of maintenance, but, ironically, without amendments such as this one, a person bringing a civil action for maintenance under the normal rules of procedure would have certain advantages which are not available under the Act.

One of the biggest problems with the existing system is the failure of respondents to show up in maintenance court. This provision would provide a strong incentive for respondents not to ignore summonses, and it would in many cases prevent the complainant from having to appear in court repeatedly. (In this regard, it should be kept in mind that a maintenance enquiry is not a criminal proceeding.)

The primary concern is that the interests of the child should not suffer because of a protracted maintenance procedure.

An alternative approach would be the following:-

- (7A) (a) If a respondent fails to appear before the court at the time appointed in a summons issued under the provisions of section 4(1), the court, after satisfying itself that the summons has been duly served, may proceed with the enquiry and issue an interim order in terms of section 5(4) in the absence of the respondent, and the maintenance officer shall give notice to the respondent of such order in the prescribed manner.
- (b) The amount specified in an interim order issued where no previous order exists, or the amount by which an interim order exceeds an existing order, shall be held in trust by the state for the beneficiaries specified in the interim order until such time as a final order is made.
- (c) If the respondent still fails to appear before the court at the time appointed in a second summons issued under the provisions of section 4(1), after receiving notice of the interim order under subsection (1), the

¹⁷ See Regulation 11(4), GN R 2433 of 10 December 1976, RSA Government Gazette 5357.

court, after satisfying itself that such second summons and such notice have been duly served, shall make the interim order a final order.

- (d) If no final order is issued, or if the final order requires payment of a lesser amount by the respondent than the interim order, the amounts or excess amounts paid in terms of the interim order shall be refunded to the respondent.¹⁸

If this alternative approach is adopted, the regulations issued under the new Child Care and Protection Act should make it possible for the beneficiaries to receive a state maintenance grant during the period between the interim order and the final order, and this Act should allow for the reimbursement of the amount paid by the state before any remaining amounts are paid over to the beneficiaries of the order once the final order is instituted.

A second alternative would be to limit the possibility of an ex parte order against the respondent to cases where the court had prima facie evidence of the respondent's income or means.

The draft proposals do not make provision for the discharge or reduction of an existing order in the absence of the custodian of the children in question. The reason for this is the importance of protecting the interests of the children at all costs. An ex parte order should be allowed only where it will benefit the children concerned, and not in cases where it might work to their detriment.

- (8) Subject to such rules as may be made under this Act, the court holding an enquiry may take into consideration any evidence in any proceedings in respect of an existing maintenance order or other order issued under section 5(4) or accept as *prima facie* proof any finding of fact in such proceedings.

- (8A) The provisions of section 236 of the Criminal Procedure Act, 1977 (Act 51 of 1977) shall apply *mutatis mutandis* in respect of any enquiry.

*Section 236 sets forth the conditions in which an entry in an account book kept by a bank shall be prima facie proof of the transactions recorded in the account book. This provision already applies to criminal proceedings for arrears by virtue of its inclusion in the Criminal Procedure Act. However, if it were applicable to enquiries as well, it would be simpler for the maintenance court to draw upon bank account balances as indications of the means of the respondent.*¹⁹

- (9) A copy of an order made against any person in his or her absence, shall be delivered or tendered to him or her by any maintenance officer or any police officer and the return of such officer showing that such copy was delivered or tendered to such person shall be deemed sufficient proof that such person was aware of the terms of such order.

¹⁸ The concept embodied in this alternative was suggested by the Prosecutor-General's office in comments on an earlier proposed bill.

¹⁹ This provision is identical to section 8A the South African Act, which was added by Act 2 of 1991.

- (10) (a) Such records of the proceedings at an enquiry shall be kept and shall be accessible to such persons upon such condition as to payment of fees or otherwise as may be prescribed.
- (b) Any such fees shall be prescribed in consultation with the Minister of Finance.
- (11) Any maintenance court which has made any order under subsection (4) may, at the request of the maintenance officer, direct that two photographs be taken of the person against whom such order has been made, and the said photographs shall be destroyed if such order is set aside on appeal or discharged.

This new provision is intended to help police trace persons who do not comply with maintenance orders.²⁰

The existing subsection 11 on privacy has been placed in an independent provision which covers various aspects of privacy -- see section 14E below.

6. Transfer of orders.

- (1) Subject to the directions prescribed in connection with the transfer of maintenance orders, the maintenance officer may direct the clerk of a court which made an order under section 5(4), in writing, to transmit such order, together with the prescribed records, to the clerk of the maintenance court within the area of jurisdiction in which the person in whose favour such order was made, or the custodian or primary caretaker of such person, resides.
- (2) On receipt of an order referred to in subsection (1), the clerk of the maintenance court concerned shall register such order in the prescribed manner.
- (3) Any order registered under subsection (2) shall for the purposes of the Act be deemed to be an order made under section 5(4) of this Act by the maintenance court where such order has been so registered.

This new provision would provide explicitly for the transfer of files from one court to another if the beneficiary changes residence. The rules promulgated under the Act should set forth procedures to guard against the loss of files during transfer.²¹

²⁰ This provision parallels subsection (5)(a) of the South African Act, as amended by Act 2 of 1991.

²¹ The wording of this provision is similar to sections 6(2)-(4) of the South African Act, as amended by Act 2 of 1991. However, to provide greater clarity, the proposed Namibian amendments separate the provisions on transfer from the provisions on notice of substitution or discharge contained in section 6(1) of the South African Act. The Namibian Act also refers to "order" rather than to "maintenance order" to make it clear that these provisions apply to *any* orders which can be made by the maintenance court under section 5(4).

6A. Notice of substitution or discharge and transfer thereof.

- (1) Whenever a maintenance court makes an order under section 5 [five] in substitution of or discharging a previous [maintenance] order, such previous [maintenance] order shall cease to be of force and effect and the maintenance officer shall forthwith give notice of the making of the order to the registrar or clerk of the court which made the previous [said maintenance] order or which imposed the sentence concerned, as the case may be, who shall record the order in the relevant [relative] records or registers in the prescribed manner.
- (2) If a transfer of the case in question to another maintenance court has already been effected in terms of section 6, the maintenance court which receives the notice of substitution or discharge under subsection (1) shall transfer such notice in the prescribed manner to the clerk of the maintenance court which now has responsibility for the case.

7. Appeal against maintenance order.

- (1) Any person aggrieved by an order made under section 5(4) [subsection (4) of section five] may, within such period and in such manner as may be prescribed, appeal against such order to the High Court.
 - [(a) in the case of an order made by a maintenance court corresponding to a magistrate's court other than a Commissioner's Court, to the provincial or local division of the Supreme Court having jurisdiction;
 - (b) in the case of an order made by a maintenance court corresponding to a Commissioner's Court, to the Appeal Court for Commissioner's Courts having jurisdiction or, in the case of any such order made in the territory, to the South West Africa Division of the Supreme Court of South Africa.]
- (1A) If the aggrieved person is a child, or the custodian or primary caretaker of a child, and if such aggrieved person so requests--
 - (a) the maintenance officer shall prepare and submit on his or her behalf the notice of appeal, and

In South Africa, a new Rule 4B sets forth specific procedures for the administration of discharges and transfers. Procedures which appear to be designed to prevent lost files in the course of transfers require that certified copies of all relevant documents be made and filed by the clerk of the court which made the order *before* the transfer takes place. The original documents are then to be transferred to the new court by registered post, where they are to be registered in the same register as maintenance cases being handled by that court during the year in which the documents are received. Similar procedures for transfer should be specified in the rules issued in terms of the Namibian Act.

(b) the Prosecutor-General, or someone designated by the Prosecutor-General, shall act on his or her behalf in the High Court of Namibia.

(1B) If an appeal is noted against a person who is a child, or the custodian or primary caretaker of a child, and if such person so requests, the Prosecutor-General, or someone designated by the Prosecutor-General, shall act on his or her behalf in the High Court of Namibia.

Where maintenance of a child is involved, this new provision would make it possible for the maintenance officer to assist with submitting the notice of appeal, and for the Prosecutor-General's Office to act on behalf of the appellant. The Prosecutor-General's Office would also be authorised to represent a respondent in an appeal where maintenance of a child is involved.

This innovation is consistent with the assistance which is already provided by the maintenance officer at the level of the enquiry. Furthermore, it is in accordance with the principle that the interests of the child are paramount under the Act.²²

The Supreme Court of South West Africa suggested in 1980 that the legislature should consider charging the Attorney-General with the duty of appearing for a complainant when the respondent appeals the decision of the maintenance court, if the complainant requests assistance.²³

A subsequent South African case held that, even without legislative reform, "where a complainant/respondent [ie, respondent in the appeal] does not engage her own legal representative or wish to appear in person, the services of the Attorney-General should be made available as amicus curiae", in keeping with the spirit of the Act. The court pointed out that maintenance proceedings are initiated by a maintenance officer who is a civil servant, in cases where children are often involved and where the complainant may be indigent. The court left open the question of what duties should be undertaken by the Attorney-General when the complainant in the maintenance case was the applicant in the appeal.²⁴

The proposed amendment would authorise assistance by the Prosecutor-General's office to the original complainant in an appeal, regardless of whether this complainant was the applicant or the respondent in the appeal, whenever the interests of children are involved.

(1C) Notwithstanding anything contained in any other law, the filing of an appeal under this section shall not have the effect of suspending payment in terms of the order pending the outcome of the appeal, unless the appeal is noted against a finding that the appellant is legally liable to maintain the person in whose favour the order was made.

²² There is nothing similar in the South African Act.

²³ *Fernandez v Loubscher* 1980 (3) SA 765 (SWA).

²⁴ *Govender v Manikum* 1981 (1) SA (N) at 1182.

This provision is designed to protect the interests of the children involved. Because an appeal can be a lengthy process, the beneficiary of the order could be substantially disadvantaged if all payments were suspended while the appeal is pending. This new subsection provides that payments will not be suspended unless the appeal is against the finding that the appellant is legally liable to maintain the person in question.²⁵

- (2) On appeal the High Court [such division or appeal court] may make such order in the matter as it may deem fit.
- (3) In sub-section (1) "order" includes --
 - (a) any refusal to make such an order;
 - (b) any refusal to make a provisional maintenance order under section 5 [five] in terms of the provisions of the Reciprocal Enforcement of Maintenance Orders Act 80 of 1963 or any other law.

7A. Interrogation of persons by maintenance officer.

- (1) A magistrate may, at the request of a maintenance officer, require the appearance before him or any other magistrate, for interrogation by the maintenance officer, of any person who is likely to give material or relevant information as to the identification, location, earnings or assets of any person who is legally liable to maintain any other person, or who is allegedly so liable: Provided that if the person who is required to appear before the relevant magistrate furnishes the information in question to the satisfaction of the maintenance officer concerned in advance of the day on which he or she is required so to appear, he or she shall be discharged from the obligation to so appear.
- (2) The provisions of sections 162 to 165, 179 to 181, 187 to 189, 191 and 204 of the Criminal Procedure Act, 1977 (Act 51 of 1977), shall apply *mutatis mutandis* in respect of the proceedings under subsection (1).
- (3) The interrogation of any person under subsection (1) may be conducted in private at a place designated by the witness.

The purpose of this new section is primarily to make it possible for a magistrate to require anyone who can furnish information which might help to trace a respondent to appear before that magistrate for interrogation by the maintenance officer.

If the person in question provides the necessary information to the maintenance officer before the date in question, he or she will no longer be required to appear. This provision will encourage those with relevant information to co-operate with the maintenance officer.

²⁵ This provision is similar to section 7(4) of the South African Act, added by Act 2 of 1991.

The possibility of interrogating an employer about the wages earned by the respondent, or obtaining information about the respondent's assets, would be useful in a situation where an ex parte order was entered against the respondent under section 5(7A).

Maintenance officers already have a general power of investigation under the existing Act, but the exercise of this power depends largely on the interest and persistence of the individual maintenance officer. This new provision would add some substance to the general investigative power.²⁶

The provisions of the Criminal Procedure Act which are referred to deal with the following matters:

162-3: witnesses to give evidence under oath, or by making an affirmation in lieu of an oath;

164: people who do not understand the oath/affirmation because of youth or lack of education may be allowed to give evidence in criminal proceedings after being warned by the presiding officer to speak only the truth;

165: the oath/affirmation may be given by an interpreter if necessary;

179: process for securing the attendance of witness;

180: service of subpoenas;

181: pre-payment for travelling and accommodation expenses for witness required to travel to another magisterial district;

187: subpoenaed witness must remain in attendance until excused by the court;

188: failure to attend proceedings, or to remain in attendance, is a criminal offence;

189: power of court to punish reluctant witnesses;

191: payment of witness expenses;

204: protection for witnesses asked to give evidence which might incriminate themselves.

8. Rights and privileges of witnesses.

- (1) Any person other than a person against whom a maintenance order is made, attending an enquiry under this act as a witness shall be entitled to an allowance as if he or she were attending criminal proceedings as a witness for the State.
- (2) The officer presiding at such an enquiry may direct that a respondent [any person against whom a maintenance order is made] shall be paid the necessary expenses to travel to and from the court and of sojourn at the court in question, or such allowance as may be paid to a witness for the accused in criminal proceedings, or both.

²⁶ This provision is based on section 7A of the South African Act, added by Act 2 of 1991.

This amendment is necessary to make it possible for the court to refund the respondent's travelling and accommodation expenses in appropriate cases if the respondent is excluded from the automatic application of section 181 of the Criminal Procedure Act in terms of the proposed amendments to section 4(3).²⁷

- (3) In connection with the giving of evidence or the production of any book, document or statement at such an enquiry, the law relating to privilege as applicable to a witness giving evidence or summoned to produce a book, document or statement in criminal proceedings in a magistrate's court shall apply.

- [(4) No person at such an enquiry shall be compelled to give evidence relating to his or her liability to maintain any other person.]

A maintenance enquiry is fundamentally a civil proceeding, with the possibility of a criminal sanction as an enforcement mechanism (as is also possible in other civil proceedings).²⁸ Therefore, the statutory protection against "self-incrimination" is unnecessary and inappropriate.

9. Offences by witnesses.

- (1) The provisions of sections 188 [211] and 189 [212] of the Criminal Procedure Act, 1977 [1955] (Act 51 of 1977 [No. 56 of 1955]), shall *mutatis mutandis* apply in relation to a person summoned under section 4 of this Act to appear at an enquiry in a maintenance court, and the maintenance court holding that enquiry may exercise in respect of such person all the powers conferred by section 170(2) and section 189 of the said Act [the said sections 211 and 212] on the court referred to therein.

This amendment would merely update the Act by providing correct cross-references to the Criminal Procedure Act, 1977. The sections referred to deal with the following matters:

188: failure to attend proceedings, or to remain in attendance, is a criminal offence;

189: power of court to punish reluctant witnesses;

170(2): power of court to issue warrant of arrest to a witness who does not return after an adjournment.²⁹

- (2) Any person who after having been sworn or having made affirmation, gives false evidence before the court holding the enquiry, knowing such evidence to be false or not knowing or believing it to be true, shall be guilty of an

²⁷ This provision is based on section 8(2) of the South African Act, added by Act 204 of 1993.

²⁸ See, for example, *Nodala v The Magistrate, Umtata* 1992(2) SA 696 (Tk) at 699F-G; *Kruger v Ferreira* 1979(1) SA 915 (NC).

²⁹ This provision is identical to section 9(1) of the South African Act, as amended by Act 2 of 1991.

offence and liable on conviction to the penalties prescribed by law for perjury.

10. **Offences relating to enquiry. [Hindering or obstructing an enquiry.]** Any person who wilfully interrupts the proceedings at an enquiry under this Act or who wilfully hinders or obstructs the court in the performance of its functions at any such enquiry shall be guilty of an offence and liable on conviction to a fine not exceeding N\$2000 [one hundred rand] or to imprisonment for a period not exceeding six months or to both such fine and such imprisonment.

This amendment raises the maximum fine which can be imposed for an offence under this section.³⁰

10A. Procedures relating to arrears. A maintenance officer shall--

- (a) in the case where payments are in terms of an order issued under section 5(4) to be made to any person acting on behalf of the state, or to any state organisation or institution, whenever such payments are in arrears, regardless of whether or not the beneficiary of such order or someone acting on behalf of such beneficiary has made a complaint regarding such arrears or
- (b) in the case where payments are in terms of an order issued under section 5(4) to be made to any person, organisation or institution other than those referred to in paragraph (a), or to an account at a financial institution, upon receipt of a complaint regarding arrears from the beneficiary of such order or someone acting on behalf of such beneficiary

institute criminal proceedings in terms of section 11.

At present, even though all maintenance payments are made into court so that maintenance officers have full access to information regarding arrears, most courts take no action on arrears unless the beneficiary of the order comes in person to make a complaint. This means unnecessary time and expense for the complainant. A court order has been violated, so an offence has been committed regardless of whether the complainant takes direct action.

The amended provision would require that the maintenance officer take action automatically if payments made into the court fall into arrears. Where payments are made directly to the beneficiary or directly into the beneficiary's bank account, a complaint from the beneficiary would still be required -- since the maintenance officer would otherwise have no way of knowing that payments were in arrears.

The new provision would also change the present policy of some maintenance courts to take action only after maintenance payments have been in arrears for at least three months. The problem with this waiting period is that it can deprive the beneficiary of much-needed income for an unacceptably long period. Furthermore, when arrears mount up, they are often paid off in very small amounts over time, which can cause serious financial difficulties for the beneficiary.³¹

³⁰ The fine in the South African Act was similarly raised to R2000 by Act 2 of 1991.

³¹ There is no similar provision in the South African Act.

11. Penalties for failure to comply with maintenance order.

- (1) Subject to the provisions of sub-section (3) any person who fails to make any particular payment in terms of [a maintenance order] an order made under section 5(4), shall be guilty of an offence and liable on conviction to a fine not exceeding N\$4000 [two hundred rand] or to imprisonment for a period not exceeding one year or to such imprisonment without the option of a fine. [and]

The maximum fine for failure to comply with a maintenance order is increased.³²

The terminology of this subsection is also altered to make it clear that this provision refers to any of the orders which may be issued under section 5(4).

- (2) (a) Any court with civil jurisdiction may, in addition to or in lieu of any penalty, on the application of the public prosecutor grant an order for the recovery from the convicted person of any amount he or she failed to pay in terms of the firstmentioned order, together with any interest thereon, whereupon the order so granted shall have the effect of a civil judgment of that court and shall, subject to paragraph (b), be executed in the prescribed manner.

The proposed amendment empowers the court to add interest to an order for the payment of arrear maintenance, in line with the practice in other civil judgments.³³

- (b) A court granting an order against a convicted person under paragraph (a) may in a summary manner enquire into the circumstances mentioned in paragraph (c), and as it may deem fit authorise the issue of a warrant of execution against the movable or immovable property of the convicted person in order to satisfy such order.

This new subsection would allow the court to issue a warrant of execution against movable or immovable property to satisfy an order for the payment of arrear maintenance, after a summary enquiry which takes into account all relevant considerations.

This new provision would streamline the process of attempting to recover arrear maintenance. At present, an order for arrear maintenance has the effect of a civil judgement, meaning that a warrant of execution can be issued. This amendment would provide a simplified procedure which would expedite recovery of the amounts owing.³⁴

- (c) At an enquiry referred to in paragraph (b) the court shall take into consideration--

³² The fine in the South African Act was similarly raised to R4000 by Act 2 of 1991.

³³ This provision is identical to section 11(2)(a) of the South African Act, as amended by Act 2 of 1991.

³⁴ This provision is identical to section 11(2)(b) of the South African Act, added by Act 2 of 1991.

- (i) the existing and prospective means of the convicted person;
- (ii) the obligations which the convicted person bears towards any other person which he or she is legally liable to maintain;
- (iii) the financial needs and obligations of the beneficiary of the order;
- (iv) the conduct of the convicted person in so far as it may be relevant to his or her failure to make payments in accordance with the order in question;
- (v) any other circumstances which should in its opinion be taken into consideration.

This new provision details the factors which the court must take into account before issuing a warrant of execution.³⁵

- (d) Notwithstanding anything to the contrary in any law contained, any pension, annuity, gratuity or compassionate allowance or other similar benefit shall be liable to be attached or subjected to execution under an order having the effect of a civil judgment under sub-section (1).

(2A) Any court which has convicted any person of any offence under subsection (1), shall on the application of the public prosecutor, whether or not any penalty is imposed or any other order is granted, make an order against a convicted person who is employed by an employer for the attachment of wages in terms of section 12 for future maintenance payments.

Even in circumstances where the option of issuing an order for the attachment of wages is already available under existing law, this option is seldom utilised. This new provision attempts to remedy this by requiring the attachment of wages whenever an employed person is convicted of the offence of non-payment of a maintenance order, regardless of whether any penalty is imposed or any other order made.³⁶

- (3) Proof that any failure which is the subject of a charge under subsection (1) was due to lack of means and that such lack of means was not due to unwillingness to work or misconduct on the part of the person charged, or to any other action or conduct by the person so charged that caused a loss of income or impaired such person's financial resources, shall be a good defence to any such charge.

³⁵ This provision is similar to section 11(2)(c) of the South African Act, added by Act 2 of 1991. However, the proposed Namibian amendments also direct the court to take into account the obligations which the convicted person bears towards any other persons which he or she is legally liable to maintain. For example, it would not be very useful to sell off a man's house for the benefit of one of his children, leaving other children whom he may have fathered homeless.

³⁶ There is no similar provision in the South African Act.

The amended working of this defence is an attempt to close any loopholes which may exist, to ensure that this defence is available only to people who have limited means through no fault of their own.³⁷

- (4) A magistrate's court shall have jurisdiction to impose summarily the full penalty for any offence under sub-section (1).
- (5) A copy of [a maintenance order] an order made under section 5(4), purporting to have been certified by the maintenance officer or by the registrar or clerk of the court or by any other officer having the custody of the records of the court which made [the maintenance] such order, shall, if the name corresponds substantially to that of the person charged with an offence under sub-section (1), on its mere production be *prima facie* proof of the fact that such [maintenance] order has been made against the lastmentioned person.

The terminology of this subsection is altered to make it clear that this provision refers to any of the orders which may be issued under section 5(4).

- (6) If a person was convicted of any offence under subsection (1), the maintenance officer may, notwithstanding anything to the contrary in any law contained, furnish the personal particulars of such person to any business which is involved in the granting of credit or the assessment of credit ratings.

This new provision gives the court leave to disseminate information about non-compliance with a maintenance order to persons seeking information in respect of credit or credit ratings. Since prison sentences are particularly inappropriate for the offence of non-compliance with a maintenance order, it may be useful to give the court the option of various other kinds of sanctions and deterrents.³⁸

12. Court may authorise payment of maintenance monies by employer on behalf of employee.

- (1) Any maintenance court [which has convicted any person of any offence under sub-section (1) of section eleven] may, where any order made in terms of section 5(4) is issued, on the advice of the maintenance officer, [whether or not any penalty is imposed or any order is granted under the sub-section] make an order authorising any employer of [such person] a person who is subject to such order to make on behalf of such person any payments required to be made in terms of the [maintenance]

³⁷ There is no similar provision in the South African Act.

³⁸ This provision is similar to section 11(6) of the South African Act, added by Act 2 of 1991. It is slightly broader, however. The South African provision authorises the provision of information only to businesses which have as their object the granting of credit or the setting of credit ratings. The proposed Namibian amendments authorise the provision of information to any business which is involved with these matters, even if they do not constitute the principal object of the business in question. For example, a company which frequently entered into hire-purchase contracts might request information from the maintenance officer.

order concerned, from the salary, wages or any other form of remuneration or allowance of such person, whereupon the maintenance officer of the court which made such [maintenance] order may from time to time in the prescribed manner cause a notice to be served on any such employer requiring him so to make any such payments at such times and in such manner as may be specified in such notice.

The amendments to this section would make it possible for a maintenance court to issue an order for the attachment of wages on the advice of the maintenance officer, whether or not the person subject to the maintenance order has fallen into arrears. For example, the maintenance officer might recommend this step where the respondent requests it, or where the complainant provides convincing reasons to fear that regular payments will not be forthcoming.

This approach should not be seen as a penalty, but merely as an administrative measure which will aid compliance with maintenance orders. However, it should be kept in mind that failure to maintain, even in the absence of a maintenance order, is already an offence in terms of section 18 of the Children's Act 33 of 1960 (and will probably continue to be an offence under the forthcoming Child Care & Protection Act). The fact that a criminal offence has in theory been committed by the simple failure to maintain provides an even stronger argument for the attachment of wages even in the absence of a conviction for non-payment of a maintenance order.

Orders for the attachment of wages in conjunction with a conviction for non-payment are covered by proposed section 11(2A) above.

- (2) Any [notice under] order made in terms of this section shall have precedence over any other order of court requiring payment to be made from the salary, wages, remuneration or allowance aforesaid.

The wording of the above provision is altered slightly to leave no doubt about the consistency of this section with the Labour Act.

- (3) Any person who fails to comply with any such notice shall be guilty of an offence and liable on conviction to a fine not exceeding N\$2000 [one hundred rand] or to imprisonment for a period not exceeding six months.

The maximum fine for an employer who fails to comply with a notice regarding the attachment of wages is increased.³⁹

13. When proceedings in respect of failure to comply with maintenance order to be converted into enquiry. If during the course of any proceedings in a magistrate's court in respect of a contravention of [sub-section (1) of section *eleven*] section 11(1) or in respect of the enforcement of any sentence suspended on condition that the convicted person make periodical payments of sums of money towards the maintenance of any other person, it appears to the court that it is desirable that an enquiry under section [*five*] 5 be held or when the public prosecutor so requests, the court shall convert the proceedings into such an enquiry.

³⁹ The fine in the South African Act was similarly raised to R2000 by Act 2 of 1991.

14. Person against who maintenance order has been made, to give notice of change of address.

(1) If any person against whom a maintenance order has been made changes the place of his or her residence or employment during the currency of the order, he or she shall forthwith give notice thereof in writing --

(a) if payment in terms of the order is to be made to any person, officer, organisation or institution, to such person, officer, organisation or institution and to the maintenance officer of the court which made the order; or

(b) if payment in terms of the order is to be made into any account at any financial institution, to the maintenance officer of the court which made the order;

[to whom or to which payment is to be made in terms of the order,] and shall state fully and clearly where the new place of his or her residence or employment is situate.

This amendment is consistent with the amendments to section 5(5) above which would make it possible for payments to be made directly to beneficiaries or into bank accounts.⁴⁰

(2) Any person who fails to comply with the provisions of subsection (1) shall be guilty of an offence and liable on conviction to a fine not exceeding N\$2000 [one hundred rand] or to imprisonment for a period not exceeding six months.

The maximum fine which can be imposed for failure to give proper notice of a change of address is increased.⁴¹

(3) Whenever in criminal proceedings in respect of any offence under subsection (2) the question arises whether or not any person bearing a particular name was resident at a particular place of residence during a particular period, or was working at a particular place of employment during a particular period, a document purporting to be an affidavit made by a person who in that affidavit alleges --

(a) that he or she was resident at the particular place of residence during the period in question, or that the particular place of residence was in his or her possession or under his or her control during such period, or that he or she was during such period in control of the allocation of or the arrangements for accommodation, and that no

⁴⁰ This provision is similar to section 14(1) of the South African Act, as amended by Act 2 of 1991. However, it adds the requirement that notice in terms of subsection (a) also be given to the maintenance court which made the order. This would facilitate the ability of the maintenance court to locate someone subject to an order who fell into arrears.

⁴¹ The fine in the South African Act was similarly raised to R2000 by Act 2 of 1991.

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person bearing the name in question was resident at such place of residence during such period; or

(b) that the particular place of employment was in his or her possession or under his or her control during the period in question, or that he or she was during such period in control of the appointment or remuneration of employees at the particular place of employment, and that no person bearing the name in question was working at such place of employment during such period,

as the case may be, shall on its production at such proceedings be *prima facie* proof of the facts stated therein.

This provision is designed to make the requirement regarding notification of change of address more enforceable.

It would prevent landlords and employers from possibly having to suffer the inconvenience and expense of coming to court simply to testify that a person who allegedly failed to give proper notice of change of address is no longer residing or working at the old address. It provides that an affidavit from the relevant landlord or employer constitutes rebuttable proof of this element of the offence.

The disappearance of the person who is liable to make payments has historically been a serious enforcement problem. Therefore, it seems wise to provide a mechanism which might facilitate enforcement of the change-of-address provision.⁴²

It has also been suggested that a new provision should be added to the Act which gives a parent of a child who is living apart from that child a legal obligation to keep the custodian parent informed of his or her address, with failure to do so constituting a criminal offence. This suggested provision has not been included in the draft, however, for the following reasons.

Firstly, such a provision is unlikely to combat the problem of disappearing parents. Where a parent cannot be located, it would be just as difficult to enforce this provision as it would be to implement a maintenance order.

Secondly, a draft Children's Status Act which has been prepared for the Ministry of Health & Social Services takes a more positive approach to the problem of disappearing parents by improving the legal position of single fathers. It is hoped that improved rights with respect to access, guardianship and custody would give fathers stronger interests in maintaining contact with their children, without the need for criminal sanctions.

The amended South African Maintenance Act includes at this point the following provision:

14A. Presumption in respect of failure to comply with maintenance order. *If it is alleged at proceedings under this Act that a person against whom a maintenance order was made has failed to make any particular payment to the person, officer, organisation or institution, or into the account at the financial institution,*

⁴² This provision is similar to section 14(3) of the South African Act, added by Act 2 of 1991. The Namibian provision differs from the South African one only in details of style and wording.

specified in the order, it shall be presumed, until the contrary is proved, that he has failed to make such payment.

Such a presumption would certainly be an aid to proof that payments are in arrears. However, this presumption would probably be unconstitutional in terms of Article 12 of the Namibian Constitution (the right of all persons to be presumed innocent until proven guilty).

*In terms of section 11(1), failure to make a prescribed payment constitutes a criminal offence. There are no other elements of the crime. Thus, the presumption in the South African Act has the effect of shifting the entire onus of proof to the accused. This would probably be constitutionally unacceptable in Namibia. See *S v Pineiro* 1993(2) SACR 412 (Nm); *S v Titus* (13 June 1991, Frank J, as yet unreported); *NANSO and Others v Speaker for the National Assembly of South West Africa and Others* 1990(1) SA 617 (SWA); *S v Marwane* 1982(3) SA 717 (A) (quoted with approval in Namibian cases).*

14A. Costs.

(1) Any court holding an enquiry under section 5 may, having regard to the conduct of the persons concerned in such enquiry in so far as it may be relevant, make such order as it considers just in relation to the costs of service of process.

(2) (a) If the maintenance officer is of the opinion that--

(i) the parentage of any child is placed in issue;

(ii) the relevant parties are prepared to consent to the taking of blood or tissue samples for the purpose of carrying out scientific tests relating to the question of parentage; and

(iii) one or more of the relevant parties are unable to pay the costs of such tests,

--the maintenance officer may at any time during an enquiry held under section 5 request the maintenance court to hold a costs enquiry referred to in subsection (3).

(b) If the maintenance officer requests, the maintenance court may in a summary manner enquire into the means of the parties referred to in paragraph (a) and any other circumstances which should in the opinion of the court be considered.

(c) After conducting such summary enquiry, the maintenance court may-

(i) make such provisional order as it may deem fit relating to the payment of the costs of the scientific tests referred to in subsection (2)(a), including a provisional order directing the state to pay the whole or any part of such costs; or

- (ii) make no order.
- (d) Whenever a maintenance court makes an order under section 5(4), such court may--
 - (i) make an order confirming the provisional order referred to in paragraph (c);
 - (ii) set aside such provisional order or substitute therefor any order which it considers just relating to payment of the costs of the scientific tests referred to in subsection (2)(a); or
 - (iii) make any other order.
- (3) Notwithstanding subsection (2), a court which has held an enquiry in terms of section 5 may make any order for payment of costs against a party to such proceedings if the court finds that the bringing of such application or the opposing thereof has been in bad faith or vexatious.
- (4) An order made under subsection (1), 2(d) or (3) shall have the effect of a civil judgment of a magistrate's court and shall be executed in the prescribed manner.
- (5) The provisions of section 7(1), (1A), (2) and 3(a) shall apply *mutatis mutandis* in respect of an order made under subsection (1), (2)(d) or (3).

It has been held that maintenance courts do not have the power to make an order for costs in the absence of an express provision granting such authority.⁴³ This new provision would give the court the power to award costs in certain limited circumstances.

The service of process in maintenance cases often results in unnecessary costs which are due to the fault of one of the parties. Subsection (1) of this new provision would make it possible for such costs to be recovered.

Subsection (2) would make it possible for deserving parties to be assisted with the costs of scientific tests to establish paternity (which currently cost as much as NS1000 in Namibia for the more reliable tissue tests).

Subsection (3) authorises the court to make any order for costs against a party which has abused the proceedings by bringing a complaint or opposing a complaint in bad faith.

Subsection (4) would make it possible for orders relating to costs to be executed as civil judgments, and subsection (5) makes it possible to appeal such orders.⁴⁴

⁴³ *Dreyer v Dreyer* 1984(2) 480 (O). However, the courts already do have discretion to make orders regarding costs in an appeal against an order of a maintenance court. *Govender v Munikum* 1981 (1) SA (N) at 1184.

⁴⁴ This provision is similar to section 14B of the South African Act, added by Act 2 of 1991, with the exception of subsection (3), which is a Namibian innovation.

14B. Effect of orders of maintenance court. Save as is otherwise provided in this Act, any order or direction made by a maintenance court shall have the effect of an order or direction of a magistrate's court in a civil action.

This provision would have the effect of making it possible to enforce a maintenance order by means of attachment of wages or property at any stage, without the prerequisite of a criminal conviction for non-payment.⁴⁵ The attachment of wages is also dealt with more specifically in sections 11(2A) and 12.

14C. Execution of writs of attachment. Any writ of attachment in execution of an order made under section 5(4) shall be executed by the messenger of the magistrate's court of the district in which the property to be attached is situate, and the messenger's fees and charges for the execution shall be paid out of the proceeds of the sale of any such property attached in execution and shall be levied in addition and in preference to the amount payable under such order, and if no such sale in execution is held, such fees shall be payable by the respondent.

This provision addresses the questions of the costs of executing a writ of attachment in respect of a maintenance order, to ensure that such costs do not operate as a barrier to this method of enforcement.

14D. Maintenance Fund.

- (1) All monies collected as fines paid in terms of this Act shall be paid into a special account to be known as the Maintenance Fund.
- (2) Where a person who is subject to a maintenance order issued in terms of section 5(4) is in arrears, a maintenance officer may recommend to the Minister that an amount not exceeding the monthly payments which should have been made in terms of such order be paid from the Maintenance Fund to the beneficiary of the order until such time as the said monthly payments recommence: Provided that where the beneficiary of the order or the parents, guardian or primary caretaker of such beneficiary, are receiving a maintenance grant in terms of the Children's Act 33 of 1960, the amount which such beneficiary is eligible to receive from the Maintenance Fund shall be reduced by the amount of such grant.
- (3) If a beneficiary of the order referred to in subsection (2) recovers any or all of the arrears owing by means of either a civil action or an order for the recovery of arrears imposed in terms of section 11(2)(a) in connection with a criminal proceeding, the court which makes the order in such civil or criminal proceedings shall provide for the repayment of any or all amounts advanced from the Maintenance Fund, at such times and in such manner as the court may see fit.

⁴⁵ See, for example, Magistrates' Courts Act 32 of 1944, sections 65J and 72. This amendment is identical to section 14C of the South African Act, added by Act 2 of 1991.

This provision would allow fines collected under the Act to be distributed as an emergency measure where maintenance payments were in arrears. If the arrears were recovered, the amounts which were advanced from the Maintenance Fund would then have to be repaid. Where the person in question was receiving a maintenance grant from the Ministry of Health & Social Services, this would be taken into account.

One problem with this approach which should be kept in mind is that the fines which are collected under the Act might constitute such small sums that it would take years for the Fund to build up enough capital to provide meaningful assistance. However, the existence of such a mechanism might encourage magistrates to impose fines in appropriate cases.

14E. Privacy.

- (1) No person shall publish in any manner whatsoever the name or address of any person under the age of eighteen years who is or was concerned in any proceedings at an enquiry under this section or the name of his school or any other information likely to reveal his identity: Provided that if the Minister or the officer presiding at the enquiry is of the opinion that such publication would be just and in the interest of any particular person, he or she may in writing dispense with the prohibition contained in this subsection to such an extent as he or she may specify.
- (2) Unless the Minister gives written consent, no person involved in the administration of this Act shall disclose to any person any information acquired through a complaint, investigation or enquiry conducted in accordance with this Act, excepting such disclosure as is necessary to address such complaint or to carry out such investigation or enquiry.
- (3) Any person who contravenes the provisions of subsection (1) or (2) shall be guilty of an offence and liable on conviction to a fine not exceeding N\$8000 [five hundred rand] or to imprisonment for a period not exceeding two years or to both such fine and such

Privacy at the enquiry is protected at present by section 5(3), and the privacy of any children involved is protected at all stages by existing section 5(11). However, the privacy of the other parties involved during the course of the investigation enjoys no protection under the current statute.

This draft section relocates existing section 5(11) and expands it to give greater protection to all parties involved. It also raises the fine which may be imposed.¹⁶

15. Rules. The Minister may by notice in the Gazette make rules--

- (a) prescribing the procedure and rules of evidence to be followed at or in connection with any enquiry under this Act;

¹⁶ The fine in the South African Act was similarly raised to R8000 by Act 2 of 1991.

- (b) as to any matter which may in terms of this Act be prescribed.

16. Repeal of laws.

- (1) Subject to the provisions of subsection (2) the laws specified in the Schedule are hereby repealed to the extent set out in the fourth column thereof.
- (2) Any order made and any action taken under any provision of any law repealed by subsection (1), shall be deemed to have been made or taken under the corresponding provisions of this Act.

[16A. Application of Act to South West Africa...]

17. Long title. The following long title is hereby substituted for the long title of the principal Act:

"To consolidate and amend certain laws [of the Republic and the territory of South West Africa] relating to maintenance."

18. This Act shall be called the Maintenance Amendment Act, 1995.